Bail for Immigration Detainees

Submission to the United Nations Working Group on Arbitrary Detention

Immigration Detention in the United Kingdom

September 2002

"Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many instances, contrary to the norms and principles of international law."

UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999)

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Executive Summary

Since the visit of the United Nations Working Group on Arbitrary Detention (the Working Group) to the United Kingdom in 1998 the political climate surrounding the issue of asylum seekers has deteriorated. Sections of the press have maintained a fierce attack on asylum seekers and have suggested that the majority are 'economic migrants' (i.e. that they are not fleeing persecution, torture, degrading or inhuman treatment) who will abscond if released from detention. Neither of these assertions have any factual basis.

Seemingly in response, the Government has increased the levels of detention without any research to support or justify this. The Government's stated target is a detention estate of some 4,000 places by April 2003.

The UK Immigration Service (UKIS) continue to ignore statutory guidelines and ministerial undertakings regarding safeguards to protect against arbitrary detention thereby creating *de facto* breaches of Article 5 of the European Convention on Human Rights (ECHR). A number of detention decisions are made on the basis of secret instructions and "special exercises" the criteria for which are not included in published UKIS guidelines. Detention is maintained on the basis of undisclosed internal reviews. Barriers are put in the way of efforts to seek disclosure of such reviews. Concrete evidence supporting allegations against detainees is not put before the courts considering bail.

Regular independent judicial oversight of detention does not occur. The Government has acknowledged that an application for bail is not judicial oversight. The lawfulness of a decision to detain is, according to the Government, only challengeable by way of judicial review or *habeas corpus*. In any event, bail procedures are out of reach of many detained asylum seekers and migrants; partly as a result of the Legal Services Commission (LSC) 'merits test' (or difficulties surrounding its interpretation) imposed on the use of public funds for legal assistance and partly because of the continuing requirement for sureties by the Immigration Appellate Authority (IAA) and the Appeals (Procedure) Rules 2000 rules which hinder access to bail hearings before the IAA. The unavailability of sureties has led to a number of legal representatives concluding that they cannot present bail applications for their clients.

The IAA is, for all practical purposes, the only form of independent oversight of detention for many thousands of detainees. The Chief Adjudicator has this year issued new guidelines on bail that are more restrictive. Adjudicators continue to demand sureties before release despite being aware that asylum seekers rarely have family or friends who can stand as sureties and, on occasion, regardless of whether sureties are appropriate in the particular circumstances of the case. There is no time limit to detention in the UK. This leads to detention for indefinite periods – in a large number of cases people are detained for many months and in some cases, years.

For the first time in the UK since the Second World War families are now detained for prolonged periods of time. Vulnerable people such as victims of torture continue to face prolonged detention. The mentally ill, pregnant women, nursing mothers and those in need of hospitalisation continue to be detained.

The Government has resisted the introduction of statutory safeguards to oversee the power to detain. Indeed, it is currently dismantling legislation designed to create automatic bail applications enacted in 1999 but never brought into force. Detention criteria are in the form of guidelines subject to change by the executive rather than laid down in legislation. Accelerated

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asylum appeal procedures are now being put into place which, allied with the increase in detention levels, will exacerbate difficulties in accessing effective legal representation for detainees.

From our experience of detention and bail procedures BID is forced to conclude that detention is employed in the UK as a deterrent to those seeking asylum. Furthermore, the lack of procedural safeguards leads to widespread arbitrary detention. This submission offers recommendations to end this unlawful practice.

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Part 1 Introduction and background

1.1 Introduction

Any asylum seeker or migrant[1] can be detained under provisions of the Immigration Act 1971 (as amended). There are wide powers to detain and no automatic, independent oversight of detention with authority to consider not only the lawfulness of detention but whether it is appropriate. Immigration detainees can be held at ports, prisons, detention centres[2] and police stations[3]. The number of places available in immigration detention and hence the numbers who are subjected to detention at some stage has been steadily increasing over the past decade[4]. There are approximately 2000 detention centres spaces around the country[5], with plans to increase this to 4000 places by Spring 2003. Immigration detention has become a key part of the UK's asylum policy.

1.2 The United Nations Working Group on Arbitrary Detention

The Working Group was established in 1991 by the UN Human Rights Commission. Its purpose is to investigate situations where detention may have been imposed arbitrarily or where it is inconsistent with international standards set out in the UN Declaration of Human Rights or other international instruments[6]. In 1997, the Commission requested that the Working Group *"devote all necessary attention to the situation concerning asylum seekers and migrants in prolonged administrative custody."*[7]

The Working Group visited the UK in 1998 to consider the situation of migrants and asylum seekers in detention. The concluding report made a number of recommendations to the UK Government. The recommendations were made on the basis of the Guarantees set out by the Working Group which form the criteria for determining whether or not the custody is arbitrary. (*See Appendix A- Guarantees of the UN Working Group*)

The 1998 report raised a number of concerns[8] including the lack of access to judicial oversight and reminded the UK Government that they should ensure that detention is resorted to

- "only for reasons recognised as legitimate under international standards" and
- "only where other measures will not suffice"

The report also recommends that detention should be

- "for the shortest possible time"
- with "an absolute maximum duration specified in law"

In addition, each decision to detain should be subject to

- "prompt, independent and impartial review"

Before resorting to detention

- "alternative and non-custodial measures should always be considered".

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1.3 The purpose of BID's submission

Most of the recommendations made to the UK by the Working Group in 1998 have been ignored. As a result, the detention of asylum seekers and migrants in the UK gives rise to arbitrary detention as defined by the Working Group. The aim of this submission is to alert the Working Group to continuing breaches of their Guarantees.

In light of our submission we hope that the Working Group will consider it timely to carry out further investigations of the situation of asylum seekers and migrants held in detention centres and prisons in the UK in 2002. We urge the Human Rights Commission to press the UK Government to invite the Working Group to return.

In August 2002 it was announced that the UN Special Rapporteur on the Human Rights of Migrants has been requested to prepare a report to the Commission on Human Rights which will focus on the human rights of migrants in detention[9]. We hope that the information in our submission will also be of use to the Special Rapporteur.

We also hope that this submission will be useful to the many organisations and individuals who are concerned about the arbitrary use of immigration detention in the UK.

1.4 Bail for Immigration Detainees (BID)

Bail for Immigration Detainees (BID) is a registered charity which prepares and presents bail applications to the Immigration Appellate Authority (IAA) on behalf of those detained under immigration legislation.

BID was established in 1998 by individuals from non-governmental agencies including the Joint Council for the Welfare of Immigrants and the Churches Commission for Racial Justice. BID was set up because there were a number of serious obstacles facing detainees who wanted to apply for bail before the IAA. These obstacles effectively denied individuals their liberty. They included primary legislation which was silent on the presumption in favour of liberty[10] and a lack of public funds for legal representation in bail applications. BID has since prepared and presented a large number of bail applications with the support of *pro bono* advocates and has wide experience of the detention process and access to judicial oversight of detention.

BID welcomed the introduction of public funding for bail applications in January 2000. It was felt that this represented the only positive step with regard to the arbitrary use of detention in the UK in recent years. As a result, a greater number of detainees have had access to bail procedures.

However, there remain a number of obstacles to obtaining release from detention and a general lack of procedural guarantees that would ensure protection from arbitrary detention.

1.5 BID's key concerns about immigration detention

- Primary legislation which is silent on the presumption in favour of liberty.[11]
- No statutory time limit on the duration of detention.
- No automatic review of detention by an independent body capable of considering the lawfulness and appropriateness of the initial detention decision or the need to maintain detention.

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- A failure to consider alternatives to detention, such as reporting restrictions.
- The requirement for sureties as a precondition of bail (and bail applications) for asylum seekers who frequently have no family or contacts in the UK who are able to stand surety for them.
- The application of a 'merits test' for the use of public funds for legal representation in bail applications.
- A failure on the part of the UK Immigration Service (UKIS) to properly inform detainees of the detailed reasons for detention and to routinely disclose UKIS reviews of the detention decision[12].
- A failure on the part of the UKIS to abide by the principle of 'equality of arms' by refusing to disclose documentation relating to the reasons for detention or the reasons for maintaining detention.
- The reluctance of Adjudicators of the IAA to consider the European Convention on Human Rights in bail applications.
- The lack of any appeal right against a negative bail decision by an Adjudicator of the IAA.
- The failure to provide written reasons for the decision in a bail application.
- The paucity of research into detention and bail leading to decision-making by the Immigration Service and courts which is not evidence-based. This results in flawed initial decision-making by the UKIS and flawed bail decisions by the IAA.
- The use of immigration detention for children and children in families, pregnant women, those with serious mental and physical health problems and those who have experienced torture, including rape.

1.6 Amnesty International's concerns about immigration detention – 'Cell Culture' 1996

In 1996 Amnesty International raised its concerns over the detention of asylum seekers in its report *Cell Culture*[13], the most recent in a series of reports started in 1988. The findings of this final report remain one of the few pieces of detailed research on detention in the UK and, sadly, its conclusions are still relevant.

Cell Culture reviewed a survey of 150 detained asylum seekers. 86% of the sample had not had bail applications made on their behalf. 55% of the sample had been detained since their arrival in the UK[14]. This latter figure is echoed in the latest research conducted into asylum seekers which found that 54% of asylum seekers in the sample (who were subsequently bailed) were detained from the day of arrival[15].

Amnesty International's report also criticised the bail procedure:

> *"...The survey demonstrates that the only plausible means of seeking independent scrutiny of a decision to detain – the right to apply to an IAA adjudicator (of the IAT) for bail – is defective in practice and simply does not provide an effective remedy to the extraordinary powers of detention available to immigration officers".*

Amnesty International concluded that their research:

> *"...highlights the misuse of detention in asylum cases as an ostensible deterrent to new arrivals, rather than as a means of achieving a particular (and valid) end namely the removal of unsuccessful asylum applicants. Only 10 of the 150 detainees (less than 7 per cent) had been purposefully detained, on the initiative of the Immigration Service, in order*

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> *to effect their removal the United Kingdom (their asylum claim having been refused and all appeal rights exhausted)."*

Amongst the recommendations Amnesty called on the Government to:

> *"…undertake, in consultation with appropriate and interested parties, an urgent, independent and wide-ranging review of its policy and practice in respect of detention of asylum seekers, with a view to bringing such policy and practice into line with internationally-recognised standards. The principal aim of this review should be to ensure that future policy results in such detention being resorted to only when necessary (i.e. when other measures short of detention will not suffice) and for a minimal period…"*

In 1996 the number detained at any one time was 850, a figure which had risen sharply from 250 in early 1993. It is now over 2,000. No "wide-ranging review" of detention policy and practice has taken place. Indeed, Government policy will lead to a more extensive detention regime without any review of whether this is appropriate or proportionate.

The Government has repeatedly claimed that detention is used primarily for the purpose of removal. Indeed, detention centres have been renamed "removal centres". However, large numbers of people are routinely held well before any attempt can be made to remove them. No statistics regarding the stages reached by detainees in the process at any given time are published by the Government but, following a fire at Yarl's Wood detention centre in February 2002, it was revealed that, of the 385 detainees held there, only 46 actually had removal directions issued against them[16].

1.7 The structure of BID's submission

To analyse whether the recommendations made by the Working Group have been followed, Part 2 of this submission looks at each Working Group recommendation in turn and makes a brief comment on the current situation in the UK. Part 3 draws the attention of the Working Group to recent important developments in detention policy. Part 4 provides a more detailed explanation of BID's concerns about each stage of the detention process, setting out the reasons why existing procedures relating to detention decisions are flawed and lead to unnecessarily prolonged periods of detention. Part 5 focuses on our experience of the deficiencies in the bail process and the lack of effective, independent oversight of detention decisions.

Part 6 of the submission considers the detention of vulnerable persons, including children, pregnant women and those with serious mental or physical health problems. The practice of detaining these categories was not explicitly considered by the Working Group in 1998, but is of great concern to BID. Part 7 considers alternatives to detention in the light of recent research. Finally, the submission makes a series of recommendations that BID believe should be followed if immigration detention is to be used in a non-arbitrary manner in line with internationally recognised standards. Suggestions of further reading and sources of information on immigration detention are included at the end of the submission.

The primary focus of this submission is detention policy, particularly in relation to bail. We do not cover issues surrounding conditions within detention centres. This submission also does not deal with the fast-track procedures at Oakington detention centre[17], which are currently the subject of an appeal to the House of Lords[18], other than to comment upon the use of detention in other centres immediately after Oakington. Further, we do not deal with the issues raised in relation to the derogation from Article 5 of the ECHR in respect of recent legislation (Anti-terrorism, Crime and Security Act 2001) which is not within BID's remit.

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Her Majesty's Chief Inspector of Prisons has conducted an inspection of some of the immigration detention centres in the UK during 2002. We look forward to the publication of the Inspector's report on individual centres and of the thematic review, which will consider the legitimacy of detention, accommodation and facilities, access to legal advice and representation, health care, services and access to the outside world[19].

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Part 2 Commentary on the recommendations of the Working Group on the issue of Immigration and Asylum seekers, 18 December 1998

In 1998 the UN Working Group on Arbitrary Detention made a series of recommendations to the UK Government regarding its use of detention for asylum seekers and migrants. To analyse the recommendations made by the Working Group this section looks at each recommendation in turn and makes a brief comment on the current situation in the UK. Further description and criticism of the procedures and policies relating to detention and independent oversight can be found in Parts 4 and 5. The Guarantees against which the Working Group assess whether detention is arbitrary are attached in *Appendix A*[20].

UN Rec. 1 (Para 26): **The Government should ensure that detention of asylum seekers is resorted to only for reasons recognised as legitimate under international standards and only when other measures will not suffice.**

- There is no evidence to suggest that alternatives to detention, including reporting restrictions, are considered fully, or indeed at all, before resorting to detention.
- It is difficult to assess whether the reasons for detention are legitimate because there is no full disclosure of the reasons for maintaining detention. Initial reasons for detention are disclosed only by means of a check-list which provides vague and generalised reasons that are not always linked to the circumstances in the particular case.
- Some detention decisions are made on the basis of criteria for detention which are not disclosed - so-called "special exercises."
- Bail summaries (reasons for detention advanced in court) giving reasons for detention are often only disclosed on the day of the bail application, thus subverting effective rebuttal and denying the 'level playing field.'
- UKIS bail summaries have been criticised by the High Court as being inadequate and lacking in balance[21]. Unbalanced and inadequate bail summaries which fail to demonstrate a reasoned decision are routinely submitted in cases where BID is the representative.
- Detention at Oakington Detention Centre is used for purely administrative reasons. In Saadi[22] it was revealed that detention was imposed on the grounds that the individual was of a particular nationality in a list of nationalities deemed suitable for the Oakington process.

UN Rec. 2 (Para 27): **At the time of detention, detainees should be provided in writing, in a language they understand, with the reasons for detention.**

- At the time of detention people are provided with the reasons for detention in the form of a checklist[23]. BID's experience is that this checklist is not always provided and when it is provided the standard reasons contained therein are often not ticked and further information is not given.
- A *written* translation of the checklist into a language the detainee can understand is never provided. An interpreter may give an oral translation (*See Appendix C – copy of an IS91).*
- A bail summary provided at a hearing is usually more detailed but serves as the only disclosed reasoned explanation for detention. Where there is no bail hearing, no detailed reasons statement is ever disclosed although BID is aware that detailed reasons statements are invariably noted on the UKIS file. (*See Appendix D – an example of a bail summary)*

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UN Rec. 3 (Para 28): **At the time of detention, detainees should be provided with a written explanation of their rights and how to exercise them.**

- The form listing reasons for detention includes a short paragraph detailing the right to apply for bail. The information contained in this section is misleading, as the two organisations[24] to whom the detainee is directed will not provide a bail service except to their own clients. No information is provided on other possible means of release. The explanation on the form is provided in English and is rarely translated.
- The form includes brief details on where to telephone for help and advice. The IAS and RLC are unable to meet the demand for representation generally and, in our experience, it can be very difficult for a detainee to make contact with an adviser from these organisations[25]. The form does not provide an explanation of how a detainee can exercise the right to bail.
- In July 2002 the Government announced its intention to publish an information leaflet for detainees. However, this measure will not address the crucial requirement of unhindered access to independent oversight of detention, which appears to remain unavailable to a large number of detainees.

UN Rec. 4 (Para 29): **Every decision to detain should be reviewed as to its necessity and its compliance with international legal standards by means of a prompt oral hearing by a court or similar competent independent and impartial review, accompanied by the appropriate provision of legal aid. In the event that continued detention is authorised, detainees should be able to initiate further challenges against the reasons for detention.**

- There is no automatic or prompt oral hearing that enables independent impartial review. The right to apply for bail does exist but there are substantial barriers to oral hearings including the requirement for sureties and the Chief Adjudicator's interpretation of the Procedure Rules[26].
- One positive step since the visit of the Working Group to the UK in 1998 was the introduction, in January 2000, of legal aid (Controlled Legal Representation) for bail applications heard by the IAA. This has lead to a significant increase in bail applications being made. However, large numbers of detainees are still denied access to bail procedures to challenge the original decision or maintenance of detention. In many cases this is because legal aid is subject to the application of a merits test [27]. This prevents a review of "*every* decision to detain".
- Detainees can make further applications for release if continued detention is authorised, but this is frustrated by the failure of the UKIS to disclose detention reviews and supporting documentation to allegations made in bail summaries that are presented to the courts. It is extremely rare for the UKIS to support allegations in court with documentary evidence. Unfortunately, adjudicators of the IAA often fail to require such evidence while nonetheless relying on it in their determination of bail applications.

UN Rec. 5 (Para 30): **Detainees should be held in special immigration detention centres in conditions appropriate to their status and not with persons charged with or convicted of criminal charges (unless so charged or convicted themselves).**

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- Despite the undertaking made by the Government that the detention of asylum seekers in prisons would cease as from 25 December 2001, those detained under Immigration Act powers are held in prison accommodation alongside those convicted of criminal charges.
- Following the fire at Yarl's Wood Detention Centre on the 14th February 2002 the Secretary of State, David Blunkett stated that *"detainees with a history of violent or criminal behaviour and those considered a danger to safety have been transferred to prison."*[28]
- The decisions to move detainees to prisons are not transparent[29]. Neither detainees nor their legal representatives are provided with written reasons for deciding that a particular individual presents a security risk nor on what basis they are "*considered a danger to safety*". Detainees who are suffering from mental illness have been sent to prisons with harsh 'lock-up' regimes.

UN Rec. 6 (Para 31): **Detainees should be given adequate access to their legal representatives, relatives, and officials of the Office of the United Nations High Commissioner for Refugees.**

- Access to legal representatives for those held in prisons is dependent on legal visits and the availability of phonecards, since incoming calls are not allowed in prisons.
- In detention centres it is possible for detainees to receive phone calls. However, destitute detainees without phonecards are not always able to ring their representatives to instruct them on issues relating to their applications. The lack of contact can be a serious impediment to a fair bail hearing. The UKIS frequently disclose their bail summary listing reasons for detention only on the day before the hearing. If instructions have to be taken or evidence sought to rebut allegations in the bail summary, communication difficulties between legal representative and detainee can be detrimental to the application.

UN Rec. 7 (Para 32): **The Government should concentrate the use of detention on appropriate cases of rejected asylum seekers at the end of the asylum determination procedure (i.e. when the incentive to abscond is increased) or where removal is imminent and there are reasons to believe it cannot be effected unless the individual is detained. The power to detain should not be exercised if the person concerned is, on the basis of substantiated evidence, fully absorbed into the society from which his removal is sought. The relevant Schedules of the Immigration Act should spell out permissible criteria for detention.**

- In BID's experience, detention is frequently used at the beginning of the asylum process, sometimes from arrival and often well before removal becomes imminent.
- It is rare for the reasons for detention to be consistent with the UKIS guidelines on detention. Frequently, in our experience, it seems there is little reason to detain at all.
- BID is not aware of any research into whether removal can be effected without the use of detention. However, in a recent research project conducted by South Bank University[30], it was discovered that within the small group studied, those who were granted bail at the end of an unsuccessful asylum process still reported for removal proceedings. In BID's experience those who face removal are often unwilling to suffer the consequences of breaking off contact with the authorities and 'going underground.'
- The same research confirms the findings of a project funded by the Immigration and Naturalisation Department of the US and conducted by the Vera Institute which found that very low levels of absconding could be achieved by linking those who had been granted

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their liberty with community based programmes[31]. The UKIS are aware of this research, yet they continue to detain asylum seekers who have been shown not to abscond if released.

- No guidelines have been issued to the UKIS which emphasise that detention should not be employed for those who are 'fully absorbed' into society.
- The criteria for detention are not spelt out in immigration legislation and are subject to changes at short notice without Parliamentary scrutiny. For example, in October 2001 the Immigration Service issued new instructions permitting the detention of families including children for prolonged periods of time, which had not been permitted prior to this date.

UN Rec. 8 (Para 33): **Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.**

- The Government's stated policy is to use alternatives to detention "*wherever possible*"[32]. However, very few bail summaries presented at bail hearings give any indication that consideration has been given to alternatives to detention.
- The UKIS has not commissioned any research or pilot studies into alternatives to detention in the UK.
- Decisions to detain are made even where the individual has previously been granted temporary admission and has outstanding appeal rights exercisable in the UK.

UN Rec. 9 (Para 34): **The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker.**

- The Operational Enforcement Manual (OEM) states that there is a presumption in favour of temporary admission. However, under current procedures it is difficult to assess whether there is compelling need to detain in every case. This is because the reasoning which has led to the decision to detain is not disclosed, documentary evidence from the UKIS file is not disclosed and the use of 'special-exercise' detention applying secret criteria is not made available.
- Research into the decision-making process conducted by Weber and Gelsthorpe[33] indicates that reasons for detention other than "a compelling need" are frequently employed by Immigration Officers. In their words, there are "goal shifts" from the published reasons for employing detention to that of deterrence. The secrecy of the detention process exacerbates this misuse and allows the Immigration Service to "goal-shift" detention criteria with impunity.
- The Chief Adjudicator of the IAA has recently introduced a new standard of proof in relation to the granting of bail. It requires Adjudicators to refuse bail when there is a "*...materially greater than normal risk of the appellant absconding*"[34]. It is BID's view that this standard of proof seriously undermines the effectiveness of the IAA in ensuring that only those for whom there is compelling need to detain remain in detention. The Chief Adjudicator's guidelines do not make it explicit that the burden of proof rests on the Secretary of State to prove (to a given standard) that there is a *compelling* reason to detain. *Compelling reason* is, in BID's view, a higher standard than *materially greater risk.*

UN Rec. 10 (Para 35): **An absolute maximum duration for the detention of asylum seekers should be specified in national law.**

- There is no maximum period of detention. This has led to periods of administrative detention of two or three years in some cases and periods of many months in detention are common.

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UN Rec. 11 (Para 36): **Any review body should be independent from the detaining authorities.**

- The IAA is independent from the UKIS. Adjudicators are appointed by the Lord Chancellor's Department and are not given indefinite tenure on taking up their posts. BID believes that, in some IAA hearing centres, the collegiate view seems to be distrustful of granting bail (for example York House near Harmondsworth Detention Centre). This view is drawn from our wide experience of appearing before adjudicators at most hearing centres in southern and central England.

UN Rec. 12 (Para 37): **Unaccompanied minors should never be detained.**

- Unaccompanied minors are detained in situations where their age is disputed by the UKIS. In BID's experience the UKIS have continued to dispute documentation produced by children in detention which is subsequently found to be valid.
- The onus on proving age rests with the applicant once a Chief Immigration Officer (CIO) has decided by "*visual assessment*"[35] that the individual is over 18. BID is not aware that CIOs receive any training in making such assessments. Although UKIS instructions state that the benefit of the doubt should be given to the purported child, in BID's experience this rarely happens.
- UKIS appears to be failing to contact the Refugee Council's Children's Panel in some cases despite being instructed to do so in *all* case of minors. This further weakens the rights of children, as it delays the instruction of independent experts to make age assessments.

UN Rec. 13 (Para 40): **National authorities should provide detailed information on relevant policy, practice and statistics in order to ensure transparency.**

- Comprehensive statistics relating to detention are not made public. It is our understanding that there are no Government statistics on absconding, levels of the granting of temporary admission, the granting of CIO bail or any other of the practices and procedures relating to detention. The only statistics are 'snapshots' of total numbers in detention at given moments during the year. The statistics also show the nationality, gender and an average duration at the given moment[36].
- The policy on detention applied by the Enforcement Directorate of the UKIS, which deals with removal action and illegal entry, are disclosed. However, the relevant policy on detention for UKIS staff who deal with initial control at the ports and airports has not been disclosed.
- Criteria for 'special exercise' detention are not disclosed.

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Part 3 Developments in detention policy

Since the Working Group visited in 1998, there have been several significant developments in detention policy. This section of the submission sets out these changes and BID's view as to their impact.

3.1 Automatic bail applications – repealed

Part III of the Immigration and Asylum Act 1999 made provision for automatic bail hearings seven and 35 days after detention.

> *"[Detention] is necessary in a small number of cases, but there must be proper safeguards. Part III fulfils the commitment in the White Paper to introduce a more extensive judicial element in the detention process. That will be achieved by introducing routine bail hearings for those detained under immigration legislation".*[37]

The fact that the Government accepted the need for automatic bail hearings was welcomed. However, the provision was never implemented and the White Paper, *Secure Borders, Safe Haven,* (the 'White Paper') published in February 2002, announced the Government's intention to repeal Part III of the 1999 Act. The Nationality, Immigration and Asylum Bill which began the Parliamentary process in April 2002 and is scheduled to receive royal assent in November executes the repeal.

In the course of Parliamentary debate about the new legislation, the then Minister, Angela Eagle MP, stated that, under the present system of bail, the number of bail hearings would rise with the increased capacity of the detention estate.

> *"With the increase to 4,000 removal places, we estimate that under the existing arrangements there will be 12,000 bail hearings before adjudicators, which puts the figure up from 700 to 1,000 per month."*

The Minister went on to state that

> *"In anticipation of putting part III into effect, we did a great deal of work to try to estimate what the implications would be of routine bail hearings for everybody in detention. We came to the conclusion that that [the introduction of automatic bail hearings] would create a further 2,100 hearings per month."*[38]

On the basis of these figures, it would seem that some 60% of those who are detained are being denied access to the current bail procedure. This view is supported by recent statistics issued by the Association of Visitors to Immigration Detention[39]covering the month of July 2002. They discovered that 55% of those with whom they had been in contact during that month appeared to have had no bail hearing.

3.2 Change of name of detention centres to "removal centres"

The Government has decided to change the name of detention centres to "removal centres" and proposes to formalise this change in law[40]. The Government have stated that the function of the centres remains the same and there are no plans to amend the criteria for detention[41]. The result of

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this change is that asylum seekers who are detained on arrival find themselves held in a facility which has the stated purpose of removing them from the UK.

3.3 Expansion of the detention estate to 4000 places by Spring 2003[42]

Since the Working Group's visit in 1998 the capacity of the detention estate had already increased, but the White Paper makes clear the intention to continue this pattern. More detention places do not result in the more efficient or targeted use of detention; on the contrary, in BID's experience it has simply led to more people being detained. As outlined above, the significant procedural changes, namely the introduction of automatic bail hearings, that were outlined by the Government in 1998 and welcomed by the Working Group in their report have not been implemented. Thus, whilst the number of detention spaces has dramatically expanded, safeguards have actually decreased.

3.4 Introduction of the use of long-term detention for families and children[43]

Policy on family detention has been reversed since the Working Group's visit. The Government has stated its intention to detain families for longer periods rather than immediately prior to removal. Previous policy set out in the 1998 White Paper, *Fairer, Faster, Firmer,* acknowledged that detention of families was "*particularly regrettable*" and should be only for "*a few days*". Further, the UKIS have disclosed that the new policy is a ministerial decision and there is no empirical evidence that demonstrates the need to detain families[44].

3.5 The failure to implement the Detention Centre Rules

The Detention Centre Rules were introduced in 2001. They cover matters including conditions in the centres and the provision of reasons for detention. Their introduction is significant in that they make statutory provisions by which detention centres must be run. The Operating Standards which flesh out the Rules have, however, yet to be completed (none have yet been published) and there is currently no consistent approach to the running of centres across the estate. For example, Rule 9 which requires the UKIS to give reasons for continued detention; in practice, this is not done.

3.6 Publication of revised Chief Adjudicator's Guidance Notes on Bail

The new IAA guidelines on bail issued in March 2002[45] emphasise the requirement for sureties offering substantial amounts in bail applications and specifically warn adjudicators not to accept nominal amounts of recognisance from sureties[46]. This guideline explicitly compromises the inherent discretion of the Adjudicator and has no basis in law. Indeed, it is argued that it breaches Article 5 of ECHR. The guidelines appear to suggest that adjudicators are not bound by the Human Rights Act 1998 (which incorporated the ECHR into domestic law). These guidelines also impose a highly contentious view as to the standard of proof required in bail applications. This will affect the ability of detainees to succeed in bail applications before the IAA.

3.7 Establishment of Oakington Detention Centre

Oakington (sometimes referred to as a 'reception centre') imposes a fast track regime on asylum seekers whereby an initial decision on cases is usually made within seven days of arrival. If refused, an increasing number of asylum seekers are then transferred to detention centres or prisons rather than being released. BID considers the reasons for detention in these cases to be particularly weak. In a recent case, BID sought the reasons for detention for an asylum seeker who had been in Oakington. BID contacted a newly-created section of the UKIS [47] who, very unusually, disclosed the reasons for detention in the file. They were "Young single male. No ties in the UK". We were

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also informed that the detainee was being "fast tracked" as he was an "Oakington case". No other reasons for detention were advanced.

3.8 The introduction of a Practice Direction on Expedited, Fast and Standard appeals

This new practice direction was issued by the Chief Adjudicator of the IAA and came into effect on the 27th August 2002. All detained clients whose claims are certified and have previously received an initial refusal on their case at Oakington will automatically be dealt with under the terms of the expedited track.These appeals will have no first hearing and will be listed for a full hearing no earlier than six and no later than eight working days from receipt of the appeal by the IAA.

BID is very concerned at the effect of this Practice Direction. It contains no special provisions for bail applications in expedited cases, nor any comment on what will happen if an asylum seeker is granted bail before the hearing of the expedited appeal.

The fact that only detained asylum seekers will be put through the expedited process following Oakington creates a further incentive for Immigration Officers to maintain detention after Oakington, in the hope that removal may soon be possible, rather than on the grounds that there is evidence that a person may abscond. In the absence of automatic provision for access to a court, very few detainees in the expedited case track will have any independent review of detention, due to the lack of time for representatives to prepare the substantive appeal, let alone a bail application or judicial review. In the absence of any safeguards, BID is concerned that these court procedures will extend the administrative detention of the Oakington procedure.

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Part 4 The procedures and polices relating to detention

This part of the submission details BID's main concerns about each stage of the detention process. Taken together these concerns lead us to conclude that detention is arbitrary. Some case studies from our work are included to illustrate our concerns. Some explanation of the process is also included, although those unfamiliar with the process of immigration detention may also find it useful to refer to the sources of further information at the end of this submission.

4.1 The power to detain – largely unlimited and unrestrained

The immigration officer's power to detain[48] was described in 1996 by Amnesty International as "*extraordinary and largely unrestrained*"[49].

In theory the power to detain is limited by Government instructions contained in the Operation Enforcement Manual which is deemed to bind the UKIS. In BID's experience these instructions are not always followed and are likely to be interpreted in widely differing ways.

Negotiations between legal representatives and the UKIS may lead to release (by way of "temporary admission" or "CIO bail") prior to intervention from a court. No independent body automatically reviews each detention decision or the exercise of release through either temporary admission or CIO bail. In cases where a bail application is made to the IAA, the Adjudicator reviews the decision to detain[50]. However, in practice Adjudicators do not represent an effective check on the power to detain. Access to the IAA is neither automatic nor, in practice, prompt. The jurisdiction of the IAA is limited and its boundaries unclear. (*See Part 5*).

4.2 Criteria for detention – not exhaustive, not statutory, not followed

The criteria for detention decisions by the UKIS have no statutory basis but are contained within the OEM. Successive sets of instructions to the Immigration Service have been published and the criteria have been broadly the same since 1991. The most recent set of instructions contain criteria for officers to consider prior to a decision to detain[51]. These include evidence of absconding, likelihood of removal, previous history of complying with requirement of immigration control, ties with the United Kingdom and factors which might constitute an incentive to keep in touch with the Immigration Service. The instructions also make reference to Article 5 and Article 8 of the ECHR and assert that the procedures outlined in the OEM are consistent with the provisions of the ECHR.

This list of criteria for detention decisions included in the OEM (*See Appendix B)* is prefaced with a reminder to officers that there is a presumption in favour of release rather than detention[52]. It also states:

> *"There are no statutory criteria for detention, and each case must be considered on its individual merits. The following factors must be taken into account when considering the need for initial or continued detention.* ***The list is not exhaustive neither is it in any order of priority."*** (emphasis added)

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That these criteria are not exhaustive conflicts with the view of the European Court of Human Rights (ECtHR). In numerous cases the Court has reiterated that the list of exceptions to the right to liberty in Article 5 (1) are exhaustive[53].

In BID's experience the suggestion that the list of criteria is not 'exhaustive' has been used by Immigration Officers to support detention based on criteria other than those laid down in the most recent instructions and permits the continued use of undisclosed instructions.

Furthermore, the criteria are frequently ignored or misinterpreted by Immigration Officers when making decisions to detain. BID is aware of cases in which detention has been maintained because the UKIS felt that the individual had:

- been discourteous to an Immigration Officer
- failed to fill in forms for travel documents
- sought asylum in the UK having travelled through other countries who were signatories to the Refugee Convention
- been of a particular nationality
- failed to seek asylum immediately on arrival
- travelled with false documents

None of these reasons are consistent with the OEM criteria.

The decision-making process in relation to detention has been the subject of research by the Cambridge Institute of Criminology[54]. The research suggests that detention decisions are often made on arbitrary basis[55]. It also suggests that published reasons for detention are not those employed by Immigration Officers:

> *"The de-coupling of detention from removal in asylum cases has apparently opened the way for 'legal drift' (into preventative and welfare-based uses of detention) and 'goal shifts' (involving general and specific deterrence) which have expanded the purposes for which immigration detention is used."*

The research found that Immigration Officers (IOs) tended to employ a different style of decision making than the Chief Immigration Officers (CIOs).

> *"CIOs were more likely than IOs to describe the official guidelines as helpful, while IOs were more inclined to say they relied on experience and common sense when making detention decisions."*[56]

One Immigration Officer interviewed noted that:

> *"...I decide myself. Yes there are criteria, but I don't think they're particularly clear or particularly helpful. I think they're all very vague and it is really the CIO at the end of the day who makes the decision."*[57]

The research also found that there was great variation amongst the rates of detention on arrival at the ports from 2% at Waterloo to 18% at Stansted. This divergence in levels of detention decisions amongst ports reinforces BID's view that decisions by Immigration Officers are inconsistent and are made on an *ad hoc* basis, not guided by criteria.

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4.3 'Special exercise' detention – detention on the basis of undisclosed criteria

In addition to the published criteria on detention, there exists 'special exercise' detention, the criteria for which are not published or disclosed. In addition to being secret, the criteria for special exercise are subject to frequent change. It is BID's experience that the Government has employed 'special exercise' detention for those who seek asylum on entry, often with their own passports or other documentation belonging to them. The use of such secret criteria on a nationality-by-nationality basis could be discriminatory and may contravene the Race Relations Act[58].

Special exercise detention was explained by the Deputy Director of the Enforcement Section of the Immigration Service in an exchange of correspondence with BID in 2000-2001:

> *"Special exercises may be mounted when we perceive there to be a threat to the integrity of the immigration control, as, for example, when people whose asylum applications have been refused and whose appeals have been dismissed by the independent appellate authority simply return immediately to the United Kingdom. We do not normally comment on such exercises, but we frequently do tell individuals when their cases are being fast-tracked."*[59]

Another letter notes;

> *" … when we mount special exercises we try to arrange for consideration of those cases to be fast-tracked, and this sometimes leads those who fear an adverse decision on their application to abscond from temporary admission earlier than we might otherwise have expected."*[60]

In the research of Weber and Gelsthorpe, Immigration Officers also described the use of 'special exercise':

> *"…particularly if there are special exercises targeting certain nationalities. Normally we're told by headquarters to do it but I gather it's all intelligence based, that there been a particular influx from that country – perhaps a deterrent factor.(How would you decide to detain, amongst that group, who would be detained?) Well we have been told in the past to detain all Chinese asylum seekers until further notice. If we're told to do that we do it."*[61]

BID believe that a policy of 'special exercise' was used against Zimbabwean asylum seekers from the end of 2000 to the beginning of 2002. It is our view that the secret policy extended to restricting the right of appeal for these individuals and deeming them to be manifestly unfounded cases using the process of 'certification' (which restricts appeal rights). Our contention is borne out, we believe, by the very high success rates from IAS and RLC in overturning such certificates and the repeated criticism of the use of the certificates by adjudicators.

CASE STUDY: A Zimbabwean asylum seeker 'A' entered the UK on his own passport and sought asylum immediately. He was immediately detained and remained in a detention centre for seven months. At 'A's bail application the Home Office opposed release on the basis that his cousin, who was in the UK, had failed to come forward as a surety. They also argued that as 'A's asylum appeal had been dismissed and as he was awaiting a decision from the higher court he had no incentive to comply with conditions. (The instructions to UKIS staff state that an outstanding appeal *is* an incentive to keep in contact). The adjudicator granted bail with a twice-weekly reporting requirement and two sureties offering £150 each.

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4.4 Immediate detention of those who seek asylum on entry

It is not possible to give figures as to the numbers detained on arrival in the UK as no statistics are published. Most informed observers conclude that substantial numbers of individuals are detained on arrival in to the United Kingdom, having claimed asylum on entry.

No information is given as to how to claim asylum at the port of entry. Although the British Airports Authority had erected a number of small signs in some airports, the UKIS provides no information at the immigration control desk information to advise putative asylum seekers that they must seek asylum on entry. It is our experience that many asylum seekers are advised by agents to enter and seek asylum at the Home Office in Croydon or at a police station. Those who are stopped at the port with false documents and those who attend the Home Office in Croydon are frequently detained.

CASE STUDY: 'B' travelled from Asia to the UK in the back of a lorry and got out at the port, seeking asylum immediately at the immigration desk. He had no documents. 'B' was promptly detained and remained in detention for 13 months. His representative did not make a bail application on his behalf as there were no sureties available. BID intervened and bail was granted with no conditions and no sureties.

4. 5 Protection from punishment: Article 31 of the UN Convention relating to the Status of Refugees (the 'Refugee Convention') – ignored

Asylum seekers who seek asylum soon after arrival at the port or later at the Home Office in Croydon should benefit from the protection of Article 31 of the Refugee Convention which protects refugees from penalty for their illegal entry or presence in the country in which they seek refuge.

> *"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

In the case of *R v Uxbridge Magistrates ex p Adimi* [62], the Home Office argued that this protection only extended to those who immediately made a "*voluntary exonerating act*" on arrival at the border and that a failure to do so offended against the phrase "*presented themselves without delay.*" The Court took the view that this was an excessively restrictive interpretation of the phrase and approves the approach expressed in Grahl Madsen's *'The Status of Refugees in International Law'*:

> *"A person crossing the frontier illegally may have reasons for not giving himself up at the nearest frontier control point or to a local authority in the border zone. If he succeeds in finding his way to the capital or another major city and presents himself to the authorities there he must be deemed to have complied with the requirement and the same ought to apply if he was unsuccessful but could show that such was his intention."*

The Court noted that:

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> *"If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached this condition."*

The Government has ignored this clear judicial authority for the protection of refugees from penalties. It has continued to punish those who have not claimed asylum immediately on arrival by extended periods of detention. The OEM instructions on criteria for detention do not make any reference to the protection of refugees contained in Article 31. We are not aware of any other instructions alerting officers of the UKIS to this prohibition on the use of penalties against refugees.

The UKIS have responded to BID's questions on this point by advancing the view that indefinite detention is not a penalty in the ordinary meaning of the word, an interpretation which ignores the *Adimi* decision.

> *"…immigration detention is not a penalty within the meaning of Article 31 of the Refugee Convention. Penalty should be given its ordinary meaning in the sense of a penalty imposed by criminal law."*[63]

CASE STUDY: 'C', an African asylum seeker, entered the UK with false documentation and did not seek asylum on arrival as he believed that he would be returned to his own country if he did so. He sought asylum at the Home Office in Croydon later that same day. 'C' was immediately detained and sent to Oakington detention centre. Later he was transferred to Liverpool Prison. The bail summary in which the UKIS case was advanced stated: *The subject has shown a blatant disregard for UK Immigration Law as demonstrated by his method of entry. He is single with no strong ties in the United Kingdom to make it likely he will remain in one place. This has been further demonstrated by his failure to provide sureties or a firm address to which he proposes to be bailed.'* After 8 months in detention 'C' was bailed with a condition which required daily signing at the local police station.

4.6 Reasons for detention and for maintaining detention – no reasoned justification

The initial detention decision is disclosed to the detainee in a IS91[64] form. The Government has stated that:

> *"Written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals, or at shorter intervals in the case of detained families. Taking into account that most people who are detained are held for just a few hours or days, **initial reasons** will be given by way of a check list similar to that used for bail in a magistrates' court."*[65] (Emphasis added.)

In BID's view, this 'checklist' form of explaining reasons for detention is too simplistic to constitute a reasoned notification of the detention decision. This point appears to be accepted by the Government in stating that it is appropriate for giving *initial reasons* only.

In addition, sufficiently comprehensive written reasons for maintaining detention should be given in all cases, on a monthly basis. An undertaking to produce monthly "written reasons" has been put on a statutory basis by the introduction of the Detention Centre Rules which became effective in April 2001. Rule 9 requires the Immigration Service to provide monthly reasons for detention. However,

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the vast majority of detainees who contact BID do not have reasons for detention given to them on a monthly basis which are consistent with the criteria for detention outlined in the OEM i.e. factors which *"must be taken into account when considering the need for initial or continued detention.(emphasis added)."*[66] This point is illustrated by the results of a small survey of 96 IS151f forms conducted by BID in May 2001 and July 2002[67] which found that in no case had the monthly review provided a reasoned justification for maintaining detention.

4.7 Internal detention reviews - ineffective

After the initial decision to detain is taken it is reviewed on a weekly basis:

> *"Detention must be reviewed after 24 hours by an Inspector and thereafter, as directed, usually weekly by an Inspector. If circumstances change in the interim, however, an Inspector must review detention again. Detention must be reviewed again by an inspector after 28 days…"*[68]

These regular internal reviews take place using the IS93E, a form that is not normally disclosed. The detainee has no method of discovering whether appropriate reviews of detention have taken place or not or whether all the factors have been considered. BID has been made very aware by its clients of the frustration and distress which this causes.

In 1998, Lord Williams of Mostyn stated that written reasons for detention means that detainees

> *"will know and at least have a degree of moral consolation that their detention is not an unthinking exercise of administrative power."* [69]

Since then, the UKIS have largely failed to console detainees by disclosing the reviews that (we are told) have been conducted. Without effective independent oversight, mistakes made by the UKIS allow detention to be maintained for long periods because of the lack of transparency of reviews[70].

CASE STUDY: 'D' was detained by the Immigration Service despite the fact he had previously been granted bail and had kept in touch with the authorities, signing on regularly at the police station as instructed. 'D' spent seven-and-a-half months in detention without a bail hearing before one was arranged by BID. However, the Immigration Service failed to produce 'D' and as a result the application had to be withdrawn. A further six weeks in detention passed. At the next hearing 'D' was produced in court and the application went ahead. It became clear that the UKIS erroneously believed he had breached the conditions of bail. He had not. 'D' was granted bail in his own recognisance of £10, with no sureties required, after nine months in detention.

4.8 Access to legal representatives – hindered by detention

One of the most serious results of detention, and one which has been referred to by many detainees who have sought the assistance of BID, is the impact detention has on their ability to instruct representatives and obtain evidence relating to their substantive asylum case.

BID is aware of many examples of the reluctance of solicitors to take on detained cases. Solicitors often tell BID that they feel that they cannot adequately prepare a case within tight time limits set out by the funding restrictions under which they operate. This is largely due to the difficulty of

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these cases in terms of the time spent going to visit detainees, the additional hours involved in obtaining liberty and the added complexity of preparing witness statements and taking instructions from people who are in detention.

In addition to the reluctance of solicitors to take on detained cases, detainees themselves experience great difficulty in obtaining evidence from their home countries when preparing for appeal. If detainees are destitute they can suffer from restricted access to phones/faxes. They also have less opportunity to contact their community in the UK which limits their access to evidence from their country of origin.

4.9 Duration of detention – indefinite

There is no maximum period of detention in the UK. BID notes that some EU states provide for a maximum duration of detention which then require the Courts to intervene before detention can be re-imposed. If such a procedure were introduced a very high standard of proof would be required of the detaining authority before further periods of detention are authorised. Thus, the Government's argument that time limits would lead to cases being artificially "strung out" may be contested[71].

Home Office statistics record that at March 30th 2002, 60% of those detained under Immigration Act powers had been in detention for longer than 1 month, with 22% remaining in detention for between four months and more than one year[72]. No statistics are collected as to the overall periods spent in detention by each detainee.

Instructions to immigration officers enjoin them to remember that (*i*)*n all cases detention must be for the shortest possible time*[73]. However this instruction carries no practical compulsion and has failed to prevent the UKIS from employing administrative detention for prolonged periods.

Prolonged detention may be experienced whilst waiting for the asylum application to be processed. In other cases, detainees endure prolonged detention whilst waiting for the Home Office to obtain travel documents. The Indian, Pakistani, Chinese and Algerian governments take a long time to issue travel documents for their nationals. The Immigration Service Travel Document Unit (ISDU) has declined to give any estimate as to the length of time this procedure takes. However, the UKIS routinely defend the decision to detain in individual cases on the grounds that the document will be issued 'quickly'.

In these circumstances, 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 incarcerated for just short of three years before removal could be carried out. BID believe that these periods of detention are excessive and serve as examples of impact of the failure to set a statutory time limit.

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:

> *"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."*[74]

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The absence of a statutory limit combines with the difficulty in accessing the bail procedure and results in a high level of frustration and uncertainty amongst detainees. An Unannounced Short Inspection to Campsfield House in 1995, concluded:

> *"Detention without time limit, no matter how reasonable the conditions, is extremely stressful. When combined with an uncertain future, language difficulties, a perceived or real lack of information and the fact that some detainees appeared terrified at the prospect of being deported, the stress increases."*[75]

CASE STUDY: 'E', a Sri Lankan asylum seeker, was detained on arrival. UKIS said that he was detained because he had failed to seek asylum immediately. In fact, 'E' had waited for the agent who brought him to the UK for a couple of hours in the transit area of the airport before approaching an Immigration Officer to ask for asylum. 'E' remained detained throughout the asylum process, his only period of freedom being three days of 'temporary admission' granted to him while recuperating from an operation. Asked why he had not absconded while he had this opportunity, he replied to BID staff that he wanted to abide by the laws of the United Kingdom. Several bail applications were made on 'E's' behalf but all of these were dismissed on the basis that he failed to seek asylum immediately on arrival, or (as time went on) on the basis that the asylum procedure was nearly finished and he would shortly be removed. He was finally removed from the UK after nearly three years in detention.

4.10 The use of prison accommodation

In October 2001 the Government gave an undertaking that the detention of asylum seekers in prisons would cease as from 25 December 2001. However, the use of prisons was re-introduced after the fire at Yarl's Wood Detention Centre on the 14th February 2002. The Secretary of State, David Blunkett, on 24th February, stated that

> *"…detainees with a history of violent or criminal behaviour and those considered a danger to safety have been transferred to prison."*[76]

BID is concerned that detainees are being transferred to prisons as a punitive measure. There is a lack of transparency and accountability surrounding the process of movement of detainees to prisons. Neither detainees nor their legal representatives are provided with the reasons for deciding that they represent a security risk. In several cases, detainees have been moved to a prison for a number of weeks, then returned to a detention facility without explanation as to why they are no longer deemed a risk.

CASE STUDY: An African man, 'F', claimed asylum after being refused leave to enter at the airport. He was detained. Following the incident at Yarl's Wood in February 2002, he was moved to a criminal prison. Neither 'F' nor his representatives were given any reasons for why he was considered a security risk. He was never interviewed by police. 'F' spent 9 weeks in criminal prison. Despite serious mental health problems and the recommendation of a psychiatrist that he should be released, he was then transferred back to detention from prison, again without explanation. He was not released immediately because of allegations about his behaviour which appear to be unfounded as they were never investigated. It was only after further intervention by 'F's' solicitor, questioning these allegations, that he was granted temporary admission.

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Part 5 Release from detention and access to judicial oversight

This part of the submission explores the various possibilities of obtaining release from detention or accessing independent scrutiny of detention. It sets out the reasons why these procedures do not constitute adequate protection against arbitrary detention. The final section details the legislative changes in relation to bail hearings before the Immigration Appellate Authority.

There are five methods of obtaining release from immigration detention facilities in the UK:

- "temporary admission"
- bail directly from the UKIS ("CIO bail")
- bail from an adjudicator or the Immigration Appeals Tribunal ("adjudicator bail")
- *habeas corpus*
- judicial review

In BID's experience, the later two remedies are rarely pursued. The other methods all have serious limitations. It is BID's view that none of the avenues available to detainees are sufficiently prompt or accessible to ensure that the decision to detain can be pursued in accordance with the right under Article 5(4) of the ECHR.

> *"Everyone has the right to liberty and security of person...*
> *4) 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."*

5.1 Temporary Admission

An immigration officer can grant 'temporary admission'[77] (TA) to those who seek leave to enter the UK. This is effectively limited permission to enter the UK on a temporary basis, subject to conditions, while the substantive immigration application is considered. Legal representatives would normally apply for TA as a first step when instructed by clients who are detained. The grant of TA is usually dependent on only three conditions – residence, a prohibition of employment and a requirement to return to the UKIS on a specified date. There is no requirement for sureties. However, the decision to grant TA is entirely discretionary and is not subject to any right of review or appeal.

5.2 CIO Bail

Failing a successful application for TA a detainee can apply for Chief Immigration Officer Bail (CIO bail).[78] The instructions to Immigration Officer regarding CIO bail state:

> *"…each case should be assessed on its individual merits but a figure of between £2,000 and £5,000 per surety will normally be appropriate."*[79]

For obvious reasons, an asylum seeker is unlikely to have such sureties available. In BID's experience, CIO bail has been granted for considerably less than two sureties offering these large sums of money but this is rare. The possibility of benefiting from this alternative to detention is therefore limited.

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There is no right of review or appeal in the event of the Chief Immigration Officer refusing to grant this form of bail. In practice, if temporary admission is not granted, CIO bail is out of reach of most asylum seekers who are detained, as they are unlikely to have funds.

5.3 Applications to the High Court

The Government assert that *habeas corpus* and Judicial Review are effective remedies consistent with the UK obligations under Article 5(4) ECHR. BID's experience is that these remedies are rarely used by detainees.

Habeas corpus reviews the lawfulness of the power to detain. It is unusual for this remedy to be sought until a number of months in detention have passed. In one of the leading cases on this point, the High Court took the view that after ten months of detention, the use of the Immigration Act powers to detain to effect removal had become unlawful[80]. The court reiterated an earlier decision that the power to detain is limited to a period which is "reasonably necessary" to carry out deportation action. "Reasonably necessary" has never been translated into guidelines.

In relation to Judicial Review, the High Court has indicated that a bail application before an IAA Adjudicator should take place prior to recourse to the High Court. The Court of Appeal said in *Vilvarajah*[81] that in cases where an Adjudicator has jurisdiction the application for bail should usually be to an Adjudicator. That is merely a reflection of the general view that if there is an alternative remedy to be sought it should be taken and the High Court should not be troubled until it has been taken[82]. Under these circumstances, legal representatives may well renew the application for bail before an Adjudicator rather than go to the High Court.

5.4 Bail applications to the IAA

For practical purposes, a bail application before the IAA represents the only independent oversight of detention. However, there is no automatic access to the IAA's oversight of detention. As set out in Part 4, internal reviews of the need to maintain detention are neither independent, impartial nor disclosed. As a result, all of the possibilities for release are dependent on the legal representative making an application for bail on behalf of their detained client.

The application for bail before the IAA can be made both during the process of examining the substantive application to be given leave to enter the country, including during the exercise of any appeal rights[83] and once all appeal rights have been exhausted and removal from the United Kingdom is possible[84]. Bail can be granted subject to conditions. The normal conditions that apply are residence and reporting conditions.

In addition, Adjudicators are encouraged by the statutory procedure rules to impose a requirement for sureties. (Primary legislation contains no such requirement.) This requirement is the subject of controversy as asylum seekers rarely have family or contacts in the United Kingdom who can stand surety for them. A bail application must be made in writing if it is not made at the same time as other substantive matters (usually the asylum appeal). The procedure rules and the form require that the names and addresses of two 'potential' sureties be provided. An application made orally (i.e. at the time of other substantive maters) does not require sureties. Representatives who cannot provide the names of two sureties with a written application for bail risk a formal complaint to the Immigration Services Commissioner or their professional governing body.

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In 2001 a proposal was made by the Lord Chancellor's Department to amend the Immigration and Asylum Appeals (Procedure) Rules 2000 by omitting the requirement for sureties (Rule 34). This proposal was widely welcomed and would have drawn much support had the consultation process on the rules been completed. Regrettably, the proposal was withdrawn when the Government announced its intention to review asylum and immigration law in 2002.

There are two exceptions to the Adjudicators' jurisdiction. The first is in those cases in which a criminal court has recommended deportation, and the second, when the Secretary of State has signed a deportation order[85]. The Government has indicated that these gaps will be closed in forthcoming legislation by extending the jurisdiction of the IAA to cover these cases[86].

There are a number of obstacles placed in the path of detainees who seek bail before the IAA to review the initial decision to detain or a subsequent decision to maintain detention.

a) **Limited and unclear jurisdiction:** The jurisdiction of the IAA is limited and its boundaries unclear – particularly in relation to decisions as to lawfulness under Article 5(4) of the ECHR. The majority of Adjudicators of the IAA take the view that their jurisdiction does not allow them to consider matters of lawfulness in relation to detention for the purposes of Article 5(4).

b) **No prompt or automatic access – the merits test for public funding:** Access to the IAA is not automatic an application must be made in writing and must provide specific details before it can be considered. Legal representatives who are funded by the LSC are not required to present a bail application for their clients. Indeed, they may be discouraged from such a course of action by the requirement that they must assess the chances of success before employing public funds of bail applications. Representatives risk having their public funding disallowed if they judge the 'merits test' incorrectly. On one interpretation of the test, if they deem the chances of success to be less than 50% they are restricted from employing government funds for a bail application. Others interpret the rules more liberally saying that issues of 'life and liberty' do not always require a 'better than 50%' chance of success. The LSC have failed to clarify the merits test since its introduction and confusion continues – at the expense of detainees.

c) **The requirement for sureties:** Adjudicators invariably require sureties in bail applications. Many legal representatives take the view that without sureties offering substantial amounts of recognisance the chance of success is inevitably 'less than 50%'. Many representatives take the view that they cannot comply with the procedural rules without two sureties and therefore will not list a bail application.

CASE STUDY: Asylum seeker 'G' had been detained from arrival. He had previously been refused entry at Coquelle (in France) and Waterloo Station despite seeking asylum at Waterloo. 'G's' solicitors had failed to proceed to a bail application because the case had little chance of success as there were no sureties available and therefore public funds could not be employed. During the course of the case, it became clear that the IAA had made a serious error: the appeal hearing had not been re-listed after an adjournment four months into 'G's' detention. BID presented the first bail application. Bail was granted for £10 recognisance and no sureties. In order to proceed with the bail application BID breached at least four of the requirements of the Immigration and Asylum Appeals (Procedure) Rules 2000.

d) **The unavailability of sureties for asylum seekers:** The Bail Circle, run by the Churches Commission for Racial Justice, maintains a register of some 175 potential sureties from the

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churches and human rights groups. Currently there are over 2,000 spaces in detention, with an intention to increase capacity to 4,000. The Bail Circle cannot possibly cope with this demand.

e) **New guidelines emphasising the requirement for sureties:** The Chief Adjudicator's Guidelines on Bail issued in March 2002 [87]emphasise the requirement for sureties offering substantial recognisance in bail applications and specifically warn adjudicators not to accept nominal amounts of recognisance from sureties. This compromises Adjudicators discretion and confirms representatives in their restricted application of the 'merits test', inevitably affecting the ability of detainees to succeed in bail applications before the IAA.

f) **Complaints against representatives:** The IAA has taken the view that a failure to abide by the Rules warrants a formal complaint to the bodies which oversee the conduct of legal representatives. BID, in common with other representatives, has been the subject of these complaints, including: the failure to offer a recognisance for applicants (who are destitute) Rule 34(3)(e); the failure to offer sureties (in cases where none are available) Rule 34(3)(f); the failure to detail changes in circumstances (in cases in which BID is using the mechanism of a bail hearing to ensure periodic review of detention as required by the ECHR) Rule 34(3)(g); the failure to advance grounds of the application even though it is known that the UKIS do not prepare bail summaries giving reasons for detention until the bail application form is served on them, and that nothing more than formulaic grounds can be produced without sight of the bail summary Rule 34(3)(g). The result of this use of the complaints procedure by the IAA is that representatives are deterred from seeking bail applications for their clients.

g) **Equality of arms/ disclosure of reviews and reasons for detention:** It is very difficult to prepare a bail application without detailed knowledge of the reasons given by the UKIS for maintaining detention. As documentation is not disclosed in the course of detention, this can result in reasons for detention previously unknown to the detainee or the representative being advanced by the UKIS in the bail summary (which is often not disclosed until the day before and sometimes only shortly before the hearing) or orally at the hearing itself, making it difficult for the representative to take adequate instructions on new points.

h) **No right of appeal against a refusal to grant bail:** A negative decision on bail attracts no right of appeal to the Immigration Appellate Tribunal (IAT) which otherwise hears appeals against the decisions of Adjudicators of the IAA. This renders the Adjudicator unaccountable and without guidance from senior courts. BID believes this has had a detrimental effect on the bail decisions of the IAA as it leads to wide variations in bail decisions. The Government appear to have recognised this shortcoming and the Lord Chancellor's Department had put forward a number of proposals regarding court procedure at the end of 2001[88]. One proposal would have provided for a right of appeal in the event of a negative bail decision. As explained above, these proposals were to have been put before Parliament in early 2002. We understand that these proposals have been withdrawn. No formal explanation was given for this but we understand it was due to the introduction of the Nationality Immigration and Asylum Bill 2002.

i) **No written determination following an application for bail:** Adjudicators are not required to provide written reasons for a refusal to grant bail. This means that applicants might not be made aware of the reasons for refusing bail. This makes it difficult to challenge the refusal in subsequent bail applications and renders the decision-making process less transparent.

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5.5 Automatic bail applications - repealed

Access to a bail application would have become automatic under Part III of the Immigration and Asylum Act 1999 which introduced two automatic bail hearings to be effective 7 and 35 days after the commencement of detention. The 1998 White Paper acknowledged the need for "*a more extensive judicial element in the detention process.*" Part III was never brought into force and in the 2002 White Paper the government appears to have concluded that a more extensive judicial element is not necessary.

> *"Part III of the Immigration and Asylum Act 1999 created a complex system of automatic bail hearings at specified points in a person's detention. It has never been brought into force. As part of our revision of immigration and asylum processes we propose to repeal most of Part III. We will implement Section 53 which allows for regulations to be made in respect of the existing arrangements for seeking bail, and Section 54 which removes an anomaly from those arrangements that prevented certain people from applying for bail. The remainder of Part III is now inconsistent with need to ensure that we can streamline the removals process in particular and the immigration and asylum processes more generally."*[89]

Whilst automatic bail hearings as proposed in Part III did not entitle an adjudicator or magistrate to examine the lawfulness of the decision to detain, the provision did go some way to ensuring independent scrutiny of decisions to detain. The Government has not proposed any alternative safeguards to that of automatic bail hearings. Indeed, they have stated that the repeal of automatic bail hearings was a purely administrative decision based on the view that such hearings "*would be a logistical nightmare that would divert scarce resources from processing asylum applications…*"[90] In BID's view, practical or logistical complexities are inadequate justification for the denial of a fundamental right. Furthermore, the ECtHR has stated that it is for the state to organise its judicial system "*in such a way as to enable its courts to comply with Article 5 safeguards.*"[91]

During the passage of the Bill, Ministers referred to judicial review and *habeas corpus* rights as an alternative to automatic bail hearings[92]. The Government failed to address the point that these remedies are complex and expensive and therefore rarely open to use by detainees. The courts have ruled repeatedly that neither route can be employed unless others have been exhausted; but it is BID's submission that the majority of those whose detention ought to be scrutinised by the courts have no opportunity even to make a bail application before the IAA, let alone challenge their detention through *habeas corpus* or Judicial Review.

The Parliamentary Joint Committee on Human Rights considered the issue of the repeal of automatic bail hearings. In their report[93] the Committee take the view that where other remedies are available the repeal of automatic bail hearings does not in itself constitute a violation of ECHR Article 5 or ICCPR Article 9.

> *"Although the period of detention is subject to requirements of reasonableness, proportionality and due diligence on the part of the authorities, the lawfulness of detention at this stage can be tested in habeas corpus proceedings, or by an appeal against, or judicial review of, the decision to remove or detain the person. Bail does not form a necessary part of that process. That being so, we do not consider that the changes to the rules on bail would be likely, in themselves, to lead to a violation of Article 5(4) or Article 9(4)."*

However, the Committee goes on to state that

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"…these [judicial review and habeas corpus] safeguards are meaningful and effective only if appropriate legal advice and information are available to detainees. As indicated already, we hope that it will be provided, but evidence from Bail for Immigration Detainees casts doubt on the effective availability of appropriate advice where and when it is needed. In this connection we note that the Department has stated that detainees are advised that they may contact the IAS or RLC for independent, free advice and representation, but no information is available to us as to the ease of obtaining access to them, the speed of their response, and whether the answers are likely be affected by the location of detainees. ***We consider that these matters should be carefully monitored, and we draw them to the attention of each House as being relevant to the effectiveness of safeguards for the human rights of detainees.****"* [94]

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Part 6 The detention of vulnerable people

The problems with the detention process and obstacles to release outlined in Part 4 and 5 of this submission have a disproportionately high impact on vulnerable detainees. This section briefly outlines some of BID's principal concerns about the use of immigration detention for children, pregnant women, survivors of torture and rape, the seriously ill and those with severe mental health problems.

Section 38.8 of the Operation Enforcement Manual defines those people who are "*normally considered suitable for detention in only very exceptional circumstances…*" These include:

- Pregnant women, unless there is the clear prospect of early removal
- Those suffering from serious medical conditions or the mentally ill
- Those where there is independent evidence that they have been tortured

BID consider that these instructions do not offer sufficient protection to vulnerable detainees.

6.1 Pregnant women

Despite Immigration Service instructions, pregnant women are detained, sometimes for several months, even when there is no prospect of early removal. No adequate explanation is given of the 'exceptional circumstances' justifying this.

BID and the London Detainee Support Group recently joined with Maternity Alliance, a charity with considerable expertise in maternity health, to explore the impact of detention on pregnant women, new mothers and babies. In a small qualitative study[95], Maternity Alliance interviewed five women who were in contact with BID. At the time of interview, two women had been detained for more than four months (one of whom had been released at the time of the interview), one woman for three months and one woman (who was detained on arrival) for two weeks. Three women were pregnant and two had young babies:

The report raised serious concerns about the impact of detention on the health and welfare of pregnant women and their babies;

> *"Good nutrition in pregnancy is very important for the healthy development of the unborn baby. A baby born to a mother who has not received an adequate diet in pregnancy is more likely to be born at a low birthweight (under 2500g), which puts the baby at increased risk of disability, ill health and death in infancy.*
>
> *Pregnant women often experience strong food cravings but the women in detention were powerless to satisfy them. Restricted mealtimes meant that pregnant women, who are advised to eat little and often, were hungry at night. They also found the food provided unpleasant and repetitive. One pregnant woman who had been detained throughout her pregnancy so far was very worried that she was not eating enough food for her baby to grow (she only ate rice) and this fear had been strengthened when an ultrasound scan had revealed her baby was small for its gestational age. Another woman was eating so little that she was unable to produce enough breastmilk to feed her baby. A baby who is not breastfed is at increased risk of gastro-intestinal illness, respiratory infections, urinary tract*

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infections, ear infections, serious respiratory allergies, eczema and childhood diabetes.[96] *The baby in question had already developed eczema."*

The report concluded that;

"The women who took part in this small study all suffered enormous emotional and psychological distress as well as serious physical discomfort as a result of being detained while pregnant or with a baby. The daily reality of their lives in detention was one of isolation, fear and depression; having to cope alone with pain and sickness; unreliable and seemingly unaccountable medical care with only ad hoc liaison with external maternity services and failure to provide essential interpreting; inadequate food; gratuitously petty rules on access to basic necessities such as baby milk and nappies. The vulnerability felt by many pregnant women and the powerlessness generally felt by asylum seekers were strongly intensified by the dehumanising experience of detention.

It appears unlikely that the decision makers were following their own rules in detaining these vulnerable women and children for such lengthy periods. The detention of pregnant women is only authorised in "exceptional circumstances" or where there is a clear prospect of early removal. It was unclear what alleged exceptional circumstances had led to the prolonged detention of some of these women – indeed one woman was released after four and a half months without any change in circumstances, which must cast doubt on the legitimacy of the original decision to detain.

Non-compliance is, in any event, probably less likely among pregnant women and new mothers who need to be in contact with medical and support services. As one of the interviewees wondered: ***"How can I run away when I have a baby and no money? Where can I go?"***

We conclude that the use of prolonged detention for pregnant women and mothers with young children inflicts harm wholly disproportionate to the policy aim of effective immigration control, and should be stopped immediately."[97]

6.2 Those with serious medical conditions

Decisions are made to detain people who have serious medical conditions, in some instances without advice from the health care centre or the clinicians involved with the person's care prior to their detention. Detention restricts the individual's ability to access the care that they had been receiving prior to detention and BID is aware of occasions when the provision of health care in the detention centres has been inadequate.

There is no requirement to define the circumstances that justify detention of the seriously ill. The UKIS may ignore recommendations for release or concerns raised over fitness to detain made by detention centre health care staff. The UKIS may also fail to give adequate consideration to health when requests for release are made by representatives and attention is drawn to a particular condition. In a recent case, BID was told by a CIO that he needed confirmation from the Detainee Escorting and Population Management Unit (DEPMU) as to whether AIDS constituted a serious medical condition.

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CASE STUDY: Asylum seeker 'H' lost contact with the UKIS when he fell seriously ill with an AIDs related illness. He re-established contact with the UKIS through his solicitor but then was detained. At the time of detention 'H's' human rights application was still under consideration. In detention he had no access to the support services previously available to him, such as counselling and additional therapies. His consultant had confirmed that he was susceptible to contagious infections. 'H' was detained for three months during which time his representatives made no bail application. BID presented a bail application that was dismissed. 'H' was then released on temporary admission following representations made by BID to the UKIS who agreed that it was inappropriate for detention to continue.

6.3 The mentally ill

Detention was previously considered inappropriate for "*those with suicidal tendencies*" or "*those suffering from serious medical conditions or the mentally disturbed.*" [98] At present, as with other vulnerable categories, the OEM allows detention '*only in very exceptional circumstances*'. In BID's experience specific concerns about the person's mental health state are not taken into account when making an initial decision to detain. 'Very exceptional circumstances' are very rarely made out in maintaining detention. The UKIS rely on the criteria which exist for categories not deemed vulnerable.

The detention of people at risk of suicide or self harm in immigration detention contrasts with the Home Office guidelines to Courts, the Police and the Probation Service on the detention of mentally disordered offenders which state:

> *"Courts are asked to ensure that alternatives to custody are considered for all mentally disordered persons, including bail before sentence, and persons who are in need of medical treatment are not sent to prison."*[99]

In detention there may be some access to mental health services but this varies between centres. In *A Second Exile; the Mental Health Implications of Detention of Asylum seekers,* the author, a psychiatrist, considers both the effect of detention on mental health and the care available for those who have mental health needs. The report, based on in-depth interviews, concluded that

> *"Detention creates trauma regardless of previous traumatic experiences producing anxiety, depression, isolation and so on, all components of traumatic experience. It was felt that such trauma may be worse than what may have been previously endured."*[100]

In BID's experience, in some cases detention has lead to a deterioration of the detainee's mental health. Eventually, detainees are released for psychiatric treatment when the detention centre medical teams are unable or unwilling to care for them.

CASE STUDY: A young woman, 'I', overstayed her student visa and was detained. She then sought asylum as she had been severely traumatised by experiences in her country of origin. She remained detained awaiting an appeal during which time her mental health deteriorated. 'I's' legal representatives took the view that two sureties would be required for a bail application and as she had only one, they felt unable to present a bail application. Her mental health deteriorated further and the medical team at the detention centre referred 'I' to the local Area Health Authority

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psychiatric team where she was diagnosed as suffering from post traumatic stress disorder (PTSD). Despite this, the Immigration Service maintained detention in breach of their instructions regarding detention of the mentally ill. BID sought bail on several occasions but was forced to withdraw due to problems with sureties. Finally, a successful application was made with one surety who had met 'I' briefly. Bail was granted with one surety offering £500. This was the first bail application that had been heard in 4 months of detention.

6.4 Torture survivors

For many detainees mental health problems experienced whilst detained may be linked to experiences of torture in the country of origin.

> *"Detention reactivates and exacerbates trauma which has been previously endured. The physical environment including the cells, uniformed security personnel, physical restrictions, searches and so on rekindle memories of previous detention and torture. Such memories may have been adequately dealt with prior to detention"*[101]

Immigration Service guidelines demand independent evidence of torture but do not take into account the complex situation experienced by survivors of torture. The guidelines place a heavy burden on the asylum seeker to obtain a medical report and until such a report is available the fact that an asylum seeker might describe torture in their country of origin is considered insufficient reason to release. This has the effect of placing a significantly higher burden of proof on the torture survivor than on other asylum seekers.

The use of detention on arrival is cause for concern because detainees frequently feel unable to disclose their torture. The Medical Foundation for the Care of Victims of Torture have made clear that detention is not conducive to the disclosure of torture.

Even where a detainee has obtained independent medical evidence there remains a risk that the UKIS will maintain detention. A research report conducted by the Medical Foundation[102] between 1 January 1999 and 23 June 2000 examined and documented the torture in their country of origin of 17 clients who were detained. All the information about the detainees past torture and present distress documented by the report was made available to representatives making applications for release. Detention was maintained, in most cases for several months, after the medical reports were written. The report concluded that there was no indication that the evidence of torture was brought to bear on the decision to maintain detain.

BID's experience in making bail applications for those who have suffered torture reflects the conclusion of the Medical Foundation research.

CASE STUDY: An asylum-seeking woman, 'J', who contacted BID was detained for four months from her arrival in the UK until the Adjudicator allowed her appeal. When interviewed by the UKIS during her first week in the UK, 'J' described her rape but detention was maintained. During four months detention no bail application was made by 'J's' legal representatives who also failed to instruct a medical expert to see her. BID prepared a bail application for her but due to an error by the UKIS she was not brought to court. The application was re-listed one week later, but 'J' was released after representations by BID when she received the decision to allow her appeal. The Home Office did not appeal the Adjudicator's decision.

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6.5 Children

The 2002 White Paper sets out a change in policy that allows for detention of children in families for longer periods than immediately prior to removal. The previous policy on the detention of families was set out in the White Paper of July 1998, 'Fairer Faster and Firmer' and stated that the detention of families *"is particularly regrettable"* and *" should be planned to be effective as close to removal as possible so as to ensure that families are not normally detained for more than a few days."*[103]

The change of policy was first announced in a letter from the Director of Immigration Services Detention Services, on the 25th October 2001 which stated that:

> *"The increase in family detention accommodation will allow the detention of those families whose circumstances justify this (i.e. a risk of absconding, identities and claims need to be clarified or pre-removal) but are not detained at present because they fall outside the detention criteria as qualified for families".*

No statistics are available showing how many children are detained each year, or providing information as to the duration of that detention. However, there has been an increase in the capacity to detain families and there are now a total of 150 spaces in designated family accommodation, excluding spaces at Oakington[104].

An increase in the use of detention for families raises fundamental questions in relation to the welfare and rights of children. It is difficult to envisage how detention facilities can offer children, many of whom seek protection from extreme trauma and distress, the support they need. Uniformed staff run detention centres, which are characterised by gates, locks, cameras and restrictions on movement. Provision for education, play and health are limited and inadequate.

In the UNHCR response to the proposals in the White Paper it is stated:

> *"Children can achieve the protection and care they need in an environment where their special psychological, religious, cultural and recreational needs are met, and their physical safety, emotional stability and overall development are safeguarded. For these reasons, UNHCR is unequivocally opposed to the detention of children who are seeking asylum."*[105]

BID reject the Government's argument that, by improving staff training and available facilities, detention of children can be made acceptable. Detention can never be in the best interests of a child and its use breaches the overarching principles of the UN Convention on the Rights of the Child (CRC). The CRC details, amongst other things, a child's right to liberty, education and family life. Article 37 (D) provides for a child "*the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action"*. However, although the UK is a signatory to this Convention, it raised an express reservation in matters relating to immigration. The Government state that they will not act in such a way as to breach the spirit of the Convention[106], but it is clear that under the current system children who are detained do not have an automatic opportunity to challenge their own detention. This is a particular cause for concern given the nature of the decision to detain outlined in Part 4.

UKIS instructions state that the use of detention must be balanced against the right to respect of private and family life (Article 8 of the ECHR) and state:

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> *"..it may be legally defensible under the Human Rights Act to interfere with a person's right to family life by detaining them in order to enforce the immigration control. But it would have to be shown to a court that a decision to detain corresponded with one of the legitimate interests which justify interference and that* ***the interference in family life caused by the detention went no further than was strictly necessary to achieve that aim*** *[emphasis added]."*[107]

In order to justify the detention of a child therefore, there needs to be evidence indicating that the change in the policy relating to the detention of families was such that it was "*strictly necessary to achieve that aim",*[108] i.e. that it is a 'proportionate' response to a particular problem. At a meeting on 27th May 2002[109] it was disclosed that the policy change of October 2001 was a ministerial decision and was not derived from statistical information or an evaluation of the likelihood of families with children to abscond to a degree that their detention became necessary to maintain/enforce immigration control.

In a letter to BID confirming this, the Assistant Director of the Immigration Services Detention Services Policy Unit notes

> *"I can confirm that the decision to change the detention criteria in terms of families was indeed a Ministerial one. It was not derived from statistical evidence but rather was based on the recognition that in some cases families would give rise to similar concerns that might be encountered in relation to single adults and that, accordingly there would be occasions when it would be appropriate to detain families for longer periods and at other points in the process than simply a few days immediately prior to removal."*[110]

In BID's experience, families in this position rarely abscond and there is no evidence available to suggest the contrary. Indeed, their motivation for maintaining contact with the authorities and complying with the terms of their admission is obvious: they would not want to jeopardise their child's welfare by living illegally without support. Asylum-seeking families develop a range of links to the community and seek stability. In BID's experience, parents detained with their children often repeat that it would be impossible for them to 'go underground' with a child or children to care for.

The law requires any interference in a qualified human right to be *"no more than is necessary to accomplish the objective"* [111]. The Immigration Service officers who make the decision to detain families do not have any independent information on whether families generally abscond or not. The Assistant Director's letter argues that such data would have little relevance to a decision to detain. However, if data suggested that families did not generally abscond then this must influence an officer in making a decision to detain them. It is our view that the absence of any such statistical information renders the detention decision suspect at best. In any event, the current criteria used in detention decisions (currently employed in relation to the detention of families) have not been subjected any independent consideration as to their effectiveness since their introduction twelve years ago (See Part 7) even though the nature and, arguably, the purpose of detention has changed.

The Parliamentary Joint Committee on Human Rights (JCHR) considered the issue of detention of children in their report on the Nationality, Immigration and Asylum Bill. The Committee concludes:

> *"It might be considered to be arbitrary to detain a child unless there was clear evidence of a risk of the child absconding or in some other way flouting the immigration process. The Government's view is that this sometimes is the case. We asked the Government whether, and, if so, how, it intended to take account of the rights of children under Article 37 when*

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> *making decisions about the detention of children under powers to be conferred by the Bill. In its reply, the Department drew attention to the desirability of keeping families together, and stressed the very limited periods of detention and the rarity of the detention of children. The interests of the child 'would naturally be an important factor in deciding whether detention should be authorised.* ***We appreciate the Government's position, but draw attention to the fact CRC Article 3(1) requires the best interests of the child to be treated as a primary consideration. It should therefore be a highly important factor in making the decision."***[112]

Responding to JCHR's, the Minister Lord Filkin stated

> *"The UK acceded to the UNCRC on the basis of reservations, including the immigration and nationality reservation. This was necessary to preserve the integrity of immigration laws and procedures in the UK and because we did not want entry to be gained by those simply wishing to make use of UNCRC Rights and with no other justification to come to the UK. Therefore the UNCRC is not binding on the UK in so far as a matter falls within the reservation, and there is therefore no requirement to make the best interests of the child a primary consideration or to adhere to any other principles set out in it.*
>
> *However, this does not prevent the UK from having regard to the UNCRC in its care and treatment of children. Moreover, the basic human rights of children are protected under the Human Rights Act, which applies to all children in the UK without exception. There are no grounds for saying that the reservation is unlawful, as the UK may enter into treaties subject to reservations, as it and other countries have done in many other cases.*
>
> *The Government remains of the opinion that the Reservation is justified in the interests of effective immigration control. The UK is not complacent and does take its international obligations seriously."*[113]

It is difficult to comprehend why the detention of families, even for a few days was "*particularly regrettable"* in 1998 but has now become acceptable for longer periods of time without any evidence that its use is proportionate to maintaining immigration control. In BID's view the consequence of this new policy is that families with children are being detained for prolonged periods when it is quite likely that they will remain in contact with the authorities if they are given their freedom by temporary admission.

Furthermore, the repeal of automatic bail hearings will remove a necessary safeguard against the detention of families for prolonged periods and may give rise to families being detained without independent oversight.

In a recent case known to BID, young children were detained for four months even though there was no imminent prospect of removal and the family had always kept in contact with the Immigration Service.

CASE STUDY: Mr and Mrs 'K' arrived in the UK in autumn 2001 with a young baby and a toddler and immediately claimed asylum. They were granted temporary admission but the Home Office refused to consider the asylum application because they had passed through a third country. The 'K's' had lived at the address required by the UKIS until they were detained in early 2002 when the UKIS considered that it was in a position to return them to the third country. However, they were not removed because a judicial review was lodged challenging this decision. The process of judicial review can take some months therefore there was *no imminent prospect of removal.* Despite the fact that very young children were detained

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and the evidence that the family had always complied with the instructions of the UKIS, the 'K' family continued to be detained for four months. BID listed a bail application on their behalf, however the UKIS moved the family to a different detention centre and so they were not produced to the court. Notwithstanding that their failure to attend was not of their making, without evidence from the family, the Adjudicator refused the application for bail. A further application for bail was made later at which the family were present. The independent adjudicator then agreed that the 'K' family should not be detained and they were released having spent four months in detention. They have since maintained contact with the UKIS as they undertook to do when first granted temporary admission.

6.6 Families split by detention

Provision in the Operation Enforcement Manual states that the head of the family may be detained to avoid interference with family life.

> *"It would generally be disproportionate to detain an entire family (and thus interfere with family or private life under Article 8), when any risk that the family would not meet the conditions for temporary admission or release would be successfully countered by the detention of one person only (i.e. the head of household)."*[114]

The UKIS and National Asylum Seeker Service (NASS), both directorates of the Home Office, will not act together to ensure that the detainee and his family are respectively detained and accommodated in reasonable proximity. Indeed, split families are frequently placed at opposite ends of the country because most detention centres are in the south east of England and most dispersal accommodation is in the North and Scotland.

The use of detention in this way has an inevitable detrimental impact on the welfare of families. Where the head of the family is detained, the partner and dependants are left to cope alone. In these circumstances, practical difficulties such as money to afford visits (not provided by NASS), long journeys, and problems in accessing adequate legal advice are compounded by the distressing uncertainty and frustration of lengthy periods of detention.

CASE STUDY: 'L' travelled to the United Kingdom in December 2000 with his wife and two children and claimed asylum. The whole family were detained for a short period at a police station on arrival and then 'L's' wife and children were granted temporary admission while 'L' was transferred to HMP Rochester. 'L's asylum case was refused and he lodged an appeal. 'L's wife had a serious disability and was left to look after the two children without any assistance. This also placed great stress on 'L'. An application for temporary admission was refused in January 2001 without any reasons being given. A further application for temporary admission was made in February 2001. This was refused on the grounds of 'L's manner of entry to the United Kingdom (which was in a lorry with his family) and an alleged incident of failing to cooperate with the Immigration Service. A bail hearing was listed for February 2001. Temporary admission was granted the day before the hearing.

Although BID is still in contact with a number of detainees separated from their families, since the increased capacity in family accommodation, the policy has shifted to one that considers the right to family life best served by detaining the entire family. In a letter from Lord Filkin to the Parliamentary Joint Committee on Human Rights in July 2002, it was stated that:

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> *"The interests of the child are clearly an important factor in the decision to detain a family. However, where it is considered appropriate to detain a family, we consider that the interests of the children of such a family are best served by detaining the family together rather than separating parents from children—this balances the interests of the child with the need to preserve family unity and, to the extent possible within the detention context, allow the family to continue to enjoy family life."*[115]

Although conceding that it is in the best interests of the child to remain with the parents, the Government have drawn the wholly perverse conclusion that it is in the best interests of the children to detain whole family. In our view they have failed to adequately consider the use of reporting restrictions to maintain contact.

6.7 Unaccompanied and disputed minors

The Government's policy is that unaccompanied minors must only ever be detained in very exceptional circumstances and then only overnight[116]. However, considerable difficulty arises where the Immigration Service does not accept that the person in question is a minor, as the OEM states "*where an applicant claims to be a minor but their appearance strongly suggests that they are over 18, the applicant should be treated as a adult*." Not only are they then treated as an adult, but an adult who the UKIS inevitably considers to be practising deception and therefore someone who is more likely to abscond. Even where the detainee provides evidence of their age, such as a birth certificate, they may be detained whilst the UKIS checks with the country of origin as to whether or not the document is genuine.

There is no guidance on how *"appearance strongly suggests"* should be interpreted, nor is BID aware that immigration officers have any particular or special expertise in the aging of children, a matter which the Royal College of paediatricians considers to be notoriously difficult. There is an instruction to give the "*applicant the benefit of the doubt*" but a further requirement for "*credible and conclusive medical evidence*" undermines the previous instruction and lengthy delays can occur whilst the matter is resolved. In several BID cases, minors have been detained whilst the UKIS disputes their claimed age despite evidence to support their claim.

CASE STUDY: 'M' was born in 1984. In early 2001 he arrived in the United Kingdom and was immediately detained. 'M's medical notes disclosed that he had been raped prior to arrival. They also disclosed that the UKIS had sought the advice of the health care centre after the detainee had said that he would kill himself. 'M' had a birth certificate, which he presented to the UKIS who refused to accept this as evidence of his age. 'M' was interviewed by the Home Office about his asylum claim, despite the evidence showing that he was a minor (minors are not normally interviewed). He remained detained for a further three months before being granted unconditional bail in the summer of 2001.

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Part 7 Proportionality and alternatives to detention

7.1 Is the use of detention proportionate to the objective of immigration control?

'*Cell Culture*' maps the changing public pronouncements around detention policy made by ministers from the early 1990s until 1996. At first, ministerial comment on detention merely repeated the argument (still included in UKIS guidelines on detention) that it was employed only as a 'last resort'. This view clearly became discredited and Home Office pronouncements then altered to suggesting that the 'great majority' of those detained had had their claims rejected.

This view has now shifted to such an extent that detention centres are renamed 'removal centres'. However, the UKIS have conceded that these 'removal centres' continue to contain those detained from arrival whose removal must therefore be a matter yet to be determined or considered. Furthermore, those detained at the end of the immigration process may nevertheless be detained for very long periods of time.

The Government still advances the proposition that detention is only used as a last resort. However, no statistics are published to demonstrate the rate of absconding from temporary admission and Adjudicator's bail. The only statistics relating to temporary admission that are available are those obtained by Weber and Gelsthorpe[117]. These indicate that of the ports concerned in the research, absconding rates vary between 3% and 12% for those granted temporary admission. As is noted in the research, these statistics are very crude.

To the best of our knowledge, the only statistics that are available in relation to absconding from immigration bail in the United Kingdom are contained within a Social Science Research Paper published South Bank University in June 2002[118]. This study used the records of BID to trace 98 immigration detainees who were bailed between July 2000 and October 2001. The research shows that very few asylum seekers who were bailed after a period of detention failed to comply with conditions of bail. The findings suggest that the UKIS lacks the ability to forecast with any degree of accuracy the particular likelihood of an individual absconding.

This low rate of absconding is replicated in the only other research on absconding of which BID is aware, a pilot project carried out by the Vera Institute in the USA at the request of the US Immigration and Naturalisation Service[119]. The 'Appearance Assistance Program' was piloted for detained migrants (including asylum seekers) who were granted their liberty into a community-based supervision system which involved personal telephone contacts and visits. The pilot found that alternatives to detention were just as effective at maintaining immigration control. The absconding figure for asylum seekers was 7% at the point the fifth hearing of the substantive asylum application took place. It is significant that the absconding statistic for the group of those arrested at work - who had normally entered the US illegally - was 12% at the point at which the fifth hearing took place. These groups would be considered a high absconding risk by the UKIS yet it appears that the absconding rate is quite low.

To the best of our knowledge, no research has been commissioned by the UK Government into the success or failure of the detention process in terms of the ability of the UKIS to accurately identify those who are likely to abscond. 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 compliance with Temporary Admission in connection with detention criteria over the past twelve years."*

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This is striking when it is borne in mind that the criteria for detention issued to the UKIS has been broadly the same since 1991. During this time, many thousands of individuals have been subject to indefinite periods of detention without automatic access to independent oversight of that detention.

In *Ex parte Daly*[120] the House of Lords noted of the principle of proportionality that:

> *'The contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 the Privy Council adopted a three stage test, Lord Clyde observed at p 808, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:*
>
> *"whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it: and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

While it appears that the part (i) of the test suggested by the House of Lords can be satisfied, it seems unlikely that the parts (ii) and (iii) would be capable of being met by Government detention policy. It is difficult to understand why there should be a need for detention on the current scale – let alone the proposed level of 4,000 spaces – if the absconding rate is as low as suggested by the existing research.

The Government does not state publicly that detention is used as deterrent. However in Weber and Gelsthorpe it is noted that "*Several goal shifts are also discernible, where detention has come to be used systematically for general deterrence and to expedite processing, and in an ad hoc fashion to encourage withdrawal of applications."*[121]

The research both in the UK and the US clearly suggests that the there is overuse of detention by the UKIS because of their inability to clearly identify those more likely to abscond. It is striking that no research has been commissioned by the UK Government into whether the means used to deprive individuals of their liberty are no more than necessary to accomplish the objective of promptly removing those who have failed to establish a right to remain in the UK.

Without such research it is difficult to avoid the conclusion that the Government simply does not know whether its detention policies are rationally connected to any legislative objective and represent the minimum necessary interference to the right to liberty. Perhaps more worryingly, it may be that in the current political climate, the Government is not concerned whether detention policies are proportionate and instead merely wishes to counter the charge that the UK's asylum and immigration policies are too lax.

7.2 Alternatives to detention

In the absence of evidence to demonstrate the necessity of detention, and given the high financial impact (the weekly costs per detention place range from £364 at Haslar to £1620 at Oakington[122]), it would seem obvious that alternatives to detention should be considered. It is also a requirement emphasised in numerous decisions of the ECtHR that the detaining authority must consider alternatives to detention.

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The UNHCR's Guidelines on applicable Criteria and Standards relating to the detention of Asylum seekers states that *"Alternatives to the detention of an asylum seeker until status is determined should be considered"* and suggests options including reporting and residency requirements.

Above-mentioned research by Leanne Weber describes a more "*constructive*" view of "*preventing absconding*", focusing on "*promoting co-operation with determination procedures*", by capitalising on peoples' incentives to comply, and by making procedures more transparent and better managed.[123]

The Government has recently introduced measures that will develop 'contact management' throughout the asylum process including biometric 'smart cards', stricter reporting regimes and a system of induction and accommodation centres[124]. The research conducted by South Bank University concluded that, with these new initiatives,

> *"…there should be no need to forcibly detain anyone, save for some whose documentation for removal is absolutely complete and where there is objective evidence of an intention to abscond, and then only for a restricted period…"*[125]

Indeed, the Government would appear to have the same view:

> *"The smart card and the reporting centres will enable us to get a grip on where people are at any time, and what they are doing. Above all, they will allow us to carry through a determination to remove someone who has come into the country fraudulently...*
> *... People who apply for asylum want permanent status in this country. That is why they do not come here and disappear illegally. By having the smart card and reporting and accommodation centres, we can not only track them but support them through to the time when they either stay as a welcome refugee or are speedily removed.*"[126]

To the best of our knowledge, however, no research has been conducted into alternatives to detention[127] and there is no sign that the Government is intending to use positive alternatives to detention or to invest proactively in identifying alternatives[128]. In fact, the Government, by increasing the detention estate and removing the provision for automatic bail hearings which would provide a review of detention decisions, has introduced a *less* targeted use of detention.

It is hard to see how alternatives can be considered without research. In relation to detention decisions, the lack of information removes a necessary element of feedback to Immigration Officers making decision to detain. As Weber and Gelsthorpe note:

> *"Immigration Officers receive highly fragmented feedback about the outcome of detentions creating the potential for the system to become self-reinforcing. Absconding after release is widely seen as confirmation of a 'good' initial decision, without considering the possible influence of the detention experience on later compliance. On the other hand it is impossible to know whether an asylum seeker who was detained until removal would have complied."*[129]

It is a sobering thought that for Adjudicators there is not even this *'fragmented feedback'* about rates of absconding in relation to bail decisions as they are unlikely to be aware of any absconding pattern of those who have been released. They would also have no knowledge at all of the outcome of those detainees refused bail who are subsequently released on temporary admission or CIO bail after the unsuccessful bail application. They are therefore making decision about the liberty of large numbers of people without any assistance at all in relation to statistical analysis of absconding rates,

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both from temporary admission and bail. In these circumstances, it is difficult to see how an Adjudicator can objectively determine a risk of absconding '*...materially greater than normal risk of the appellant absconding*' when no evidence of what is "normal" exists.

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Part 8 Conclusion & Recommendations

The United Kingdom Government has largely ignored the recommendations made by the Working Group in 1998 and has failed to introduce procedural guarantees which would ensure protection from arbitrary detention. It is BID's view that seven out of the fourteen Guarantees adopted by the UN Working Group on Arbitrary Detention are violated by the present procedures and practices in relation to detention and release from detention in the UK.

The consequences are that every year thousands of people, many of them vulnerable, continue to endure indefinite and prolonged detention without transparent decision-making. The UKIS' continued refusal to employ transparent and open procedures in the detention decision-making process undermines their claim that detention is used as a last resort.

Many detainees lack access to competent legal advice and an independent and impartial body capable of reviewing detention and the lawfulness of the decision to detention. The arguments advanced by the Government that automatic oversight of detention is too expensive, too complex and will merely slow down the process of removal are all unconvincing and, in any event, do not outweigh the presumption in favour of liberty.

The deprivation of liberty for administrative reasons based on arbitrary decisions and apparently without consideration of more humane alternatives is a violation of fundamental human rights. A review of the policies, procedures and practices in relation to the detention of asylum seekers leads to the conclusion that detention is being employed as a deterrent to seeking asylum in the United Kingdom. It therefore breaches the United Kingdom's obligations under the ECHR and the Government's own publicly-available guidelines on immigration detention.

There have been some improvements in access to the bail procedure as a result of the introduction of Controlled Legal Representation by the LSC. However, access to independent judicial oversight of detention for large number of detainees continues to be non-existent or at best insufficient.

BID does not advertise its service inside detention centres. In the year 2000/2001 over 700 detainees sought our assistance in relation to bail. BID was able to assist less than 50% of those who approached us for help. Although we were successful in about 50% of the cases of those we were able to assist by preparing and presenting a bail application, many of those we represented were refused bail because they did not have sureties, irrespective of whether or not sureties were an appropriate measure in the particular circumstances of the case and without proper consideration of alternatives where sureties were unavailable.

Drawing on our experience in working with asylum seekers and migrants detained under Immigration Act powers, BID recommend:

To the Government:

- There be a statutory presumption in favour of liberty
- The detention of children be prohibited by statute
- The detention of the mentally ill, those with serious medical conditions and those who have been tortured, be prohibited by statute
- A statutory maximum length of detention be introduced

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- Statutory provision be made for all those who are detained by the UKIS to be brought promptly and automatically before a court which has jurisdiction to consider the lawfulness of detention, and if lawful, the necessity of detention in the particular circumstances of the case. If refused, further reviews of this nature must take place at regular intervals
- Independent research be commissioned into detention, temporary admission, and bail
- The use of prisons for the purpose of immigration detention be prohibited by statute and the criteria under which detainees are classified a risk to security be made public and placed on a statutory footing. Individual risk assessments should be disclosed to detainees and their representatives

To the UK Immigration Service:

- A written, reasoned notification for the decision to detain in the language which the detainee can understand be provided
- All detention reviews conducted after the initial decision to detain has been made be disclosed
- The contents of the file on which the decision to detain has been based be disclosed
- An explanation be given in each case as to why alternatives to detention have not been employed.

To the Lord Chancellor's Department and Legal Services Commission:

- The merits test in section 5 of the General Civil Contract be withdrawn or written in a such a way that it provides for free legal representation to all detainees seeking bail both at an original bail hearing and subsequent reviews if not successful on the first occasion
- Legislation be amended to avoid the requirement for sureties for asylum seekers who have no contacts or family in the UK
- The Immigration and Asylum Appeals (Procedure) Rules be amended to avoid any impediments to access to the courts and to ensure a full right of appeal to a superior court in the event of a refusal to grant release on bail.

To the Immigration Appellate Authority:

- Amend the Chief Adjudicator's Guidelines to ensure that the IAA provides effective, independent oversight of detention decisions in line with the requirements of Article 5 (4) of the European Convention on Human Rights
- Amend the Chief Adjudicator's Guidelines to state that the standard of proof requires a "compelling need" to detain and so that there is a clear statement that sureties are not required
- Provide written reasons for the decisions made at bail applications
- Withdraw the Practice Direction in relation to Expedited appeals

To the United Nations Working Group on Arbitrary Detention:

- Urgently initiate another report on detention practices in the UK in relation to migrants and asylum seekers in the United Kingdom.

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Glossary

Bail summary: The reasons given for detention at a bail hearing by the Immigration Service. This is often only disclosed at the hearing.

Certification: *See* Manifestly unfounded - restriction of appeal rights.

Chief Immigration Officer (CIO): A senior Immigration Service officer usually in day-to-day control of ports and enforcement units.

CIO Bail: Bail granted by a Chief Immigration Officer to a person subject to immigration control. Normally release is conditional upon the lodging of substantial amounts of money (often between £4,000 – £10,000), a residence condition and a date for reporting back to the Immigration Service.

Controlled Legal Representation: Public funding for the payment of legal representation in court hearings including bail applications.

ECHR: European Convention on Human Rights

EctHR: European Court of Human Rights

Habeas Corpus: A legal remedy employed by those detained by the state without such a power being granted by Parliament.

Immigration Appellate Authority (IAA): The court whose jurisdiction covers all immigration matters.

Immigration Officer (IO): The basic grade of officer in the Immigration Service. These officers will make the initial decision to detain.

Judicial Review: The procedure by which the High Court oversees administrative decision-making by the government.

Manifestly unfounded (MU): The procedure by which the Secretary of State alleges that an asylum claim has no foundation or merit.

OEM: Operation Enforcement Manual –the guidance to Immigration Officers- See extract attached at Appendix C

Temporary Admission (TA): The release of a person subject to immigration control. The release is usually on conditions relating to residence and a date for reporting back to the Immigration Service The Immigration Service instructions and criteria regarding detention. Used by the Enforcement Section of the Immigration Service.

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Bail for Immigration Detainees	www.biduk.org
Barbed Wire Britain	www.barbedwirebritain.org.uk
Detention Watch UK	c/o jdavidrhys@aol.com
Immigration & Nationality Department	www.ind.homeoffice.gov.uk
United Nations High Commissioner for Refugees	www.unhcr.ch

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Endnotes

[1] The majority of those held in immigration detention have claimed asylum. At 29 December 2001, of the 1545 individuals in detention, 1280 (83%) were asylum-seekers *(Source, Asylum Statistics United Kingdom 2001, the Home Office July 2002).*

[2] In 2002 the Government changed the name of detention centres to removal centres, and propose to formalise this change in law (see Para. 4.75 2002 White Paper). In this report the term detention centres is used throughout as BID believe that this term most accurately reflects the function of the centres.

[3] JCWI Immigration, nationality & refugee law handbook, *ed. Duran Seddon, Joint Council for the Welfare of Immigrants, 2002,* p 489

[4] There were 250 people detained in early 1993, by July 2002 detention capacity was 2009, (Lord Filkin, HoL Deb, 17 Jul 2002, C 1241)

[5] Detention centres are located at Haslar in Hampshire, Dover in Kent, Tinsley House close to Gatwick airport, Harmondsworth near Heathrow, Campsfield in Oxfordshire, Lindholme in Yorkshire and Dungavel in Scotland. Oakington (Cambridgeshire) is used for not more than seven days for cases under the fast track asylum process.

[6] UN Declaration Article 9 "*no one shall be subjected to arbitrary arrest, detention and exile."* International Convention on Civil and Political Rights Article 9 (1) *"no one shall be subjected to arbitrary arrest or detention."* Article 14 of the Universal Declaration on Human Rights states "*Everyone has the right to seek and to enjoy in other countries asylum from persecution."*

[7] Resolution 1997/50

[8] Matters of concern raised by the UN Working Group in 1998

"The United Kingdom must observe the provisions of the 1951 Convention relating to the Status of Refugees and the other international instruments to which the United Kingdom is a party, i.e. the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms. The functioning of the legal regime in the United Kingdom, in the context of the above international instruments, gives rise to the following concerns:

(a) The functioning of the legal regime on occasion makes the restriction on liberty and free movement sufficiently prolonged that it might in specific instances result in arbitrary deprivation of liberty;

(b) The release of certain persons on account of non-availability of space and the detention of certain other persons whose cases for release are much stronger but who are detained because space is available makes detention dependent on the availability of space, rather than the quality of the applicant's case;

(c) Upon detention, there is no immediate access to court or to a quick judicial remedy;

(d) There is no judicial oversight of detention;

(e) At the outset, no written grounds for detention are communicated to the applicant;

(f) There are no written rules or statutory procedures delineating the obligations of the Government towards detainees and the rights of detainees while in custody;

(g) There is no specified time limit within which, pursuant to an order of detention, the applicant is required to be produced before an adjudicator. There is also no legal regime for time-bound appeal disposal and procedures in regard thereto;

(h) The decision to detain an asylum seeker is made by an immigration officer who may not have sufficient training in refugee law or the human rights situation in the refugee-producing countries. There is also no effective remedy to challenge a decision before a court or before an independent review body. Although the White Paper proposes that an

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asylum detainee will have an automatic right to a bail hearing after seven days of detention, in many instances legal aid may not be available for a bail hearing. Even though a bail hearing may be provided, as promised by the Government in the White Paper, this would not be an effective substitute for an independent review whereby the reasons for a decision to detain may be challenged. Consequently, asylum seekers may have no effective opportunity to challenge the reasons for detention, as a bail hearing would only examine reliability of surety and its relationship to the applicant."

[9] *Resolution 2002/62 of the Commission on Human Rights,* letter of 2 August 2002 from Gabriela Rodriguez, Special Rapporteur on the Human Rights of Migrants

[10] Schedule II Immigration Act 1971

[11] Ibid

[12] The requirement to give reasons for continued detention is contained in the Detention Centre Rules which came into force in April 2001. In BID's experience, this Rule is often ignored by the Immigration Service.

[13] Cell Culture: The Detention & Imprisonment of Asylum –seekers in the United Kingdom*, Amnesty International United Kingdom, December 1996*

[14] Cell Culture, *Amnesty International,* p 14

[15] *Maintaining Contact: What happens after detained asylum-seekers get bail?,* Bruegel, I & Natamba, E, Social Science Research Papers, No. 16, South Bank University, June 2002, p 8

[16] Look Rooker in the House of Lords (HoL Deb, 25 Feb 2002) stated "*Of the 385 individuals being held there [at Yarl's Wood] before the fire, 294 were due for removal although a date had not been set in every case. Some 248 cases were removable but a date had not been set. Of the other 91, the largest sub-group were 72 detainees who had arrived ex-Oakington with appeals outstanding.*"

[17] "*[Oakington is] a centre solely for asylum applicants and operates on a different set of criteria to all other immigration detention…80% of Oakington detainees are released after receiving a decision, the remainder go on to be detained in other centres*" JCWI handbook, p 506

[18] Saadi & Others, Court of Appeal

[19] Outcomes for the Inspection of Immigration Detention Centres, *HM Chief Inspectorate of Prisons, 8/3/02*

[20] Paragraph 38 & 39 of the recommendations are not within BID's remit and so are not commented on here.

[21] ex Parte AKB *(CO/2053/96)*

[22] Saadi *(CO/0074/01)*

[23] The Immigration Service checklist is called the IS 91

[24] The Immigration Advisory Service (IAS) and the Refugee Legal Centre (RLC) are independent charities. They receive Government funding to carry out their work.

[25] For example, some detention centres provide "free phone" services for IAS and RLC but to access the advice lines a touch-tone telephone must be used which is not provided.

[26] The Immigration and Asylum (Procedure) Rules 2000

[27] Section 5, The General Civil Contract of the Legal Services Commission

[28] David Blunkett MP, HoC Deb, 25th February 2002, C 442

[29] See 'Criteria for Transfers from Removal Centres to Prisons, Criteria for Transfers Between Removal Centres', *Detention Services Policy Unit, June 2002*

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[30] *Maintaining Contact: What happens after detained asylum-seekers get bail?,* Bruegel, I & Natamba, E, Social Science Research Papers, No. 16, South Bank University, June 2002

[31] Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, *Final report to the Immigration and Naturalisation Service, Vera Institute of Justice, August 2000*

[32] Operational Enforcement Manual (last reviewed and disclosed July 2001), Chapter 38.1

[33] Deciding to Detain: how decisions to detain asylum-seekers are made at ports of entry, *Weber, L & Gelsthorpe, L, Cambridge Institute of Criminology, 2000*

[34] Guidance Notes for Adjudicators from the Chief Adjudicator, *His Honour Judge Henry Hodge, Revised January 2002, Issued March 2002*, p 11

[35] Operational Enforcement Manual, Chapter 38.7.3.1

[36] Asylum Statistics, United Kingdom, the Home Office- published quarterly

[37] The Rt. Hon. Jack Straw, 2nd Reading of the 1999 Immigration and Asylum Bill (Act), HoC Deb, 22nd February 1999, C 39

[38] Standing Committee E, 14 May 2002, Angela Eagle, Under Secretary of State for the Home Department, Col 256

[39] July 2002, Statistics gathered by Association of Visitors to Immigration Detainees (AVID)

[40] White Paper: Secure Borders, Safe Havens: Integration with Diversity in Modern Britain, *Home Office (CM 5387 HMSO), 2002*, Para. 4.74

[41] "*It does not signal a change of function for such centres. They will remain designated places of detention for the purposes of the Immigration Act. Similarly, it does not signal a change to the powers to detain"* Lord Bassam, HoL Deb 15 July 2002, C 1081

[42] White Paper, 2002, Para 4.75

[43] Ibid, Para 4.77

[44] Letter to BID from the Immigration Service, 18 June 2002

[45] Guidance Notes for Adjudicators by the Chief Adjudicator, March 2002

[46] Guidance notes, Para. 2.4.2

[47] MODCU (Management of Detained Cases Unit)

[48] Paragraph 16 (1) (2) Schedule II Immigration Act 1971 (as amended)

[49] Cell Culture, p 5

[50] Brezinski and Glowacka (unreported) CO/4251/95, CO 4237/95

[51] Operational Enforcement Manual, Chapter 38.3

[52] Ibid, Chapter 38.3

[53] *'The court recalls that Article 5(1) of the Convention contains a list of permissible grounds for deprivation of liberty, a list which is exhaustive. Consequently no deprivation of liberty will be lawful unless it falls within one of the grounds set out in subparagraphs (a) to (f) of Article 5.* Witold Litwa v Poland (26629/95) at paragraph 49.

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[54] Deciding to Detain: how decisions to detain asylum-seekers are made at ports of entry, *Weber, L & Gelsthorpe, L, Cambridge Institute of Criminology, 2000, p 116*

[55] "*the reasons for making a decision to detain can differ from the written justification recorded afterwards, which presents serious difficulties in challenging detention. These discrepancies may be the unintended result of a number of officers dealing with a particular case, or may reflect deliberate attempts to justify detention where the reasons are unclear, or fall outside the official guidelines*" Detention of asylum seekers on arrival in the UK, Part 3: Post-decision practices and key questions, *Weber, L,* p 6

[56] Ibid, p 73

[57] Ibid, p 63

[58] Section 19b of the RRA as amended makes it unlawful for a public authority, including government departments, to discriminate on the grounds of race in carrying out its functions. However, Section 19d provides an exception for certain acts in immigration and nationality cases, hence it is not unlawful for a relevant person to discriminate on the grounds of nationality, or ethnic or national origins in carrying out immigration and nationality functions. Ministerial Authorisations permit discrimination on the grounds of nationality in certain circumstances. If special exercises are carried out under Ministerial Authorisation No 1 then what is required is more than a perception of a threat: what is required is statistical evidence showing a pattern or trend of breach or specific intelligence or information which has been processed in accordance with the IND Code of Practice. If this test is not being observed then the detention may amount to an act of discrimination which is not covered by the Authorisation and which is consequently unlawful.

[59] Letter to BID from the Deputy Director of Enforcement, 30 October 2000

[60] Letter to BID 14 August 2000

[61] Deciding to detain, p 21

[62] [1999] INLR 490

[63] Letter to BID of 8th March 2002, from UKIS Terminal 4

[64] See Appendix D

[65] White Paper: Fairer, Faster, Firmer: A Modern Approach to Immigration Control, *Home Office, 1998*

[66] See Appendix C – OEM, criteria for detention

[67] In May 2001copies of 47 monthly reviews were collected from individuals detained at Campsfield House. In July 2002 copies of 47 monthly reviews from detainees at Harmondsworth, Lindholme, Haslar and Tinsley House were gathered; a total of 96 forms from a 15 month period.

[68] Operational Enforcement Manual, Chapter 38.6

[69] HoL Deb, 1999

[70] "*reviews are hampered by 'organisational inertia'. This effect, which is commonly observed in large organisations, makes it difficult to overturn decisions made by peers in the absence of changed circumstances. In this case, legal developments or deterioration in the detainee's health were the events most likely to prompt release on temporary admission… It seems that the original basis for the detention is rarely looked at afresh, so that some cases, particularly those where identity is a matter of continued dispute, or where efforts to remove have failed, can become 'institutionalised'*." Deciding to Detain: the organisational context for decisions to detain asylum seekers at UK ports, *Leanne Weber & Todd Landman, University of Essex Human Rights Centre, May 2002* p 7

[71] See, for example, HoL Deb, 19 Jul 1999, C 718

[72] Table 9, Asylum Statistics: 1st Quarter 2002, Home Office.

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[73] Operational Enforcement Manual, Chapter 38.1

[74] ICCPR Concluding Observations of the Human Rights Committee, 2001

[75] Report of an Unannounced Short Inspection by H.M. Inspectorate of Prisons: Immigration Detention Centre, Campsfield House, *Home Office 1995*

[76] HoC Deb, 25th February 2002, C 442

[77] Para 22 Schedule II Immigration Act 1971 (as amended).

[78] Para 34 Schedule II Immigration Act 1971 (as amended)

[79] Operational Enforcement Manual 39.5.1

[80] Re Wasfi Mahmod [1995] Imm AR 311

[81] *Vilvarajah [1990] Imm AR 457*

[82] Ex Parte Kelso [1998] Imm AR 603

[83] Paragraphs 22, 29, Schedule II Immigration Act 1971 (as amended)

[84] Paragraph 34 Schedule II Immigration Act 1971 (as amended)

[85] Schedule III Immigration Act 1971

[86] This was part of the 1999 Immigration and Asylum Act 1999 but was never commenced. Measures are contained in the Nationality, Immigration and Asylum Bill 2002.

[87] Guidance Notes for Adjudicators by the Chief Adjudicator, March 2002

[88] Consultation on the Asylum Appeal (Procedure) Rules 2000

[89] White Paper, 2002, Para. 4.83

[90] Angela Eagle MP, Official Report, Standing Committee E,14 May 2002, C256

[91] In the case of GB v Switzerland the European Court (Application number 27426/95) considered a procedure which is similar to that in this country involving a "a two tier procedure which includes as the first instance an administrative authority, and as the second, the Federal Court, which is the highest judicial authority in Switzerland." When considering the 'speed' of proceeding under Article 5(4), the court indicated that; "It is for the State to organize its judicial system in such a way as to enable its courts to comply with the requirements of that provision [Article 5(4)]."

[92] "Habeas corpus still applies." David Blunkett, MP, HoC Deb 24 Apr 2002, C 359; "I emphasise that repeal of those hearings does not remove an individual's right to appeal for habeas corpus.." Angela Eagle, MP, HoC Deb 24 Apr 2002, C 431

[93] Nationality, Immigration and Asylum Bill, Seventeenth Report of Session 2001-2, *House of Lords, House of Commons, Joint Committee on Human Rights HL Paper No 132, HC 961*

[94] *Joint Committee on Human Rights HL Paper No 132,* p 32

[95] A Crying Shame: Pregnant asylum-seekers and their babies in detention, McCleish, J, Cutler, S & Stancer, C, Maternity Alliance, Bail for Immigration Detainees & London Detainee Support Group, September 2002, p 4

[97] Ibid, p 11

[98] IDI Jan/97

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[99] MNP/90 1/55/8

[100] A Second Exile: The Mental Health Implications of Detention of Asylum-seekers in the United Kingdom, *Pourgourides, C.K, Sashidharan, S.P, Bracken, P.J, Northern Birmingham Mental Health Trust, 1996,* p 66

[101] Ibid, p 65

[102] "Protection Not Prison: Torture Survivors detained in the UK", Susi Dell and Mary Salink sy, Medical Foundation for the Care of Victims of Torture.

[103] White Paper 1998, para. 12.5

[104] *"Excluding Oakington, there are approximately 150 family beds. These are usually organised in family rooms with four beds. Therefore, the total number of families is likely to be no more than 30 to 40 at any one time, including parents."* Lord Filkin, HoL Deb, 17 Jul 2002, C 1241 Note: Family units are in operation at Harmondsworth and Dungavel, and at Yarl's Wood before it's closure in April 2002. Families are also held in Tinsley House.

[105] UNHCR Comments UK White Paper on Asylum and Immigration: "Secure Borders, Safe Havens" *UNHCR BO London; 18 March,2002*

[106] See letter to the Committee from Lord Filkin, Parliamentary Under Secretary of State for the Home Office re the Nationality, Immigration and Asylum Bill, 2 July 2002

[107] Operation Enforcement Manual 38.1.1.2

[108] Ibid. 38.1.1.2

[109] Meeting of the Detention User Group on 27th May 2002

[110] Letter to BID of 18 June 2002

[111] R v Secretary of State, Ex Parte Daly [2001] UKHL

[112] Joint Committee on Human Rights, Seventeenth Report of Session 2001-2, HL Paper No 132, HC 961, p 33

[113] Letter to the Committee from Lord Filkin, Parliamentary Under Secretary of State for the Home Office re the Nationality, Immigration and Asylum Bill, 2 July 2002

[114] Operation Enforcement Manual, Chapter 38.1

[115] Letter to the Committee from Lord Filkin, Parliamentary Under Secretary of State for the Home Office re the Nationality, Immigration and Asylum Bill, 2nd July 2002

[116] Operational Enforcement Manual, Chapter 38.7.3.1

[117] Deciding to Detain, June 2000

[118] Maintaining Contact: What happens after detained asylum-seekers get bail?, *Professor Irene Bruegel & Eva Natamba, South Bank University, June 2002*

[119] Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, *Final report to the Immigration and Naturalisation Service, Vera Institute of Justice, August 2000*

[120] [2001] UKHL 26

[121] Ibid, page 113

[122] HoC Deb, 25 Oct 01, C 333 W

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[123] *Detention of asylum seekers on arrival in the UK, Part 3: Post-decision practices and key questions*, Weber, L, Published in Tolley's Immigration, Asylum and Nationality Law Vol 16 No 1 2002 p 10

[124] *"We are making improvements in the area of contact management as detailed in the current Nationality, Immigration and Asylum Bill. This states that those in the proposed accommodation centres may be required to report on a daily basis with the accommodation centre. We will seek to maintain contact with those asylum-seekers who are dispersed. Those who do not require National Asylum Support Service (NASS) accommodation will also be required to report at the NASS address, at reporting centres or at police stations attended by staff from the Immigration and Nationality Directorate. During the induction process asylum-seekers will be advised of their obligations to notify any change of address and to report as required. Provision of support will be made conditional on asylum-seekers reporting as required".* Beverly Hughes, MP, HoC Deb, 15 July 2002, C 92 W

[125] Maintaining Contact, p 16

[126] David Blunkett MP, HoC Deb, 29 Oct 2001, C 634 & Col 461

[127] "*In March 2001 a conference hosted by the Home Office which aimed to inform the development of 'a major programme of internal and external research' on asylum issues identified future areas of research as including detention and "the positive alternatives to detention…what measures might ensure/encourage compliance (rather than focusing on absconding)? Opportunities exist for the consideration of best practice models, using cross policy approaches."* Bridging the Information Gaps, Home Office, p. 46

[128] *"…, this research [Deciding to Detain] has established that there is considerable variation in the use of detention between ports, amongst individual immigration officers, according to the availability of detention space, and due to adaptive changes over time - some of which have expanded the use of detention (e.g. 'legal drift' and 'goal shifts') and some of which have reduced it (e.g. 'normalisation' of irregular modes of arrival). This makes it difficult to assert that any fixed conception of a 'last resort' operates in practice. It has been argued that an absolute conception of 'last resort' (based, for example, on principles of proportionality) requires that all alternatives to detention have been exhausted in any particular case. But immigration officers in the UK have available to them a limited range of non-custodial options to encourage co-operation with asylum procedures compared with some other countries, and several alternatives used regularly in enforcement contexts are either not available in law at the time of arrival (e.g. CIOs' bail) or lack the appropriate infrastructure to be used from the outset (e.g. extra reporting requirements)."* Detention of asylum seekers on arrival in the UK, Weber, p 11

[129] Ibid, p 73

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Appendices

A Guarantees of the UN Working Group
B The Operation Enforcement Manual (Criteria for detention)
C Copy of an IS 91- the form giving reasons for detention
D Copy of a bail summary

APPENDIX A

UN Working Group on Arbitrary Detention

Criteria for determining whether or not the custody is arbitrary

69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees:

Guarantee 1: To be informed, at least orally, when held for questioning at the border, or in the territory concerned if he has entered illegally, in a language which he understands, of the nature of and grounds for the measure refusing admission at the border, or permission for temporary residence in the territory, that is being contemplated with respect to him.

Guarantee 2: Decision involving administrative custody taken by a duly authorized official with a sufficient level of responsibility in accordance with the criteria laid down by law and subject to guarantees 3 and 4.

Guarantee 3: Determination of the lawfulness of the administrative custody pursuant to legislation providing to this end for:

(a) The person concerned to be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality;

(b) Alternatively, the possibility of appealing to a judge or to such a body.

Guarantee 4: To be entitled to have the decision reviewed by a higher court or an equivalent competent, independent and impartial body.

Guarantee 5: Written and reasoned notification of the measure of custody in a language understood by the applicant.

Guarantee 6: Possibility of communicating by an effective medium such as the telephone, fax or electronic mail, from the place of custody, in particular with a lawyer, a consular representative and relatives.

Guarantee 7: To be assisted by counsel of his own choosing (or, alternatively, by officially appointed counsel) both through visits in the place of custody and at any hearing.

Guarantee 8: Custody effected in public premises intended for this purpose; otherwise, the

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individual in custody shall be separated from persons imprisoned under criminal law.

Guarantee 9: Keeping up to date a register of persons entering and leaving custody, and specifying the reasons for the measure.

Guarantee 10: Not to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations.

Guarantee 11: To be informed of the guarantees provided for in the disciplinary rules, if any.

Guarantee 12: Existence of a procedure for holding a person incommunicado and the nature of such a procedure, where applicable.

Guarantee 13: Possibility for the alien to benefit from alternatives to administrative custody.

Guarantee 14: Possibility for the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and specialized non-governmental organizations to have access to places of custody.

70. Where the absence of such guarantees or their violation, circumvention or non-implementation constitutes a matter of a high degree of gravity, the Working Group may conclude that the custody is arbitrary.

From:

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF
TORTURE AND DETENTION: Report of the Working Group on Arbitrary Detention GENERAL, E/CN.4/1999/63, 18 December 1998

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 11 (a) of the provisional agenda

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APPENDIX B

Extract from the Operation Enforcement Manual (02-05-2001)

38.8 Factors influencing a decision to detain

The following factors must be taken into account when considering the need for initial or continued detention. The list is not exhaustive neither is it in any order of priority.

- what is the likelihood of the person being removed and, if so, after what timescale?;
- is there any evidence of previous absconding?;
- is there any evidence of a previous failure to comply with conditions of temporary release or bail?;
- has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry);
- is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave etc);
- what are the person's ties with the UK? Are there close relatives (including dependants) here? Does anyone rely on the person for support?; Does the person have a settled address/employment?;
- what are the individual's expectation about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford an incentive to keep in touch?;
- is the subject under 18?;
- has the subject a history of torture?;
- has the subject a history of physical or mental ill health?

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