Bail for Immigration Detainees

POLICY PAPER

Safeguards against arbitrary & prolonged detention

March 2015

Winner of the JUSTICE Human Rights Award 2010

"Detention without clear limits is a very troubling problem" (Bingham Centre for the Rule of Law, 2013: 3)[1]

"*It is a corrosive and discriminatory idea, that the individual liberty of foreigners lacking immigration status is less worthy of protective safeguards under the rule of law than those – whether own nationals or foreigners – who are detained because they are suspected of committing crimes*" (Bingham Centre for the Rule of Law, 2013: 4)[2]

[1] Bingham Centre for the Rule of Law, (2013), Immigration Detention and the Rule of Law: safeguarding principles'. Available at http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf
[2] *Ibid.*

1. About BID

BID is an independent national charity established in 1999 to improve access to release from immigration detention for those held under Immigration Act powers in immigration removal centres and prisons. BID provides immigration detainees with free legal advice, information, representation, and training, and engages in research, policy and advocacy work, and strategic litigation. BID is accredited by the Office of the Immigration Services Commissioner (OISC), and won the JUSTICE Human Rights Award 2010. Between 1 August 2013 and 31 July 2014, BID supported over 3,000 people held in immigration detention.

With the assistance of barristers acting *pro bono*, BID prepares and presents bail applications in the Immigration and Asylum Chamber of the First-tier Tribunal for the most vulnerable detainees, including long term detainees, people with serious mental or physical ill-health, detainees who have intractable travel document problems, or who are main carers separated by detention from their children, and who are unable to obtain legal representation. BID runs a bi-annual survey of legal representation across the UK detention estate, and aims to raise awareness of immigration detention through its research and publications, including "*The Liberty Deficit: long-term detention and bail decision-making. A study of immigration bail hearings in the First-tier Tribunal*" (2012), and "*Fractured Childhoods: the separation of families by immigration detention*" (2013). BID also works through advocacy with civil servants via a number of Home Office-convened stakeholder groups, and with parliamentarians.

The domestic and European courts have granted BID permission to intervene in a number of cases raising important issues regarding immigration detention policy and practice, including: Abdi v United Kingdom (European Court of Human Rights, Application 2770/08, judgment 9 April 2013)[3]; D and Others v Home Office [2005] EWCA Civ 38; [2006] 1 WLR 1003[4];R (AM) v SSHD and Kalyx Limited [2009] EWCA Civ 219[5];Razai & Others v SSHD [2010] EWHC 3151 (Admin)[6]; two landmark cases before the Supreme Court and Shepherd Masimba Kambadzi v SSHD [2011] UKSC 23, [2011] 1 WLR 1299[7]; Lumba and Mighty v SSHD, [2011] UKSC 12, [2012] 1 AC 245[8]; BA v Home Office [2012] EWCA Civ 944[9]; and most recently by the Court of Appeal in the case of David Francis v SSHD ((2013/2215/A)[10].

[3] In which the ECtHR considered the United Kingdom's administrative detention of foreign national former offenders for deportation.
[4] In which the substance of BID's intervention was specifically relied upon by the Court of Appeal in respect of the problems of access to justice for detained immigrants
[5] In which the Court of Appeal held that a disturbance and fire at Harmondsworth Immigration Removal Centre raised issues which triggered the state's investigative obligations under Article 3 ECHR
[6] In which the court considered evidence indicating systemic difficulties with the Secretary of State's policy of providing accommodation for immigration detainees who are considered to be high risk.
[7] Where the court considered whether a breach of public law duty involves non-adherence to a published policy (and delegated legislation) requiring periodic detention reviews.
[8] Established a breach of a public law duty involving non-adherence to a published policy identifying substantive detention criteria.
[9] Concerning the circumstances in which a claim for damages arising out of a historic period of detention could properly be struck out for abuse of process on the basis that it could have been included in an earlier challenge brought while the detainee still remained in detention; the Court of Appeal again expressly relied for its findings on BID's intervention concerning difficulties of access to justice for immigration detainees.
[10] The Court of Appeal dismissed arguments by the Secretary of State for the Home Department that detainees recommended for deportation should be prevented from claiming false imprisonment when they were detained in contravention of the Hardial Singh principles.

2. Executive summary

There is currently no maximum period in the UK for the detention of foreign nationals under immigration powers. The UK is alone in Europe in having no upper limit on detention.

BID is opposed to the use of immigration detention. While detention continues to be used in the UK we consider that

- it should be time limited and
- subject to regular, automatic judicial oversight

During 2014, 857 of those people leaving detention in an immigration removal centre had been detained for longer than six months, 26 for between 2 and 4 years, and 1 person for over 4 years. People are being detained in the UK despite serious mental or physical ill health, the existence of barriers to their removal, or simply because they have a criminal record.

A time limit on immigration detention in the UK would undoubtedly reduce these abuses of the use of detention. But a time limit alone is insufficient: any period of detention must also be subject to proper consideration of the necessity of detention in the first place. If a time limit on detention is introduced in the UK, it is essential that all detainees should be protected against any maximum detention period becoming the norm.

Existing safeguards for immigration detainees are inadequate. Since the Immigration Act 2014 some decisions to release on bail made by the independent immigration tribunal can be overruled by the Home Secretary. The Home Office has failed to address practical barriers that prevent detainees getting regular access to the bail process, for example lengthy delays in the Home Office provision of bail addresses where no suitable private address is available. BID's regular legal advice surveys show that detainees are frequently unable to secure legal advice and representation on the fact of their continuing detention.

Immigration detainees need protection throughout their detention against arbitrary and unnecessary detention in the form of a meaningful safeguard that is both entirely independent of the Home Office, and not reliant on detainees to initiate.

This safeguard should take the form of judicial oversight of detention, comprised of regular and automatic hearings before a court empowered to consider the legality of detention (not merely to grant bail), and "impose conditions or order release" (Bingham Centre, 2013)[11]. Detainees should be brought before the court

- On the first full day after being taken into detention, then
- At specified and regular intervals up until any legal maximum detention period is reached, and
- Be provided with legal representation for each hearing for as long as their detention is maintained.

[11] Ibid. See safeguarding principle 21: Automatic court control.

3. Detention has the potential to be harmful or unlawful from the very first day: necessity of detention is the primary consideration

Any period of detention must be subject to proper consideration of the necessity of detention in the first place.

Administrative detention of even very short duration can be harmful, especially to people who are very sick or vulnerable. This is the case whether the person detained is seeking asylum, is an overstayer or illegal entrant, or has criminal convictions in the UK. In certain cases the courts have found detention for periods of just a few days to be unlawful, and sometimes sufficiently inhumane and degrading to be in breach of Article 3 of the European Convention on Human Rights[12], resulting in awards of compensation.[13]

There can be, therefore, no simple, linear relationship between the number of days, weeks, or years spent in detention and the lawfulness of that detention or the harm caused by that detention to the detainee and his or her family. For this reason, the overriding consideration before a person is detained under immigration powers must be that of necessity. No time limit on detention in the UK, however short, would of itself engage the issue of the necessity of detaining a person.

A time limit on immigration detention on its own is an insufficient safeguard.

4. Existing limits on certain types of detention in the UK

The UK currently has no upper limit on immigration detention for adults, and has never had such a time limit. The UK is now the only EU country without such a time limit.[14]

It is a principle of several international bodies that immigration detention should be subject to a maximum time period (see Appendix B). A number of these bodies have recommended that the UK adopt an upper time limit for immigration detention. A number of detention organisations and other bodies have been campaigning for the introduction of a maximum detention period in the UK, variously set at 72 hours, 28 days or 6 months detention.

The parliamentary inquiry into the use of immigration detention in the UK (2014-15) sought answers to the question 'what is the impact of the UK having no time limit on immigration detention?' In written evidence the Immigration Law Practitioners' Association replied simply: "[without a time

[12] See for example six judgments in which the High Court has found that the manner and conditions of immigration detention by the Home Office of mentally ill people breached their rights under Article 3 ECHR (prohibition of inhumane and degrading treatment): R (S) v SSHD [2011] EWHC 2120; R (BA) v SSHD [2011] EWHC 2748 (Admin); R (HA) v SSHD [2012] EWHC 979; R (D) v SSHD [2012] EWHC 2501 (Admin); R (S) v SSHD [2014] EWHC 50; R (MD) v SSHD [2014] EWHC 2249 (Admin). 7 R (HA) v SSHD [2012] EWHC 979, para 83.

[13] Home Office, FOI release published 22 October 2014, Compensation paid out for unlawful detention from 2011 to 2013. Available at https://www.gov.uk/government/publications/compensation-paid-out-for-unlawful-detention-from-2011-to-2013

[14] The UK is not a party to EU Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals, which sets a six-month limit on detention with the possibility of further detention for limited periods to a maximum of 18 months in total.

limit] detention in the UK does not conform to international standards" (ILPA, 2014: 13).[15]

TYPE OF DETENTION	MAXIMUM PERIOD	POWERS
Following arrest by the police	24 hours (extendable to 36 hours by police superintendent, to 96 hours by a magistrate)	Criminal
Immigration detention (parents with their minor children)	72 hours (extendable to 7 days with ministerial authority)	Immigration
Pre-charge (arrested under Terrorism Act)	14 days (in stages)	Terrorism
Post-charge custody time limit (remand)	56 - 182 days	Criminal
Immigration detention (adults)	None	Immigration

In the criminal justice system in the UK there are clearly defined limits to the use of detention and custody. A person arrested by the police on suspicion of a criminal offence can be held for up to 24 hours without being charged. A police superintendent can extend this to 36 hours, and magistrates can authorise further detention up to a maximum of 96 hours, where there is reasonable suspicion that the person has committed a serious crime such as murder.[16]

Since January 2011 there has been a pre-charge maximum on detention of 14 days for individuals arrested under the Terrorism Act.[17]

Custody time limits apply, separately to each charge, once a person is charged with an indictable, either-way or summary offence. Post-charge custody time limits for periods spent on remand in prison before trial range from 56 days (2 months) to 182 days (6 months). The Crown Prosecution Service states in guidance that the "legal burden of complying, monitoring and making application to extend CTL [custody time limits] rests with the prosecution" (CPS)[18], further stating that:

> *"The purpose of setting Custody Time Limits (CTL) for the preliminary stages of a case is to progress the case expeditiously and avoid an accused person remaining in custody for an excessive period*" (CPS, nd)[19].

The UK already has an upper limit on the use of immigration powers, but only for the detention of parents with their minor children for the purpose of removal, as part of the family returns process. Home Office policy since 2011 has been that families with minor children can be detained under

[15] Immigration Law Practitioners' Association, (2014), '*All Party Parliamentary Group on Detention: enquiry into immigration detention in the UK: Submission from the Immigration Law Practitioners' Association*'

[16] See Home Office, (May 2014), '*Revised code of practice for the detention, treatment and questioning of persons by police officers Police And Criminal Evidence Act 1984 (PACE) – CODE C*'. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364707/PaceCodeC2014.pdf

[17] Since 25 January 2011 (see '*Pre-Charge Detention in Terrorism Cases - Commons Library Standard Note*', 2012'. Available at http://www.parliament.uk/business/publications/research/briefing-papers/SN05634/precharge-detention-in-terrorism-cases . The *Protection of Freedoms Act 2012* permanently reduced the pre-charge detention period to a maximum of 14 days by amending the *Terrorism Act*.

[18] Crown Prosecution Service, '*Prosecution Policy and Guidance: Custody Time Limits'*. See section 'Principle'. Available at http://www.cps.gov.uk/legal/a_to_c/custody_time_limits/#a05 . [Accessed 14.2.2015]

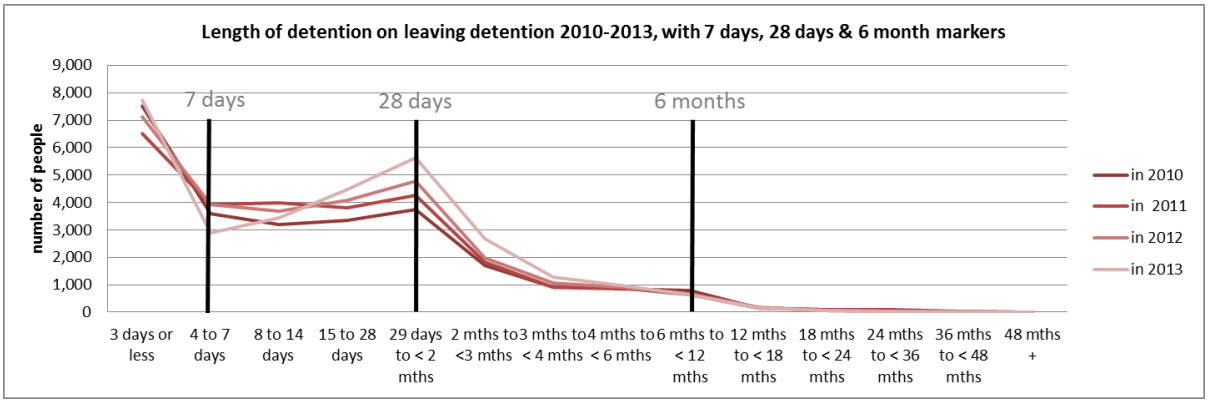
[19] *Ibid.*

immigration powers for no longer than 72 hours, extended to 7 days in exceptional circumstances. The Home Office says "stays will be limited to 72 hours and linked to a specific removal date but exceptionally could be extended up to a week with ministerial authorisation" (Home Office, 2010: 17).[20]

5. Indefinite detention is damaging: a time limit would reduce the worst abuses of use of detention

It is possible to examine Home Office statistics on the length of time people are kept in detention and draw some conclusions about the number of detainees held under current practice whose detention might be affected by the introduction of an upper limit on detention in the UK.

During the full year 2014, a total of 857 (2.9%) of those people leaving detention in an IRC[21] had been detained for longer than six months. Among the 857 detainees held for over 6 months by the time they were released in 2014, 26 people had been detained for between 2 and 4 years, and 1 person had been detained for over 4 years.[22]



Source: Home Office, *Immigration statistics, July to September 2014, Table dt_06_q: People leaving detention by reason, sex, and length of detention*. Available at https://www.gov.uk/government/statistics/immigration-statistics-july-to-september-2014-data-tables

An upper limit on detention of 6 months would only limit the detention of a minority of detainees, a few hundred each year, but in this cohort of detainees some of the worst abuses of the use of detention in the UK can be found.

[20] Home Office UK Border Agency, (December 2010). '*Review into ending the detention of children for immigration purposes*'. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275349/child-detention-conclusions.pdf

[21] Source: Home Office, (26 February 2015), 'Immigration statistics, October to December 2014'. Available at https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2014/immigration-statistics-october-to-december-2014#asylum-1. These figures do not include any data on detainees held under immigration powers in the prison estate. Since November 2014 published Home Office migration statistics include the number of people detained under immigration powers in the prison estate, but to date there is no published data relating to length of detention in prisons. See Bail for Immigration Detainees, 2014, '*Denial of Justice: the hidden use of UK prisons for immigration detention*'. Available at http://bit.ly/1LzhjNt

[22] Appendix A shows the mode of release from detention for people leaving detention during 2014.

An upper limit to detention would have helped BID's client Mr B, released on bail in early 2015 after three and a half years in detention, who had been unremovable during almost the entire period of his detention, had been self-harming while detained, and who had been without a legal representative for several months when BID first met him.

Reports from authoritative sources indicate some unacceptably prolonged detention post-sentence in the prison estate[23]. In 2012 Her Majesty's Chief Inspector of Prisons reported encountering "one [man] who had been detained for nine years after his sentence had ended and was still awaiting a decision on his future".[24]

Of those people leaving detention in an IRC during 2014, 36.5% were detained for periods of more than 28 days, some of them for the extreme periods measured in years described above. If an upper limit of 28 days detention in the UK were to be introduced, this has the potential to curtail the detention therefore of around one in three of those leaving detention in any year under current Home Office detention practice.

However, even an upper limit of 28 days does not prevent the detention of those whose loss of liberty was unnecessary, ill-considered, damaging, unlawful, or all of these, despite being measured in days and weeks, not month or years. Of those held for up to 28 days in detention during 2014[25], only 62.7% were removed from the UK; while 37.3% were released from detention into the community, suggesting that the decision to detain them in the first place was unnecessary.

There is no evidence to suggest that a time limit would result in higher absconding rate or lower removal rates. Home Office statistics suggest the introduction of time limits for the detention of families with minor children made no change to absconding rates, which remained at 5%.[26] There is no evidence to suggest that absconding rates for other categories of detainee would be higher as a result of a time limit.

There is concrete evidence from many countries that in circumstances where the detention of people can be carried out in a manner that is open-ended and potentially indefinite, such as immigration detention in the UK, that this can be damaging to the mental health of people in detention after even relatively short periods of detention.[27] A time limit would at least provide some certainty to

[23] Data on the length of detention in prisons is not included in Home Office published statistics on detention, and these detainees are held entirely outside any guidance on their management in detention offered by Detention Service Orders and the statutory Detention Centre Rules.

[24] HM Inspectorate of Prisons, (2012), '*Report on a full unannounced inspection of HMP Lincoln 20-24 August 2012*' p.36. BID understand from queries put to HM Inspectorate of Prisons that the 9 years of immigration detention in this case may have been interrupted on one occasion rather than continuous.

[25] Source: Home Office, (26 February 2015), *'Immigration statistics, October to December 2014'*. Table dt_06: People leaving detention by reason, sex and length of detention. Available at https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2014/immigration-statistics-october-to-december-2014#asylum-1

[26] "The Home Office-commissioned evaluation of the family returns process found that exactly the same proportion of families (5%) absconded in the new family returns process, as in the previous process, where large numbers of families were detained, in some cases for very long periods (Source: Home Office, (2013), 'Evaluation of the new family returns process'). It therefore appears that the reduction in detention of children has not increased the risk of families absconding". BID, (2014), '*Bail for Immigration Detainee's submission (1 of 3) to the APPG on Refugees and APPG on Migration's parliamentary inquiry into the use of immigration detention in the UK: the separation of families by immigration detention, and (from paragraph 16) the detention of children'*. See para 18. Available at http://bit.ly/1M1lrGb

[27] The National Clinical Director for Health and Criminal Justice for the Department of Health has acknowledged that custody causes mental distress and acts to exacerbate existing mental health problems, heighten vulnerability and increase the risk of self-harm and suicide. It is

detainees that there would be an end point to their administrative detention. The Mental Health in Immigration Detention Action Group has stated that

> "*having an upper limit for detention under Immigration Act powers would be a very positive step for the mental health of detainees*" (2013, p:22)[28]

6. Detention for the shortest period necessary or detention as default?

Home Office policy states "detention must be used sparingly, and for the shortest period necessary"[29]. Successive legislation in the UK has developed a specific but wide-ranging set of purposes for which immigration detention can be used by the Secretary of State (the Home Secretary)[30].

These wide-ranging statutory powers give Home Office staff the discretion to detain people who are subject to immigration control, including those who are refused leave to enter, or whose leave has been cancelled; illegal entrants or overstayers; asylum seekers; and 'foreign criminals'. People can be detained pending examination of their case and a decision on whether to grant, cancel or refuse leave to enter, pending a decision over whether to remove or deport, and pending the enforcement of that removal or deportation.

In certain cases each of these processes may take months or years.

In addition to statutory powers to detain and policy guidance on the use of detention there are common law limitations on the power to detain. The authoritative statement of the implied limitations of the power to detain conferred by the Immigration Act 1971 is contained in what are widely known as the 'Hardial Singh principles'.[31]

These principles provide some limited protection in relation to the reasonableness of the length of detention in any case, and helpfully lay out an expectation of 'reasonable period', 'imminence of removal' and the obligation on the Secretary of State to act with due diligence and expedition. In Hardial Singh's case a period of 6 months detention was found to be unlawful, but more recent case law has found periods of 46 and 45 months immigration detention to be lawful.[32]

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well documented that the effect of custody on mental health also holds for immigration detention, and that the open-ended nature of immigration detention is particularly damaging. See for example Robjant, K. et al (2009), 'Psychological Distress amongst Immigration Detainees: A cross sectional questionnaire study'. *British Journal of Psychology* 48:275-86; Pourgourides, C. (1997), 'The mental health implications of detention of asylum seekers in the UK'. *Psychiatric Bulletin* 21:673-674; Bail for Immigration Detainees, (2009), *Out of sight, out of mind: experiences of immigration detention in the UK*; Gatwick Detainee Welfare Group, (2012), '*A prison in the mind: the mental health implications of detention in Brook House Immigration Removal Centre'*

[28] *Mental Health in Immigration Detention Action Group Initial Report*, 2013. Available at http://www.medicaljustice.org.uk/images/stories/reports/MHIDAGreportR.pdf . See also McGinley, Ali & Trude. A, (2012), '*Positive duty of care? The mental health crisis in immigration detention: A briefing paper by the Mental Health in Immigration Detention Project'*, AVID & BID. Available at http://bit.ly/1DJmpoC

[29] Home Office, '*Enforcement Instructions & Guidance, Chapter 55 Detention and Temporary Release, section 55.1.3. Use of detention'*. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/400022/Chapter55_external_v19.pdf

[30] Including Immigration Act 1971 Schedules 2 and 3 (amended and supplemented by subsequent legislation); UK Borders Act 2007.

[31] See *R v. Governor of Durham Prison, Ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, United Kingdom: High Court (England and Wales), 13 December 1983. Available at http://www.bailii.org/ew/cases/EWHC/QB/1983/1.html

[32] See Shafiq Ur-Rehman [2013] EWHC 1280 (Admin) available at http://www.bailii.org/ew/cases/EWHC/Admin/2013/1351.html ; Francis [2014] EWCA Civ 718) available at http://www.bailii.org/ew/cases/EWCA/Civ/2014/718.html

Extract from R v. Governor of Durham Prison, Ex parte Singh, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, United Kingdom: High Court (England and Wales), 13 December 1983. § 7-8.

"Although the power which is given to the Secretary of State in para 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that **it is subject to limitations**. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being **impliedly limited to a period which is reasonably necessary for that purpose**. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation **where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.** In addition, I would regard it as implicit that **the Secretary of State should exercise all reasonable expedition** to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

The evidence is mounting from inspectorate reports of a 'detention as default' culture[33] in the Home Office. BID's experience as legal representatives for immigration detainees supports these findings: we see this culture manifested as apparently unthinking use of detention and as something more punitive, including the re-detention of people shortly after release on tribunal bail.

It is our view that this 'detention as default' culture at the Home Office enables

- Greater numbers of people to be detained initially when detention is not necessary to achieve the Home Office objective
- A lack of urgency in Home Office detained casework.
- Widespread failure by the SSHD to release from detention even after it becomes apparent that removal will not be possible within a reasonable period
- Detention periods to become extended in too many cases beyond anything that could be considered reasonable or proportionate.

In 2011, the Independent Chief Inspector of the UK Border Agency observed a culture among Home Office decision-makers in which detention was treated as the default position. He noted:

> *"Clearly, there will be a number of cases where the prospect of removal is imminent and the risk of further offending or absconding is such that detention is appropriate. However, of the*

[33] See in particular Bhatt Murphy Solicitors, (September 2014), ' *Written evidence to the Parliamentary Inquiry into the use of immigration detention in the UK, hosted by the APPG on Refugees and the APPG on Migration'* Available at http://www.bhattmurphy.co.uk/media/files/Written_evidence_to_APPI_final.pdf

cases sampled by us where the foreign national prisoner had been detained under immigration powers, the highest percentage concerned convictions for fraud and forgery and these offences are not listed in the Agency's policy as offences where 'particular weight' or 'particularly substantial weight' should be given to the risk of further offending or harm to the public. Despite this, such cases were also overwhelmingly likely to result in detention. The individual circumstances of such cases may again justify detention, but the sheer weight of cases resulting in detention is of concern and, in our view, there remains a culture that detention is 'the norm'. Indeed, one member of staff said, 'A decision to deport equals a decision to detain.' (ICIUKBA, 2011: 22) [34]

HM Inspectorate of Prisons (HMIP) and the Independent Chief Inspector of Borders & Immigration (ICIBI) carried out a joint thematic inspection on the effectiveness of Home Office immigration detention casework[35], published in 2012. Among their findings, was that:

"In a quarter of the file sample (n=20), inefficiencies in casework were the main explanation for ongoing detention, and in a further 10 cases there were delays in removing people. In some cases, asylum claims were not dealt with efficiently, leading to periods of detention that were not the fault of detainees. Prosecution for non- compliance had not been used in any cases and in some it appeared that detention was used as a default rather than a rigorously governed last resort. Ex-prisoners could be detained for long periods even if their prison sentences had been short. The high level of authorisation needed to release ex-prisoners was inconsistent with the presumption in favour of release. Files were in poor condition, and missing information could have included documents to establish the validity or otherwise of unlawful detention claims." (HMIP & ICIBI, 2012: 31)[36]

In his 2014 report '*An Inspection of the Emergency Travel Document Process',* the Independent Chief Inspector[37] concluded that, rather than using the option of prosecuting foreign nationals for the offence of non-compliance with the travel documentation process[38], Home Office caseworkers instead "relied on open-ended and costly detention, effectively waiting for detainees to "give in".... ". He continued:

"*Long-term detention is still the Home Office's default position in [foreign national offender] cases where the individual is non-compliant with the [emergency travel document] process. Of the FNO cases in our sample that had been released on bail rather than removed, only six had been bailed by the Home Office rather than as the result of an order by an immigration judge. This suggests a significant presumption towards maintaining detention. This is a questionable*

[34] Independent Chief Inspector of the UK Border Agency, (2011) '*A thematic inspection of how the UK Border Agency manages foreign national prisoners February – May 2011*', para 6.15. Available at http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Thematic-inspection-report-of-how-the-Agency-manages-Foreign-National-Prisoners.pdf

[35] HMIP & ICIBI, (2012), '*The effectiveness and impact of immigration detention casework: A joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration December 2012'* Available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf

[36] *Ibid.*

[37] By this time known as the Independent Chief Inspector *of Borders & Immigration.*

[38] s35(3) Asylum and Immigration (Treatment of Claimants etc) Act 2004: Non Cooperation with a Request for Information: s35 creates an offence of failing to comply, without reasonable excuse, with actions that the Secretary of State may require someone to take so as to enable a travel document which will facilitate the person's deportation or removal from the United Kingdom to be obtained by that person or on his behalf. This provision was intended to prevent people, who have exhausted all avenues of appeal following a failed asylum claim, to avoid deportation by refusing to sign the necessary documentation that is required before that person can leave the UK. See Crown Prosecution Service, Legal Guidance: Immigration at http://www.cps.gov.uk/legal/h_to_k/immigration/#noncoop

approach, given both the wording of the Home Office's own policies on detention and the presumption of a right to liberty under Article 5 ECHR." (ICIBI, 2014:50)[39]

7. Existing safeguards against arbitrary and prolonged detention are inadequate, especially without legal advice & representation throughout detention

The detention of each individual is subject to a monthly internal review by the Home Office, and ongoing detention is subject to escalating levels of authorisation within the Home Office. Detainees are not provided with the findings of these Home Office internal reviews but are instead given a 'monthly progress report', which all too often makes little or no reference to any progress made by the Home Office in their case. A detainee or her legal representative can only obtain the full details of Home Office monthly reviews of their detention by means of a Subject Access Request which may take months for the Home Office to comply with. Even then, internal reviews do not always reflect the reality of Home Office detention practice, and new information provided to the Home Office in a case, such as medical reports, may not be referred to by the Home Office in their detention reviews.

There are a number of remedies available for people held under immigration powers in the UK. Detainees or their legal advisors may make representations to the Home Office or seek independent examination of their ongoing detention by means of:

- Applications to the Home Office for release on Chief Immigration Office or SSHD bail, or Temporary Release
- Applications to the First-tier Tribunal (IAC) for release on immigration bail
- Applications to the Administrative Court for permission to bring a Judicial Review of the lawfulness of their detention

Even with the benefit of legal advice and representation these existing safeguards for immigration detainees are inadequate.

Applications for release from detention on Temporary Admission or immigration bail to the SSHD – the detaining power – perhaps unsurprisingly have low success rates. [1] In Q2 2013, the Home Office granted release on immigration bail to 28 detainees. During the same period, the First-tier Tribunal (IAC) granted release on immigration bail to 328 detainees.[40]

The result of applications to the independent First-tier Tribunal for release on immigration bail are increasingly compromised now that both regular and timely access to the Tribunal and Tribunal decisions to release are no longer independent of actions by the SSHD. The Home Office has failed to address practical barriers that prevent detainees getting regular access to the bail process, for example the lengthy delays in the Home Office provision of bail addresses where no suitable private

[39] Independent Chief Inspector of Borders & Immigration, (2014), '*An Inspection of the Emergency Travel Document Process May-September 2013*', para 8.23. See para 5.1. Available at http://icinspector.independent.gov.uk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf

Source: Home Affairs Committee: Written evidence. *The work of the Home Office Immigration Directorates Q2 2013*. Available at http://www.parliament.uk/documents/commons-committees/home-affairs/Home-Office-Immigration-Directorates-written-evidence.pdf

address is available[41]. Provisions in the Immigration Act 2014 now mean that some decisions made by the immigration tribunal to release on bail can be overruled by the Home Secretary.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced a new round of cuts to immigration legal aid, removing from scope all general immigration work, including preparing and presenting claims to the Home Office, and appeals including deportation appeals. Legal aid advisors now face the difficult task of advising on the merits of ongoing detention and bail applications without funding to examine the underlying substantive immigration case that caused their client to be detained.

BID's regular legal advice surveys show that detainees are frequently unable to secure legal advice and representation.[42] Since April 2013 the proportion of survey respondents held in IRCs with a legal advisor and who are in receipt of legal aid has dropped. In November 2013 just 52% of detainees interviewed for BID's survey who had a legal advisor were in receipt of legal aid, while in May 2014 the proportion was 54%. Both of these are the lowest rates of publicly funded legal representation since BID began these surveys. Longer-term detainees are being left without ongoing legal advice on the fact of their detention. Legal aid advisors should be in a position to carry out regular reviews of ongoing detention, escalate contact with the Home Office, and make regular applications for release to both the Home Office and the First- tier Tribunal (IAC). Instead, legal aid providers typically now wind down engagement with detained clients and close files as detention progresses.[43]

If an immigration detainee is unrepresented, and is unaware of or unable to prepare and present effective applications for consideration of her release, then her ongoing detention will go entirely unexamined in any meaningful way. The shortcomings of a detention system that relies on a group of people with often poor or non-existent English language skills, and without a legal advisor, to initiate any safeguarding procedure involving consideration of their release or the lawfulness of their ongoing detention are obvious.

Earlier in this paper we explained why a time limit on immigration detention in the UK, while helpful on its own is not sufficient to protect detainees against unnecessary and arbitrary detention, which may then become prolonged. In BID's view, immigration detainees need protection throughout their detention in the form of a meaningful safeguard that is both entirely independent of the Home Office, and not reliant on detainees to initiate.

We consider that such a safeguard is regular and automatic judicial oversight for each person taken into detention under immigration powers, whether detained in an immigration removal centre or the prison estate post-sentence. In the section below we explain how we think such judicial oversight should operate.

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[41] See 'Bail for Immigration Detainee's submission (2 of 3) to the APPG on Refugees and APPG on Migration's parliamentary inquiry into the use of immigration detention in the UK. BID's concerns about the failure of the immigration bail process to provide adequate safeguards to immigration detainees against arbitrary and long term detention'. Available at http://bit.ly/1DJZ1HB

[42] Since November 2010 BID has carried out nine surveys, one every six months, across the IRC estate, a total of 1026 separate interviews. Prior to the reduction in scope of public funding for legal advice introduced via LASPO which came into force in April 2013, between 68% and 75% of respondents to BID's survey who had an immigration advisor were in receipt of legal aid..

[43] There appears to be a tension between, on the one hand the Legal Aid Agency instruction to provider firms to periodically apply i) a merits test for substantive issues and ii) a separate merits test for bail, either or both of which could lead to file closure; and on the other hand the obligation on provider firms with exclusive contracts for IRC work to continue to act for the client. At present, exclusive contractor firms bear the cost of keeping client files open for extended periods if a person is not released from detention for months or years. There is no stage billing for the type of work that in BID's view should be carried regularly for as long as a person is detained, namely case planning, advice letters to clients, receiving calls from clients, reviews of their ongoing detention, making temporary admission applications and representations to the Home Office for updates on a case, including in relation to travel document applications.

8. What regular, automatic judicial oversight of immigration detention should mean

The Bingham Centre for The Rule of Law detention safeguarding principle 'Automatic court control' outlines the need for judicial oversight of detention:

> *"…comprised of regular and automatic hearings before a court empowered to consider the legality of detention (not merely to grant bail), and "impose conditions or order release"* (Bingham Centre, 2013)[44].

For BID, regular and automatic judicial oversight means that all immigration detainees should be brought before such a court

- On the first full day after being taken into immigration detention, then
- At specified and regular intervals up until any legal maximum detention period is reached,
- On any additional date as ordered by the court under this oversight process
- With the benefit of publicly funded legal representation for each court hearing to review ongoing detention for as long as their detention is maintained, (i.e. outside the statutory legal aid means and merits test).
- With any evidence underlying the Home Office's decision to detain and maintain detention, including risk of absconding, or risk of harm or re-offending on release, available both to the detainee and the court.
- Ready for release, with any licence address checks concluded in order to enable release to a specified address if so ordered by the court.[45]

[44] The Bingham Centre for the Rule of Law, (2013), '*Immigration Detention and The Rule Of Law: Safeguarding Principles'*. See safeguarding principle 21: Automatic court control. Available at http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf

[45] This will require NOMS and the National Probation Service to ensure that preparation for release at sentence half way point is carried out for foreign national prisoners in the same way as for British citizen prisoners.

Appendix A:

Mode of release from detention by length of detention upon leaving

Mode of release	Total Detainees	Removed from the UK	Granted leave to enter / remain	Granted temporary admission / release	Bailed	Other
Length of detention						
Up to 7 days	**11042**	50.90%	0.01%	46.30%	0.01%	0.01%
7-28 days	**7741**	50.20%	0.18%	37.26%	0.10%	0.90%
29 days to <2 months	**5,145**	50.10%	0.02%	35.37%	12.20%	0.07%
2 months to <3 months	**2,485**	62.50%	0.01%	28.13%	8.21%	0.06%
3 months to <6 months	**2385**	64.60%	0.00%	23.77%	10.69%	0.07%

Source: Home Office, *Immigration statistics, October to December 2014, Table dt_06_q: People leaving detention by reason, sex, and length of detention*. Available at https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2014-data-tables

Appendix B:

International standards on maximum detention periods

1999	UN Working Group on Arbitrary Detention Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7: "A maximum period should be set by law".
2011	UNHCR/Office of the High Commissioner for Human Rights Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011): 2: "Maximum time limits on … administrative [immigration detention] in national legislation are an important step to avoiding prolonged or indefinite detention". … 11: "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons".
2012	*UNHCR Detention Guidelines (2012), Guideline 6: "To guard against arbitr*ariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite".
2013	The UN Committee Against Torture[46] recommended in its concluding observations on the UK's fifth periodic report (2013) that the UK adopt a time limit and end "de facto indefinite detention."
See also	
2013	Bingham Centre for the Rule of Law, (2013), *Immigration Detention and the Rule of Law: safeguarding principles*'[47] • Safeguarding principle 16 Brevity – detention must be as short as possible • Safeguarding principle 17 Maximum – the duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.

[46] UN Committee Against Torture, 'Fifth periodic report of the United Kingdom, (6-31 May 2013)'. Paragraph 30(c). Available at http://www.justice.gov.uk/downloads/human-rights/cat-concluding-observations-may-2013.pdf

[47] Bingham Centre for the Rule of Law, (2013), Immigration Detention and the Rule of Law: safeguarding principles'. Available at http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf

How to contact BID

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Bail for Immigration Detainees