

Submission to the Universal Periodic Review – Bail for Immigration Detainees (BID)

About BID:

BID is an independent national charity established in 1999 to challenge immigration detention. We assist those held under immigration powers in removal centres and prisons to secure their release from detention through the provision of free legal advice, information and representation. We are accredited by the Office of the Immigration Services Commissioner (OISC). Between 1 August 2020 and 31 July 2021, BID provided advice to 4,792 people. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice.

This submission sets out our concerns about the government’s plans to replace the Human Rights Act; immigration detention; use of GPS technology to monitor people who are on immigration bail; and the rights of children and families affected by the deportation system.

Replacing the Human Rights Act with a ‘Bill of Rights’

On 14th December 2021 the government published a consultation on proposals to revise the Human Rights Act and replace it with a ‘Bill of Rights’, under the alleged intention to “restore a proper balance between the rights of individuals, personal responsibility and the wider public interest”¹. While some of these proposals would be unworkable or make our judicial system more complex and costly, others will diminish access to fundamental rights and make government less accountable. This contravenes numerous recommendations in the last Universal Periodic Review which sought guarantees that any amendments to the Human Rights Act would not weaken human rights.

The government proposes having a condition that individuals must have suffered a ‘significant disadvantage’ to bring a claim under the Bill of Rights². This would be unnecessary, counter-productive and deny redress to people whose human rights have been breached.

The government proposes limiting people’s ability to pursue a rights-based claim alongside another type of claim³. It is also seeking to limit access to damages for people whose rights have been breached, under the apparently benign intention of ‘strengthening the courts’ discretion’ in granting remedies. Both of these measures would reduce access to remedies for people whose human rights have been breached.

The government is also seeking to ‘restrain the ability of the UK courts to use human rights to impose ‘positive obligations’ onto our public authorities⁴. This misconstrues the nature of fundamental rights. Rights create corresponding obligations, and few if any rights could be meaningfully secured if corresponding positive obligations were simply ignored.

In its consultation the government misrepresents universal human rights in an attempt to impose limits on who can access them. The consultation states an intention to “emphasise the role of responsibilities within

¹ Ministry of Justice Consultation: *Human Rights Act Reform: A Modern Bill Of Rights*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf

² Ibid. page 65, paragraph 222

³ Ibid, page 66, paragraph 226

⁴ Ibid, page 67

the human rights framework⁵” and criticises “a ‘rights culture’ that displaces personal responsibility and the public interest⁶”. This translates into proposals to diminish human rights protections for people whose conduct the government does not approve of. However, fundamental rights are universal, not the privilege of the virtuous, deserving or “responsible”: as Article 2 of the Universal Declaration of Human Rights puts it, “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...”.

Of particular concern are the government’s proposals to curtail access to human rights for people facing deportation, either through limiting the rights that people can appeal to, or preventing the courts from overturning deportation decisions made by the secretary of state. Their proposals would ensure repeated and serious breaches of fundamental rights, inconsistently with the stated aims of the consultation.

As we argued in a joint letter to the government with 20 other civil society organisations, the consultation uses misleading case studies and statistics to present its case⁷.

The proposals pose a profound threat to human rights in the UK and we urge those carrying out the review to read the consultation in full.

Immigration detention

Asylum seekers and migrants in the UK can be detained by immigration officers exercising powers conferred on the Secretary of State under a number of different Immigration Acts⁸. The Immigration Act 1971 provides the majority of the statutory powers of detention for those subject to immigration control, although these provisions have been amended and added to by subsequent legislation.

There are very few safeguards against unjust or arbitrary deprivation of liberty. The decision to detain is made by an individual Immigration Officer and is not overseen by a court⁹ i.e. there is no independent judicial oversight of the use of detention. Second, unlike people suspected of a criminal offence, there is no automatic legal advice or representation to challenge immigration detention, and access to legal advice in immigration detention is frequently poor¹⁰. Third, bail hearings are ordinarily heard in the First-tier Tribunal, which does not have the same safeguards to ensure a fair trial and prevent wrongful deprivation of liberty as those which exist in the criminal justice system¹¹. Fourth, there is no time limit. Fifth, people

⁵ Ibid, page 6, paragraph 8

⁶ Ibid, page 35

⁷ <https://www.biduk.org/articles/joint-letter-raises-serious-concerns-over-the-government-s-human-rights-act-reform-consultation>

⁸ The Immigration Act 1971; the Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; UK Borders Act 2007; Citizenship Immigration and Borders Act 2009.

⁹ In 2018 the government introduced automatic bail hearings for people in immigration detention after four months. However these exclude foreign national offenders and the process is beset by shortcomings. A response to a BID FOI request revealed that only 4% of referrals for an automatic bail hearing actually led to a grant of bail.

¹⁰ See the results of BID’s legal advice surveys [here](#). The lack of immigration advice available to time-served foreign national offenders detained in prisons is well-documented and was recently declared unlawful by the High Court - see *SM v Lord Chancellor* [2021] EWHC 418 (Admin) .

¹¹ The tribunal can admit any evidence it considers relevant even if that evidence wouldn’t be admissible in a court of law. The tribunal does not have the power to compel witnesses to attend court.

are not given written reasons at the outset explaining the reasons for their detention¹².

Although detention for immigration purposes is an administrative and not a criminal process, it is experienced as a punishment or coercive tool by the people subject to it, and many people are held for months or years. Detention is consistently shown by reputable sources to be harmful to people’s mental and physical health¹³, particularly those who are vulnerable, and involves breaches of the right to liberty, private life and family life. In several cases the courts have found that detention breached an individual’s right not to be subject to cruel, inhuman or degrading treatment (Article 3 ECHR)¹⁴.

In 2021, 24,497 people entered immigration detention. Of those leaving detention, 87.3% were released back into the community. A government-commissioned independent review into detention in 2018 stated that the Home Office’s figures on the proportion of detainees removed at the end of their period of detention: “continue to call into question the extent to which the current use of detention is cost effective or necessary”¹⁵.

At a separate section of the report, Shaw stated: “It is apparent that more than half of those subject to immigration detention are eventually released back into the community. I remain of the view that, very frequently, detention is not fulfilling its stated aims¹⁶.”

Home Office detention decision-making

No department should have such wide and unchecked powers of detention, least of all one with a track record of making decisions that are flawed or unlawful. The Home Office paid out total of £9.3m compensation for 330 cases of wrongful detention in 2020/21¹⁷ (and a total of £24.4 million to 914 people in the last 3 years). Many of these cases pertain to breaches of detainees’ human rights by the Home Office. 77% of people leaving detention in 2020 were released back into the community. Home Office decisions in other areas are also often flawed – in the last year, 49% of people challenging a Home Office decision in the First-tier Tribunal have been successful¹⁸.

Detention is used far too casually.

¹² When the Home Office decides to detain someone, it must provide them with an ‘IS.91’ form which purports to explain the reasons for detention, but is just a simple form with generic boxes that are ticked by the Home Office Official authorising detention.

¹³ See, for instance, Royal College of Psychiatrists, *Detention of People with mental disorders in Immigration Removal Centres* https://www.rcpsych.ac.uk/docs/default-source/improving-care/better-mh-policy/position-statements/position-statement-ps02-21---detention-of-people-with-mental-disorders-in-immigration-removal-centres--2021.pdf?sfvrsn=58f7a29e_6#:~:text=it%20is%20the%20view%20of,a%20return%20into%20immigration%20detention.

¹⁴ See for example: Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons*, Appendix 4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

¹⁵ Review commissioned by Home Secretary Theresa May in 2015, Stephen Shaw, (former Prisons and Probation Ombudsman) “Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons A follow-up report to the Home Office”, July 2018. Pg 27

¹⁶ Ibid. pg 22

¹⁷ Home Office Annual Report and Accounts, page 129

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000127/HO_Annual_Report_and_Accounts_2020-21_FINAL_AS_CERTIFIED_accessible_.pdf

¹⁸ Tribunal statistics quarterly October to December 2021, Main Tables, FIA3, available here <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2021>

As the parliamentary JCHR found in its inquiry into immigration detention published in 2019, “*While there are strict safeguards to ensure independent decision making and fair processes for detention in the criminal justice system, there are far fewer protections for people caught up in the immigration system*”¹⁹. The Home Affairs Committee stated in its report on immigration detention that “*there are serious problems with almost every element of the process, which lead to people being wrongfully detained, held in detention when they are vulnerable and detained for too long*”²⁰.

Immigration detention in prisons:

Since the onset of the pandemic those held in prisons – people serving sentences, those on remand awaiting trial²¹, and immigration detainees – are subjected to punitive conditions, locked in their cells for over 22 hours a day, most often 23.5, with people sometimes being held in their cells for days at a time and unable to take a shower. Although regimes in some prisons have relaxed, strict lockdown regimes persist in many prisons.

Her Majesty’s Inspector of Prisons has reported that the conditions frequently amount to ‘prolonged solitary confinement’, which is prohibited by the United Nations Standard Minimum Rules for the Treatment of Prisoners (the ‘Mandela Rules’, adopted unanimously by the UN General Assembly in 2015). It can amount to torture or cruel, inhuman or degrading treatment, according to the UN Special Rapporteur on Torture²².

For immigration detainees held in prisons, their confinement was also indefinite. The number of people detained in prisons under immigration powers increased from 359 at the end of December 2019 to 655 at the end of December 2021 (55% of all detainees)²³. It is well documented in medical literature that immigration detainees are more likely to have pre-existing mental health conditions or have experienced torture, modern slavery or other traumatic experiences than the general population, and therefore more vulnerable to harm in detention²⁴. Meanwhile the purpose for which they are being detained – removal from the UK – may be unrealistic.

In July 2021 BID and the charity Medical Justice published a research report²⁵ examining the impact of prison conditions on our clients, who are held indefinitely under immigration powers. People described confinement as “psychological torture”, feeling “trapped”, “hopeless” and “suffocated”. Symptoms were incredibly severe, including involuntary shaking, memory loss, physical pain and insomnia. Detainees with high risk mental health conditions, including diagnoses of post-traumatic stress disorder (PTSD), severe

¹⁹ Joint Committee on Human Rights *Immigration Detention*
https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/148403.htm#_idTextAnchor000

²⁰ *Immigration Detention* Home Affairs Committee <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/91302.html>

²¹ 1 Fair trials, ‘Locked up in Lockdown: Life on Remand During the Pandemic’, 2021 <https://www.fairtrials.org/app/uploads/2021/11/Locked-up-in-lockdown-Life-on-remand-during-the-pandemic.pdf>

²² UN News, ‘Solitary Confinement Should Be Banned in Most Cases, UN Expert Says’, 18 October 2011.
<https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>

²³ Home Office detention statistics, available here <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-are-detained-or-returned>

²⁴ This is well documented. For example, see M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason and C. Katona, ‘*The Impact of Immigration Detention on Mental Health: A Systematic Review*’, BMC Psychiatry 18, no. 1 (December 2018).

²⁵ Every day is like torture " : Solitary confinement & Immigration detention *Bail for Immigration Detainees* https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1328/Solitary_Confinement_Report_Final_2.pdf

depression, and a history of self-harm and suicidal thoughts have experienced serious deterioration in confinement. Previously healthy clients developed mental health problems as a result of their treatment. The experiences of our clients reflect the overwhelming medical evidence of the harm that prolonged solitary confinement causes²⁶. We also found a concerning lack of medical support available to people confined in prisons.

This reflects the findings of Her Majesty’s Inspector of Prisons, who reported, after having visited more than 50 prisons since the beginning of the pandemic, that prisoners spending 23 hours a day in their cells was “normal”²⁷. Their report, “what happens to prisoners in a pandemic”²⁸, highlighted the impact of restrictive prison regimes on those subject to them:

“The most disturbing effect of the restrictions was the decline in prisoners’ emotional, psychological and physical well-being. They were chronically bored and exhausted by spending hours locked in their cells. They described being drained, depleted, lacking in purpose and sometimes resigned to their situation. Some said they were using unhealthy coping strategies, including self-harm and drugs, while others reported using mundane routines to pass the time and cope with their confinement and associated anxieties”

The Prison Reform Trust reported in August 2020 that while almost all prisoners were locked in their cells for 23 hours per day or more, two thirds were held in conditions that amounted to solitary confinement, while the other third were held with a cell-mate²⁹. Although this practice pre-dates the pandemic and we were aware of people being held in their cells for 23 hours per day or more prior to the pandemic and has been criticised by the Subcommittee on the Prevention of Torture³⁰, this type of treatment has since become far more widespread.

GPS electronic monitoring of people on immigration bail

In December 2020 the Home Office began using GPS technology to monitor people on immigration bail, providing 24/7 real time location monitoring, tracking an individual’s every move. In August 2021, the government made electronic monitoring mandatory for anybody on immigration bail facing deportation, except where one of two exceptions applies³¹. The Home Office has stated in its Data Protection Impact Assessment that “the number of tag wearers is expected to rise from 280 to 4500”³².

This amounts to a serious infringement on basic rights including the right to liberty, private life and family life and greatly widens the state’s surveillance powers and access to sensitive personal data. The

²⁶ Sharon Shalev, A Sourcebook on Solitary Confinement, 2008; Stuart Grassian, ‘Psychiatric Effects of Solitary Confinement’, Washington University Journal of Law & Policy 22 (January 2006); Appel AM, Aon M, Cakal, E, ‘Solitary Confinement’ (DIGNITY Library, 2018).

²⁷ BBC News, ‘Prisoners Locked up for 23 Hours Due to Covid Rules Is “Dangerous”’, 20 October 2020. <https://www.bbc.com/news/uk-54607813>

²⁸ HM Inspectorate of Prisons, ‘What Happens to Prisoners in a Pandemic? A Thematic Review’, February 2021, 4.

<https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2021/02/What-happens-to-prisoners-in-a-pandemic.pdf>

²⁹ For example, see Prison Reform Trust, ‘Prisoners’ Mental Health Suffering under Conditions of “Prolonged Solitary Confinement”’, 11 February 2021. <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/972?SkinSrc=%5bG%5dSkins%2fPRT%2fAdmin>

³⁰ The Subcommittee on the Prevention of Torture (SPT), following their visit to the UK in September 2019, express their serious concern regarding the “numerous reports of the prolonged use of segregation in prisons in the United Kingdom”. See Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Visit to the United Kingdom of Great Britain and Northern Ireland Undertaken from 9 to 18 September 2019. Report of the Subcommittee’, 25 May 2021, para. 86.

³¹ Those exceptions are where the Secretary of State considers tagging to be a) Impractical, or b) Contrary to the individual’s ECHR rights

³² This was disclosed to us in correspondence with the Home Office. We can submit a copy of this.

psychological harm caused by electronic monitoring is well-documented³³ – People involved in a Ministry of Justice GPS Electronic Monitoring Pilot³⁴ a feeling of being ‘constantly watched’ by the authorities. The harmful impact of electronic monitoring, and the significant intrusion on individual liberty and privacy, is recognised by the courts, and the UK’s Supreme Court has accepted in *Jalloh*³⁵ that curfews – which are frequently used alongside electronic monitoring – amount to a form of detention.

The Home Office has given itself almost unlimited discretion to retrospectively access 24/7 geolocation data. This data will be collected, processed and retained by the private subcontractor – Capita – and may be accessed by the Home Office under certain circumstances including “where it may be relevant to a claim by the individual under Article 8 ECHR”³⁶.

Article 8 claims relate to intimate personal details about an individual’s family or private life. People who make human rights claims will now be required to give the state unrestricted access to highly personal and sensitive geolocation data—simply because it “may be relevant” to their claim. Individuals may not even be made aware of this when it happens. The act of making a legal claim about one’s human rights has never—and should never—entitle the state to engage in surveillance over one’s entire private life. Immigration bail is an administrative tool for contact management of people liable to be detained. The purpose of monitoring and processing data using GPS technology for purposes other than ensuring that people do not abscond is disproportionate and potentially unlawful.

This wide discretion to access GPS data is contrary to data protection laws which require that personal data must only be “processed for specified, explicit and legitimate purposes”³⁷.

Additional concerns that we do not have space to cover in detail

The Home Office has a statutory duty to safeguard and promote the best interests of all children affected by its decisions. However, it routinely forcibly separates parents from their children through deportation, causing immense harm to children and breaching their rights under article 8 ECHR. Through our legal casework BID has witnessed first-hand the devastating impact this regime is having on families and communities, and last year we published a research report demonstrating the impact of the UK’s harsh deportation law on families who are subject to it³⁸. A particular focus of the research was the devastating impact deportation has on children. In the interviews we carried out, fathers facing deportation reported their children developing anxiety; crying constantly; unable to let their dad out of their sight; withdrawing from everything; loss of appetite; difficulty sleeping; having nightmares; and in one particularly serious case

³³ One study found that electronic monitoring has an impact on the ability to participate in society; relationships; financial and emotional stress; sleep; feelings of dehumanisation and stigma See *Bhatia, Monish “Racial surveillance and the mental health impacts of electronic monitoring on migrants”*

³⁴ Process evaluation of the Global Positioning System (GPS) Electronic Monitoring Pilot Qualitative findings, Ministry of Justice Analytical Series 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779199/gps-location-monitoring-pilot-process-evaluation.pdf

³⁵ *The Queen (on the application of Jalloh) v Secretary of State for Home Department* [2020] UKSC 4, 12 February 2020, where the Supreme Court found that unlawful curfews of this nature amounted to false imprisonment.

³⁶ Page 23, Home Office bail policy https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952910/immigration-bail-v7.0-gov-uk.pdf

³⁷ Code of Practice: Electronic Monitoring, Electronic Monitoring Directorate, October 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926813/em-revised-code-practice.pdf

³⁸ “Excessively cruel” : Detention, deportation & separated families https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1314/Deportation_Report_Final.pdf

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self-harm and attempted suicide. Unsurprisingly, the trauma of enforced parental separation has a lasting impact on children, as demonstrated in a literature review we published in November 2020³⁹. We also found that families resisting deportation face immense obstacles to accessing justice as a result of the removal of legal aid, the prohibitive cost of private representation, and the barriers to appealing deportation while deprived of your liberty in a detention centre or a prison.

³⁹ Literature Review: The Impact of Forced Family Separation on a child. https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1217/Literature_Review_-_Impact_of_Forced_Separation_on_a_Child.pdf

