



# **Denial of justice: the hidden use of UK prisons for immigration detention**

**Evidence from BID's outreach, legal & policy teams**

**September 2014**

**Winner of the JUSTICE Human Rights Award 2010**

*“Very, very difficult, stressful & draining everything out of you. From phone calls, phone number, everything is just impossible, impossible” (Mr C to BID, June 2013)*

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Letter from BID to Home Office Immigration Enforcement in relation to inclusion of numbers and length of detention of detainees in the prison estate in published Home Office detention statistics, 2013

## 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 to 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.

We have a dedicated prisons legal team, which provides immigration legal advice and representation to a number of detainees held in the prison estate, and carries out outreach work in prisons in the form of legal surgeries, the distribution of self-help materials, and training for prison staff.

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)<sup>1</sup>; *D and Others v Home Office* [2005] EWCA Civ 38; [2006] 1 WLR 1003<sup>2</sup>; *R (AM) v SSHD and Kalyx Limited* [2009] EWCA Civ 219<sup>3</sup>; *Razai & Others v SSHD* [2010] EWHC 3151 (Admin)<sup>4</sup>; two landmark cases before the Supreme Court and *Shepherd Masimba Kambadzi v SSHD* [2011] UKSC 23, [2011] 1 WLR 1299<sup>5</sup>; *Lumba and Mighty v SSHD*, [2011] UKSC 12, [2012] 1 AC 245<sup>6</sup>; *Suppiah & Ors, R (on the application of) v SSHD* [2011] EWHC 2 (Admin) (11 January 2011)<sup>7</sup>; *BA v Home Office* [2012] EWCA Civ 944<sup>8</sup>; and most recently by the Court of Appeal in the case of *David Francis v SSHD* ((2013/2215/A)<sup>9</sup>.

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<sup>1</sup> In which the ECtHR considered the United Kingdom's administrative detention of foreign national former offenders for deportation.

<sup>2</sup> 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

<sup>3</sup> 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

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> Established a breach of a public law duty involving non-adherence to a published policy identifying substantive detention criteria.

<sup>7</sup> Challenges to immigration detention brought by families detained at Yarl's Wood. In finding that the detention of two families pending removal was unlawful and in breach of articles 5 and 8 ECHR, the court found there was significant evidence that the Secretary of State was failing to apply its policy that families should only be detained exceptionally with the rigour that it deserved.

<sup>8</sup> 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

## 1. PREFACE: “Fundamentally flawed”: the use of prisons as a place of detention

As of the 31 December 2013, **2,796** people were held in immigration detention in immigration removal centres, in short-term holding facilities (STHF), and in pre-departure accommodation (PDA)<sup>1</sup> but a further **1214** people were being held as immigration detainees in the prison estate<sup>1</sup>.

Being detained and losing one’s liberty is bad enough when a person is held in an immigration removal centre, but immigration detention in a prison is unfair and unjust from the start. Detainees held in the prison estate suffer from multiple, systemic, and compounding barriers to accessing justice, with an often devastating effect on their ability to progress their immigration case, seek independent scrutiny of their ongoing detention from the courts and tribunals, and seek release from detention, as well as on their physical and mental wellbeing.

This report describes these practical barriers, which include but are not limited to:

- No automatic access to on-site immigration legal advice like that provided for detainees in IRCs.
- The existence of financial disincentives to legal aid providers who wish to work with detainees in prisons under current Legal Aid Agency contracts.
- Immigration detainees routinely held under serving prisoner regimes.
- Prison regimes and restrictions that preclude the holding of mobile phones, adequate access to wing telephones during working hours, and a slow internal postal system in prisons, which delay and frustrate timely communication with legal advisers, the courts, and the Home Office.
- Lack of internet access in prisons which hinders legal research for unrepresented detainees, and makes cooperation with the Home Office redocumentation process very difficult
- Home Office escorting failures resulting in failure to produce detainees at bail hearings.
- Time limited videolink connections to prisons.
- Delays in receipt of Home Office bail summaries as a result of slow internal mail in prisons.
- Loss of grants of Home Office Section 4 (1)(c ) bail accommodation as a result of production failures and listing delays, sometimes after several months waiting for a grant of a bail address.
- Home Office failure to provide travel warrants enabling detainees held in prisons and produced in person at hearing centres to reach their Home Office Section 4(1)(c) bail address if granted bail.
- Failure to fit electronic tags within the prescribed two working days resulting in extended detention in prison.

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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.

<sup>9</sup> 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.

Concerned by the increasing numbers of immigration detainees being held in the prison estate, in February 2013, Bail for Immigration Detainees (BID) along with the Prison Reform Trust, Detention Advice Service (DAS)<sup>10</sup>, and the Association of Visitors to Immigration Detainees (AVID), wrote to the Immigration Minister and the Prisons Minister to draw attention to our concerns about the expanding use of the prison estate to hold immigration detainees.

“Prison is, quite simply, an inappropriate environment in which to hold those who have served the sentences handed to them by the criminal courts. This is clearly recognised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its standards on the treatment of persons deprived of their liberty, which sets out that holding immigration detainees in prison is “fundamentally flawed”. In its most recent report on the UK, published in 2009, the CPT highlighted its concern that it had encountered “a number of foreign nationals who were being held in prison a considerable time after their sentences had expired”, and made the explicit recommendation that “such persons, if they are unable to be deported at the end of their sentence, should be transferred to a facility designed to provide conditions of detention and a regime in line with the status of immigration detainees.”

The CPT standards acknowledge that “in certain exceptional cases, it might be appropriate to hold an immigration detainee in a prison, because of a known potential for violence.” However, the new agreement between UKBA and NOMS suggests that current policy is operating on a basis that is entirely contrary to this. We know that since the end of 2012, there has been a freeze on transfers of post-sentence detainees from prison to immigration removal centres (IRCs). This contradicts the UK Border Agency’s own [previous] policy of individualised risk assessment on a case-by-case basis, set out in Chapter 55 of the Enforcement Instructions and Guidance.

We would also draw your attention to the very significant issue of equivalence of treatment with detainees held in IRCs, particularly in relation to access to immigration legal advice. Whilst not without its problems, those held in IRCs have access to immigration advice through the Detention Duty Advice scheme. Across the prison estate, however, no such coordinated provision exists. Whilst some prisons engage the services of an independent immigration advice provider, such as the Detention Advice Service, as Prison Inspectorate reports repeatedly note, many do not. There is, in our experience, often a dearth of information about immigration solicitors in prison, and alongside the language difficulties that many detainees face, as well as the significant barrier to communication with the outside world posed by limited access to phones, this can result in detainees finding it almost impossible to access legal services in the community. Bail for Immigration Detainees’ most recent survey on access to legal representation across the detention estate found that, of those detainees who had previously been in prison, 79% had received no independent immigration legal advice whilst there (May 2012). The full usage of the 1,000-detainee capacity would mean that around one quarter of those held under immigration powers are now detained in prison.”

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<sup>10</sup> DAS ceased to operate in 2014.

The immigration minister replied on 20<sup>th</sup> May 2013. In one paragraph he noted<sup>11</sup>:

In relation to access to legal services, within the prison estate, the TSFNO population is able to access the same legal services as the serving population. All prisons have legal visits for face to face discussions as well as the usual telephone access. The only restriction compared to an IRC is that the legal representatives cannot call their client on the telephone as and when required, as prisons do not allow staff or those detained to carry mobile phones. There are telephones available within accommodation areas, which would be accessible during normal office hours.

If, when a prisoner becomes time served, they do not agree to remain in their current establishment, they are relocated to an establishment that can offer remand facilities. These facilities also offer access to legal services.

We were concerned that the minister's response appeared to suggest that immigration legal advice is available on the same basis to detainees in prisons as those held in the IRC estate. This has never been the case, as the Legal Aid Agency will acknowledge. The minister's reply does not reflect the experience of BID and other organisations acting as legal representatives to immigration detainees held in the prison estate, or providing support and advice, namely that detainees held in prisons are actively disadvantaged in relation to access to immigration legal advice and access to the courts. Regimes for immigration detainees held in prisons can never offer equivalent access to justice to that available in a standard IRC regime

In recent dealings with BID, Home Office senior managers appear to be of the view that detainees are held in the prison estate under remand conditions rather than serving prisoner conditions. Again, this view is not supported by the facts on the ground. Detainees are in BID's experience almost always held under serving prisoner regimes, despite having served the custodial element of their sentence.

Despite having the power to detain, and responsibility for the conditions of that administrative detention, the SSHD and her senior managers in the Home Office do not seem overly curious about the practical details of how up to a quarter of all immigration detainees in the UK are being held.

1. The Home Office has failed to engage with any of the concerns about access to justice for immigration detainees held in the prison estate, outlined in a briefing prepared by BID for the National Asylum Stakeholder Forum (NASF) meeting of September 2013<sup>12</sup>. Faced with this evidence, the response from the then director of Immigration Enforcement at the Home Office was not to agree to look further into these concerns but to reiterate that he was not aware of any cases where there were genuine logistical difficulties in getting access to legal advice in prisons.

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<sup>11</sup> The acronym 'TSFNO' used by the Minister in his letter stands for 'time served foreign national offender'.

<sup>12</sup> Bail for Immigration Detainees, (2013), '*Detention under immigration powers in UK prisons: severe restrictions on access to justice*'. Available at <http://www.biduk.org/148/briefing-papers/briefing-papers.html>

## 1. The unsuitability of prisons as a place of administrative detention

In BID's view prisons are not appropriate places to hold immigration detainees, including those who have previously served a custodial sentence. This view, confirmed by evidence from our legal casework, is one which is shared by HM Prison Service, by HM Inspectorate of Prisons, and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its standards on the treatment of persons deprived of their liberty (2013)<sup>13</sup>, sets out its position that holding immigration detainees in prison is "fundamentally flawed".

"In those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel." (Council of Europe, 2013: 65)

In its report on the UK published in 2009<sup>14</sup>, the Committee for the Prevention of Torture (CPT) highlighted its concern that in prisons in the UK it had encountered "a number of foreign nationals who were being held in prison a considerable time after their sentences had expired", and made the explicit recommendation that:

"Such persons, if they are unable to be deported at the end of their sentence, should be transferred to a facility designed to provide conditions of detention and a regime in line with the status of immigration detainees." (Council of Europe, 2009: para 82: 41)

In its response<sup>15</sup> to this report, in December 2009 the UK Government noted:

"295. The UK Border Agency (UKBA) makes every effort to ensure that a foreign national prisoner's removal by deportation coincides, as far as possible, with his or her release from prison on completion of sentence. Where a detainee refuses to cooperate with the removal or deportation process, detention may be prolonged. The Courts have supported this position.

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<sup>13</sup> Council of Europe, (2013), 'CPT standards. CPT/Inf/E (2002) 1 - Rev. 2013 English', Strasbourg. Available at <http://www.cpt.coe.int/en/documents/eng-standards.pdf>

<sup>14</sup> Council of Europe, (2009), 'Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. CPT/Inf (2009) 30', Strasbourg. Available at <http://www.cpt.coe.int/documents/gbr/2009-30-inf-eng.pdf>

<sup>15</sup> Council of Europe, (2009), 'Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following its visit to the United Kingdom from 18 November to 1 December 2008. CPT/Inf (2009) 31', Strasbourg.. Available at <http://www.cpt.coe.int/documents/gbr/2009-31-inf-eng.pdf>



296. Foreign criminals subject to deportation action are detained under Immigration Powers upon the expiry of their criminal sentence pending removal or deportation from the UK. However there may be delays in the deportation process if foreign national prisoners do not fully co-operate with the documentation process. Failing to answer questions or providing false information will prevent or delay the UK Border Agency obtaining a travel document to facilitate their removal.

297. An individual's detention is reviewed on a regular basis by a senior manager at a level appropriate to the length of detention. The majority of those whose detention needs to be maintained post sentence pending their deportation are transferred from prisons to be detained in the UK Border Agency Removal Estate. In some instances, it is necessary for certain individuals to remain in prison (despite their detention under Immigration Act powers). This may be for reasons of security or control and where it is assessed that those concerned are not suitable for the more relaxed regimes provided in immigration removal centres. A protocol agreement between the UK Border Agency and the Ministry of Justice reflects the types of offenders concerned" (Council of Europe, 2009: 58)

Here the UK Government is clearly acknowledging that:

- i) At the time of their response to the CPT (2009) some form of risk assessment was being carried out in relation to the risk posed in terms of security or control by individuals;
- ii) Only a subset of time-served foreign national prisoners ("certain individuals", "the types of offenders concerned") will be detained under immigration powers in prisons after the custodial element of any criminal sentence;
- iii) That regimes in immigration removal centres are "more relaxed" than those provided in prisons.

Although much emphasis is put in the UK Government response to the CPT in 2009 on the non-cooperation of detainees in relation to obtaining travel documents as justification for ongoing detention, it is not clear what relevance this has to the practice of holding of immigration detainees *in the prison estate*, which was the concern that the Committee for the Prevention of Torture was addressing. In any case, since this UK Government response to the CPT in 2009, the Independent Chief Inspector of Borders and Immigration (ICIBI) has carried out an inspection of the Home Office travel document processes<sup>16</sup> and noted in 2014:

"The Home Office claims that non-compliance by individuals with the ETD process is a major source of delay. I was concerned to find, however, that it did not have a clear picture of the scale of the problem, other than in criminal cases, and had no effective strategy for tackling it" (ICIBI, 2014:2)

"... despite recommendations I have made previously, I was concerned to find that the Home Office was still keeping foreign criminals, who had completed their prison sentences, in immigration detention for months or even years in the hope that they would eventually

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<sup>16</sup> Independent Chief Inspector of Borders & Immigration, (2014), '*An Inspection of the Emergency Travel Document Process May-September 2013.*' Available at <http://icinspector.independent.gov.uk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf>

comply with the re- documentation process. Given the legal requirement only to detain individuals where there is a realistic prospect of removal, this is potentially a breach of their human rights” (ICIBI, 2014: 2)

### **Evidence on differential position of the UK Government on the use of prisons in Scotland to hold immigration detainees**

As recently as March 2013, in relation to immigration detainees held post-sentence in prisons in Scotland, the UK Government partially accepted the CPT recommendation that prisons are not normally suitable for as a place of immigration detention, stating that it has an action plan for work between the Scottish Prison Service (SPS) and the Home Office to ensure that such administrative detentions in prison are kept under constant review and detainees are transferred to an IRC at the earliest possible stage. There is no equivalent plan for prisons in England & Wales, where, by contrast, NOMS/HM Prison Service has a Service Level Agreement<sup>17</sup> with the Home Office for the use of prison beds for immigration detainees.

### **HM Inspectorate of Prisons (HMIP)**

As recently as January 2014, HM Inspectorate of Prisons stated at BID’s AGM<sup>18</sup> that an inspection expectation for establishments in the prison estate in the UK is that:

“Immigration detainees held solely under administrative powers are not held in prisons other than in exceptional circumstances following risk assessment” (HMIP, 2014)<sup>19</sup>

HMIP also reported that during inspection visits the inspectorate was now finding increasing numbers of immigration detainees in prison establishments, late notification of detention to these individuals, no change in prison regime on becoming a detainee rather than a serving prisoner, poor access to immigration legal advice and representation, lack of interpretation services, along with few resettlement services

Following inspection visits to specific prison establishments HMIP has made a number of recommendations that prisons are not appropriate places for holding immigration detainees. For example, in the case of HMP Wandsworth:

“Foreign national prisoners included 69 held administratively beyond the end of their sentence, the longest for over two years. This was poor practice and these detainees did not have access at Wandsworth to the facilities available at an immigration removal centre – such as the internet, fax machines and a less restrictive regime” (HMIP, 2013: 35)<sup>20</sup>

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<sup>17</sup> The current Service Level Agreement is not in the public domain.

<sup>18</sup> Denial of justice: the hidden use of prisons for immigration detention & the BID Annual General Meeting, Tuesday January 21st 2014, London. See <http://bit.ly/1nKZz6c>

<sup>19</sup> HM Inspectorate of Prisons, PowerPoint presentation ‘*Immigration detainees in prisons*’, given at BID’s AGM January 2014, slide 3.

<sup>20</sup> HM Inspectorate of Prisons, (2013), ‘*Report on an announced inspection of HMP Wandsworth by HM Chief Inspector of Prisons 13-17 May, 10-14 June 2013*’. Available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/wandsworth/wandsworth-2013.pdf>

In the case of HMP Pentonville which held 67 immigration detainees in November 2013<sup>21</sup>:

“The prison was not an appropriate place in which to hold a large number of immigration detainees” (HMIP, 2013: 6)<sup>22</sup>, “S20.. ...Overall, Pentonville was not an appropriate place in which to hold immigration detainees” (HMIP, 2013:15)<sup>23</sup>.

And in the case of HMP Liverpool, which held eleven detainees in November 2013<sup>24</sup>:

“Foreign national detainees should be moved to an immigration detention centre once their criminal sentence has been served. (Repeated recommendation 4.14)” (HMIP, 2014: 35)<sup>25</sup>

### **National Offender Management Service**

The view of the National Offender Management Service (NOMS)/ HM Prison Service, as outlined in Prison Service Instruction 52/2011 *Immigration, Repatriation and Removal Services*’ (2011) is that:

“Immigration detainees should only remain or be moved into prison establishments when they present specific risk factors that indicate they pose a serious risk of harm to the public or to the good order of an Immigration Removal Centre, including the safety of staff and other detainees, which cannot be managed within the regime applied in Immigration Removal Centres. This regime derives from Detention Centre Rules and provides greater freedom of movement and less supervision than prisons, as well as access to the internet and mobile telephones” (NOMS, 2011: para 2.68)<sup>26</sup>.

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<sup>21</sup> Source: Home Office management information provided to NASF stakeholders.

<sup>22</sup> Available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/pentonville/Pentonville-2013.pdf>

<sup>23</sup> HM Inspectorate of Prisons, (2013), ‘Report on an unannounced inspection of HMP Pentonville by HM Chief Inspector of Prisons 27 August–6 September 2013’. Available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/pentonville/Pentonville-2013.pdf>

<sup>24</sup> Source: Home Office management statistics provided to NASF stakeholders.

<sup>25</sup> HM Inspectorate of Prisons, (2014), ‘Report on an unannounced inspection of HMP Liverpool by HM Chief Inspector of Prisons 14–25 October 2013’ Available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/liverpool/liverpool-2013.pdf>

<sup>26</sup> NOMS, (2011), ‘Prison Service Instruction 52/2011 *Immigration, Repatriation and Removal Services*’.

## 2. Immigration detainees in prisons: administrative detention within a criminal justice framework

**The manner and conditions of detention of immigration detainees in the prison estate take place entirely outside the scope of the statutory Detention Centre Rules, the Detention Services Operating Standards, and Detention Service Orders.**

Any comparison of the treatment of immigration detainees in the UK removal centre estate, which is managed by the Home Office, and those detainees held in the prison estate, which falls under the overall management of the National Offender Management Services, must consider the operating instructions relied on daily by managers and custodial staff in these establishments. Such instructions and guidance are entirely different, and reflect the overall control of these two separate custodial estates, the one operating within the criminal justice system and the other providing custody for administrative purposes.

### **Instruments governing the conditions and treatment of immigration detainees in the IRC estate**

Conditions of immigration detention in the immigration removal centre estate are governed by various instruments. The Detention Centre Rules (2001), a statutory instrument laid before Parliament, sets out rules governing admissions and discharge, welfare and privileges, religion, communications, healthcare, maintenance of security and safety (control or restraint, use of force, temporary confinement), duties of custody officers, access to detention centres, and visiting committees.

These Rules are supplemented by a set of Detention Services Operating Standards (2002)<sup>27</sup> which set out minimum auditable standards across a wide range of services, procedures, and functions of the operation of an immigration removal centre.<sup>28</sup>

Detention Service Orders (DSOs) are instructions outlining procedures to be followed by Home Office UK Visas and Immigration staff<sup>29</sup>. For example Detention Service Order 06/2013 '*Reception and Induction Checklist and Supplementary Guidance*'. These instructions are updated from time to time, though we note that some DSOs, for example DSO 10/2007 '*The issuing of travel warrants to detainees attending asylum and immigration tribunal (AIT) courts*'<sup>30</sup> which has not been updated for seven years, are of limited value because the IRC and tribunal hearing centre infrastructure and practice to which they relate has changed significantly since the date of publication seven years ago.

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<sup>27</sup> Available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257352/operatingstandards\\_manual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257352/operatingstandards_manual.pdf)

<sup>28</sup> For example, detainees' cash, detainees' property, disabled detainees, female detainees, and handling a death in detention.

<sup>29</sup> Available at <https://www.gov.uk/government/collections/detention-service-orders>

<sup>30</sup> Available at <https://www.gov.uk/government/publications/travel-warrants-for-detainees-attending-asylum-courts>

A number of HM Prison Service Instructions (PSIs) and Orders (PSOs) relate to the criminal justice aspects of foreign nationals in the prison estate, and prison staff liaison with officers of the Home Office (including UKBA and its predecessors), but these instructions have not been written to cater to the unique status of immigration detainees facing lengthy stays, possibly of some years in a few cases, in the prison estate. Regardless of any contractual agreement between NOMS and the Home Office governing the use of beds in the prison estate, the work of prison governors and prison staff is governed by Prison Service Instructions and Orders, and governors and prison staff are accountable to NOMS and the Ministry of Justice not the Home Office.

Practices that are fair and just in the context of a custodial sentence may be unfair and even unlawful when applied to individuals held in administrative detention that could, or may need to be, ended at any point at the discretion of the SSHD for a variety of reasons. Conversely the absence of policies and practice prevailing in IRCs may lead to unlawful practices in prisons.

For example, Rule 35 of the Detention Centre Rules 2001, on paper at least, is an essential safeguard for vulnerable people held in immigration removal centres, including those who have been tortured. Rule 35 requires that the doctor at any immigration removal centre “shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.” Rule 35 also requires that “the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State” and that a copy of the Rule 35 report be sent to the Secretary of State “without delay”<sup>31</sup>.

Unfortunately, despite the existence of the Rule 35 safeguarding mechanism, there is evidence of systematic failure of the operation of the Rule 35 process in IRCs<sup>32</sup>, and there has been criticism of the Home Office on this issue from, among others, HM Inspectorate of Prisons<sup>33</sup>, as well as a number of court judgments<sup>34</sup>.

Notwithstanding the effects of the Rule 35 process in IRCs, there is no requirement for an equivalent process in the prison estate, meaning that vulnerable immigration detainees have very

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<sup>31</sup> Home Office Detention Services Order DSO 17/2012 states at paragraph 34 that the Home Office case owner has two working days to respond to a Rule 35 report and must engage with the concerns raised and give reasons for maintaining detention or ordering release. The case owner’s name and team must be clearly identified. The medical practitioner should be sent a copy of the Home Office response (para 26) and if the Rule 35 report is considered deficient in some way, clarification must be sought from the medical practitioner (para 32).

<sup>32</sup> See for example, Medical Justice, (2012), “The Second Torture”: the immigration detention of torture survivors’. Available at <http://www.medicaljustice.org.uk/about/mj-reports/2021-the-second-torture-the-immigration-detention-of-torture-survivors-22052012.html>

<sup>33</sup> HMIP and 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’. Available at <http://www.justiceinspectors.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/04/immigration-detention-casework-2012.pdf>

<sup>34</sup> For example, *EO & Ors, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) (17 May 2013). Available on BAILLI at <http://www.bailii.org/ew/cases/EWHC/Admin/2013/1236.html>

little chance of being identified and brought to the attention of Home Office caseowners for consideration of their release from administrative detention. Such detainees held in prisons may continue to be detained in breach of Home Office policy. The identification and consideration for release of ill and vulnerable immigration detainees held in prisons is but one aspect of detention conditions that is not currently subject to detention-specific guidance.

It is not at all clear to BID that the Home Office properly considered the possibility of contradictions between its own guidance and instructions and the NOMS instructions relied on by prison governors and staff, or ensured that safeguards for vulnerable and ill detainees held in prisons are in place, prior to its decision to use the prison estate to house hundreds of immigration detainees regardless of their risk level, and often in isolated conditions.

## Hidden detainees: failure of the Home Office to include detainees held in the prison estate in published detention statistics

Immigration detainees held in the prison estate, in numbers up to at least 1200 at any one time, are not included in any published Home Office statistics.

Not only are immigration detainees in the prison estate held entirely outside the scope of the statutory Detention Centre Rules, the Detention Services Operating Standards, and Detention Service Orders, but their numbers do not appear in published Home Office statistics on immigration detention<sup>35</sup>. This cohort of detainees is therefore entirely hidden from public view.

### Numbers and distribution

Publicly available Home Office migration statistics (27 February 2014)<sup>36</sup> show that at the end of December 2013, 2,796 people were held in immigration detention in immigration removal centres, in short-term holding facilities (STHF), and in pre-departure accommodation (PDA).

On 4<sup>th</sup> December 2013 the Home Office told BID that there were 959 immigration detainees being held in the prison estate across 81 prisons<sup>37</sup>. A response by the then-Minister for Immigration on 10<sup>th</sup> December to a parliamentary question noted that for “the week commencing 2 December 2013, there were 957 immigration detainees held in prisons”<sup>38</sup>. In April 2014 the Secretary of State for Justice noted in parliament that

“As of the 31 December 2013, 1,230 people were being held in prisons in England and Wales not in relation to criminal proceedings. Of these, 1,214 were being held as immigration detainees”<sup>39</sup>

For the avoidance of doubt, these are foreign nationals detained by the SSHD under immigration powers and housed in the prison estate, not foreign nationals either on pre-trial remand or serving a custodial sentence and held under criminal justice powers.

Therefore in addition to a cohort of 2796 people publicly acknowledged by the Home Office to be held under immigration powers, there were therefore a further 1214 (or possibly 959) detainees held in the prison estate at that time who were not reflected in published Home Office detention statistics, an additional 43% (or possibly 34%) of the published Home Office detention snapshot for

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<sup>35</sup> The Ministry of Justice similarly does not publish information on the number of immigration detainees in the prison estate in the UK, only offering data on nationality, ethnicity, and religion<sup>35</sup>.

<sup>36</sup> Home Office ‘*Immigration statistics, October to December 2013*’. Published 27 February 2014. Available at <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2013/immigration-statistics-october-to-december-2013#detention-1>

<sup>37</sup> Source: Home Office management information provided to stakeholders of the National Asylum Stakeholder Forum (NASF).

<sup>38</sup> Hansard: HC Deb, 12 December 2013, c319W

<sup>39</sup> Hansard 9 April 2014, c249W. There are, however, widely discrepant figures available from the Home Office for the numbers of detainees held under sole Immigration Act powers in prisons. An alternative figure of 850 immigration detainees held in prisons on the same date (31 December 2013) is found in Hansard 13 May 2014, c 459W.

that date. Put another way, at the end of December 2014, around 4010 (or possibly 3753) people in total were being detained under immigration powers in the UK, but a significant proportion of this population is not included in published Home Office statistics and is therefore hidden from public and parliamentary view.

### **Home Office failure to publish statistics on detainees held in the prison estate**

Our concern here is that Home Office failure to include the growing number of prison-held detainees in the overall detention statistics, and the length of time they have spent in detention is now actively misleading parliament, inspectorates and other oversight bodies, and the public.

Since 2012 BID has been in correspondence with statisticians in Home Office Statistics, and more recently with senior managers at the UK Border Agency (now the Home Office) in an attempt to get comprehensive and publicly available data on the number of immigration detainees held in the prison estate and the length of their detention.

On 29<sup>th</sup> May 2012 BID, together with Detention Advice Service (DAS) wrote to Bryce Millard, Acting Head Asylum and Enforcement Statistics and Publication (AESP), Migration Statistics at Home Office Statistics, seeking inclusion of prison-held immigration detainees in Home Office quarterly detention statistics. We wrote:

“As Bail for Immigration Detainees highlighted in its response to the Home Office’s 2011 consultation on immigration statistics, according to a Service Level Agreement between the UK Border Agency and NOMS issued in 2009, data on time-served foreign nationals in the prison estate is collected, shared, and discussed on a monthly basis by both the Ministry of Justice and the Home Office. We would anticipate, therefore, that there would be little or no additional cost to making this figure available in the Home Office quarterly immigration statistics. Finally, we would point out that, since foreign nationals held post-sentence in prison under immigration powers alone are clearly part of the detained population, there appears, quite simply, to be no logical reason for excluding them from the quarterly figures.”

Early in 2013 BID decided to escalate the issue of lack of published statistics on this population to a national stakeholder level with the Home Office. By mid-June of 2013 the Home Office told BID that it was in a position to provide snapshot figures of this population to attending stakeholders at the National Asylum Stakeholder Forum (NASF) in the form of management information (in other words data not of publishable quality) on the occasion of each quarterly meeting of the NASF.

These snapshots indicate the total number of detainees in the prison estate for a specified week, and show the number of detainees by prison establishment<sup>40</sup>. This information was first provided to NASF stakeholders, including BID, in May 2013, and subsequently for September and November 2013. However, this information has not been provided since despite two requests from BID dated 13<sup>th</sup> March and 31<sup>st</sup> March 2014.

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<sup>40</sup> In November 2013 this snapshot also included a breakdown of 18 year olds, 19 year olds, 20 year olds, and over-21 year old detainees held in the prison estate, at BID’s request.



### **Published data on length of detention in the prison estate**

In September 2013 BID wrote at the request of the Home Office to Jonathan Nancekivell-Smith, Director of Returns, Immigration Enforcement, to lay out in detail what BID wished to see changed in relation to published statistics on prison-held detainees<sup>41</sup>. Specifically BID requested that the published data on the total number of immigration detainees should include those held in prisons post-sentence, and for the length of their time in detention to be factored in to the various tables on length of detention currently produced and published by the Home Office. Essentially, all existing published Home Office statistics on detention will need to be adjusted to include the prison-held cohort. No response has yet been received to these specific requests.

In correspondence with BID, Home Office statisticians have highlighted ongoing problems with matching separate databases belonging to the Ministry of Justice and the UK Border Agency/Home Office in such a way as to ensure reliable information. The Home Office has told BID that they do not collect data on length of detention in prisons.

The failure to be able to indicate length of time spent in detention is particularly worrying, as under the current agreement with NOMS to use bed space in the prison estate up to a maximum capacity of 1000 beds, Home Office policy on transfers from immigration detention in prison to immigration detention in an IRC is largely dependent at present on the length of time spent held in a prison. Essentially, those detainees that have been held in a prison for the longest post-sentence are first in line for a transfer to an IRC. Home Office Enforcement Instructions & Guidance Chapter 55 'Detention'<sup>42</sup>, at 55.10.1 'Criteria for detention in prison' states:

“In the absence of the criteria or risk factors set out above, the length of time that an FNO has been held in a prison bed solely as an immigration detainee will be the main factor in deciding when to transfer to an IRC. In other words, priority for transfer to an IRC will be given to those FNOs who have been held in prison beds the longest.”

The only data BID has on length of immigration detention in prisons is that obtained from our own clients. In June 2013 BID administered its long-running legal advice in detention questionnaire to clients detained in prisons for the first time, by post (it is now run every six months). For that small sample BID found that the average (mean) length of detention in prison post-sentence was 11.5 months.

The length of time spent in detention to date at the time of interview<sup>43</sup> by detained respondents is shown below for detainees in the IRC estate and separately for participating BID clients detained in the prison estate, for the surveys administered in May 2013, November 2013 and May 2014.

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<sup>41</sup> See Annex A for this letter in full.

<sup>42</sup> Available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288547/Chapter\\_55.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288547/Chapter_55.pdf)

<sup>43</sup> Information taken from BID research report 'Access to immigration advice for immigration detainees in IRCs & prisons' (provisional title, publication pending).

<b>IRC detainees</b>	<b>BID IRC Survey 6 May 2013</b>	<b>BID IRC Survey 7 Nov 2013</b>	<b>BID IRC Survey 8 May 2014</b>	<b>HMP detainees</b>	<b>BID HMP Survey 1 May 2013</b>	<b>BID HMP Survey 2 Nov 2013</b>	<b>BID HMP Survey 3 May 2014</b>
<b>Average (mean) length of detention</b>	8 months	6 months	8 months	<b>Average (mean) length of detention</b>	12 months	12 months	14 months
<b>Range</b>	(1-40 months)	(1-28 months)	(1-40 months)	<b>Range</b>	(2-36 months)	(1-54 months)	(1-84 months)
1 day - 1 month to date	23%	23%	11%	1 day - 1 month to date	0%	0%	0%
1- 3 months to date	22%	26%	20%	1- 3 months to date	10%	15%	21%
3- 6 months to date	19%	21%	28%	3- 6 months to date	20%	7%	13%
6- 9 months to date	13%	7%	14%	6- 9 months to date	15%	19%	33%
9 months - 1 year to date	5%	8%	9%	9 months - 1 year to date	25%	7%	0%
1 year to <2 years to date	14%	7%	12%	1 year to <2 years to date	15%	30%	13%
2 years to <3 years to date	1%	2%	4%	2 years to <3 years to date	10%	7%	17%
3 years + to date	1%	0%	1%	3 years + to date	5%	7%	4%
not known	0%	6%	0%	not known	0%	1%	0%

(Source: Bail for Immigration Detainees)

At the time of writing, of our total caseload, the detainees who have spent the longest time in immigration detention are those who are held in the prison estate. This data should not be taken as representative of lengths of detention across the IRC estate<sup>44</sup>, but only of BID's client group at the time of survey.

<sup>44</sup> See for example Home Office Statistics, Immigration statistics, January to March 2014. Available at <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2014/immigration-statistics-january-to-march-2014#detention-1>

## 6. Regimes & lock up: the fiction of immigration detainees being held on remand regimes in prisons

The Home Office *Enforcement Instructions & Guidance*, Chapter 55 'Detention and temporary release'<sup>45</sup>, at 55.10.1 'Criteria for detention in prison', is silent on the type of regime under which immigration detainees are to be held under in the prison estate, referring only to "prison accommodation" or "prison beds."

Prison Service Instruction 52/2011 *Immigration, Repatriation and Removal Services* is more specific, offering the following:

### "Allocation of those detained solely under immigration powers

2.65 Where foreign national prisoners have reached the end of their custodial sentence but continue to be held under immigration powers there is no automatic requirement to return them to a local prison, although they should be treated as unconvicted prisoners (see PSO 4600 Unconvicted, Unsented and Civil Prisoners)

2.66 Persons detained only under immigration powers must be treated as an unconvicted prisoner with the same status and privileges (see PSO 4600). Where a prisoner is held beyond the end of his custodial sentence in a prison which does not normally hold unconvicted prisoners, consideration may be given to enable the prisoner to remain where (s)he is. The prisoner must be made aware that (s)he will be held with convicted prisoners and his/her agreement must be recorded on the form at Annex C. Where an immigration detainee opts to be held with convicted prisoners, all reasonable efforts must be made to accommodate the privileges to which unconvicted prisoners are entitled. However, it remains a matter for the Governor to determine whether or not it is appropriate for the prisoner to remain in convicted conditions.

2.68 Immigration detainees should only remain or be moved into prison establishments when they present specific risk factors that indicate they pose a serious risk of harm to the public or to the good order of an Immigration Removal Centre, including the safety of staff and other detainees, which cannot be managed within the regime applied in Immigration Removal Centres. This regime derives from Detention Centre Rules and provides greater freedom of movement and less supervision than prisons, as well as access to the internet and mobile telephones"

The intention, on the part of HM Prison Service at least, appears to be that immigration detainees (like pre-trial remand prisoners of whatever nationality) should be given greater opportunity for contact, communication, and visits with family and friends and legal advisors, among other benefits. PSI 52/2011 makes specific reference to the access to the internet and mobile telephones available under an IRC regime.

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<sup>45</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307995/Chapter55.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf)

Among BID's caseload of immigration detainees in prisons there is a significant proportion of individuals whose offences would be deemed 'low level' by the Crown Prosecution Service and who have been assessed by their NOMS offender managers as posing only a low risk of harm to the public and a low risk of reoffending. There is no obvious or justifiable reason for these individuals to be held in the prison estate.

While Home Office managers routinely state that detainees are held in the prison estate under remand conditions, it appears that little has been done by these same managers to check whether or not this is in fact the case. One only has to visit prisons where immigration detainees are held, as BID legal managers do on a regular basis, or read letters to BID from detainees held in prisons, to discover that this is not the case. Detention under serving-prisoner conditions is the norm – not the exception – for BID's prison-held clients, and in each of the prisons where we deliver face to face legal advice to immigration detainees.

BID's legal work with our own clients detained in prisons, with other organisations that work in prisons to support and advise foreign nationals, and our outreach and research among prison-held detainees themselves, reveals a more complex picture that goes beyond a straightforward remand regime versus serving prisoner regime division.

We have no information yet on how the purchase by the Home Office of a specific number of prison beds for holding immigration detainees articulates with HM Prison Service policies on their location. Although HM Prison Service policy is that immigration detainees held in prisons 'should' or 'must' be held with unconvicted prisoners, if this is not possible for practical reasons (such as the security category or nature of the prison in which they are being held) during their custodial sentence, then detainees are required to sign a disclaimer to say that they are prepared to accept being held in serving-prisoner conditions. We have no information at present to indicate whether detainees in all the dozens of prisons where they are currently held are indeed routinely offered such disclaimers to sign, or what steps are taken by HM Prison Service or the Home Office if a detainee is not willing to sign such a disclaimer.

What is clear is that detainees in every prison that BID visits to provide legal surgeries and bail workshops, as well as those clients who reply to our regular legal advice surveys of detainees across both estates, report to us that they experience no practical difference in their daily routine once they finish the custodial part of their sentence and become an immigration detainee in the same establishment.

It seems a reasonable assumption that holding detainees in prison conditions, without on-site Home Office immigration staff and automatic access to immigration legal advice, is likely to inhibit progress and any subsequent resolution of immigration cases. Severe practical barriers to communication slow detainees' interactions with the Home Office just as much as with legal representatives and family members.

In the aspects of prison regimes that really matter to detainees trying to resolve their immigration case, including access to legal advice and the courts, it is clear that being held in a prison puts detainees at a clear disadvantage when compared with detainees held in IRCs.

Immigration detainees held in prisons told BID in June 2013:

*“It is hard to find someone to help me with my immigration case because I am only allowed to leave my cell for one hour a day, which is never enough time for me to do anything”.*

*“I’m being made to follow a ‘B Category’ prison regime where I was transferred 4 months after my sentence expired.”*

*“I am very upset. After my one month sentence was completed I have spent a further 10 months in the prison, which I feel was very unfair.”*

*“The prison service have made it loud and clear that they’re not here to help me with my immigration matter but are here to punish which is what prison is about, which to me make no sense as I’ve finished my sentence 4 years ago.”*

When subject to a typical serving-prisoner regime with long periods on lock up or away from the wing on work or activities, without access to wing telephones, immigration detainees held in prisons may have a window of only thirty minutes during office hours to both eat lunch and use a wing telephone to find a legal advisor, or speak to their legal advisor, to the Home Office<sup>46</sup> or the courts.

Although the exact times will vary between establishments, the examples below of prison regimes indicate the restrictions placed upon immigration detainees in prisons. These timetables were reported to BID by immigration detainees in these prisons, and subsequently checked with prison staff and other support organisations. The details were correct at the time of collection.

*HMP Peterborough (female side) immigration detainee regime (February 2014)*

Remand regime for detainee on activities rather than work in HMP Peterborough (female side)		
8.30 – 11.45	activities	Away from wing and telephones
11.45 – 12.15	lunch and exercise	Access to telephone, must also eat lunch in this 30 minute slot.
12.15 – 1.45	lock up	No access to telephones
1.45 – 5.45	activities	Away from wing and telephones
5.45 – 6.30	dinner and association	Access to telephones but outside core business hours for solicitors
6.30	lock up	No access to telephones

*HMP Peterborough (male side) immigration detainee regime (February 2014)*

07.30 – 8.00	Cell door opens Breakfast Can use wing telephone	Access to telephones but not core business hours for solicitors
08.00 – 8.30	Exercise or remain in cell	No access to telephones
08.30 – 11.45	Unlocked from cell and wing	Away from wing and telephones

<sup>46</sup> For example, chasing the progress of an application to the Home Office for Section 4 (1)(c) bail accommodation in order to be able to lodge an application for release. BID’s casework and research shows these applications are currently subject to delay of months in many cases.

	For education, gym, library Have to leave the wing Must work – if you refuse get an IPP If you are written down 3 times, you get put down a level from standard to basic (no TV, no association)	
11.45 – 12.15	Back to the wing Lunch Can use wing phone	Access to telephones, must also eat lunch in this 30 minute slot.
12.15 – 1.45	Lock up	No access to telephones
1.45 – 4.45	Unlocked from cell and wing For education, gym, library Have to leave the wing	Away from wing and telephones
4.45 – 6.45	Back to the wing Tea/supper Association, pool Can use wing telephone	Access to telephones but not core business hours for solicitors
6.45	Lock up	No access to telephones

Detainees described to BID how their lock up regime did not change when they finished the custodial part of their sentence and became detainees held under immigration powers. In HMP Peterborough both remand and sentenced prisoners have the same lock up regimes. Remand prisoners (and detainees) can work by choice, but are away from their wing and therefore unable to access telephones, with the exception of one 30 minute slot at lunchtime, until lock up at the end of the day. Detainees who chose to work have no routine access to telephones on the wings during working hours. By the time detainees who work have returned to their wing and the telephones, solicitors' offices are often closed. This timetable restricts the opportunity for telephone contact with a solicitor on time-sensitive legal matters, including applications for immigration bail, or with a Home Office caseowner, to an entirely unreasonable as well as counter-productive degree.

The remand regime at this establishment offers a range of activities, and under this regime detainees can have visits every day. However, if a detainee opts not to work and engages in activities instead, they will have a 30-minute window during which they can use telephones on their wing, during which they must also take lunch. They may not be able to get to speak to their solicitor during this period if he or she is unavailable.

A regime such as this is in no way comparable to the 24 hour access to telephones via mobile phones, generally available to detainees held in IRCs.

At HMP Huntercombe, all immigration detainees are asked to sign a disclaimer to say that they agreed to be held under the conditions outlined below, which are identical to serving prisoners.

*HMP Huntercombe regime for immigration detainees (March 2014)*

- Howard, Fry and Rich wings

8.00 – 8.15	Open, breakfast	Access to telephones but not core business hours for solicitors
8.30 – 11.45	Allocated to work or education, unless refusing to work (in which case will lose enhanced status).	Away from wing and telephones
11.45 – 1.30	On wing, access to telephone	Access to telephones.
1.40 – 4.15	Allocated to work or education, unless refusing to work (in which case will lose enhanced status).	Away from wing and telephones
4.15 – 6.30	On wing, association, access to telephone.	Access to telephone but out of core office hours
6.30	Lock up. Can book a course until 7pm.	No access to telephone

- Mountbatten wing

7.45 – 8.30	Open, breakfast	Access to telephones but not core business hours for solicitors
8.30 – 11.45	Allocated to work or education, unless refusing to work (in which case will lose enhanced status).	Away from wing and telephone
11.45 – 1.30	On wing, access to telephone	Access to telephones
1.40 – 4.15	Allocated to work or education, unless refusing to work (in which case will lose enhanced status).	Away from wing and telephones
4.15 – 5.15	On wing, access to telephone.	Access to telephone
5.15 – 6.00	Lock up	No access to telephone
6.00 – 7.30	Association (only 3 phones per wing, now wing capacity increased to 90 from 60).	Access to telephone but out of core working hours.
7.30	Lock up	No access to telephone

In practical terms the serving-prisoner regimes governing the custody and daily life of immigration detainees held in prisons in England & Wales cannot be considered to offer equivalent access to communication with legal advisors, the courts and tribunals, and the Home Office, to that available under a standard IRC regime.

## Transfer of immigration detainees from prison to IRC

A request for disclosure under the Freedom of Information Act to the Home (August 2013) seeking information on the number of transfers of detainees from prisons to IRCs, showed that despite the current revised Home Office policy outlined in *'Enforcement Instructions and Guidance'* at Chapter 55.10.1 on transfers to prison at the end of the custodial element of a sentence, which appeared to mean that foreign nationals facing deportation may remain in the prison estate regardless of the level of risk that they posed, a number of transfers of immigration detainees from the prison estate (managed by the Ministry of Justice) to the immigration removal centre estate (managed by the Home Office) appeared to be taking place.

Agreements between NOMS and the Home Office for the use by the Home Office of bed space in the prison estate cannot be helpful for prison governors and staff at the present time, given current concerns in many quarters about overcrowding in the prison estate. It is particularly worrying that the agreed number of immigration detainees in prisons has risen from one Service Level Agreement to the next, and the number of detainees in the prison estate appears to have exceeded the agreed number on at least one occasion at the end of 2013<sup>47</sup>. We cannot know whether this has happened more frequently as the Home Office does not publish the number of immigration detainees in the prison estate.

On September 3<sup>rd</sup> 2013 BID wrote to Jonathan Nancekivell-Smith, (Director, Returns, Immigration Enforcement) at the Home Office to seek clarification of the circumstances under which such transfers from prisons to removal centres were taking place. We asked the following questions:

### “1. Return to prison if removal fails

Under the current policy at 55.10.1, where immigration detainees are transferred to IRCs from detention in prison with removal directions in place, are they generally returned to the prison estate (either directly or indirectly via the IRC they left from) if the removal does not proceed? Or would you expect that where a removal has failed those individuals would generally then remain in the IRC estate? This enquiry is directed towards the general intention of the policy as applied to the proportion of removals that fail.

### 2. Transfers to IRCs under the current policy before the 1000 bed capacity reached

We understand that the recent Detention and Escorting Forum meeting<sup>48</sup> was told by the Home Office that the 1000 bed capacity purchased by the Home Office for holding immigration detainees has not yet been reached, but when that capacity is finally reached the Home Office will begin to transfer people to the IRC estate, prioritising those held longest in prison under immigration powers.

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<sup>47</sup> “As of the 31 December 2013, 1,230 people were being held in prisons in England and Wales not in relation to criminal proceedings. Of these, 1,214 were being held as immigration detainees”. Source: Hansard 9 April 2014, c249W

<sup>48</sup> This is a Home Office stakeholder meeting attended by a small number of stakeholder organisations, operating under the Chatham House Rule.



Given that under the new version of 55.10.1 there have been a number of transfers each month to the IRC estate of detainees who have not been served with removal directions, yet the 1000 bed capacity has not been reached, I would be grateful if you would provide clarification of the type of circumstances under which such transfers might take place.”

In an email to BID dated 30<sup>th</sup> September 2013 Jonathan Nancekivell-Smith replied as follows:

“1. Return to prison if removal fails

*... We would normally expect them to **return to the prison estate** unless they have new removal directions set very quickly and the new date is imminent.*

“2. Transfers to IRCs under the current policy before the 1000 bed capacity reached

*... There have been some individuals who have been moved to an IRC for a short period, for example to ensure that they are able to attend appeal hearings where the prison timings would prevent this. **These individuals will then be moved back to a prison bed following their court hearing.**” (emphasis added)*

The intention of the Home Office appeared clear, that detainees who are held in the prison estate under the current policy were expected to remain in the prison estate, even if transferred on a temporary basis to an IRC by the Home Office.

However, it appears that transfer to an IRC is an option available only to the Home Office. Since the September 2013 response to BID from the Home Office indicating that transfers of detainees from a prison to an IRC do take place “for example to ensure that they are able to attend appeal hearings where the prison timings would prevent this”, BID has applied to the Home Office on behalf of clients in a number of cases to transfer to an IRC in the same spirit, for bail hearings rather than appeal hearings.

These requests have been made for the purpose of a bail hearing in a number of cases where clients are detained in prisons from which they are required to lodge bail applications at York House immigration tribunal hearing centre at Hatton Cross in London. York House is currently experiencing severe delays in listing bail hearings for so-called “production cases” that require secure hearing rooms for applicants or appellants that must be produced in person at the hearing centre.

In one case, BID sent a request to the Home Office DEPMU (Detainee Escorting and Population Management Unit) seeking a transfer from immigration detention in a prison without a videolink facility to an immigration removal centre (IRC) for a period of ten days for the purpose of lodging and having heard an application for release on immigration bail. BID had spent some weeks unsuccessfully trying to coordinate a bail hearing date at York House with pro bono counsel. The request for a transfer to an IRC was sent on 4th February 2014. After two weeks with no response from the Home Office the request was sent again on 27<sup>th</sup> February 2014. No response was ever received from the Home Office to this request to transfer to an IRC for the purposes of a court hearing.

In another case a detainee used a template letter supplied by BID to make a request to the Home Office to be transferred to an IRC from the prison where he was being detained in order to be nearer to his wife and children. His wife was ill and finding it difficult to travel four hours to visit him. A subsequent Home Office bail summary noted the response from DEPMU to the detainee's request for a transfer to an IRC:

“At present time, we are not moving any FNO's [Foreign National Offenders] into the IRC estate as we have bed space readily available in the prison estate that we must utilise effectively. I understand and take note of your points raised over the telephone, but we cannot give priority to specific detainees based on these merits (sic)” (Home Office correspondence, 2013)

A letter passed to BID by one client held in a prison noted in relation to a request to transfer him from detention in a prison to an IRC:

“The estate management team advised on 05 April 2013 that at the present time, no transfers to IRC's (sic) are taking place” (Home Office correspondence, 8<sup>th</sup> April 2013)

As one BID client wrote to us in June 2013:

*“I am spending my time 20-22 hours behind the bar while I have finished my sentence two months ago. I have complained to transfer me to nearest removal centre but they don't care.”*

#### **Home Office action plan for transfers to IRCs of immigration detainees held in prisons in Scotland**

A close reading of Committee for the Prevention of Torture (CPT) reports of inspections of UK prisons, and the subsequent responses to these reports by the UK Government, suggests more urgent attention is being paid by the Home Office to the transfer of time-served foreign national offenders from detention in prisons in Scotland by comparison to the treatment of detainees held elsewhere in the UK prison estate.

It would appear that at the same time that the Home Office was using prison beds in England to hold immigration detainees regardless of individual risk level, and returning detainees to the prison estate after temporary transfers to IRCs for court hearings or interviews, as recently as 2013 the UK Government was making commitments to the CPT and producing action plans to ensure effective and timely liaison between all agencies to ensure detainees are transferred out of prisons in Scotland “as quickly as possible once their sentence has been completed” (Council of Europe, 2013: 58)<sup>49</sup>

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<sup>49</sup> Council of Europe, (2013), ‘Response of the Government of the United Kingdom to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 17 to 28 September 2012’, Strasbourg. Available at <http://www.cpt.coe.int/documents/gbr/2014-12-inf-eng.pdf>

The European Committee for the Prevention of Torture visited prisons in Scotland during 2012<sup>50</sup>. At paragraph 87 of their subsequent report<sup>51</sup> it made a familiar and repeated recommendation:

**“Section ‘Conditions of detention in Barlinnie, Greenock and Kilmarnock Prisons’**

“The CPT has noted that in the response of 8 February 2013, it is stated that *the Scottish Prison Service will seek to put in place an action plan to minimise detention of foreign nationals subject to removal after the expiry of their prison sentence*. ...The CPT recommends that foreign national prisoners, if they are not deported at the end of their sentence, be transferred immediately to a facility which can provide conditions of detention and a regime in line with their new status of immigration detainees. Further, it *would like to receive a copy of the action plan*” (CPT, 2013: para 87)(emphasis added)

The UK Government responded<sup>52</sup>:

“73. We partially accept this recommendation. When requested to do so, the SPS [Scottish Prison Service] holds a prisoner who is subject to a deportation order in custody pending their transfer to a Home Office detention centre. SPS liaises closely with the Home Office to ensure prisoners are transferred as quickly as possible once their sentence has been completed. We do accept that in some instances this takes longer than we would wish. FNOs may continue to be detained in prison for reasons of security or control and where it is assessed that those concerned are not suitable for the more informal environment provided in IRCs.

74. The SPS are discussing the CPT’s concerns with the Home Office and *an action plan* is in place to minimise this and keep it under constant review.” (Council of Europe, 2013: 25)(emphasis added)

The UK Government’s ‘Action Plan for the Removal of Foreign National Offenders following EDL’, which despite its title suggesting that it is a plan for action on removals rather than place of detention, does in fact deal with expediting of transfers out of prison post-sentence of immigration detainees. The Action Plan can be found in full at Annex B<sup>53</sup> of the UK Government response in 2013.

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<sup>50</sup> Prisons in England & Wales were not in scope during the inspection visit of 2012 on which the March 2013 CPT document reported.

<sup>51</sup> Council of Europe, (18 July 2013), ‘*Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 24 October 2012*’, Strasbourg. Available at <http://www.cpt.coe.int/documents/gbr/2013-14-inf-eng.pdf>

<sup>52</sup> Council of Europe, (27 March 2013), ‘*Response of the Government of the United Kingdom to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 17 to 28 September 2012*’ (page 38). Available at <http://www.cpt.coe.int/documents/gbr/2014-12-inf-eng.pdf>

<sup>53</sup> *ibid*

## **[Home Office] Action Plan for the Removal of Foreign National Offenders following EDL**

### Initial Notification

Individual prisons must notify Home Office Criminal Casework within 24 hours of all foreign nationals, dual nationals, and those whose nationality is unclear or where the prisoner refuses to give nationality so that Criminal Casework can establish their Immigration status using referral forms CCD 1 (Scotland) and CCD 2 (Scotland).

### On-going Monitoring

If no decision has been received from Criminal Casework in relation to the prisoner's Immigration status or nationality has yet to be confirmed by the Home Office, prisons should make further contact with Criminal Casework Glasgow at the following intervals, keeping full notes of all contact in the prisoners file:

- 8 weeks prior to consideration for release of a short-term prisoner on HDC by email (see below);
- 8 weeks prior to a Risk Management Team considering a prisoner for progression to less secure conditions/unescorted community access by email (see below);
- 8 weeks prior to release date by email;
- 14 days prior to the release date by email;
- 24 hours prior to the release date by telephoning the enquiry line. The urgent nature of the case must be clearly explained.

For those prisoners held solely on an immigration warrant, where the above process has not led to the release of the prisoner in to Home Office custody, contact must be made with Criminal Casework Glasgow at the following intervals at the latest, keeping full notes of all contact in the prisoners file:

- 4 weeks after the prisoner's EDL;
- 8 weeks after the prisoner's EDL (copied to the Assistant Director of Prisons);

If this does not resolve the issue, the Assistant Director of Prisons should be informed and will take this matter up direct with the Home Office, *with a view to the early removal of the relevant FNO from SPS custody*. As an additional safeguard the Population Manager will also monitor this and provide regular information on foreign nationals held on an immigration warrant only to the Assistant Director of Prisons to ensure any issues are dealt with quickly and appropriately." (Council of Europe, 2013: 38)(emphasis added)

## **7. Communication with legal advisors, Home Office & family: telephone, prison post, and internet use**

### **Restrictions on telephone calls**

Immigration detainees held in removal centres can hold simple mobile phones which enable them to make and receive calls at any time of the day or night, at their own expense. By contrast, detainees held in the prison estate are subject to the same restrictions on the possession and use of mobile phones as the remand and serving prisoners that they are held alongside. Access to the prison landline telephones on their wing is highly restricted by prison regimes and by the limited amount of time detainees are able to spend on their wing on association, and their ease of communication is further hampered by their inability to receive calls from legal advisors (detainees in prisons can only make calls out).

In his response to BID, AVID, PRT and DAS in May 2013, the then immigration minister stated that for immigration detainees held in prison conditions

“The only restriction compared to an IRC is that the legal representatives cannot call their client on the telephone as and when required ...” (emphasis added)

This comment significantly understates the impact on detainees in prisons of their inability to be able to carry mobile phones or access telephones on the wing at any time of the day. The minister acknowledges that legal representatives cannot call their clients when they need to if they are detained in prisons, but does not appear to recognise that this is a matter for concern.

In one prison BID attends, an NGO providing support services has informed us that detainees who wish to make an urgent legal call can go to the legal department and sit with an officer to make a call to their solicitor free of charge. It is entirely at the officer’s discretion, and it is up to the detainee to stress the urgency of the call. This facility is not available during lock up, and does not lend itself to dealing with time-sensitive or urgent legal matters. Access to telephones for immigration detainees should not be at the discretion of prison officers.

A man currently detained post-sentence in a north London prison has written to BID to explain that he finds it hard to get someone to help him with his immigration case because he is only allowed to leave his cell for one hour a day, which he describes as “never enough for me to do anything”. Another BID client currently held in a south London prison is in the same situation, and described to us in August 2013 how he is only out of his cell for association for one hour each day at 6pm, while yet another held in HMP Feltham can only use the wing phone between 6 and 7pm.

Legal casework is frustrated by the fact that telephone calls cannot be made by an advisor to a detainee held in prison, unlike a detainee held in an IRC. A legal representative must instead wait for the detainee to call them, with no guarantee that the call can be taken.

The length of calls out from prisons may also be limited. BID legal managers report that conversations of more than 10 minutes are not always possible. This is often insufficient, for

example when taking a witness statement from a detained client, or exploring options for bail accommodation and sureties.

Detainees have reported to us that there may be delays of some weeks in certain prisons before PIN clerks add telephone numbers to a PIN list. These delays affect detainees as well as prisoners, and may mean that calls to specific numbers including legal advisors are not possible.

In a postal survey of BID's prison-held detained clients in June 2013<sup>54</sup>, many detainees have indicated that it is very difficult in prison to get information and to contact solicitors or NGOs

*“It is difficult to get immigration help if not impossible from prison. There is simply no one to help you. Officers do not give you opportunities to make phone calls to charities and organisations that can help.”*

*“While being in detention in a prison environment it is impossible for people like myself to gain access to phone calls at any given time of the day for the purpose of social or solicitor calls. Detainees in IRCs have access to mobile phones, the internet and other services, while I'm being made to follow a 'B Category' prison regime where I was transferred 4 months after my sentence expired. Access to legal services is nil, there's been no surgery since my arrival in February and there is no way one can contact a solicitor without having it in your PIN...”*

*“Association time is not suitable to call my solicitor as the offices are closed or not opened. Cost of phone call is expensive from the prison. Letters are not delivered promptly on some occasions.”*

*“Having to put in application to call legal advice is a nightmare because it can take weeks if the PIN clerk has a back log like a lot of prisons do.”*

*“It is difficult to get visits or make phone calls to family or legal advisors from prison. When I ask officers to fax any paper work they say they are not allowed & this gives me difficulty with bail application and making photocopies.”*

Legal calls are not free for detainees in prisons, who can access telephone and fax services only if they have credit against their telephone PIN number. Constraints on time on the wing and access to telephones during working hours are compounded by financial constraints.

#### **Faxes sent only at the discretion of prison officers**

In IRCs fax use – within reasonable limits – is free of charge. In the prison estate, detainees must seek assistance from prison officers to send faxes, and it appears that fax use is at the discretion of individual officers. One detainee told BID:

*“As a detainee it's all about time, and asking prison staff to fax paperwork back & forward is a problem, because it's only important to the detainee to have important paperwork back in time for the courts.”*

In January 2014 a represented client of BID called from a prison in Wales to ask whether we had received a fax he had sent the previous day (BID had not received it). He later rang back to say that

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<sup>54</sup> In June 2013 BID contacted 38 current clients who are detained in prisons, and invited them to complete a postal survey called “Tell us about your experience of getting immigration legal advice in prison”. This survey is now administered every six months.

the officer had refused to send the fax. We called the duty governor, who told BID that prisoners and detainees in that establishment were not normally permitted to send a fax other than in exceptional circumstances, and that our client could send the document by post or by special delivery if he had the funds to do so.

### **Slow postal system in prisons delays time-sensitive correspondence**

Detainees in one prison told us that they get an allowance of two free letters each week on a remand regime. For a detainee forced to attempt to conduct their own legal case and unable to use the internet, this may not be sufficient.

Slow delivery of mail after it has arrived at prison is a common experience for detainees held in prisons. Mail may take several days to reach them on the wing after it has been delivered to the prison. This affects correspondence from legal representatives, from the Home Office, and from the courts or the immigration and asylum tribunal. Some of this correspondence will relate to time-sensitive matters such as deportation appeals and time-limited grants from the Home Office of Section 4 (1)(c) bail accommodation.

Additional resources are then wasted by HM Courts & Tribunals Service in dealing with request for extensions for appeals, and the Home Office Section 4 bail team in dealing with requests for extensions of grants of bail support.

Unrepresented detainees held in prisons – a cohort which now includes people with a viable and arguable case to appeal their deportation but no means to pay for legal advice - may be unaware that they can make an out of time appeal if Home Office correspondence reaches them too late. The use of prisons for immigration detention therefore creates practical barriers to accessing justice that have severe and life-changing consequences.

### **Lack of internet access in prisons hinders legal research for unrepresented detainees**

Unlike detainees in IRCs, people detained in prisons are unable to access the internet to do their own legal research and obtain forms<sup>55</sup>. One detainee held in a prison told BID:

*“Being locked in prison not as a serving prisoner but as a detainee it is impossible to do researches on immigration matters due to the fact the prison do not offer any help to detainees.”*

In the context of prison-held detainees, lack of a legal representative does not necessarily mean a case has no merit, it may simply mean that the detainee has been unable to access a publicly funded immigration lawyer for reasons of the geography of Legal Aid Agency immigration and asylum contracts, lock-up and other restrictions of easy phone use, or their legal matter being out of scope of legal aid.

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<sup>55</sup> It should be noted that access to the internet in IRCs is often highly restricted for reasons that are not clear. HM Inspectorate of Prisons reported in 2014 that access to the BID website was blocked in Haslar IRC during an inspection visit. (See HMIP, '(2014), 'Report on an unannounced inspection of Haslar Immigration Removal Centre by HM Chief Inspector of Prisons 10–11 and 17–21 February 2014'. Available at <http://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2014/07/Haslar-2014-Web.pdf> Detainees may be unable to print off documents, or open .pdf files. Use of the internet by detainees in IRCs is monitored.

Despite the removal from the scope of legal aid of deportation matters after April 2013, detainees held in prisons will still generally want and need to appeal their deportation. It is essential that such detainees without the financial means to pay for professional legal advice and representation are provided with supervised access to the internet in order to be able to prepare and lodge an appeal against deportation themselves.

**Lack of internet access makes cooperation with the Home Office redocumentation process very difficult**

Prison-held detainees face great practical obstacles to meaningful cooperation with the documentation process, including those individuals who have clearly and consistently expressed their view to the Home Office that they wish to return to their country of origin. For over 900 detainees currently held in prisons, compliance with the documentation process may be a practical impossibility without internet access.

The consequences for an individual of being unable to obtain travel documents are wide-ranging and serious, whether or not an individual is detained, and include:

- Inability to return to their country of origin
- Perception of an increased risk of absconding, especially for individuals who are appeal rights exhausted, leading to longer detention periods due to difficulty in getting released on bail
- Ineligibility for voluntary return packages or withdrawal of offers
- Ineligibility for early removal schemes for foreign national prisoners
- Criminal charges where non-cooperation with the travel document procedure is alleged by the Home Office
- Destitution for people in receipt of asylum support

Given the serious implications both for detainees and Home Office removal targets of the lack of internet access for detainees in prison who wish to cooperate with documentation, BID briefed the office of the Independent Chief Inspector of Borders & Immigration on this matter as part of the recent inspection of Home Office travel document processes and removals<sup>56</sup>.

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<sup>56</sup> Independent Chief Inspector of Borders and Immigration, (2014), *'An Inspection of the Emergency Travel Document Process May-September 2013'*. Available at <http://icinspector.independent.gov.uk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf>



## 9. NO AUTOMATIC PROVISION OF IMMIGRATION LEGAL ADVICE

### No immigration legal advice surgeries in prisons

Regardless of their main immigration case and the new legal aid landscape for general immigration matters, immigration detainees need advice on the fact of their ongoing detention, especially if they have not been removed or deported from the UK or released after a reasonable period.

Across the IRC estate immigration detainees have automatic access to publicly funded immigration legal aid advice, subject to the statutory means and merits test for legal aid, via the Detention Duty Advice scheme operated by the Legal Aid Agency. Although BID's research shows that there continue to be unacceptable delays in getting an appointment at certain removal centres, and out of hours and emergency cover is patchy across the IRC estate, in some of the larger removal centres these immigration advice surgeries operate four days each week. In May 2014 40% of detainees who told BID they had made a surgery appointment were able to have an initial exploratory appointment with a solicitor from a provider firm within one week<sup>57</sup>.

There is no equivalent provision for immigration detainees held in the prison estate.

Those legal firms and NGOs that attend prisons report to BID that governors are reducing the number of hours during which legal advisors are able to come in to the prison. Legal visits may not be allowed for more than two hours at a time, meaning that the number of clients the provider can see on that visit is limited. This may render a prison visit financially unviable for providers. Governors have also been reducing contact hours with detainees for NGOs funded by HM Prison Service to provide services to foreign national prisoners and immigration detainees.

*“Here at HMP [R] legal advice is no deal. There aren't (sic) anyone at the establishment that are experienced in the field. There's no one to go to for help. FNP rights are not the responsibility of the officers, quoted by a senior member of staff.”*

*“No legal help and most of us don't have sufficient funds to support our immigration case”*

*“I don't have any help, I don't know legal jargon so I cannot explain my issues properly and I suffer mental health issues and should need help”*

### Some prisons holding immigration detainees appear to fall outside the reach of the geographical area covered by legal aid contracts.

There are financial disincentives in the current Legal Aid Agency fee structure to those legal aid practitioners who wish to continue to do legal aid immigration work in prisons, especially in relation to travel costs. Some prisons holding immigration detainees are holding very small numbers of detainees, and are uneconomic for both Home Office staff and legal aid providers to visit regularly. However, economies of scale are not possible with the current fragmented distribution of detainees across around 80 prisons in the HMPS estate.

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<sup>57</sup> Bail for Immigration Detainees, (2014), 'Summary: Survey of levels of legal representation for immigration detainees across the UK detention estate (Surveys 1-8) July 2014'.

A detailed account of access to legal advice for immigration detainees held in the prison estate, and financial disincentives to legal aid immigration and asylum contract holders is beyond the scope of this briefing. In an exercise that is unpublished but which has been shared by BID with the Legal Aid Agency and the Home Office, BID has mapped the 2013 Legal Aid Agency immigration and asylum tender round results (contract 'access points') against known locations of prisons where immigration detainees were held in August 2013. This exercise revealed that 5 of the 80 prisons holding immigration detainees in August 2013 were 50 miles or more away from the nearest Legal Aid Agency 'access point' for immigration and asylum contract holders.

Legal aid providers of immigration advice who travel to a prison to see a potential new client are unable to claim travel expenses from the Legal Aid Agency unless they are able to sign a Legal Help form. Travel to prisons to take instructions from potential clients is often only financially viable if a legal aid provider is able to see several detainees at one visit. In prisons holding dozens of immigration detainees (e.g. HMP Wandsworth and HMP Elmley) this can be considered. However, 49 of the 80 prisons (61%) holding detainees in August 2013 had 10 or fewer detainees, while 31 of the 80 prisons (39%) had 5 or fewer detainees.

Where legal aid firms have to make long slow journeys to remote prisons, time spent out of the office is another financial disincentive to make that trip if the potential client does not pass the means or merits test.

The Legal Aid Agency has told BID that there is only limited flexibility to amend fee structures and payments under the current contractual arrangements, so the current situation is likely to prevail until at least 2015/16.

### **What can the Legal Aid Agency do?**

BID raised concerns about the lack of access to immigration legal advice for detainees in prisons at the annual NASF stakeholder meeting on legal aid in August 2012. BID, along with ILPA and Detention Advice Service, subsequently met with the then Legal Services Commission. The LSC indicated that they would not be able to give consideration to providing legal surgeries in prisons for immigration detainees, as they do in IRCs. The LSC undertook to examine the financial disincentives to legal aid providers to travel to prisons, but to date no change to payments has been made so far as we are aware. The LSC did however undertake to put a note in the NOMS staff newsletter indicating to prison staff that details of immigration legal advisers with a legal aid contract could be obtained via the LSC website, and this was duly sent out in early 2013.

In the NASF stakeholder meeting on legal aid in December 2013, at which the Home Office and the Legal Aid Agency<sup>58</sup> were present, BID again tabled poor access to immigration legal advice in prisons as an agenda item. BID's surveys of access to legal advice in IRCs consistently show that the majority of detainees in IRCs who had previously been in prison serving a custodial sentence had received no independent immigration advice while they were in prison, so access to immigration advice from prisons is anyway poor. We pointed out that the number of immigration detainees

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<sup>58</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made provision for the abolition of the Legal Services Commission (LSC). The LSC was replaced by the Legal Aid Agency, an executive agency of the Ministry of Justice, on 1 April 2013.

held in the prison estate had risen again since this issue had been raised the previous year. Now up to a quarter of detainees were being held in the prison estate, and among BID's own clients our research suggests that prisons were now where the longer term detainees are at present (the mean length in detention of BID HMP clients in June 2013 was 11.5 months)

*Prison case immigration advice needs by type*

	Legal aid	Also available for fee paying clients.
Remand	Asylum and asylum appeals Certain immigration JR work	General immigration work, including preparing/ presenting/engaging on claim/case with UKBA, and appeals. Including deportation.
Serving/recalled	Asylum and asylum appeals Certain immigration JR work	General immigration work, including preparing/ presenting/engaging on claim/case with UKBA, and appeals. Including deportation.
Detained	Asylum and asylum appeals Detention and bail Certain immigration JR work	General immigration work, including preparing/ presenting/engaging on claim/case with UKBA, and appeals. Including deportation.

There is an acute need for immigration legal advice in prisons, and BID believes more needs to be done by the Legal Aid Agency to support those few legal representatives prepared to undertake this work, and to ensure advice reaches immigration detainees in prison, including publicly funded immigration advice for those eligible for it. Compared to the position in 2012, the Home Office was at that point sharing information on the number of detainees held in prisons and their location, which should make planning of services easier (though the provision by the Home Office of management information on detainee numbers in the prison estate now appears to have ceased in 2014). Small changes in funding for work in prisons could act as real incentives to providers otherwise willing and interested in doing this work.

We asked the Legal Aid Agency the following questions:

- How could the contracting of legal aid facilitate those providers prepared to undertake this work to be able to do so, and not at substantial loss.
- Is it not appropriate to rethink such issues as travel costs and attendance fees in relation to immigration advice for serving prisoners and immigration detainees in prisons?
- What about other contractual solutions such as allowing providers to work outside their area?

**Limited access to Home Office staff**

Some prisons holding immigration detainees are holding very small numbers of them, often in hard to reach and isolated locations. It appears that it is also uneconomic for Home Office staff to maintain a permanent presence in such prisons or visit regularly. BID's enquiries in 2013 with some of the prisons holding very small numbers of immigration detainees show that these prisons typically have no on-site immigration staff, unlike those prisons that BID spoke to which hold greater numbers of immigration detainees.

	May 2013	August 2013	
HMP Guys Marsh, Dorset	7 detainees	6 detainees	No immigration officer permanently on site. Immigration staff visit every 2 weeks.
HMP Haverigg, Cumbria	1 detainee	4 detainees	No immigration officer on site. There is an Offender Management Unit staff member who is responsible for liaising with UKBA and organising visits.

We would expect that Home Office work on an immigration cases where that detainee is held in prison conditions will almost certainly progress towards resolution much more slowly without on-site Home Office staff, especially when combined with poor access to immigration solicitors, low rates of legal representation, and severely curtailed and delayed communication with detainees in prisons.

## 10. PRACTICAL BARRIERS TO ACCESSING THE COURTS & THE IMMIGRATION BAIL PROCESS

In addition to the communication difficulties affecting immigration detainees held in prisons outlined above, including communication with the courts, there are other practical barriers for detainees attempting to access the courts and tribunals for bail applications and other immigration hearings. These practical barriers arise out of inadequate and unreliable Home Office escort provision, and the current inability of HM Courts & Tribunals Service and the First-tier Tribunal (IAC) hearing centres to meet the required capacity for so called 'secure hearing facilities' that are required where detained foreign nationals must be produced in person for a court hearing.

Mr F was detained in prison and without legal representation at the time of this bail hearing, he was later taken on as a client by BID:

### **Case of Mr F**

Mr F was being detained under immigration powers in a prison in the Greater Manchester area without appropriate videolink facilities to the First-tier Tribunal (IAC) hearing centre. His immigration bail hearing was listed for 9<sup>th</sup> September 2013. On the day he was not produced in person at the hearing centre. His wife who was present in the hearing room reports that the First-tier judge went ahead with the bail hearing without Mr F. Mr F had no legal representative to act for him or to withdraw the application. His application for release was refused. Mr F received the bail summary in prison the day after the bail hearing, and a week later had still not received the written reasons for refusal of bail.

### **Bail summaries arrive too late**

The bail summary is the document containing the Home Office case against release of a detainee by the First-tier Tribunal on immigration bail. Home Office guidance<sup>59</sup> is that a bail summary should be faxed to the applicant at their place of detention by 2pm on the day preceding a bail hearing.

BID has been advised by detained clients that bail summaries are not reaching them in time for the hearing because the internal postal system in prisons is very slow. As a result detained bail applicants are unable to see the case to be made against their release and identify factual errors made by the Home Office in the summary. Bail applicants who are unable to have sight of the bail summary on the day before their hearing may be unable to issue further necessary instructions to counsel, or, if unrepresented, carry out any meaningful preparation for the hearing.

### **Internal post delays means Home Office Section 4 (1)(c ) bail accommodation grant letters arrive on the wing as - or after - they expire**

Home Office failure to produce detainees in person at bail hearings, and HMCTS inability to lodge bail applications within the normal 3-6 day timescale also lead to loss of Section 4 bail addresses (see below), and the need to re-apply.

<sup>59</sup> Home Office, (January 2014), '*Immigration judge bail. Version 7.0*'. See page 8. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274575/Bail\\_v7.0EXT.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274575/Bail_v7.0EXT.pdf)

**Case of Mr A**

Mr A is currently held as an immigration detainee in HMP Wormwood Scrubs. He waited eight and a half months to receive a grant from the Home Office of a Section 4 (1)(c) bail address. When it eventually reached him ( and BID as his representative) by post, only 6 of the 14 days validity remained. BID immediately lodged a bail application for him at Hatton Cross hearing centre as required by HMCTS for the prison where he was being held. Due to the current delays in listing cases where the applicant must be produced in person, and despite discussions with hearing centre staff, we did not receive a bail hearing date within the usual 6 day period, which would have enabled us to apply to the Home Office to extend his grant of Section 4 (1)(c ) support. His bail address therefore lapsed, and Mr A has now begun the application process for a Home Office Section 4 (1)(c ) bail address once again. It can be expected to take many months.

It is hard to underestimate the anguish that this loss of a bail address after many months of waiting causes detainees, and the careful and sensitive approach required on the part of BID's legal managers and legal casework volunteers to explaining that administrative failure now means that having waited for six or nine months for a Section 4 address to be able to apply for bail, the detainee must again wait while a new address is provided.

**Time limits for video-linked immigration bail hearings**

Immigration bail applications can be heard from prisons via videolink in about one in four of the prisons currently holding immigration detainees. BID has found that video links from prisons are subject to a maximum of 60 minutes after which time they will be cut off, meaning that the hearing may continue without the applicant.

BID has experience of clients held in prisons who have appeared via a videolink that has been cut short before the end of the hearing, who, having been present for only the first part of their hearing, do not know whether they have been granted release on bail when they call BID from prison the following day. In these cases it appears that prison staff either don't know or don't tell them about their release.

In 2012 a BID client had his bail application heard via videolink from a prison on the south coast (HMP Lewes). After 20 minutes of the videolink, (a 10 minute con then another 5-10 minutes for everyone to get into position) the First-tier judge told the applicant that as the videolink facility would be available for 60 minutes in total, there would come a point if the hearing continued past 60 minutes where the applicant would no longer be able to connect with the hearing centre, although the hearing would continue, and he would be informed of the result later on.

This is highly unsatisfactory for both applicant and legal representative, and is especially unjust for unrepresented bail applicants. We can speculate that it may be generally felt in the prison service that 60 minutes is sufficient for a bail hearing, especially as videolink facilities in prisons are used overwhelmingly in the criminal justice system for entering pleas, which are short events. Regardless, this is arbitrary and unjust.

BID’s research on bail decision making in the First-tier Tribunal (IAC), ‘*The Liberty Deficit: long-term detention and bail decision making. A study of immigration bail hearings in the First-tier Tribunal*’ (2012),<sup>60</sup> shows that bail hearings can last up to two hours for both represented and unrepresented applicants, and for represented applicants the mean hearing time is 52 minutes (not including the 10 minute consultation prior to the hearing). It is not possible to know in advance which bail hearings are likely to go over 60 minutes, but it is more likely where applicants have a long immigration history or have family issues, and these features are common to a significant proportion of BID’s clients detained in prisons.

Represented hearings	Mean length = 52 minutes Not including 10 minute con	Range 5 – 120 minutes
Unrepresented hearings	Mean length = 29 minutes Not including 10 minute con.	Range 5 – 75 minutes

(Source: BID, 2012: 26, table 5)<sup>61</sup>

BID first brought this problem of videolinks from prisons to the attention of the President of the First-tier Tribunal (Immigration and Asylum Chamber) at the July 2012 Immigration & Asylum Chamber Presidents’ Stakeholder meeting. BID sought information about any arrangements in place with particular prisons for videolink immigration bail hearings, and details of where responsibility lies for decisions about the maximum length of videolink hearings. In BID’s view, which was expressed to both the First-tier Tribunal President and HM Courts & Tribunals Service, in the interests of fairness there should either be no upper limit to videolinks from prisons to First-tier Tribunal (IAC) hearing centres, or, if that is not practical, to cap it at 120 minutes rather than sixty.

The President of the First-tier Tribunal (IAC) noted that he agreed strongly with BID’s concerns about this, and this is reflected in HM Courts & Tribunals Service (HMCTS) minutes of the meeting. He stated that prisons only want a 60 minute slot for video links, and a 120 minute slot is highly unlikely in his view. HMCTS was present at the meeting and when asked to speak to this point stated that videolinks in prisons are a matter for HM Prison Service, devolved to Governor level. It appears therefore that any change to the current upper time limit on videolink slots would therefore require negotiations with dozens of prisons.

In BID’s view, limiting the length of bail hearings or requiring them to be heard without the applicant present, is capable of severely prejudicing the interests of the bail applicant. This is not a prejudice that detainees in immigration removal centres experience. Immigration detainees held in immigration removal centres do not have time limited bail hearings.

**Failure of Home Office escorting contract: detainees not produced in person at bail hearings**

Deportation appeal hearings are heard in person, requiring the production of any appellant held in immigration detention. Bail hearings have overwhelmingly been heard via videolink between FTT IAC hearing centres and IRCs since 2008. However, production in person at bail hearings is

<sup>60</sup> Bail for Immigration Detainees, (2012), ‘*The Liberty Deficit: long-term detention and bail decision making. A study of immigration bail hearings in the First-tier Tribunal*’. Available at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

<sup>61</sup> *ibid*

required for a significant proportion of immigration detainees held in the prison estate. In around three in four of the prisons where immigration detainees were held in August 2013 detainees must be produced in person at a Tribunal hearing centre in order for their immigration bail application to be heard<sup>62</sup>.

Of the 59 prisons without videolink facilities that held detainees as of August 2013, some are over 100 miles from the nearest hearing centre or magistrates court where the Tribunal allocates detainee and bail cases as either a first, second or third choice. Using guidance from HM Courts & Tribunals Service<sup>63</sup> it appears that, for example, any application lodged by a detainee in HMP Dorchester must be allocated to Newport HMCTS hearing centre 110 miles away. Applications lodged by detainees held at HMP Haverigg in Cumbria (no local Legal Aid Agency immigration & asylum contract, no on-site Home Office staff) must be allocated to Manchester (110 miles), Bradford (93 miles), or North Shields (146 miles) in that order of preference.

However, it is BID's experience that the Home Office is unable to manage the current escorting contract so as to ensure that immigration bail applicants are produced in person at FTT bail hearings from prisons where there is no videolink. As a result, bail hearings may need to be withdrawn and relisted, and this is not always a straightforward matter.

Detainees who are not produced at a bail hearing may have waited weeks or months for a Home Office Section 4 (1)(c) bail address, and due to the slowness of prison internal mail systems combined with the restrictions on using telephones and sending faxes, may be unable to get an extension of their grant of Section 4 support in order to get the bail application re-listed in time.

Unnecessarily withdrawn bail cases are a waste of HMCTS resources, and also the resources of the Home Office. If a detainee who is not produced at a bail hearing is reliant on Home Office Section 4 (1)(c) bail accommodation, that accommodation may have been empty for a number of weeks pending licence-related checks during which time the Home Office is paying both rent on the empty accommodation and the cost of detention.

It is not at all clear that the Home Office has allocated additional resources for escorting immigration detainees to immigration bail hearings, given the rise in the immigration detainee population in prisons to over 1000 in recent months. Each year the First-tier Tribunal receives around 10,000 applications from immigration detainees for release on immigration bail, and although no data is publicly available it seems likely there are now hundreds of additional requests for escorted journeys to immigration bail hearings given the increase in the prison detention population.

Given the rise in the number of immigration detainees in the prison estate, in September 2013 BID asked the Home Office<sup>64</sup>:

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<sup>62</sup> Source: Ministry of Justice website.

<sup>63</sup> HM Courts & Tribunals Service, (2010), '*AIT workload allocation list (post code list)*'

<sup>64</sup> Via the BID briefing on the use of prisons for immigration detention, prepared for the National Asylum Stakeholder Forum (NASF) meeting of September 2013.



- What if any additional financial provision has been allocated for escorting costs related to journeys to bail hearings from prisons for the financial years 2011-12, 2012-13, and 2013-14?
- What if any alterations that have taken place to the current Home Office escorting contract in order to allow for further assessment of need or provision for additional journeys to court from prisons without videolink facilities?

At the time of writing, the Home Office has not responded to either question.

### **Extended detention periods due to listing delays for bail hearings**

BID lodges a significant proportion of the immigration bail hearings heard at the First-tier Tribunal<sup>65</sup> when considered alongside the legal aid firms with exclusive contracts to deliver immigration advice in removal centres. We are therefore in a good position to identify at an early stage when delays are occurring in listing, and the extent of those delays.

On the basis of November 2013 figures provided to BID by the Home Office for the number and distribution of immigration detainees in the prison estate, around 20% of prison detention beds fall within the catchment area for Hatton Cross Immigration hearing centre<sup>66</sup>.

Since the start of 2014 all BID clients detained in prisons from which they must lodge a bail application at the Hatton Cross hearing centre have been experiencing significant delays in getting hearing dates. These delays have amounted to two or three weeks in some cases. In other cases HMCTS staff have simply been unable to give a hearing date, or have subsequently given one with very short notice of a day or so, meaning that counsel and sureties cannot be marshalled, and BID cannot take instructions from the client in sufficient time due to the communication problems with detainees held in prisons. Under normal circumstances HMCTS operates a bail listing target of 3-6 days from receipt of a bail application.

The problem appears to be that there is simply not enough capacity for so-called 'production courts' required for immigration bail, deport appeals and any other hearing where a detained foreign national must be produced in person.

A significant number of detainees currently held in prisons are therefore faced with extended detention as a result of delay in lodging bail applications where they must use Hatton Cross and, as a result of uncertainty in listing practice at present, may be less able to present a strong bail application if counsel and sureties are unable to attend a hearing listed at very short notice.

An application to the First-tier Tribunal for release on immigration bail is an urgent matter, and has always been treated as such by the First-tier Tribunal. It is highly unusual for bail hearings to be

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<sup>65</sup> During a sample period in 2013 (between 28th January and 4th March 2013) our monitoring showed that BID lodged 17% of bail cases across England and Wales that were lodged by the IRC exclusive contractors or BID. A similar exercise in 2011 showed that BID lodged 24% of such immigration bail applications (Source: Bail for Immigration Detainees, (March 2013), *'Exclusive contractors & bail hearings: analysis of daily court listings in the First-tier Tribunal 2011 & 2013'*.)

<sup>66</sup> Source: HM Courts & Tribunals Service, (2010), *'AIT workload allocation list (post code list)'* and Home Office management information on number and distribution of immigration detainees in the prison estate. HMCTS confirmed to BID that this document is still current at the time of writing, 2014.

subject to delays of weeks in listing. We believe that the current configuration of the FTT cannot cope with the existence of immigration detainees held in prisons in significant numbers, who must be produced in person at court hearings in secure hearing rooms because there are no videolink facilities to FTT hearing centres in the majority of prisons.

BID has brought this problem of delay to the attention of both the President of the First-tier Tribunal and HM Courts & Tribunals Service at the Immigration & Asylum Chamber Presidents' Stakeholder Meeting on 18<sup>th</sup> March 2014. Both the FTT President and HMCTS have acknowledged to BID that there is a shortage of secure hearing rooms in the London area, and that work is ongoing to rectify this. The report on the HMCTS Fundamental Review of the First Tier Tribunal (2014)<sup>67</sup> notes

#### **"7. Estates**

129. Generally we have not found any compelling evidence that the existing sites should be shifted to either: better meet user needs; or more effectively align with the location of Home Office Presenting Officer Units; processing centres; or Immigration Removal Centres. In moving forward to meet the government's Digital Strategy and with the possibility of more efficient ways of working (e.g. via e-mail or use of video links) geographical presence should increasingly become less of an issue.

130. We have identified a couple of issues, however, with respect to London and the South. These are the *limited secure hearing room facilities available to London based hearing centres (noting that hearings requiring this type of venue are increasing)* and the apparent geographical anomaly that there is no hearing centre between London and Wales (Newport) which can require appellants etc to have to travel considerable distances.

134. We further recommend that considering the current limitations on secure court rooms available to the FtT(IAC) jurisdiction (especially in London) coupled with the increase in fast track appeals being processed by Home Office, we recommend that work should be undertaken in the London region to *explore if more secure court capacity can be found from across the wider HMCTS estate* and centralised into a single venue to be used for all IA hearings which require such facilities." (HMCTS, 2014: 40)(emphasis added)

At the time of writing we are not aware of any increase in secure hearing room capacity in London, and detainees held in prisons seeking to have bail applications heard at Hatton Cross are still subject to lengthy and unreasonable delays.

Where bail applications from detainees in prisons cannot be listed in a timely fashion, it is very likely that some will lose their Home Office bail addresses and the opportunity to apply for release, especially where those detainees have no legal representation, are unaware of the possibility of extension, and cannot easily ensure such an extension as a result of the communication barriers in prisons.

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<sup>67</sup> HM Courts & Tribunals Service, (January 2014), *'The Fundamental Review of the First-tier Tribunal Immigration and Asylum Chamber: A joint review by the judicial and administrative arms of the First-tier Tribunal (IAC) taking an in depth look at the operations of the Tribunal'*.

### **Loss of Home Office Section 4 (1)(c ) bail addresses**

During 2014 BID has started to see a number of cases in which clients who have faced delay in getting a bail hearing date at Hatton Cross, and who are reliant on Home Office Section 4 (1)(c ) bail accommodation in order to lodge a bail application, have lost their 14-day grant of a Section 4 bail address<sup>68</sup> because it lapses after 14 days. Without a date of hearing, Home Office Section 4 bail address grants cannot be extended. In such cases, interim results from research carried out by BID<sup>69</sup> shows that detainees have typically waited many months for the grant of a bail address from the Home Office.

#### **Case of Mr M**

Mr M was held under immigration powers in London prison. On 4<sup>th</sup> February 2014 BID lodged an application for bail on behalf of Mr M at Hatton Cross hearing centre. On 11<sup>th</sup> February BID spoke to the hearing centre, where a bail clerk informed us that Mr M had not been listed yet and that the tribunal could not say when he would be listed, due to a backlog of bail applications from detainees held in prisons. We were informed that our client was 12th in the queue of detainees who will need to be produced in court.

We wrote to the hearing centre the same day, 11<sup>th</sup> February 2014, to notify them that Mr M had a grant of Section 4 (1)(c ) dispersal accommodation which would expire on the 18th February 2014. He had waited **3 months** since 11th November 2013 for this bail accommodation, a period of over three months, without which he could not apply for release. If he did not receive a notice of hearing before 18th February, then his Section 4 grant would lapse, his accommodation would be cancelled by the Home Office, and Mr M would have to wait for another lengthy period in order to be provided with a bail address to enable him to lodge his bail application again.

After further calls to Hatton Cross Mr M was issued with a notice of hearing, and at the last minute BID was able to extend his Home Office Section 4 (1)(c ) bail address. His bail application was heard by the FTT towards the end of February 2014.

### **Travel warrants for immigration detainees bailed while detained in a prison**

Detainees released on immigration bail who are being held in IRCs will almost certainly have had their bail hearing heard via videolink. If they are bailed to Home Office Section 4 (1)(c ) bail accommodation, on the same day they will be provided by the IRC management company with a travel warrant to the Home Office Section 4 (1)(c ) bail address, at the same time as they are provided with any medical notes and their personal belongings.

This requirement to issue a travel warrant is covered under Home Office Detention Service Order DSO 10/2007 *'The issuing of travel warrants to detainees attending asylum and immigration*

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<sup>68</sup> A standard dispersal address, for which grants are issued for 14 days.

<sup>69</sup> See <http://www.biduk.org/964/news/bids-research-into-delays-in-the-provision-of-section-4-bail-accommodation-by-the-home-office.html>

*tribunal (AIT) courts*<sup>70</sup>, a document which is so old (seven years) that it was written at a time before the use of videolinks for immigration bail hearings became standard. Notwithstanding that, this DSO does not address the circumstances of immigration detention in the prison estate, and would in any case not be required to be observed by prison staff, but updated guidance would help clarify where responsibility lies within the Home Office in such circumstances.

BID is aware of a growing number of occasions where detainees held in the prison estate, who must be produced in person at FTT hearing centres, are not being provided with travel warrants to their Section 4 (1)(c) bail address if bailed by the FTT. As a result they may be unable to reach their bail address by the end of the day on which they were released, or indeed at all. Travel to a Section 4 bail address typically involves a long journey from a London hearing centre to Gateshead, for example. Detainees held in prisons may also be produced at immigration bail hearings without their personal belongings, and are likely to have no money or insufficient means to get themselves to their bail accommodation in the absence of a travel warrant.

Where a detainee is bailed to Section 4 (1)(c) accommodation but is left by escorts at the FTT hearing centre with no travel warrant with which to reach the accommodation they are put in a position where they may, through no fault of their own, be:

- i) In breach of their secondary immigration bail conditions and hence at risk of re-detention and categorisation as an absconder;
- ii) In breach of the conditions of any release license or other ancillary order and hence at risk of recall to prison.

#### **Case of Mr A, January 2013**

Mr A was detained under immigration powers on 15<sup>th</sup> August 2013. He had previously been detained between June 2009 and April 2012 when he was released on immigration bail. At the time of this bail hearing Mr A was being held under immigration powers in HMP Peterborough. He had a grant of Section 4 (1)(c) bail accommodation in Gateshead.

Mr A was produced in person at the bail hearing. He was taken by escort from HMP Peterborough to Birmingham IAC hearing centre on 28<sup>th</sup> January 2014 where his bail hearing was to be heard at 10.00am. Mr A was represented at his bail hearing by pro bono counsel.

At about 11.30 on January 28<sup>th</sup> 2014 the judge granted release on bail to Mr A with no tagging requirement.

Shortly afterwards counsel called BID. Mr A was effectively stuck at Birmingham IAC as the escort was not willing to return him to HMP Peterborough to collect his belongings and pick up his travel warrant. The escort informed counsel that as so many detainees are refused bail they do not plan for detainees to be released.

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<sup>70</sup> Available at <https://www.gov.uk/government/publications/travel-warrants-for-detainees-attending-asylum-courts>

BID's duty legal manager then spoke to the head of Home Office DEPMU, as he had assisted in a previous similar situation, who undertook to try to arrange a van to take Mr A back to HMP Peterborough and then update BID.

Having been granted bail at about 11.30 am, Mr A remained in the custody suite at the hearing centre until after lunch. Counsel discussed the situation with Mr A, and he had suggested asking the judge to vary the grant of bail so that he was released the following day instead, so that he can be returned to HMP Peterborough for one more night.

After lunch the FT judge tore up the original grant of bail, and issued a fresh grant, valid from 6pm that same day, and ordered the escort to return him to HMP Peterborough. The new FTT IAC Grant of bail notice states under 'Secondary conditions of bail'

*"Note: for logistical reasons the Applicant shall remain in detention until not later than 6.00pm today".*

However, at this point the escorts were saying that they needed a fresh IS91 form. At about 2.30pm that day counsel informed BID that Mr A had been put in a van back to HMP Peterborough.

Home Office DEPMU, then called back to say that there had been a mistake and the client had been granted bail only from 6pm. Unfortunately the BID legal manager omitted to tell him what action the judge had taken to try to resolve the situation.

On 29<sup>th</sup> January 2013, the day after his release on bail, BID spoke by phone to Mr A, who had been returned to HMP Peterborough by escorts at about 6.30 (his release on bail had been granted from 6pm) but seemingly refused access. Mr A explained that the escort drivers initially spoke with the person at the prison gate and were told Mr A could not be admitted as he was not a prisoner.

Mr A also spoke with the person at the gate that evening and was told he could not be admitted and he could not get a travel warrant as everyone from the finance department had gone home. He was informed he must wait until the morning and could not leave his belongings in the prison.

Mr A spent the night under a bush outside the prison.

At 8am the next morning he approached staff at the gate again and was given a travel warrant but told he could not have his higher discharge grant and must get this from Birmingham IAC.

At Peterborough train station he was told he could not use the travel warrant as it was dated 28<sup>th</sup> January 2014 (the previous day and the date he was granted bail) and by now it was 29<sup>th</sup> January 2014. He returned to the prison (a walk of about half an hour) and was told they could not give him a fresh travel warrant, despite not having used the one previously given.

He later told BID that he eventually made his way to a nearby town where he had a friend. When he made contact with BID we informed him that he would need to apply to vary the conditions of his bail and his friend would most likely need to be assessed for suitability.

Mr A remained in this nearby town until a few days later, when he was travelling in a van that was stopped by the police. On 6<sup>th</sup> February 2014, BID received a letter sent by fax from Mr A saying that he was back in HMP Peterborough serving an 8 week custodial sentence for breaching a restraining order prohibiting him from entering a specific area. This was the only local area Mr A knew and to which he had made his way once the travel warrant he had been given by the prison was found to be invalid, and he could get no further assistance from HMP Peterborough to get to his Section 4 bail accommodation in Gateshead.

### **Case of Mr O, December 2013**

Mr O had been detained in December 2012 at the end of the custodial element of his sentence. At the time of this bail hearing he was being held under immigration powers in HMP Wormwood Scrubs in London. On 25<sup>th</sup> October 2013 the Home Office wrote to Mr O with a grant of Section 4 (1)(c) bail address in Cardiff to be used in the event of his release.

There is no videolink facility at HMP Wormwood Scrubs, so Mr O was produced in person at the bail hearing. He was taken by escort from HMP Wormwood Scrubs to York House hearing centre in Hatton Cross on 4<sup>th</sup> December 2013 where his bail hearing was to be heard at 10.00am. Mr O was represented at his bail hearing by pro bono counsel from Garden Court Chambers. The First-tier judge granted Mr O release on immigration bail.

Counsel reported to BID shortly after the hearing had concluded that despite having been released, Mr O had no travel warrant to get to his Cardiff bail accommodation from the hearing centre. His personal possessions were also still at HMP Wormwood Scrubs.

Counsel told BID that he would put Mr O in a taxi to the prison and pay for it. His further discussions with the escorts on behalf of Mr O had not been fruitful in obtaining transport back to the prison. They had no instructions to do so, it was not their remit, and moreover, they were not insured for the action.

Counsel gave Mr O £40 and put him in a taxi from Hatton Cross to HMP Wormwood Scrubs.

At some point after Mr O's release, on the same day, BID spoke first to the Foreign National Coordinator at HMP Wormwood Scrubs, explained the situation with Mr O and asked her to follow up and make sure he gets his possessions and travel warrant. She said they need an IS91 form before they are able to release. She said she was not able to help with the matter of his travel warrant as Mr O was about to be released anyway.

The Foreign National Coordinator then transferred the call to the on-site Home Office Immigration Enforcement Unit. They said that they cannot discuss a prisoner's situation with a third party, and given that Mr O had been granted bail it was not their concern anymore because they deal with deportation only not release. BID asked about the procedure in these situations, and was told that bailed detainees are free and they do not deal with these people. They pointed out that a bailed person doesn't need an IS91, because it is used for the detention of people, not for release. Finally the Home Office staff noted that they could not issue a travel warrant because they are "not a

charity”.

BID also spoke with the Home Office Section 4 bail team that afternoon to inform them about the situation with the client, and asked if they could call HMP Wormwood Scrubs to ask the prison to issue a travel warrant. They suggested we speak to Mr O’s caseowner and confirmed that there is a procedure that a detention centre should issue a travel warrant. The caseowner called to explain that the procedure is that after the judge’s decision a HOPO should present a bail decision to a caseowner and a caseowner then issues instructions for a detention centre to issue a travel warrant. But the decision can be faxed from the court too. It appears that the procedure where a detainee is being held in a prison and produced at a hearing in person was not discussed.

BID spoke with the head of Home Office DEPMU, to ask for assistance with this case and to determine where responsibility lay for issuing a travel warrant. DEPMU noted that the escorts had been correct to say they were not able to take Mr O back in their van once he had been bailed as they had no authority. He undertook to speak to HMP Wormwood Scrubs and ask them to issue a travel warrant on a one-off basis on behalf of the Home Office. DEPMU called back shortly afterwards to say that Mr O had been issued with a travel warrant.

BID then spoke to HMP Wormwood Scrubs, who confirmed that Mr O had reached the prison gate at 2pm and had been given his travel warrant by the prison.

BID subsequently called Home Office Section 4 bail team to inform them that Mr O was now on his way to the accommodation, and asked them to keep it for him given the long distance between London and Cardiff. Mr O later arrived at his Section 4 accommodation.

On 26th February 2014 BID wrote to Andrew Jackson, Director of Criminal Casework, Home Office Immigration Enforcement, to seek:

- Clarification of the role of prison staff, and their contractual obligations to the Home Office whether HM Prison Service or private contractor, in the correct preparation of detainees where they must be produced in person at a hearing centre, to allow for the possibility of release, and including the issuing of a travel warrant in each case;
- Clarification of actions required on the part of escorts, including any contractual obligations, so as to minimise the likelihood of future failures by escorts to convey a travel warrant with the bail applicant to the hearing centre.

We provided detailed case studies to illustrate the problem.

The Home Office replied a month later to say that our letter “highlighted some inconsistencies of approach and training needs which we are looking to address”.

Unfortunately, since the Home Office indicated to BID in March 2014 that steps would be taken the problem has simply continued, which suggests that the inconsistencies in approach to the issuing of travel warrants to bailees have not yet been identified by the Home Office, and training has not

yet taken place. We understand that in certain prisons such as HMP The Verne (re-roled as an IRC from September 2014), after a number of bailed detainees have become stranded at hearing centres, governors have taken the matter in hand and made local arrangements. It is unclear why the Home Office has to date not sought a solution to this release-related problem.

BID is aware of a growing number of such instances from our own case load since December 2013, and have been informed by firms of solicitors of a pattern of frequent failures to provide travel warrants for their clients too. One firm of solicitors wrote in a letter sent in July 2014 to the First-tier Tribunal and copied to the Home Office, BID, ILPA and a number of prison governors:

“This is the second time in as many weeks that solicitors from this firm have had to provide money from their own personal funds to ensure that our clients are able to travel to their bail accommodation ...and comply with the bail conditions set down by the court”.

These represented bail applicants had the benefit of a *pro bono* barrister who was able to step in and assist to some degree, but unrepresented bail applicants will not have that assistance available and can be assumed to be at a much higher risk of recall or re-detention as an apparent absconder.

In the cases we are aware of where the bailee was represented, barristers and solicitors have in some cases personally funded travel costs for their client, for example in one case to the tune of £140 for a ticket from London to , or in a London case a taxi fare from the hearing centre back to the prison. In one case the judges tried to assist by delaying release to a specified time later in the day to allow the bailee to be returned by escorts to prison in an attempt to resolve the problem.

No department in the Home Office seems willing to accept responsibility for the issuing of travel warrants to detainees held in prisons, as this example provided to BID by a firm of solicitors illustrates:

“Solicitor first contacted [...] at Section 4 to inform them of the bail grant. They arranged for the property to remain available. Solicitor explained that no travel warrant appeared to have been issued and asked Section 4 to either provide one urgently or explain who can. Solicitor was told to contact the caseowner in CCD [Home Office Criminal Casework]. Solicitor contacted CCD and was... informed that it was not CCD’s responsibility to issue travel warrants; rather it was either Section 4’s or the removal centre’s responsibility.

Solicitor contacted [the prison], and was told that it was not their responsibility and there was nothing that could be done their end to assist with a travel warrant. They recommended that the solicitor contact the tribunal. The solicitor contacted Newport IAC to explain the situation. Enquiries were made with the HOPO who appeared at the bail hearing and explained there was nothing that could be done; that really the client should have been taken back to [the prison] and a travel warrant issued from there [the escort company had already refused to do so].

CCD ... then called to reiterate what his colleague had said – it is not the responsibility of the caseowner to issue a travel warrant and there is nothing that can be done. He recommended the solicitor speak to a senior manager at Section 4. The solicitor then



spoke to a senior manager at Section 4 ... who informed the solicitor that it was unequivocally not Section 4's responsibility."

The saga continued for some hours after this point and is simply too long to recount in full here; it resulted in the solicitor giving the bailed client £100 from his own pocket to enable him to reach his destination. During this time the solicitor was unable to carry out other essential legal aid work for other clients.

In BID's view this failure is a systemic problem with the use of prisons as a place of immigration detention. It appears that the Home Office has put no system in place to ensure travel warrants are provided, and HM Prison Service is not required as a matter of course to issue travel warrants to prisoners in the event of a court release as these are issued by magistrates' and crown courts. Prisons are governed by Prison Service Instructions in this matter rather than by the (very out of date) Home Office Detention Service Order on travel warrants.

At the 18<sup>th</sup> March 2014 Immigration & Asylum Chamber Presidents' Stakeholder Meeting BID tabled an agenda item to draw this problem to the attention of the FTT President, and seek an indication as to whether IAC hearings centres could arrange to issue travel warrants to this group of bailees, in the same manner as magistrates' courts and crown courts. The FTT President indicated during the meeting that this would not be possible.

As a result of the Home Office failure to resolve this situation, bailed detainees are being put in a position that could have serious consequences for their immigration case and their criminal record.

### **Failure to release within 2 working days allowed for tagging**

Immigration detainees, including those detained in prisons, may be released by the First-tier Tribunal with a condition that they be subject to electronic monitoring on release, which requires the fitting of a tag<sup>71</sup>. Revised guidance to judges hearing such cases, issued in 2008, and contained in the current bail guidance for judges<sup>72</sup> notes that a period of two working days has been agreed between the (then) UKBA, the Ministry of Justice, and the FTT President.

"...The revised B1 form - application to be released on bail, now contains the following words in section 3c which indicates that the applicant agrees to return to the detention centre whilst arrangements are made to carry out the tagging with UKBA. This section has been agreed between the President, MoJ lawyers and UKBA to ensure lawful detention until the tag has been fitted.

...if bail is granted and electronic monitoring is considered an appropriate condition of bail , the applicant will remain in detention until such time as UKBA have arranged for them to

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<sup>71</sup> Since March 2014, electronic monitoring services are provided to the Home Office by Capita operating as EMS.

<sup>72</sup> Tribunals Judiciary, (2012), *'Bail guidance for judges presiding over immigration and asylum hearings'*. Available at <https://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/bail-guidance-immigration-judges.pdf> See Annex 5, ELECTRONIC MONITORING ("TAGGING"). Revised policy issued to Immigration Judges by Miss E Arfon-Jones, Deputy President of the Asylum and Immigration Tribunal on 14 August 2008.

be electronically monitored , *but not exceeding 2 working days after the date on which bail is granted.*

You will also need to include the following information in the form by which bail is granted and the conditions are set out.

- (a) make the tagging a condition; and
- (b) set out what is to happen if tagging has not been arranged within 2 days (*In such instances for the time being it has been agreed that the applicant should be released without tagging.*)” (Tribunals Judiciary, 2012: 23)

The most recently available Home Office instructions on electronic monitoring<sup>73</sup> were silent on timescales in relation to the fitting and removing of tagging equipment for bailees<sup>74</sup>.

BID’s prisons team now reports that prison staff in a number of prisons, including HMP Wormwood Scrubs, seem entirely unaware of the two working day upper limit for fitting tags to immigration bailees.

Not only may detention in prison beyond this two day tagging period be unlawful but, as is becoming wearily familiar, there are knock-on effects from delayed release on bail from prison for grants of Section 4 (1)(c ) bail accommodation, which may then have severe effects on the immigration case of the individual concerned including the risk of being labelled as an absconder or being considered in breach of licence and recalled. As ever, it is the detainees with no legal advisor and no support who are the most at risk and the least able to resolve or challenge such problems.

**Case of Mr I held in HMP Wormwood Scrubs.**

Mr I was first detained between July 2010 and December 2011. He was then convicted of theft in 2012, and given a sentence of two weeks before being re-detained under immigration powers in June 2012, and then bailed in September 2012. He was convicted of theft again in April 2013 and re-entered immigration detention in May 2013 before being granted immigration bail in October 2013.

When his bail application was heard in October 2013, Mr I had been waiting for over 4 months for the Home Office to make a grant of a Section 4(1)(c ) bail address. The Home Office had at one point cancelled his application for bail support, in the mistaken belief that Mr I was still serving a custodial sentence.

On the day after his bail hearing in October 2013 Mr I called the BID office from HMP Wormwood Scrubs. He had no idea he had been granted bail as the video link went down before the end of the hearing, so he was in effect not present at the point when the judge granted bail. Prison staff had possibly been unaware of the decision, but in any case he had not been informed of his release. Because he was to be tagged as a condition of bail, BID

<sup>73</sup> Home Office, (2010), ‘Electronic monitoring policy. Criminality and detention Group v.2.8’.

<sup>74</sup> These instructions appear to have been withdrawn at the time of writing.

explained that he may not be released until the next day (within the two day upper limit).

The next day Mr I called back to say that he had still not been released from detention in prison. BID then spoke with a prison staff member who said she would contact us after 2pm if Mr I had not been released at that point. No further contact was received that day from HMP Wormwood Scrubs or Mr I.

On the following day in November 2013 at 7pm Mr I was finally released from detention. **He was held one day longer in detention than he should have been**, despite the fact that his grant of bail clearly stated “the Home Office is arranging electronic monitoring within two working days of this grant of bail”.

His Section 4 bail support grant for accommodation in Manchester expired on the day he was released, one day later than the maximum allowed for fitting a tag. Mr I attempted to call the accommodation provider but was unable to reach him. Consequently he did not travel to Manchester that night as he did not want to arrive and not be let into the building. He spent his first weekend following release with a friend.

BID then spoke to his Home Office caseowner. She asked if he had absconded, BID explained the circumstances. She replied that she had ordered his release and believed he was released at 4pm on the day after the agreed two day upper limit for arranging tagging. When BID explained he had stayed with a friend she then stated that he was not eligible for Section 4 support as he was not destitute. BID explained that he was destitute and the friend was not in a position to accommodate him longer term. Mr I was allowed by the Home Office to remain in Section 4 (1)(c ) bail accommodation.

#### **Case of Mr P held in HMP Wormwood Scrubs**

In February 2013 BID received a call from Mr P to say that he had not been released from HMP Wormwood Scrubs two days after his bail hearing, nor had he yet been fitted with a tag (a condition of his release on FTT bail). He had spoken to a senior officer at the prison who said that there was “nothing on their computer” about him being released. BID asked Mr P to call us the following day if he is still being detained (we were not able to call into the prison to speak with him).

BID then called HMP Wormwood Scrubs, speaking to the Home Office team on-site who said that they had only just received the fax confirming his release. BID reminded her that over 48 hours had passed since the grant of release and asked that Mr P be released immediately. BID also asked about the progress of fitting a tag on Mr S, and she replied that the two day time limit is not to fit the tag on the person but to sort out the tagging equipment in their accommodation.

BID later called the main switchboard at HMP Wormwood Scrubs to check if he had been released, but there was no answer. We tried the custody number again but no one was in the office.

We later found out that Mr P had been released from detention in prison over 24 hours after the 2 day agreed upper limit for fitting a tag had expired.

## 11. CONCLUSION

The sheer scale of the use of the prison estate for immigration detention has become impossible to ignore over the last year or so. A worrying conflation has developed between criminal justice and immigration detention, which is enabling hundreds of immigration detainees to be held under restrictive prison conditions for months or years post-sentence, often for periods longer than their custodial sentence.

This report has offered evidence of the systemic barriers to accessing justice experienced by immigration detainees held in the prison estate. Practical restrictions on communication in prisons lie at the heart of many of these barriers, meaning that detainees are unable to receive time-sensitive documents in time to take action or respond quickly enough to progress their case. These are not trivial restrictions, and can be life changing.

The lack of the sort of automatic access to immigration legal advice that detainees in IRCs have, subject to means and merits tests, handicaps the resolution of detainees' immigration cases, to the disbenefits of the individual detainees and the Home Office.

Even if granted release on bail, detainees in prisons are subject to poor practice on the part of prison and Home Office staff which can lead to extended detention or the risk of recall to prison or re-detention through no fault of their own.

The effect of the entirely unnecessary frustration and disappointment that these barriers generate on the mental health of detainees in prisons is almost unbearable to contemplate.

But beyond practical restrictions, it is a scandal that the detention under immigration powers in the prison estate of up to one in four detainees in the UK takes place entirely outside statutory and other rules designed to provide safeguards against the improper use of detention and unacceptable detention conditions. It is also entirely unacceptable that the number of detainees held in prisons is entirely absent from published Home Office statistics. Home Office statistics are now actively misleading, in relation both to the number of immigration detainees in the UK and lengths of time spent in detention.

As a result, the scale of immigration detention in prisons is not understood by parliamentarians or the public, and cannot therefore be subject to proper scrutiny.

BID believes that UK prisons should no longer be used to hold immigration detainees.

## **Annex A**

### **Letter from BID to Home Office Immigration Enforcement in relation to inclusion of numbers and length of detention of detainees in the prison estate in published Home Office detention statistics, 2013**

Jonathan Nancekivell-Smith  
Director, Returns  
Immigration Enforcement

18<sup>th</sup> September 2013

Dear Jonathan

#### **Publication of statistics on detainees in the prison estate**

BID has requested information via NASF on the number of immigration detainees currently being held in the prison estate. A question has also recently been asked in parliament.

We are pleased that snapshot numbers of detainees by prison establishment are now being provided to NASF members. This has allowed BID to carry out some analysis of the current distribution of detainees against the geography of immigration legal advice across England and Wales after the Legal Aid Agency tender outcomes for Immigration and Asylum Services, published earlier this year. We will be able to share that analysis with you and the Legal Aid Agency shortly.

#### **1. Publication of data on number of detainees held in prison estate by establishment**

We would like to request that this information now be published quarterly by Home Office Statistics in the form of qualified management information if necessary. The prison estate now contains a significant cohort of the overall detained population, and we consider that not to make this data publically available is positively misleading.

#### **2. New tables to reflect data on period of time spent detained post-sentence in prison estate**

Home Office Statistics currently produce the following tables in relation to detention in the IRC estate which include length of detention:

**Table dt\_09\_q: People in detention by sex and length of detention**

As at end

of quarter	Length of detention	Total detainees	Adults	Children
2008 Q4	*Total	<b>2,250</b>	2,210	40
2008 Q4	*Total Male	<b>1,966</b>	1,941	25
2008 Q4	*Total Female	<b>284</b>	269	15
2008 Q4	*Total asylum detainees	<b>1,527</b>	1,499	28
2008 Q4	*Total non-asylum detainees	<b>723</b>	711	12
2008 Q4	A: 3 days or less	<b>105</b>	102	3

**Table dt\_05: People leaving detention by reason, sex and length of detention**

**Table dt\_05\_q: People leaving detention by reason, sex, and length of detention (by quarter)**

We would like to propose that information on length of detention in prison be provided to NASF stakeholders in the first instance, with an expectation that this data would also be published as part of Home Office statistics at a later date as new freestanding tables. In line with current information published in relation to IRC-held detainees, we would like to request a snapshot of length of detention (as in table dt\_09\_q), and the total length of time detained in prison on leaving (as in table dt\_05 and table dt\_05\_q).

Home Office *Enforcement Instructions and Guidance* at 55.10. 1 'Criteria for detention in prisons' states that decisions on transfers from the prison estate to the IRC estate post-sentence will be based primarily on the length of immigration hold in prison. Would you please clarify what information on length of detention will be relied on to make these decisions in line with this policy.

We would welcome an update from Home Office Statistics on any further data-matching exercises that have been carried out across Ministry of Justice and Home Office databases and in relation to detainees held in prisons.

### **3. Implications for current published data on length of detention**

It is BID's understanding that the current data on length of detention published in tables

**Table dt\_09\_q: People in detention by sex and length of detention**

**Table dt\_05: People leaving detention by reason, sex and length of detention**

**Table dt\_05\_q: People leaving detention by reason, sex, and length of detention (by quarter)**

do not include periods of time spent in detention in the prison estate. We believe that these tables should be adjusted to reflect the total length of detention across both estates. This would presumably be a similar exercise to that which took place when the published data on length of detention was changed to include detention in every IRC an individual had been held in during one continuous period of detention, rather than simply the time spent in the most recent or current IRC.

BID's own 6-monthly legal advice survey shows that at June 2013 the mean length of detention for our prison-held detained clients is 11.9 months post-sentence (range 2 months to 36 months).

We therefore request that published data on total length of detention now include periods of time spent in prisons under immigration powers, in order to avoid being actively misleading. Until this can be achieved we believe a note should be added to these tables to indicate that time spent detained in prisons is not included.

### **4. Children and age-disputed young people**

Thank you for agreeing to break down the quarterly snapshot of immigration detainees held in prison by the numbers of 18-21 year olds, this is most helpful. However, this still leaves significant gaps in the information available on the detention of children and young people.

First, we are not aware of any publicly available information on the detention of children under Immigration Act powers in the children's secure estate. We note that a new Home Office instruction 'Managing Foreign National Offenders under 18 years old' was published on 29<sup>th</sup> May this year. We believe it is essential that figures are published on the numbers of children detained under Immigration Act powers in the children's secure estate, to enable proper oversight of this practice.

In addition, no information is available to stakeholders on the numbers of age-disputed young people who are detained in prisons under Immigration Act powers. As you will be aware, the Home Office has been providing stakeholders with management information on the detention of age-disputed young people in Immigration Removal Centres for several years. This has enabled a fruitful dialogue on policy and practice in this area. We are very troubled that no equivalent information is being collected by the Home Office on age-

disputed young people in prison. These young people are even more isolated than their peers in Immigration Removal Centres, and may for example not be aware of the existence of charities including BID who might be able to assist them. The provision of data on these children and young people would enable proper monitoring of the Home Office's implementation of their duty under s55 of the 2009 Borders, Citizenship and Immigration Act in relation to this group.