**Submission to the government’s Windrush ‘lessons learned’ review**

BID is an independent national charity established in 1999 to challenge immigration detention. 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. Between 1 August 2017 and 31 July 2018, BID provided advice to 5,941 people. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice.

We have represented members of the Windrush generation and their children who have been detained.

We will address each of the 6 questions set out in the terms of reference in turn.

1. What, in your view, were the main legislative, policy and operational decisions which led to members of the Windrush generation becoming entangled in measures designed for illegal immigrants?
2. What other factors played a part?
3. Firstly, we object to the use of the term ‘illegal immigrants’ which is both inaccurate and inflammatory. Only an act can be illegal. It is inaccurate to use the term ‘illegal’ to describe those who have crossed borders through unofficial routes as it violates their right to due process before the law[[1]](#footnote-1). To refer to a person as illegal suggests that their *very existence* is against the law[[2]](#footnote-2), and furthermore, being undocumented is not of itself a criminal offence. Something should only be referred to as illegal once it has been designated as such by the appropriate authority after there has been a due process that includes legal advice, representation, and appeal. There should have been a presumption of innocence[[3]](#footnote-3).
4. The first question of this review contains an implicit acceptance that anyone who falls into the category is the legitimate subject of hostile environment ‘measures’ – measures which force people into social exclusion, poverty, and destitution. The Home Office as a government body, and a body which plays a role in the determination of protection claims, should take care to use neutral language[[4]](#footnote-4).
5. There are many reasons why people may have irregular immigration status. One example is children who are born and raised here but who may be undocumented because the fees to regularise their status are too high, or the system is too complicated to navigate in the absence of legal aid. BID regularly has clients who were brought up in local authority care but do not have British citizenship because the local authority never made the application for them. Many people are undocumented simply because of delayed[[5]](#footnote-5) or characteristically harsh[[6]](#footnote-6) Home Office decision-making.
6. The term ‘irregular’ is now used by the Council of Europe, the International Labour Organization, the International Organization for Migration, and the Organization for Security and Co-operation in Europe[[7]](#footnote-7). The term is better able to capture the diversity of and respect for the dignity and humanity of the people it designates.
7. We do not believe the Windrush scandal can simply be framed as “members of the Windrush generation becoming entangled in measures designed for illegal immigrants”. Former Home Secretary Amber Rudd, when questioned in the House of Commons over the Windrush scandal, took it as an opportunity to voice broader concerns about Home Office processes and culture: “I am concerned that the Home Office has become too concerned with policy and strategy, and sometimes loses sight of the individual”. Paulette Wilson, a member of the Windrush generation who was made homeless, detained, and threatened with removal, said to HASC “you cannot keep treating people like this”. Both the former Home Secretary and someone who suffered under her policies are in agreement that the Windrush scandal represents a broader issue about how the Home Office treats people *per se*, and the policies of the hostile environment. It is thus disappointing that the first objective of this review is limited to investigating of *how* the Windrush generation ‘became entangled in measures designed for illegal immigrants’, without investigating the fairness or humanity of the measures themselves.
8. As Home Secretary Theresa May aimed to create a ‘really hostile environment for illegal immigrants’ through a set of policies that prevent undocumented migrants from working, renting accommodation, accessing healthcare, benefits, driving licenses. The measures are largely enforced by citizens and include penalties for landlords who rent to and employers who employ ‘illegal immigrants’. These measures pushed members of the Windrush generation, and others without the correct documentation, into desperation, poverty and homelessness.
9. The ‘hostile environment’ was designed to encourage people to leave voluntarily and works in tandem with extensive use of detention and enforced removal in pursuit of the government’s aim to reduce migration to the ‘tens of thousands’. Windrush citizens suffered as a result of measures designed to push them towards voluntary departure and more coercive measures aimed at enforced removal.

Legal aid

1. One of the key legislative decisions that contributed to the Windrush scandal was the removal of all non-asylum immigration work from the scope of legal aid, through cuts to legal aid brought in by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 which came into force in 2013. Members of the Windrush generation had to pay for private lawyers at considerable cost. Across the board, cuts to legal aid for immigration cases have resulted in justice only being accessible to the wealthy.
2. The cost of private legal representation increases in line with the amount of work that a lawyer does, such that many who can initially afford an immigration lawyer will find it difficult to pay for all the work required to successfully fight a case, especially if it goes through a protracted appeals process. Anthony Bryant, a Windrush citizen, ran up considerable debts as a result of legal fees and was forced into homelessness.
3. The fact that legal aid is not available for most immigration work has deeply affected all those subject to immigration control. Most of BID’s clients – immigration detainees – are unrepresented for their main immigration case. They are often forced to scrape together funds from friends and family to pay for private legal representation. These fee-paying clients often have insufficient means to pay for enough immigration advice to progress or conclude their case. There is also no guarantee of quality. Essential disbursements (e.g. expert reports, which usually cost over £1,000) and evidence collection prove unaffordable for most detainees who are paying privately. This handicaps the instructed legal advisor, and disadvantages the client in a fair resolution of the case.
4. In November 2010, BID began to conduct surveys every six months into immigration detainees’ access to legal representation from within detention. In November 2012, prior to the implementation of the legal aid cuts, 79% of surveyed detainees reported having a legal representative at the time of survey, 75% of which were funded by legal aid. In May 2013, immediately after the introduction of LASPO cuts to legal aid, the proportion of those surveyed with a legal representative fell to 43%. In total, under a third (29%) had a legal aid solicitor. The results have shown little change since. The most recent survey conducted in May 2018 found that 50% of those surveyed did not have a legal representative at all and only 30% had a representative funded by legal aid. 57% of unrepresented participants in the latest survey advised us that money was the reason they did not have a lawyer.
5. In the context of immigration law, the stakes are incredibly high. Decisions affect individuals’ right to remain in the UK, their liberty, access to housing, healthcare and work. Cuts to legal aid prevented members of the Windrush generation from effectively arguing their case and many more non-Windrush people have been effectively blocked from accessing justice in the same way, and become ‘entangled’ in hostile environment measures. Whether or not they are able to challenge this depends on whether they are lucky enough to find a lawyer who will work on their case for free; or whether their case attracts sufficient public outrage to force the Home Office to reconsider.
6. The impact of legal aid cuts has been exacerbated by the growing complexity of immigration law. During the passage of LASPO, the government claimed that the immigration cases that would be placed outside of scope did not require legal aid funding because the process for making applications is accessible and straightforward.[[8]](#footnote-8) BID does not consider this to be the case. The legislative provisions have been repeatedly amended and expanded.[[9]](#footnote-9) In addition to the proliferation of legislation, the Immigration Rules have more than doubled in length since they were drafted, running at over 1000 pages.[[10]](#footnote-10) There have been 5,700 changes to the Immigration Rules since 2010, and 230,000 words added.[[11]](#footnote-11) As well as the Immigration Rules, there are also rafts of other guidance documents on the Home Office website that are subject to constant change (and are not publicly archived online). It is near impossible to navigate this area of the legal system without a lawyer.
7. This complexity also presents challenges for Home Office caseworkers, and increases the frequency of Home Office mistakes. Colin Yeo, immigration and asylum barrister at Garden Court Chambers, in evidence to HASC described the situation as follows:

*“On the issue of complexity, I think there are two problems. One is that sometimes the Home Office makes mistakes. The rules are very complicated and mistakes do happen and there is a reasonably high error rate… The other situation that arises - and this is probably more common - is that because the rules are so complex and bureaucratic, it is very hard for applicants to make a successful application without a lawyer now.”[[12]](#footnote-12)*

1. Recent statistics[[13]](#footnote-13) show that the Home Office now loses most of its appeals[[14]](#footnote-14). This underlines the importance of legal aid where Home Office errors (on more than just Windrush cases) are commonplace and the courts play an important corrective function.
2. The 2014 Immigration Act also removed appeal rights in the majority of cases. This, combined with cuts to legal aid, left many people including members of the Windrush generation without the ability to challenge Home Office decision-making. Not only did this have devastating consequences for individuals, but constructing immunity against challenges to its own decisions prevented mistakes from being identified and lessons being learned earlier in the process.

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| **Case study: Tanya** Tanya fled war in the Democratic Republic of the Congo (the DRC) 20 years ago and was recognised as a refugee in South Africa. She has not lived in the DRC since fleeing and had children in South Africa. Tanya came to the UK to start a new life, fearful of the xenophobic violence that is prevalent in South Africa after an attack on her son. The Home Office apprehended Tanya and tried to remove her to the DRC. She appealed her decision and the Tribunal found that she should be removed to South Africa rather than the DRC. Notwithstanding this, removal directions were set for the DRC, a country that Tanya and her family had not lived in for 20 years. Tanya no longer has any ties or family in the DRC, all her family members having fled in the war. It would not be possible for her husband and her children to move to the DRC. Tanya could not afford a lawyer and she could not find a legal aid lawyer willing to take her case. BID represented Tanya in her application for bail and instructed a pro bono barrister to appear for her at the bail hearing. BID and Tanya’s barrister were very concerned that Tanya’s asylum case had not been properly considered, and that her Article 8 case had not been considered at all. On a pro bono basis, the barrister submitted a fresh claim on Tanya’s behalf, based on both her asylum case and article 8 case. The barrister also managed to commission a pro bono expert report on state of the DRC and the dangers that Tanya would face if she were removed there. Because of counsel’s submissions in the week prior to her planned removal, Tanya’s removal did not go ahead and she had more time to find representation. The only reason she was not removed to a country that would potentially violate her rights under the Refugee Convention, and also her Article 8 rights, was a matter of luck. Through BID a barrister was found who took it upon themselves to submit representations for her on a pro bono basis.  |

Fees

1. The costs to those subject to immigration control that have come as a result of the legal aid cuts have been further compounded by the extortionate fees charged by the Home Office for immigration applications. Fees have risen sharply since 2010, and the Home Office has made £800m in revenue from fees in 6 years[[15]](#footnote-15). An application for Indefinite Leave to Remain for a mother and her 6 children costs £16,723. Many who would be able to successfully apply for regularisation or citizenship would be discouraged from applying. Regardless of whether they have a legitimate claim to remain in the UK, anyone who is not a British citizen, including members of the Windrush generation, may end up becoming ‘entangled’ in measures introduced as part of the hostile environment policy simply because they don’t have sufficient funds to pay Home Office application fees.

High evidentiary burden and culture of disbelief

1. The Windrush scandal brought to light the fact that the Home Office enforced a far more stringent standard of proof than other institutions including government departments. As the Joint Committee on Human Rights (JCHR) argued in their report on the detention of two Windrush citizens,

*“The Home Office required standards of proof from members of the Windrush generation which went well beyond those required, even by its own guidance; and moreover were impossible for them to meet—and which would have been very difficult for anyone to meet. This led to officials making perverse decisions about their status.”[[16]](#footnote-16)*

1. The unfairly high standard of proof required by the Home Office extends to all those making applications to the Home Office, not merely members of the Windrush generation. It applies in many different contexts.
2. For BID’s clients, this excessively high standard of proof can have devastating consequences. For instance, the Home Office continues to detain torture victims because of the high evidentiary burden it places on detainees and medical practitioners to prove that detention will be harmful. When medical practitioners make submissions to the Home Office, through what is known as the rule 35 process, indicating that the detainee is a victim of torture or has a serious health condition, Home Office caseworkers generally do not accept that medical evidence on a rule 35 report that an individual is a victim of torture is sufficient proof that detention will cause harm[[17]](#footnote-17). There is already a presumption in favour of liberty for all detainees, especially vulnerable adults. But only in exceptional cases does the Home Office accept that the risk of harm outweighs the factors in favour of maintaining detention. Home Office statistics indicate that in the first quarter of 2018, only 12.5% of those who submitted a rule 35 report were subsequently released from detention[[18]](#footnote-18).

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| **Case study: Bella**Bella is a victim of rape and FGM and has been diagnosed with depression, PTSD and borderline personality disorder. A medical practitioner completed a very detailed rule 35(3) report which recorded her history of trauma including rape (considered by the doctor to constitute torture) and noted that detention was causing her to experience sleep walking, bed-wetting and flashbacks. The rule 35(3) report stated that if released the detainee could expect improved sleep and mood and a reduction in flashbacks and sleep disturbance. The medical practitioner also noted that her release would enable her to access specialist community organisations for PTSD and for victims of sexual violence and LGBT discrimination.The rule 35(3) report response from the Home Office decision-maker ignored the evidence that detention was having a negative impact on the detainee’s health and categorised the detainee level 1 at risk. The Home Office decision-maker stated that the medical practitioner had confused rape with torture, and dismissed the torture claim. The response further stated: “That is not to diminish your claim to have been raped, although it is noted that no medical evidence was submitted with the rule 35 report to corroborate your claim”. It was acknowledged that rape is an indicator of risk and thus the detainee was assessed as level 1 under the AAR policy. |

1. Stephen Shaw, the former prisons and probation ombudsman, found in his latest report on the welfare in detention of vulnerable persons, that doctors in detention centres felt there was a ‘culture of disbelief’ and that ‘their clinical views were not being taken seriously by Home Office caseworkers’… ‘that caseworkers ignore rule 35 reports and challenge medical views on fitness for detention’.
2. Similarly, BID clients applying for post-release accommodation are required to provide detailed evidence to prove they will be destitute if released from detention. Since changes to the bail accommodation regime brought about on the 15th January 2018, the Home Office seems to require a detainee to show that every person who provided any kind of support to them in the past can no longer do so. The volume of evidence required is almost impossible to gather from inside a detention centre. As a result, detainees are denied support that they are legitimately entitled to, and either remain in detention, or are released into destitution, as a result. British citizens are not be made to go through this rigorous process in order to claim any housing benefit, or other form of support that they are legitimately entitled to.

‘Refusal culture’ resulting in extremely harsh decision-making

1. Throughout the Windrush scandal it was clear that the Home Office made no proactive efforts to help people who were trying to regularise their status. The Home Office made refusals instead of trying to assist people who failed to meet the burdensome standard of proof. There was no proactive effort to help people attempting to navigate a labyrinthine system. This ‘culture of refusal’ is recognisable across different Home Office departments.
2. Detention decision-making is arbitrary and harsh. The Home Office is required to serve immigration detainees with an IS91 form which explains the reasons they have been detained. In BID’s experience, this is a tick-box exercise. Although the Home Office is required to provide reasons for detention, it is not required to justify its decision (for instance to a judge), and so these reasons do not need to be supported by any evidence. We find that once the Home Office has decided to detain someone, the presumption in favour of liberty is in practice replaced by a presumption in favour of maintaining detention. This is true regardless of the length of detention, or whether the detainee is a survivor of torture or trafficking, or has serious health problems.
3. As well as applying for bail to the First-tier Tribunal (FtT), our clients can apply for bail directly from the Secretary of State. These applications are almost never granted, and recently have begun being refused on the basis that they were not written on the correct form. Monthly reviews of detention also rarely lead to release, even though the existence of such a review process is meant to be meaningful and has been used by immigration minister Caroline Nokes as a justification for the lack of a time limit on immigration detention. Stephen Shaw, the former prisons and probation ombudsman, asserted that on the 3-month case progression panels he inspected (which assess the appropriateness of detention after 3 months) ‘*the presumption of liberty seemed in practice to have been replaced by a presumption to maintain detention on the basis that more information was needed*’.
4. This culture of refusal is engendered by the explicit intention to create a ‘hostile environment’, and pressure on caseworkers to meet enforcement targets. The pursuit of targets is not consistent with fair and just decision-making. Decisions on people’s immigration cases should be made on the facts of the case, not on the need to grant or refuse a certain number or proportion of applications.

Excessive use of detention

1. It was clear in the Windrush cases that the Home Office resorted to detention far too quickly. The JCHR’s inquiry into the detention of two Windrush citizens found that the Home Office

“*did not ensure, as it should have done at the outset of these matters, whether it had a right to detain… from the cases we have examined it is clear that detention powers are being used too readily and without need or legal justification”*

1. Overall statistics reveal that these cases were far from anomalous. On 28 June a letter to the HASC from the Home Office reported that, it had "mistakenly detained" 850 people in the five years between 2012 and 2017. In the same five-year period, the Home Office had paid compensation of over £21m for unlawful detention[[19]](#footnote-19).
2. Detention should only be used as a matter of last resort, for the purpose of imminent removal. However, Home Office statistics show that most people are not removed at the end of their period of immigration. Stephen Shaw argued

“*It is apparent that more than half of those subject to immigration detention are eventually released back into the community. I remain of the view that, very frequently, detention is not fulfilling its stated aims*”

Shaw’s report cites statistics which show that only 45% of those leaving detention were removed from the country, and that 80% of detained asylum seekers are released back into the community. Shaw suggests that such figures “continue to call into question the extent to which the current use of detention is cost effective or necessary”. Similarly, a recent HMIP inspection on family detention in Tinsley House removal centre[[20]](#footnote-20)found that only 4 of the 19 families detained there had been removed. The rest were released back into the community, detention having failed to serve its purpose.

1. The JCHR also found there to have been a flawed assessment of the risk of absconding:

““even if a person did not have a right to remain, detention should only be used if it is necessary and proportionate… Given that both individuals had families in the UK the Home Office’s decision was not based on any real assessment of the risk of the individual absconding”

BID ‘s experience shows that anyone in detention who is subject to removal but does not want to be removed, is always seen to be a high risk of absconding.. We rarely see any assessment of the individual facts of the case and whether these would increase or reduce the risk of absconding, rather a blanket assertion that individuals present a risk of absconding. As a result, detention is used absent any proper assessment of whether it is necessary or proportionate.

1. The Home Office should not make the blanket assumption that anyone liable to be removed who does not want to be removed is a high risk of absconding. The Home Office itself has provided evidence to show that overall only 5% of people subject to immigration control abscond[[21]](#footnote-21). The real figure is likely to be even lower as the mere fact of missing a reporting event (perhaps through illness or delays in transport) is categorised as absconding.
2. Furthermore, many Windrush citizens were particularly vulnerable to harm in detention, in part because of their age. This did not prevent them from being detained. 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. The Windrush citizens are just a fraction of the vulnerable people who the Home Office detains unnecessarily, causing significant enduring harm.

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| **Kevin**Kevin is the father of four British citizen children. He had been detained and released on bail twice after his custodial sentence for a drug-related offence. He abided by his bail conditions and reported regularly to the Home Office, and in any case he was unlikely to abscond as a primary carer of four dependent children. Despite this he was detained for a third time whilst reporting. Three of his children were expecting to be collected by him from school, and his 17-year-old autistic son was in the family home – Kevin’s wife was out of the country at a family funeral. He warned the Home Office that if he was detained no-one would be available to pick his children up from school. They ignored his warnings and detained him, and his children were placed into emergency foster care. His wife had to return to the UK earlier than expected to retrieve her children, who were by now extremely traumatised, from local authority care. Kevin was eventually released on bail, for a third time, several weeks later. In this case the Home Office acted in breach of its own policy and is subject to litigation.  |

Lack of compassion

1. Former Home Secretary Amber Rudd suggested that the Windrush Scandal was revelatory of a broader lack of compassion within an institution which “sometimes loses sight of the individual”.
2. Similarly, in his second report, Stephen Shaw voiced concerns about Home Office caseworking methods leading to a lack of compassion. The Home Office has not fully accepted the recommendation from his first report for caseworkers to meet detainees face-to-face. He argued that this is necessary to that caseworkers can understand “the impact their decisions have upon detainees”.

“*those I met who had seen inside an IRC were clearly affected by the experience. One caseworker said, somewhat ruefully, that her job had been easier before the visit as it had been possible to consider detainees just as case files rather than as people”*

(iii)Why were these issues not identified sooner?

1. It is disingenuous to say these issues were only identified at the point the Windrush stories captured the national attention. The Home Office was aware that Windrush citizens may be suffering under hostile immigration policies, but chose not to investigate. Caribbean diplomats had been warning the Home Office about Windrush cases for years, and were “reassured that there was nothing to worry about and that these were just a few anomalous cases[[22]](#footnote-22)”. According to The Guardian, “the government has admitted in a response to a parliamentary question that it took no action in response to a detailed 2014 warning, in a research paper about the looming problem”. In addition, foreign secretary Philip Hammond was alerted to the issue during the UK-Caribbean forum in 2016[[23]](#footnote-23). It was only once had become front-page news that the Home Office decided to act.
2. We cannot be certain whether the Home Office’s long period of inertia prior to the Windrush scandal was attributable to stringent removal targets (It is important to remember that when seen from the perspective of removal targets, the treatment of Windrush citizens looks like a success). But it is clear that there was a considerable period of time between the British government identifying the issues (or rather, having these issues pointed out to them), and its decision to act. Equally the government’s apology came not when it realised what had happened but when the scale of media and public outrage became impossible to ignore.
3. This is symptomatic of an institution that is more responsive to negative press coverage than to considerations of justice. For instance, Home Office guidance on the deportation of pregnant women directs caseworkers to consider ‘the likelihood of adverse media attention’[[24]](#footnote-24). Emily Dugan has documented how Amber Rudd developed a strategy to fast-track cases that received media attention <https://www.buzzfeed.com/emilydugan/home-office-secret-process-immigration-media>.
4. Alternatively, the Home Office changes policies only at the point where they are found to be unlawful. There are many recent examples of this: the government’s policy of deporting EU national rough sleepers[[25]](#footnote-25); the ‘deport first’ appeal later policy[[26]](#footnote-26); the government’s narrow definition of torture[[27]](#footnote-27) all were found to be unlawful. Only recently, after extensive legal proceedings did the government agree to hold an independent inquiry into the abuse of detainees at Brook House IRC exposed by the BBC’s “Panorama” footage[[28]](#footnote-28).

Lack of oversight

1. Home Secretary Sajid Javid informed the Human Rights Committee that the detention of two Windrush cases was a product of a ‘series of mistakes’ as opposed to a systemic issue within the department – “I have seen no evidence of a systemic problem”[[29]](#footnote-29). If this is correct, the fact that so many mistakes were made without anybody in a position of authority within the Home Office being aware points to a serious lack of external oversight of Home Office decisions and processes.
2. The Human Rights Committee argued that the Home Office

“*failed to apply common sense and appropriate oversight when reviewing (Windrush) applicants… Home Office officials appear to have considerable discretion in their decision-making, without a need to adequately reason and justify their decisions when deciding to deprive a person of their liberty. It appears that in these two cases, at least, they failed to comply with the stated policy on considering all alternatives to detention. It also appears that inadequate oversight and monitoring of the progress of these cases meant these failings were not detected.”*

With the committee’s Chair, Harriet Harman, going further and suggesting that the Home Office has become a ‘law unto itself’.

1. Shaw’s report documents many areas where oversight was either ‘internal’ or non-existent. The Home Office has extensive and highly coercive powers including detention and enforced removal, and these decisions are not scrutinised by a judge.

*“there remains a need for robust independent oversight of the caseworking process”… “I also proposed in my first report that the Home Office consider introducing an independent element into detention decision making. While this has not been implemented as I had envisaged, the Home Office has developed increased internal oversight via a system of case progression panels that look at detention decisions independently of the case owner”…*

*“I note that almost all of the safeguards against excessive use of detention introduced since my first review are internal, and there remains a need for robust independent oversight.”*

Since the 2014 Immigration Act, rights of appeal have largely been replaced by ‘internal review’. As a result the Home Office can make decisions without having to justify them to third parties.

1. We share Shaw’s view that Home Office oversight processes are far from satisfactory. BID has recommended for many years that any decision to detain ought to have robust independent (preferably judicial) oversight. If there was judicial oversight of the decision to detain then members of the Windrush generation – who had been here many years, had strong community links and posed no threat or risk of absconding – would not have been detained.

Data and transparency

1. We are concerned about the Home Office’s record-keeping practices. The case of Anthony Bryant, where the Home Office recognised that his detention wasn’t justified on the basis of HMRC submissions he made, only then to re-detain him later, would be familiar to many BID clients. Home Office decisions to detain, and to maintain detention, often do not accept that a parent has a genuine and subsisting relationship with a child in the UK even in cases where the same parent is challenging the Home Office in a separate immigration case on the basis of their relationship with their child, or in cases where the Home Office did in the past accept genuine and subsisting family life.
2. Relatedly, we are concerned about the Home Office’s evasion of accountability through the failure to store system-wide data on key issues. The Home Office refuses to provide responses to BID’s numerous FOI [requests](file:///%5C%5Cbiduksvr%5CS%5CResearch%20%26%20Policy%5CRudy%5CFOI%20requests%5Cresponses%5CFOI%2049562%20separated%20families%20%27we%20don%27t%20store%20the%20data%27%20-%20Sullivan.pdf) on how many parents it separates from their children through detention and deportation on the basis that it could only be provided at disproportionate cost. We know this practice to be widespread: in the last year, BID represented 167 parents separated from 328 children by immigration detention. By refusing to reveal this data, the Home Office evades public scrutiny and accountability on an issue that has received considerable attention in recent months in the light of US family separations. We have also been frustrated by the lack of data on re-detention, and on the number of grants of bail in principle (now conditional bail) which do not lead to release.
3. In addition, scandals within the Home Office often only come to light when reported by whistle-blowers. It took undercover filming as part of a BBC “Panorama” documentary on Brook House to reveal institutional violence, racial abuse, and cover-ups by IRC staff; numerous Home Office caseworkers have recently whistle-blown about the chaos of asylum decision-making[[30]](#footnote-30)[[31]](#footnote-31).

Ignoring evidence

1. As argued above, the Home Office ignored repeated warnings about its treatment of Windrush citizens. In addition, the Home Office consistently ignored representations on specific cases.
2. The Human Rights Committee found that in the cases of Anthony Bryant and Paulette Wilson, Home Office officials ignored evidence and pieces of information that were already on the case files. They did not listen to the evidence of ‘relatives, MPs, or others making consistent and clear representations on behalf of these individuals’.
3. We often see the Home Office ignore evidence. BID often makes applications for bail from the Secretary of State on behalf of clients who have been separated from their children by immigration detention. These applications include detailed submissions regarding the damage that is being caused by family separation. Not only does the Home Office always refuse these applications, the refusals consistently fail to mention any consideration of welfare of the children despite the Home Office having a statutory duty to safeguard and promote the welfare of children in the UK, pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

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| **Case study: Sunil**Sunil was detained first in 2013 as the Home Office pursued deportation proceedings. He has two British children and a British partner, and fought his deportation on the basis that it would violate his article 8 rights to private and family life. The Home Office accepted that he had a genuine and subsisting family life in the UK. Sunil was re-detained once in 2016 for over 9 months, and again in 2017, causing severe distress to him and his family. Having seen his Home Office file via a subject access request we made to the Home Office, it is evident that considerations of family life were ignored each time the Home Office decided to detain him, and each time they decided to maintain his detention. We regularly see similar examples of the Home Office disregarding its section 55 duty to safeguard and promote the welfare of children.Certain Home Office documents even actively state that he does not have children. This is particularly concerning given that his whole deportation appeal was fought on that basis, and once again raises serious concerns about institutional memory and record-keeping. |
| **Case study: Jeremiah**Jeremiah was first detained under immigration powers in September 2016, at the same time as the Adults at Risk policy was first introduced. He is a highly vulnerable torture survivor. Jeremiah’s health deteriorated in detention to such a degree that he tried to commit suicide on a number of occasions. Following his third attempt, he was placed under 24-hour suicide watch for three months. Jeremiah was confined to a room by himself, with an officer constantly watching him. He only left his room a handful of times in this period. The Home Office made an assessment under the Adults at Risk policy, and decided to maintain Jeremiah’s detention. In the written Adults at Risk response, the Home Office stated: “you are the origin of this decline and… the increased isolation that you feel is an unintended consequence of your current behaviour”. This traumatising period of detention only came to an end when Jeremiah was released on bail by the High Court, after nearly a year in detention. Nevertheless he was re-detained two years later.  |

(iv) What lessons can the Home Office learn to make sure it does things differently in future?

1. The Home Affairs Committee, in its report on Windrush, said

*“We are further concerned that the problems which affected the Windrush generation and their children will happen again, for another group of people. The lessons learned review being carried out by the Home Office must get to the bottom of why warnings, both internal and external, were disregarded and how processes can be improved to surface systemic problems—which the Windrush case certainly was—so that another crisis can be more quickly spotted and averted.”*

Let us be clear, the problems which affected the Windrush generation continue to happen for other groups of people – migrants without the correct documentation. But as long as the Home Office remains an under-resourced, error-prone, opaque organization that has recourse to the most coercive powers available to the state without judicial oversight, we expect further crises to arise.

Repeal the “hostile environment” legislation

1. The Home Secretary has publicly stated that the “hostile environment” ‘doesn’t represent our values as a country’, and has begun referring it as the ‘compliant environment’. Re-naming something without actually changing anything will not work. The government should now repeal the legislation itself which makes life intolerable for people without the correct documentation, including Windrush citizens, who lose access to housing, healthcare, jobs, and other forms of social support. These measures are inhumane, regardless of immigration status.
2. The Home Affairs Committee expressed concern that the hostile environment was ‘too open to interpretation and inadvertent error’. It relies on untrained citizens – doctors, landlords, employers etc. – to carry out immigration checks and has been shown to be directly discriminatory.
3. The legislation that forms the basis of the “hostile environment” was not itself based on any evidence, nor assessment of the unintended consequences, but rather on the hope that it would make life so difficult for irregular migrants that they would voluntarily leave the UK. Research since its implementation calls into question both its efficacy and its side-effects.
4. Research from the University of Oxford concluded that the hostile environment had failed to achieve its aim but had had damaging side effects.

*"Our research provides little evidence suggesting that immigration enforcement brings down numbers of irregular immigrants.*

*"This research does however suggest that immigration enforcement has (unintended) side-effects, such as increasing human suffering whilst giving rise to criminal practices and pushing irregular immigrants further underground.[[32]](#footnote-32)"*

1. The 2014 Immigration Act contains provisions to make it compulsory for private landlords to check the immigration status of all new adult tenants, sub-tenants and lodgers in order to assess whether they have the right to rent in the UK. Under the 2014 Act, non-compliant landlords could be fined. Under the 2016 Immigration Act, they face imprisonment. Research by the Joint Council for the Welfare of Immigrants (JCWI) finds that the policy discriminates against BME individuals and foreign nationals[[33]](#footnote-33) - these groups find it harder to access private rental accommodation as a result of the policy. It is likely that similar patterns of racial discrimination will emerge in the practical application of the hostile environment policies in other sectors. As Colin Yeo, immigration and asylum barrister at Garden Court Chambers argues, “*the system of imposing no duty on employers and landlords to check immigration status but imposing a penalty for employing or renting to a person without permission encourages employers and landlords to follow a risk based and therefore discriminatory approach*.”[[34]](#footnote-34)

Restoration of legal aid for immigration matters

1. Legal aid is essential to ensure that people have effective access to justice. This need is particularly urgent given the Home Office’s extensive powers and susceptibility to error[[35]](#footnote-35). If legal aid is not restored for immigration matters, miscarriages of justice such as those experienced by the Windrush citizens will continue unchecked.

Independent oversight

1. We have emphasized in considerable detail the lack of independent oversight in Home Office case-working processes. The danger this presents is particularly acute in an institution that has such wide-ranging and coercive powers.
2. In particular, we believe there should be judicial oversight of the decision to detain to ensure that it is only used when absolutely necessary once all alternatives have been exhausted. Even though deprivation of liberty is the most severe punishment available to the state, anyone subject to immigration control can be detained without the Home Office having to justify its decision before a judge. As a result, decisions to detain do not need to be and are not supported by any evidence that it is necessary as a last resort. Although we do not believe immigration detention is necessary, whilst it exists we argue for increased judicial oversight along with an overall reduced reliance on detention.

Cultural change

1. The Home Office should address the culture of disbelief that pervades all areas of Home Office decision-making, which places an unfairly high evidentiary burden on individuals.
2. Excessively harsh decision-making has been driven by removal targets in conjunction with the belief that anything which makes life difficult for irregular migrants will help to achieve this by encouraging them to return home. For instance, Stephen Shaw found that “Home Office staff felt significant pressure to maximise removals and there may be tension between this and dealing appropriately with vulnerable people.”
3. It is our view that caseworkers cannot simultaneously work to removals targets whilst making fair decisions according to the merits of each individual case.

(v) Are corrective measures now in place? If so, please give an assessment of their initial impact

1. I it is our view that despite a few corrective measures, the broader systemic conditions that produced the Windrush scandal have not been addressed. The fundamental problems with the Home Office as an institution have not been rectified

Windrush citizens with a criminal record:

1. We find it both unjust and irrational that the Home Office has decided to remove anyone with a criminal record from any kind of redress, including compensation and return to the UK for those who have been deported. The government has seemingly accepted that members of the Windrush generation should be considered British citizens but this cannot truly be the case, because a British citizen would not lose the right to remain in the UK simply as a result of their criminal record.

Windrush review

1. This review itself constitutes the beginning of a long corrective process whose initial impact cannot yet be judged. However, we have concerns about the narrowness of its terms of reference (about which civil society groups were not consulted), the composition of the IAG, and the extent of the review’s independence.

Windrush taskforce

1. The Home Office has confirmed that the data provided to the Windrush taskforce won’t be used for immigration enforcement purposes. We welcome this measure which amounts to an admission that trust in the system is low, and that people need direct assurances that they will not be pursued by the Home Office if they engage with the process.
2. BID’s Tom Nunn, giving evidence to the Home Affairs Committee, explained the lack of trust that our clients have in the system:

“*Fundamentally in all of this, there is a huge problem in terms of trust. You have to understand the unstable situation that people who are in detention are facing. Often it takes me a long time to win trust with someone who thinks that I work for the Home Office or that I am going to be one of the people who takes the information they give me and that is going to lead to them being deported quicker.*

*If you look at what has happened with the hunger strikers, when they raised their concerns—and their concerns are not about conditions in Yarl’s Wood, they are more about the way that this whole estate operates—they get a letter from the Home Secretary saying, “We are now going to speed up your removal*”.

1. Trust has been depleted by hostile environment policies which require various government departments and agencies to share data with the Home Office, which is then used for enforcement purposes. It is pleasing to see that the government recognizes the role that a firewall can play between taskforce and immigration enforcement, and how this might encourage people to cooperate. We would welcome similar firewalls between immigration enforcement and other organizations such as schools and hospitals.

 (vi) What (if any) further recommendations do you have for the future?

Deportation of people with strong ties to the UK

1. The government should stop seeking to deport people who, like members of the Windrush generation, have grown up in the UK and have strong ties here and who have British citizen partners and children.
2. Section 32(5) of the UK Borders Act 2007 provides for automatic deportation of a foreign national who has been convicted of an offence and sentenced to 12 months imprisonment as a result[[36]](#footnote-36). In addition, the Home Office can pursue deportation of anyone if they consider it would conducive to the public good and in the public interest.
3. The ease with which the Home Office can pursue deportation can be contrasted with the various difficulties appellants face challenging those decisions. Appellants are required to show that deportation would be ‘unduly harsh’; legal aid is not available for challenges; many of those facing deportation are detained under immigration powers on the prison estate without access to legal advice. As a result, many individuals with very strong article 8 claims to remain in the UK are unable to successfully challenge their deportation.
4. Stephen Shaw articulated this clearly in his latest report:

*“I found during my visits across the immigration estate that a significant proportion of those deemed FNOs had grown up in the UK, some having been born here but the majority having arrived in very early childhood. These detainees often had strong UK accents, had been to UK schools, and all of their close family and friends were based in the UK.*

*“Many had no command of the language of the country to which they were to be ‘returned’, or any remaining family ties there.*

*“In short, I find the policy of removing individuals brought up here from infancy to be deeply troubling. For low-risk offenders, it seems entirely disproportionate to tear them away from their lives, families and friends in the UK, and send them to countries where they may not speak the language or have any ties. For those who have committed serious crimes, there is also a further question of whether it is right to send high-risk offenders to another country when their offending follows an upbringing in the UK.”*

1. We agree that deportation is a disproportionate punishment, and would echo Shaw’s recommendation that “the Home Office should no longer routinely seek to remove those who were born in the UK or have been brought up here from an early age”.

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| **Case study: Mo**Mo is a Somali national who came to the UK aged 2, with his mother in 1997, and was granted indefinite leave to remain. He has never left the UK since. He doesn’t speak Somali or any other local languages. He has no immediate family in Somalia, there is nobody to support him there, and would be at risk of destitution. He grew up without a father figure. His mother in the UK has been ill since he was young, and he acted as her carer. Since his first adult conviction, the Home Office has been pursuing deportation against him. He became friends with a group who were involved in criminal activity and was convicted of various offences as a minor, spending time in young offenders’ institutions and came to the attention of Operation Nexus. In 2011 and again in 2012, prior to the introduction of the hostile environment policy, the Home Office made decisions not to pursue deportation. After turning 18 he was convicted of possession of a firearm and sentenced to 6 years imprisonment. After this happened, he made significant efforts to turn his life around. He took part in victim awareness courses, youth work courses, and education courses, and has many references from people on prison schemes, and friends.He was soon after served with a Notice of Deportation, and since his asylum claim was refused he became appeal rights exhausted. He has been detained for well over a year, and has twice had removals cancelled- once because he threatened to harm himself, and once because of ‘lack of escorts’.  |

EEA nationals

1. The Windrush citizens were living in the UK with the belief that they had the right to remain, as well as the right to work, rent accommodation and study. In this respect their situation is similar to that of EEA nationals who have been living in the UK. After Brexit, EEA nationals living in the UK will be required to prove that they have been resident in the UK for 5 years in order to establish their right to remain. The Home Office should learn from the treatment of Windrush citizens to ensure that:
2. EEA nationals who have been living in the UK are not required to meet such onerous evidentiary requirements;
3. Those who have difficulty satisfying these requirements will be assisted to do so.
4. There are currently estimated to be 3.8 million EU citizens living in the UK, all of whom will be required to apply for settled status if they want to remain in the UK. This has the potential to present a problem on a far higher scale than the Windrush scandal because only 57,000 of the people living in the UK in June 2017 who arrived from a Commonwealth country before 1971 are not UK nationals.”[[37]](#footnote-37)
5. The Home Secretary has said that ‘the default position would be to grant rather than refuse applications’, and has suggested that individuals will not need to provide such high quantities of evidence because the Home Office will check people’s HMRC and DWP records. We welcome any move to lessen the standard of proof incumbent on applicants. However, there will still be difficulties for citizens who lack paperwork and computer literacy including many of the 300,000 Roma individuals who live in the UK. Most of these are EU citizens and have the right to be in the UK but would find it difficult to prove that they have been resident for 5 years in the UK, especially if the application system is digital. In general, people who have been ‘economically inactive’ for periods of time may also have difficulty.
6. The Home Office’s workload is likely to increase sharply and it will need additional funding to process these applications properly and fairly. It has already been subject to budget cuts through austerity policies.
7. There will undoubtedly be people who are unable to prove 5 years’ residency in the UK, or who miss the deadline for applying. All of them will be vulnerable to detention and removal.

**Contact:** Rudy Schulkind, Research & Policy Coordinator: rudy@biduk.org, 0207 456 9762

1. Ibid [↑](#footnote-ref-1)
2. <https://blogs.bmj.com/bmj/2018/10/02/the-words-we-use-matter-why-we-shouldnt-use-the-term-illegal-migrant/> [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/358/2015-08-26_Submission_from_Bail_for_Immigration_Detainees_to_HO_asylum_support_reform_consultation.pdf> [↑](#footnote-ref-4)
5. <https://www.bbc.co.uk/news/uk-england-41096675> [↑](#footnote-ref-5)
6. <https://www.freemovement.org.uk/uk-immigration-statistics/> [↑](#footnote-ref-6)
7. <http://mighealth.net/eu/images/e/ec/Chol.pdf> [↑](#footnote-ref-7)
8. Coram Children’s Legal Centre, Rights without remedies: legal aid and access to justice for children, February 2018 retrieved from <https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf> [↑](#footnote-ref-8)
9. Immigration legal provisions and can be found in statutes from 1971, 1988, 1999, 2002, 2004, 2006, 2007, 2008, 2009, 2014 and 2016. Refer to Colin Yeo, “How complex is UK immigration law and is this a problem?”, *Free Movement*, 24 January 2018, retrieved from <https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/> [↑](#footnote-ref-9)
10. Martha Bozic, Caelainn Barrm, Niamh McIntyre and Poppy Noor, “Revealed: immigration rules in UK more than double in length”, *The Guardian,* 27 August 2018, retrieved from <https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010> [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. Oral evidence taken on 10 October 2017, HC (2017–19) 421, Q52. [↑](#footnote-ref-12)
13. https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-october-to-december-2017 [↑](#footnote-ref-13)
14. https://www.freemovement.org.uk/uk-immigration-statistics/ [↑](#footnote-ref-14)
15. <https://www.bbc.co.uk/news/uk-england-london-42771667> [↑](#footnote-ref-15)
16. [**https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/103407.htm**](https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/103407.htm) [↑](#footnote-ref-16)
17. <http://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/667/Adults_at_risk_2018.pdf> [↑](#footnote-ref-17)
18. Home Office “Immigration Statistics, Immigration Enforcement Transparency Data Q1 2018”, (24 May 2018).

<https://www.gov.uk/government/publications/immigration-enforcement-data-may-2018> [↑](#footnote-ref-18)
19. <https://www.theguardian.com/uk-news/2018/jun/28/wrongful-detention-cost-21m-as-immigration-staff-chased-bonuses> [↑](#footnote-ref-19)
20. <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2018/08/Family-detention-Tinsley-House-Web-2018.pdf> [↑](#footnote-ref-20)
21. APPG inquiry into immigration detention, page 25 <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf> [↑](#footnote-ref-21)
22. <https://www.theguardian.com/society/2018/aug/15/guy-hewitt-how-i-forced-uk-government-act-windrush-scandal> [↑](#footnote-ref-22)
23. <https://www.theguardian.com/uk-news/2018/jul/18/revealed-depth-of-home-office-failures-on-windrush> [↑](#footnote-ref-23)
24. Home Office guidance ‘family separations’ version 4.0 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666491/family_separations.pdf> page 27 [↑](#footnote-ref-24)
25. <https://www.bbc.co.uk/news/uk-42354864> [↑](#footnote-ref-25)
26. <https://www.bbc.co.uk/news/uk-40272323> [↑](#footnote-ref-26)
27. <https://www.theguardian.com/uk-news/2017/oct/10/torture-victims-were-wrongly-imprisoned-in-uk-high-court-rules> [↑](#footnote-ref-27)
28. <https://www.bbc.co.uk/news/uk-england-sussex-45830860> [↑](#footnote-ref-28)
29. [**https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/103407.htm**](https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/103407.htm) [↑](#footnote-ref-29)
30. **Asylum decision-maker: 'It's a lottery'** <https://www.bbc.co.uk/news/stories-43555766> [↑](#footnote-ref-30)
31. Asylum offices 'in a constant state of crisis', say whistleblowers <https://www.theguardian.com/uk-news/2017/dec/25/asylum-offices-constant-state-crisis-say-whistleblowers-home-office> [↑](#footnote-ref-31)
32. <https://www.mirror.co.uk/news/politics/theresa-mays-hostile-environment-policy-13438909> citing Oxford university research: <https://www.compas.ox.ac.uk/project/does-immigration-enforcement-matter-diem/> [↑](#footnote-ref-32)
33. <https://www.jcwi.org.uk/sites/jcwi/files/2017-02/2017_02_13_JCWI%20Report_Passport%20Please.pdf> [↑](#footnote-ref-33)
34. <https://www.freemovement.org.uk/a-draft-submission-to-the-windrush-lessons-learned-review/> [↑](#footnote-ref-34)
35. <https://www.freemovement.org.uk/uk-immigration-statistics/> [↑](#footnote-ref-35)
36. <https://www.legislation.gov.uk/ukpga/2007/30/section/32> [↑](#footnote-ref-36)
37. <https://www.bbc.co.uk/news/uk-43795077> [↑](#footnote-ref-37)