Inquiry into Draft Directive on Common Procedures for the Return of Illegally Staying Third Country Nationals
Sub-Committee F (Home Affairs)
House of Lords Select Committee on the European Union

Submission by Bail for Immigration Detainees (BID), December 2005

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This submission has been written on behalf of Bail for Immigration Detainees by Sarah Cutler, Policy and Research Manager.

1. Bail for Immigration Detainees (BID) is a registered charity that exists to improve access to bail for asylum seekers and migrants detained under Immigration Act powers. BID does not receive public or Legal Services Commission funding. BID's key activities are

§ Providing free information and support to detainees to help them to exercise their right to liberty and represent themselves in bail applications before Immigration Judges
§ Preparing and presenting free applications for release for detainees who are unable to represent themselves, in particular families, using free assistance from barristers to present the bail application
§ Working to influence detention policy and practice, including through research
§ Sharing and encouraging best practice with the legal profession, for example through the *Best Practice Guide to Challenging Immigration Detention* written by BID and published jointly with ILPA, the Law Society and the Legal Services Commission.

2. BID was established in 1998, and has considerable casework experience of the detention and removal policies and practices of the UK Immigration Service. Based on that experience, we would like to put forward information to the Sub-Committee on the following aspects of the Draft Directive where they have implications for the UK, or suggest measures that will improve national practice, namely;

§ The provisions for individuals who cannot be removed, whether temporarily or indefinitely
§ The conditions and duration of detention
§ The safeguards for individuals to be removed (such as concerning their arrest or escort), particularly where removal action is sub-contracted to private companies.

BID also wish to comment briefly on the treatment of children in UK immigration detention.

3. BID welcomes the Commission's recognition that removals must be governed by clear, transparent and fair rules, which also respect the human rights and fundamental freedoms of those facing removal. BID is concerned that current practices in the UK may fail to balance the rights and dignity of the individual with the objective of immigration control and an increase in removals. **BID hopes that this Directive will be developed in such as way as to ensure that standard are driven up, and that this inquiry provides an opportunity for scrutiny of some of the excesses of current UK policy.**

4. In particular, BID feels it is important that the following stated aims of the Draft Directive be preserved throughout the negotiation process:

    § "*limiting the use of coercive measures, binding it to the principle of proportionality and establishing minimum safeguards for the conduct of forced return.*" (point 6, p 4)

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- *"Limiting the use of temporary custody and binding it to the principle of proportionality"* (point 10, p 4)
- *"Establishing minimum safeguards for the conduct of temporary custody."* (point 11, p 4)

We agree with the Refugee Council and Amnesty International that "states need more guidance than is currently provided" if these principles are to be put in to practice.[1]

5. **The provisions for individuals who cannot be removed, whether temporarily or indefinitely (with reference to Article 8 'Postponement'):** BID wishes to highlight that where there is no possibility of removal, it is imperative that individuals are not detained under Immigration Act powers. In BID's view, the desire of the Government to be seen to be taking action to increase the number of removals has resulted in detention being maintained in some cases even though removal is not imminent. No statistics are collected as to the overall periods spent in detention by each detainee, but in BID's experience there are lengthy delays in removals to certain countries that result in long periods of detention. In particular, prolonged detention may occur whilst waiting for the Home Office to obtain travel documents from Indian and Chinese authorities, for example. Certain nationalities are detained despite the fact that no removals are taking place. For example, in 2004 and 2005, nationals of the Democratic Republic of Congo (DRC) who did not have travel documents from their embassy were detained for prolonged periods of time despite the fact that the Embassy appeared not to be issuing such documentation for many months at a time. In relation to Iraq, despite practical difficulties blocking removal to Iraq for nearly 18 months from February 2004 up to October 2005, many undocumented Iraqi nationals remained in detention for long periods of time without the slightest possibility of removal to their country. Similarly, in 2005, the UK detained Zimbabwean nationals despite the fact that removal was not imminent, and removal to that country was ultimately suspended by the Courts.

6. **The conditions and duration of detention (with reference to Article 13, 'Safeguards pending return', and Article 14 'Temporary Custody', and Article 15 'Conditions of Temporary Custody'):** BID is opposed to the use of immigration detention and would like to see alternatives being employed. However, where detention is used as a part of immigration control, BID call for its use to be in line with international and domestic human rights standards.[2] Detention should only be used where removal is imminent, and must be

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[1] Joint Refugee Council and Amnesty International UK response to the House of Lords Select Committee on the EU Inquiry into the Draft Directive on common procedures for the return of third country nationals, December 2005

[2] Human rights standards require that detainees can challenge the deprivation of their liberty.

- Article 5(4) of the European Convention on Human Rights requires that: "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*
- UNHCR 'Guidelines on applicable criteria and standards relating to the detention of asylum-seekers' (revised 1999) state that regard should be had to the general principle that asylum seekers should not be detained. These guidelines also set out the need for prompt review by a court.
- Guarantee 3 of the United Nations Working Group on Arbitrary Detention states that detainees should be "*be bought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality*." [2]
- Council of Europe: Twenty guidelines on forced return[2], Guideline 9, 'Judicial remedy against detention' states: *"(1) A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be*

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justified in each case. This requires automatic and prompt scrutiny by an independent judicial body. At present, detention policy and practice in the UK fails to provide adequate legal safeguards for detainees. **BID hopes that this Directive will result in fundamental changes to the UK's practice by introducing an element of judicial scrutiny and the safeguard of a time limit on detention.** In BID's experience, change of this nature is urgently needed for the following reasons:

- The decision to detain is an administrative one. There is no automatic judicial supervision of detention and many detainees have no, or very poor, legal representation and many experience great difficulty in accessing an independent review of their detention by way of a bail application. HM Inspectorate of Prisons has drawn attention to the fact that "*Access to competent and independent legal advice is becoming more, not less, difficult as fewer private practitioners offer legally aided advice and representation.*"[3]
- Very limited statistics are available about the use of detention. The UK Government does not publish details about the numbers affected by detention each year, or the total length of time that people remain locked up. Amnesty International believes that upwards of 25,000 people who had at some stage sought asylum were detained in the UK in 2004, some possibly just overnight and others for prolonged periods of time.[4]
- Detention is without limit of time, and can be for prolonged periods (official snapshot figures for the end of June 2005 show more than 20% of detainees had been detained for more than three months, and up to more than a year in 55 cases).
- Detention can take place at any stage of a person's case: from arrival under 'fast track' processes for a decision on the asylum claim, to just before removal.
- Detention is increasingly being used for vulnerable people, including families. Over 13% of the total beds are now dedicated to families. Save the Children think up to 2000 children each year may be detained.[5]
- The number of self-inflicted deaths in detention has significantly increased – seven immigration detainees took their own lives between January 2003 and September 2005, yet there were only four such deaths between 1989 and 2003.
- The Government wants to increase the number of people who are detained. *Controlling our borders: A Five Year Strategy for Asylum and Immigration* published by the Home Office on 7 February 2005 sets out plans to increase the use of detention with the aim of removing more people each month than the number of new unfounded claims received, and increasing the use of fast-track processes based on detention. In the strategy, the Prime Minister writes "…*we will move towards the point where it becomes the norm that those who fail can be detained*."

7. **Article 13 (2) - written confirmation that return has been postponed.** BID welcomes this proposal, which would be useful for detainees who may experience repeated setting and cancelling of removal directions. This can block release on bail even where there is repeated failure to remove. In BID's experience, this increased transparency would help to avoid the situation where detention becomes unlawful but an illusion that removal is imminent is maintained, in order to maintain detention.

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released immediately if the detention is not lawful. (2) This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation."

[3] HM Inspectorate of Prisons, inspection report on Dover Immigration Removal Centre, July 2004

[4] Amnesty International report, **United Kingdom: Seeking asylum is not a Crime – Detention of people who have sought asylum**, 20 June 2005

[5] See '**No Place for a Child: Children in UK immigration detention – Impacts, Alternatives and Safeguards'**, Save the Children, February 2005

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Article 14 – provides for temporary custody orders to be issued by judicial authorities, subject to review once a month and extendable to a maximum of six months.

8. **Article 14 (1)** – BID welcomes the provision that less coercive measures than detention should be used unless necessary. We believe that this decision about the level of monitoring required and the decision as to who represents 'a risk of absconding' must be taken by a judicial authority and subject to transparent regulations. There must be an opportunity to challenge the monitoring mechanism imposed, particularly where the mechanism impinges on the civil liberties of the individual, for example 'tagging' or electronic monitoring. In the UK, the power already exists to tag anyone who is subject to residence or reporting. This was introduced in S 36 of the 2004 Immigration and Asylum (Treatment of Claimants etc.) Act. The provision to order electronic monitoring is not restrained by clear criteria, appeal or time limit and there is no burden on the state to demonstrate that it is a necessary or appropriate measure for a particular individual. There is no research to show how many people abscond[6] so no evidential basis for introducing the criminalising policy of tagging. In a written Ministerial statement on the 8 November 2005, the Immigration Minister Tony McNulty informed the house that since the pilot began in October 2004, 49 people have been tagged.[7]

9. **Article 14 (2)** – BID welcomes the provision of judicial involvement in the decision to detain and to maintain detention. It is important that such review is thorough and robust, in particular with access to legal advice and representation. It is important that this monthly review does not obstruct the right to apply for bail, judicial review or habeas corpus at any stage.

10. The Home Office have refuted the need for automatic bail hearings or an increased element of judicial review as unnecessary and administratively burdensome. The parliamentary Joint Committee on Human Rights have cautioned that "*[Judicial] safeguards are meaningful and effective only if appropriate legal advice and information are available to detainees*".[8] However, the government continue to reject the suggestion that bail hearings should be automatic: "*…we do not accept that there is a need for an automatic bail hearing at any point in a person's detention. Detainees are able to apply for bail at any time to a Chief Immigration Officer, the Secretary of State or an Adjudicator to be released on bail. In addition, every person's detention is subject to administrative review by the Immigration Service at regular intervals and at progressively more senior levels as detention continues.*"[9]

11. BID's casework experience illustrates that detainees are not in fact able to exercise their right to a bail application under the present system, and there is a need for the measures proposed in this directive.

12. Instructions to immigration officers state that (*i*)*n all cases detention must be for the shortest possible time*[10]. However this instruction carries no practical compulsion and has failed to prevent the Immigration Service from employing administrative detention for prolonged periods. Detention periods of six months are not uncommon, and in some cases that BID is aware of, detention was maintained for over two years, the worst case being

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[6] A letter from Home Office Research and Development Statistics (RDS) to BID in May 2002 stated that "*the Home Office has not commissioned any research on the subject of complian ce with Temporary Admission in connection with detention criteria over the past twelve years.*"

[7] House of Commons, Hansard, 8 Nov 2005 : Column 11WS

[8] Joint Committee on Human Rights report on the Nationality, Immigration and Asylum Bill, 21 June 2002, p. 32.

[9] House of Commons, Home Affairs Committee, '*Government Response to the Committee's Fourth Report: Asylum Removals*', HC 1006, 18 July 2003, p.8.

[10] Operational Enforcement Manual, Chapter 38.1 (last published and disclosed July 2001)

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incarcerated for just short of three years before removal could be carried out. Concern about this situation was expressed in the Concluding Observations of the Human Rights Committee when monitoring the UK's compliance with the International Covenant on Civil and Political Rights (ICCPR) in 2001[11].

13. In 2004, the UK was criticised by Mr Alvaro Gil-Robles, Commissioner for Human Rights, Office of the Commissioner for Human Rights, Council of Europe, on his visit to the UK. His report found the reasons provided to detainees by the immigration officer at the time of the decision are at best cursory and the explanation of bail rights technical and perfunctory. The report states: *"The possibility of effectively contesting one's detention is all the more important, as it is indefinite and subject only to internal administrative review. It is not entirely clear what form this review takes - the Home Office guidelines refer only to the need to keep detention "under close review to ensure that it continues to be justified". The ability of asylum seekers to contest their detention is not a hypothetical question. Of the 1,514 asylum seekers detained on 27th December 2004, 55 had been detained for between 4 and 6 months, 90 for between 6 months and a year and a further 55 for over one year. These are not negligible figures… It is not acceptable... that such lengthy detention should remain at all times at the discretion of the immigration service, however senior the authority may be. It seems to me that there ought, at the very least, to be an automatic judicial review of all detentions of asylum seekers, whether failed or awaiting final decisions, that exceed 3 months and that the necessary legal assistance should be guaranteed for such proceedings."*[12]

14. The 2002 Nationality, Immigration and Asylum Act repealed the never implemented provision for automatic bail hearings for all detainees. Many detainees have no legal representation and therefore cannot access elective bail procedures. This means that in many cases, the Home Office is never required to justify their decision to deprive an individual of their liberty.

15. An example from BID's casework shows that detention may be maintained for no reason in some cases:

    N was detained for 8 months before BID made a bail application on his behalf. Whilst in detention, N had no visits from his solicitor and no telephone communication he could understand. He received some papers in English which he could not read. N had been given Temporary Admission on arrival in the UK but inexplicably was detained later after being hospitalised as a result of a racist attack. At N's bail hearing the Home Office did not contest his release and the Immigration Service could offer no reason for incarcerating him for over 8 months. N was released with 1 surety and no reporting conditions. He is now living with relatives and has a new solicitor.

16. The following example of detention of French nationals illustrates that, if left unchallenged, detention may be maintained even where clearly unlawful:

    In July 2003, BID became aware that two French nationals had been detained, although they had provided French passports. It took determined representations from BID (South) to secure their release following nearly three weeks of detention. It also took equally

[11] ICCPR Concluding Observations of the Human Rights Committee, 2001 "*Asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience. The Committee notes, moreover, that asylum seekers, after final refusal of their request, may also be held in detention for an extended period when deportation might be impossible for legal or other considerations*".

[12] Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4th - 12th November 2004, Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, para. 49

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determined representations to secure the release of the French passports which were retained for three weeks or so, meaning one of the French nationals couldn't return to France and therefore lost his job.

17. **Article 14 (4)-** BID agrees that there should be an upper time limit on detention, although we do not agree that six months is an acceptable length of time to be detained for the administrative convenience of the state, where imprisonment is not a result of a criminal act. BID is concerned that an upper time limit of six months would normalise detention of this length. **BID urges the Committee to consider recommending a lower time limit of 28 days, which should be plenty of time for removal to take place.**

18. BID have argued repeatedly that there must be an upper limit on the length of detention, not least because detainees have told us that not knowing how long they are to be incarcerated is one of the most distressing aspects of detention. *'They took me away' – Women's experiences of immigration detention in the UK'* by BID and RWRP highlights shocking testimony from thirteen women asylum seekers, who were detained for periods ranging from a week to 86 weeks. The women's experiences illustrate that detention is often not used in line with stated policy. Women described struggling to find lawyers and being unaware of, or unable to exercise, their legal rights. Women also described being unable to access physical and mental health care and treatment in detention, and felt that their health deteriorated as a result. The women who got out of detention and went back to live in the community continued to experience a fear of being re-detained and lived under the shadow of the ultimate fear of being removed from the UK. One woman interviewee stated *"The information on bail is in the small print. Also, by the time you get the letter in detention, your state of mind is such that you don't always take it in. They don't explain it to you." [Q13]* Another commented that *"I just felt like it is better to die than to live. I never thought I could take it. The problem is 'for how long'?"*[13]

19. In particular, BID would draw attention to the vulnerability of many of those detained. Children in families, rape survivors, people with serious medical and physical health problems are all detained in the UK. There can be no justification for detaining such people for lengthy periods.

20. **Article 15 (1) – provides for contact with legal representatives without delay**. In BID's experience, such contact is a particular problem for those detained under Immigration Act powers in prisons. BID is concerned about the number of foreign national prisoners who remain detained solely under Immigration Act powers at the end of their sentence. Official statistics for the last quarter show 170 people were detained under Immigration Act powers in prisons.[14] Their detention is indefinite, and this double punishment effectively goes beyond punishment meted out by the courts in response to a recognised offence. **BID welcomes the provisions in Article 15 (2) regarding the use of specialised custody facilities but also calls for there to be steps taken to ensure that people are not held under Immigration Act powers at the end of their criminal sentence.**

21. **Article 15 (3) – instructs states to ensure that minors are not kept in temporary custody in common prison accommodation**. BID condemns the use of detention for children, and is concerned that the Draft Directive does not provide stronger protection for minors. BID urges the Sub-Committee to examine the issue of the detention of children in some depth to seek assurances that the detention of children will not be legitimised by this Directive. Article 5 'Family relationships and best interest of the child' states that member

[13] *'They took me away – women's experiences of immigration detention in the UK', BID and Asylum Aid, August 2004*
[14] Quarterly Asylum Statistics, 24 September 2005

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states "*shall also take account of the best interests of the children in accordance with the 1989 United Nations Convention on the Rights of the Child*". For this to be the case, it is important that children are protected from detention, which can never be in their best interests.

The safeguards for individuals to be removed (such as concerning their arrest or escort), particularly where removal action is sub-contracted to private companies (with reference to Article 10 'Removal', in particular, not exceeding reasonable force, and in accordance with fundamental rights)

22. BID is concerned that current practice in the UK has led to people being forcibly removed using extreme physical force that has resulted in harm to individuals. Two inquiries have been undertaken by the Prison and Probation Ombudsman, Stephen Shaw, into undercover stories by the Daily Mirror and the BBC into levels of violence, racist and sexist abuse and intimidation by guards and escorts.
23. Reports by the Medical Foundation and the Institute of Race Relations have documented the level of harm done to detainees during forced removal attempts. These reports are consistent with BID's experiences.[15] BID has experience of forced removals of women in the advanced stages of pregnancy, and cases where a family has been split by removal, leaving the children in the UK and forcibly returning the mother to her country of origin.

[15] See 'Harm on Removal: Excessive Force Against Failed Asylum Seekers' The Medical Foundation, November 2004

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