

Injustice in Immigration Detention

Perspectives from legal professionals

Research report commissioned by the Bar Council
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Executive summary

Immigration detention is a major contemporary issue. The numbers of people in immigration detention have increased in the last decade. The UK has one of the largest immigration detention systems in Europe. There is no time limit. Some 30,000 people with immigration status issues spend widely varying lengths of time in detention each year. Major problems within the UK's immigration detention system have been exposed to a barrage of official inquiries, NGO reports and media coverage. The human consequences, financial costs and indeed the effectiveness of detention as a policy measure are highly controversial.

This report uses the concepts of the rule of law and access to justice to investigate the situation of people in immigration detention. It examines (1) the legal and policy framework and how the government practises immigration detention; (2) how legal processes work as mechanisms for people to challenge their detention; (3) detainees' access to legal services and their capacity to engage with the legal system. The research, carried out over three months, draws on a review of official documents, research and statistical data, as well as 21 interviews with barristers, solicitors, immigration judges and other specialists.

Analysis of the data collected points to numerous injustices regarding detention. At a wider level, we need to find more constructive ways to deal with people seeking work, sanctuary and settled family life in the UK. But as long as detention persists as a feature of immigration control, from the rule of law and access to justice perspectives, it needs to be subject to much stronger safeguards. Key findings are outlined below. The lack of a time limit stands out as a particularly important issue, and is addressed last.

- 1. The legal and policy framework for immigration detention is flawed.** There are broad statutory powers to detain people to prevent unauthorised entry and with a view to deportation. This leaves much to be defined by administrative guidance, which leaves considerable room for discretion on the part of Home Office decision-makers. This is inappropriate given that immigration detention involves deprivation of people's physical liberty. Moreover, people are held on administrative, not criminal grounds. A more robust statutory framework is needed to govern the use of immigration detention in the UK.
- 2. Poor standards of public administration have been normalised.** Lawyers report that evidence of imminence of removal, the risk of absconding and public harm is often poorly reasoned or evidenced; immigration decision-makers often fail to act diligently and expeditiously; mistakes are made with serious consequences for the individuals involved and their families. Too much depends on access to the courts. This is not good public administration. It is also deeply inappropriate given the deprivation of liberty involved. The perspectives of legal professionals collected suggest that a major overhaul of the public administration of detention is long overdue.
- 3. A genuine, robust framework to prevent harm in detention is needed.** In many ways, everyone is vulnerable in detention. Despite several breaches of ECHR Article 3 and a barrage of criticism, the new policy guidance on Adults at Risk has failed to protect people from serious harm in detention. Serious welfare concerns persist; indeed research participants working closely on these issues were concerned that the policy guidance might have made things worse, and the policy has already been subject to legal challenge.
- 4. Home Office assessment of the risk of absconding and risk of public harm on release is problematic.** In particular, having an outstanding claim represents a major reason for people not to go underground. As the government seeks to restrict migration, there are pressures on the reporting system. But the available evidence suggests fairly high rates of compliance with community-based reporting restrictions in general, including among people previously detained. This suggests that there are typically alternative and more humane ways to address the concern about absconding. Lawyers were also concerned that assessments of risk of public harm on release rely too much on the interpretation of the immigration caseworker and too little on the evaluation of the Prison and Probation Service, and that the focus of detention should be on addressing risks of more serious forms of harm.

5. **Many people detained for long periods have some kind of criminal record, but there are legal or logistical barriers to deportation.** Currently, some people spend longer in immigration detention than they served in their prison sentence. People should not be held in criminal prisons beyond the end of a custodial sentence. There is no reason why notifications of liability for deportation could not be sent to people a few months prior to the end of their criminal custodial sentences (instead of towards the end, as tends to happen currently). This would allow for necessary representations and legal challenges, and where these are unsuccessful, the arranging of travel documents. This would avoid the present situation of double punishment.
6. **There is a lack of prompt, automatic court control, a key safeguarding principle.** The most prompt and accessible mechanism to obtain release is by making an application for bail, a summary process, experienced as a lottery by many legal professionals and detainees. Home Office representation in the bail process regularly includes errors and misleading assertions; standards of evidence are poor; judicial interpretation of key factors under consideration (including imminence of removal, public harm, and risk of absconding) can vary considerably. Changes pending in the 2016 Immigration Act are inadequate to address the concerns raised.
7. **Judicial review (JR) provides a way to challenge detention for some, but not all the people who are detained unlawfully.** JR judgements have generated a body of case law that checks some of the excesses of the detention system, and the JR process has allowed some particularly problematic aspects of detention policy to be challenged. But it remains vague on key issues like reasonable length of detention, and there are a number of barriers that prevent cases getting to court. It is not a substitute for a clear statutory framework and better public administration.
8. **Many people struggle to secure the free legal representation they need to challenge their detention in court.** Access to publicly funded immigration advice much earlier would help many people resolve their immigration status or make plans to leave the UK, avoiding detention. The Detention Duty Advice scheme provides much-needed initial legal help to many people, and also assists many with legal representation. However, lawyers' accounts suggest not everyone succeeds in obtaining legal aid that they are entitled to, as promptly as they need. This is due to capacity problems; the increasingly rigorous enforcement of means and merits test by the Legal Aid Agency; and law firms' resulting caution. The financial risks that lawyers face in the current system favours large-scale business models, which get mixed reviews from detainees and practitioners; the new LAA tender seems unlikely to change this. Use of private and pro-bono services seems to be increasing, but access to these is uneven. Outcomes for detainees without legal advice and representation are poor. Given what is at stake for individuals, much better legal aid provision is needed for immigration matters in general and particularly for everyone detained under immigration powers. Consideration should be given to 'polluter pays' measures whereby the Home Office pays costs in cases it loses.

Each of these issues is important to consider in themselves, but they also interact with each other, as do the recommendations for change. Importantly, however, one issue cuts across and offers potential to address concerns in many different areas:

9. **There should be a time limit on detention.** This exists in many other prosperous and democratic societies. The 'legitimate aims' of immigration detention in the UK – for initial processing of unauthorised entrants, or pending imminent removal – already acknowledge that time matters. But what constitutes a reasonable period for detention and standards of due diligence are ill-defined within the current legal and policy framework. Many detentions last months and even years. The lack of a statutory time limit helps immigration detention to slip into the realms of convenience, punishment and deterrence. It causes significant psychological distress. A time limit – many support 28 days - puts the onus on public authorities to make more careful decisions and act diligently, as seen with historic changes in the UK's criminal justice and mental health systems. Too often days slip into months slip into years of people's lives – it is high time that the administrative detention of people under immigration powers is taken more seriously.

1. INTRODUCTION

1.1 Questioning access to justice in immigration detention

Major injustices within the immigration detention system have been documented through a barrage of official inquiries, NGO reports and media exposés. After a decade in which detention has increased substantially, and legal aid has been cut drastically, this report asks, what is the current state of immigration detainees' access to justice?

The UK has one of the largest immigration detention systems in Europe.¹ There are around 3,400 people being held in immigration detention, and the numbers have increased considerably over the last decade.² There are nine dedicated 'Immigration Removal Centres' around the UK, many run by private, profit-making security contractors, using detainee labour at wages as low as £1 per hour to augment their competitive edge.³ Some 14% of immigration detainees are held in prisons, typically after serving a custodial sentence. Around 30,000 people spend widely varying lengths of time in immigration detention centres each year, indeed some people spend several years in detention, as there is no time limit. Immigration detainees are a diverse population, originating primarily from Asia and Europe, and Sub-Saharan Africa. The population is around 90% male. Although the coalition government of 2010-15 pledged to end child detention entirely, 71 children were detained in 2016.

The UK's immigration detention system is controversial. First, it has a clear human cost with abundant evidence that it has a seriously detrimental effect on people's health and well-being, numerous instances of serious abuse and deaths in detention, privately-run centres plagued by scandal, and grave concerns about the inappropriate holding of immigration detainees in prisons.⁴ Second, the financial cost of the immigration detention system is increasingly questioned, reported to have cost the government £125 m in the year ending 31 March 2016; around £34,000 per detainee per year; and nearly £14 m in compensation claims in the three years from 2012.⁵ Third, the efficacy of the UK's detention regime, as a tool of immigration control, has also been brought into doubt by the fact that currently just over half of those leaving detention do not leave the UK but are released into the community. This raises questions about the original decision to detain and fuelling campaigns for alternative approaches.⁶

Two concepts frame the analysis in this report. The principle of the *rule of law* emphasises that in a just legal system the law is clear and consistent, is applied equally to all within the state, limits bureaucratic discretion, protects human rights, complies with international law, facilitates dispute resolution and ensures fair adjudication.⁷ Within this, ensuring effective *access to justice* is vital. There is a distinction between people having formal legal rights, and being able to have their rights

¹ Global Detention Project, 'United Kingdom Immigration Detention Profile' (London: Global Detention Project, 2016).

² Information on detained population in IRCs from Home Office *Immigration Statistics - January to March 2017* (Detention Tables). Figure for population in prisons from AVID <http://www.aviddetention.org.uk/immigration-detention/detention-prison>. Demographic data is available for IRCs only.

³ Kate Bales and Lucy Mayblin "'Paid work" or underpaid labour? The labour exploitation of detainees within immigration detention' *Discovery Society*, 2 August 2017.

⁴ Mary Bosworth, *Inside Detention* (Oxford: Oxford University Press, 2014), Lampard, Kate and Ed Marsden 'Independent investigation into concerns about Yarl's Wood immigration removal centre A report for the chief executive and board of Serco plc' (2016).

⁵ Terry McGuinness and Melanie Gower, 'Immigration Detention in the UK: An Overview', House of Commons Briefing Paper No. 7294 (2017).

⁶ Home Office *Immigration Statistics - January to March 2017*, Table dt_06.

⁷ Lord Bingham, 'The Rule of Law,' *The Cambridge Law Journal* 66, no. 1 (2007): 69.

recognised, protected and defended.⁸ Drawing on earlier analytical frameworks, to evaluate access to justice in relation to immigration detention this report asks:⁹

- **What rights are enshrined in law and policy?** i.e. the framework provided by international law, primary legislation, case law, policy and administrative guidance, and how they are reflected (or not) in the practices of relevant actors and institutions.
- **By what legal processes can people access their rights?** i.e. the mechanisms through which people may claim their rights and how these work in principle and in practice.
- **How can people access legal advice and representation?** i.e. the availability, funding and quality of the professional services which facilitate people's engagement with the legal system.
- **How do people exert agency within this process?** i.e. people's awareness of their rights, and capacities and strategies as they engage with the legal system, which may be enhanced or constrained by individual characteristics and the wider societal context.

The research on which this report is based includes:

- **A review of existing information**, including legislation, policy documents, and research and analysis published by specialist legal organisations, NGOs, and academic journals.
- **Analysis of key statistical sources:** from the Home Office, Legal Aid Agency, Daily Court Listings, Bail for Immigration Detainees and Bail Observation Project.
- **21 semi-structured qualitative interviews with a range of legal professionals**, including solicitors, barristers, judges, and other specialists (see Appendix).¹⁰

This research has several limitations: it was carried out over a three-month period and raises many issues that urgently call for further investigation. The research focused on the perspectives of legal professionals who see day-to-day where the legal system is failing. It did not seek perspectives from people who have experienced immigration detention first-hand (although it does draw on testimony already available), or of Home Office officials; it was primarily London-based; and we were unable to obtain via Freedom of Information Act requests detention-specific data on legal aid and legal processes which would be relevant.

The remainder of this section briefly introduces the wider context of UK immigration law and policy: this is important because people are detained due to particular issues with their immigration status. The rest of the report is divided into three sections, reflecting the analytical framework outlined above. Section 2 examines the powers of the state, human rights constraints, and UK government practice in relation to immigration detention. Section 3 unpacks the legal mechanisms through which people challenge their detention, i.e. bail and judicial review. Section 4 maps the landscape of legal services relevant to detention, exploring questions of funding and quality. Each section touches in different ways on the legal awareness, capacities and strategies of people held in immigration detention. Section 5 summarises the findings and considers what needs to change.

⁸ Mauro Cappelletti and Bryant G. Garth, *Access to Justice*. 1, B. (1978).

⁹ Hague Institute for the Internationalisation of Law, 'Measuring Access to Justice in a Globalising World: The Hague Model of Access to Justice,' (Hague: HILL, 2010).; Julinda Beqiraj and Lawrence McNamara 'International Access to Justice: Barriers and Solutions,' (London: Bingham Centre for the Rule of Law, 2014).

¹⁰ Interviews were informed by initial familiarisation, via informal conversations with legal professionals, and observation of public bail hearings at Newport, Hatton Cross and Taylor House.

Immigration Removal Centres in the UK

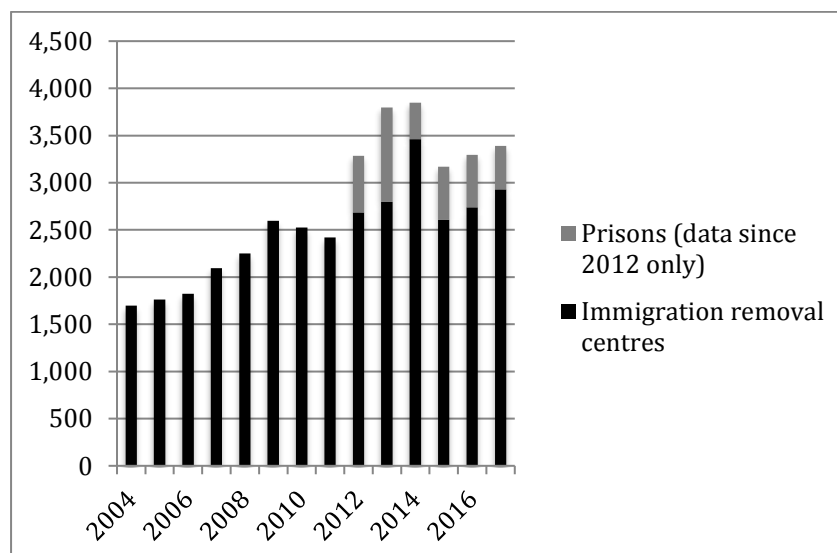


Top 10 nationalities of people entering detention in IRCs, 2016 and 2009-2016

Rank	2016		2009-2016	
1	India	2761	Pakistan	27070
2	Pakistan	2560	India	22596
3	Albania	2184	Nigeria	14332
4	Romania	1553	Bangladesh	12709
5	Iran	1552	Afghanistan	12378
6	Bangladesh	1502	China	9515
7	Nigeria	1432	Albania	9143
8	Poland	1204	Iran	7921
9	Iraq	1178	Vietnam	6207
10	Afghanistan	923	Eritrea	6082

Source: Home Office *Immigration Statistics - January to March 2017, Detention*, table dt_04

Annual snapshots of the number of people in detention under immigration powers



Sources: Home Office *Immigration Statistics* and AVID Freedom of Information Requests¹¹

¹¹ The population can fluctuate during the year. IRC data from Home Office *Immigration Statistics - January to March 2017, Detention*, Tables dt12q, dt13. Figures are for end of Q4 each year except 2017 end of Q1. Prison data from the Association of Visitors to Immigration Detainees (AVID) FOI requests, see

1.2 A wider context of immigration injustice

The complexity of immigration law is much commented upon by legal professionals.

Migrants are often in an ambiguous position in that human rights are universal, but immigration rights are carefully controlled. The structure of immigration law is complex: *'layer upon layer of inadequately thought out, hastily drafted legislation all too often incompatible with human rights' and rule of law guarantees.*¹² There is rapid change: over the course of the twentieth century, immigration controls were progressively formalised in racialised, gendered and economically discriminatory ways. In recent years there has been an intensification of migration legislation and regulation, aimed at the control and selection of migrants, and new 'Immigration Rules' are produced most months.¹³

The Home Office (HO) is responsible for making initial decisions on applications to enter or remain in the UK, and the enforcement of those decisions. It is widely acknowledged that **HO immigration work has been 'beset by serious administrative and managerial problems'**.¹⁴ Frontline staff have high workloads and inadequate training; are under pressure to meet refusal and efficiency targets; have considerable authority and discretion in their decision-making, but must navigate multiple, proliferating sets of guidance; and there is a widely documented *'culture of disbelief'*.¹⁵

Rights of appeal against HO decisions have been progressively restricted. Where there is no international protection or human rights element to the claim, migrants may only appeal out-of-country. The HO can certify asylum or human rights claims as clearly unfounded, which denies in-country rights of appeals. Numerous issues have been identified with out-of-country appeals.¹⁶ Research on asylum appeals in-country has highlighted several concerns, including substantial delays, limits on the availability of legal aid representation, and the aggressive approach taken by the HO and some judges to evidence provided by appellants and experts.¹⁷ Notwithstanding, success rates indicate that the Home Office often makes mistakes: in 2016/17 43% of appeals were allowed in the First-tier Tribunal and 32% in the Upper Tribunal.¹⁸ For people wanting to build a life in the UK, and fearful of removal, the period of waiting for appeal is one of stress and uncertainty which can drag on for several months or even years, during which they may be reliant on asylum support, informal work and social networks, or become destitute.¹⁹

There has been a substantial increase in Judicial Review (JR) claims, once all appeal rights have been exhausted. Most immigration JRs concern the *application* of law or policy, although occasionally law or policy itself is challenged. Immigration JRs are the subject of

<http://www.aviddetention.org.uk/immigration-detention/detention-prison>. Figures for end of Q4 each year, except 2016 end of Q3, and 2017 end of Q1, and data for 2012 and 2013 are approximate.

¹² Alison Harvey, Immigration Law Practitioners' Association, cited in Halsbury's Law Exchange, 'A State of the Nation Report on Legal Aid: Can We Safeguard Access to Justice?' (London: Halsbury's Law Exchange, 2016), 5.

¹³ Gina Clayton. *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2016).

¹⁴ John Campbell *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* (Abingdon: Routledge, 2017), 28.

¹⁵ Campbell *Bureaucracy, Law and Dystopia*.

¹⁶ Although a recent case opened up the opportunity to JR a certification decision. *Kiarie and Byndloss, R (on the applications of) v SSHD* [2017] UKSC 42 (14 June 2017).

¹⁷ Robert Thomas 'Immigration appeals and delays: on the verge of a crisis?' Blog for the UK Administrative Justice Institute, 18 May 2017, Andrew Burrige and Nick Gill, "Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals," *Antipode*, 49, no. 1 (2017) 23–42.

¹⁸ Ministry of Justice *Tribunal and Gender Recognition Certificates Statistics*, Table FIA3 and UIA3.

¹⁹ Melanie B.E. Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees,' *Journal of Ethnic and Migration Studies* 40, no. 12 (2014): 1991–2009.

intense debate: on the one hand, there are concerns that many weak claims are made; but on the other, many well-founded claims may not be getting to court, particularly in the context of legal aid cuts. Immigration accounts for 80% of judicial review claims.²⁰ The Immigration and Asylum Chamber of the Upper Tribunal (where the vast majority of immigration JRs are heard as of 2013) has kept on top of the workload without any substantial increase in salaried judges. However, there are concerns that this may be to the detriment of ordinary immigration appeals; and that it is contingent on many claims not proceeding to a substantive hearing because they are certified as Totally Without Merit; refused permission to proceed at an oral hearing; or settled out of court by the HO.²¹ It has been suggested that the legal system for challenging immigration decisions *'has been changed and modified for short-term political reasons with little in the way of strategic planning.'*²²

In this context, being able to access legal advice and representation is very important. Only practising lawyers regulated by their relevant professional body, or immigration advisors regulated by the Office of the Immigration Services Commissioner (OISC), are allowed to provide immigration advice. Against a background of prior legal aid cuts, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) dramatically reduced legal aid available for immigration matters, on the dubious basis that *'individuals in immigration cases should be capable of dealing with their immigration application, and it is not essential for a lawyer to assist.'*²³ Now only cases with a strong human rights element may receive support, but are still subject to increasingly rigorous 'means and merits' tests. Against a background of earlier cuts, the numbers of 'matters started' with legal aid dropped – in recent years it has been around one-third of levels immediately pre-LASPO, and the value of claims to the LAA for these matters dropped to around half.²⁴ This has intensified concerns about the availability and viability of immigration practice.

Scope of legal aid for immigration matters

- **Asylum claims** - but not refugee family reunion, asylum interviews (unless allowed by regulations e.g. for children) or asylum support (except for accommodation).
- **Challenging immigration detention**, including bail, temporary release or admission including the conditions applied to the person on release.
- **Victims of domestic violence**, under certain circumstances, when applying for indefinite leave to remain and residence cards under EEA regulations.
- **Victims of trafficking in human persons**, where there is a conclusive or reasonable grounds determination, and applying for settlement or further permission to remain as a refugee or with humanitarian protection.
- **Security-related cases subject to special proceedings:** in the Special Immigration Appeals Commission, and in relation to notice and control order proceedings for terrorism prevention and investigation measures.
- **Judicial review:** generally in scope, including detention and removal/deportation, with some restrictions e.g. for repeated JR claims perceived as abusive.
- **Exceptional Case Funding:** people are eligible to apply for this if their case does is out of scope, but their basic human rights would be threatened by the refusal of legal aid.

Thus, although the UK still receives significant numbers of people looking for work, sanctuary, or a settled family life, staying in the UK legally is becoming an increasingly challenging and complex process, and the possibility to appeal HO decisions and legal aid

²⁰ Robert Thomas, 'Immigration Judicial Reviews: Resources, Caseload, and 'System-manageability efficiency' *Judicial Review*, 21, no.3 (2016), 209-220.

²¹ Thomas 'Immigration Judicial Reviews'. Appeals concerns featured in *The Senior President of Tribunals' Annual Report* (London: MoJ, 2016) and TWM concerns in *Wasif v The SSHD* [2016] EWCA Civ 82 (09 February 2016).

²² Thomas 'Immigration Judicial Reviews', 219.

²³ MoJ, *Reform of Legal Aid in England and Wales: The Government Response*, (London: MoJ; 2011), 27.

²⁴ 'Matters started' covers Legal Help and Controlled Legal Representation – explained in more detail in section 4.2. Legal Aid Agency *Legal Aid Statistics*, Tables Jan to Mar 2017, Tables 5.1. 5.3, 6.2 and 6.3.

to do so increasingly restricted. In this context, growing numbers of people have found themselves in immigration detention.

2. POWERS, RIGHTS AND GOVERNMENT PRACTICE

The legal framework governing immigration detention is complex: national immigration legislation gives very broad powers, but also provides important human rights constraints; there is a wide range of case law examining the lawfulness of detention, and there is also a lot of administrative guidance.

The gravity of depriving a person of their liberty is recognised in the European Convention on Human Rights (ECHR) Article 5: *‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law’*. The ECHR is transposed in Schedule 1 of the UK’s HRA. To be lawful and not arbitrary, immigration detention must be cogently justified, prescribed in law, and compliant with appropriate safeguards.²⁵

This section highlights the inadequacy of the UK framework, on paper and in practice, focusing on permissible reasons for detention; length of detention; and the question of unsuitability for detention. The Bingham Centre for the Rule of Law has outlined a set of safeguarding principles drawing on a range of legal sources, summarised below; this helps to frame the analysis of the UK’s use of immigration detention.

²⁵ Michael Fordham QC with Justine N Stefanelli and Sophie Eser ‘Immigration Detention and the Rule of Law: Safeguarding Principles’ (London: Bingham Centre for the Rule of Law, 2013).

Rule of law safeguarding principles for immigration detention

SP1: Liberty. Everyone, whatever their immigration status, has a basic freedom from detention.

SP2: Equality. Everyone, whatever their immigration status, has a basic right to equal treatment under equal law.

SP3: Prescribed rules. Detention requires clear and published prescribed rules setting out the criteria and process.

SP4: Special needs. The prescribed rules must protect vulnerable persons and groups from unsuitable detention or conditions.

SP5: Authority. Detention can only be imposed by decision, and carried out by action, of prescribed and duly-authorised authorities.

SP6: Adherence. Detention must always be compliant with the prescribed rules.

SP7: Individualisation. Detention must be based on due appraisal of the individual circumstances.

SP8: Alternatives. Detention must be based on due appraisal of the alternatives to detention.

SP9: Non-routine. Detention cannot be used as a routine measure of immigration control.

SP10: Non-penalising. Detention cannot be used as a routine measure to penalise irregular immigration status.

SP11: Non-arbitrary. Detention must not be arbitrary.

SP12: Legitimate aim. Detention can only be used for a legitimate aim: for carrying out entry or removal controls effectively.

SP13: Necessity. Detention must be a last resort: sufficiently closely connected to the legitimate aim as to be necessary to achieve it.

SP14: Achievability. Detention cannot be imposed, or maintained, unless the legitimate aim is achievable expeditiously.

SP15: Diligence. Detention is unlawful if the legitimate aim is not pursued diligently and expeditiously.

SP16: Brevity. Detention must be as short as possible.

SP17: Maximum. The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.

SP18: Reasons. Detainees must promptly, clearly and regularly be told the grounds and maximum duration of their detention, and their rights.

SP19: Conditions. Detention must be in humane, dignified conditions, in distinctive non-penal facilities.

SP20: Contact. Detainees must always be able to communicate with the outside world, legal representatives and relevant agencies.

SP21: Automatic court control. Every detainee must promptly be brought before a court to impose conditions or order release.

SP22: Administrative review. The executive must regularly review the appropriateness and conditions of detention.

SP23: Judicial review. A detainee has the right to have the lawfulness of detention reviewed by a court empowered to order release.

SP24: Legal representation. Every detainee is entitled to prompt, continuing, adequate legal assistance, state-funded if unaffordable.

SP25: Compensation. Everyone unlawfully detained is entitled to adequate compensation regarding the violation of their rights.

2.1 Reasons for detention

ECHR 5(1)(f) sets out the ‘legitimate aims’ of immigration detention: i.e. to prevent unauthorised entry and where action is being taken to return the person. UK immigration legislation also gives the state the power to detain non-nationals in order to regulate unauthorised entry, or to hold someone pending removal or deportation.²⁶ The main source of administrative guidance,²⁷ the *Enforcement Instructions and Guidance* (EIG) Chapter 55, gives the main approved reasons for deciding to detain someone:

- To effect removal or deportation, where this is imminent;
- Initially to establish a person’s identity or basis of their claim, where there is insufficient reliable information to decide whether to grant temporary admission;
- Where there are strong grounds for believing that the person will fail to comply with any conditions attached to the grant of temporary admission or release with restrictions;
- Where release is not considered conducive to the public good.

²⁶ See Immigration Act 1971 Sch 2 paragraph 16(2) and Sch 3, paragraph 2; Nationality Immigration and Asylum Act 2002 Section 62, UK Borders Act 2007 Section 36. Note that removal refers to the administrative removal of unauthorised entrants or those who have violated terms of their leave to remain, and deportation is a removal deemed to be conducive to the public good, typically after serving a prison sentence.

²⁷ Other sources of administrative guidance are Detention Service Orders and the Detention Centre Rule, 2001.

The guidance lists several factors that should inform HO decisions whether there is reason to detain someone: likelihood and timescale of removal, evidence of previous absconding or failure to comply with conditions of release or bail, history of (non)compliance with immigration laws, the nature of the person's personal ties in the UK, whether the progress of their legal case provides an incentive to comply with conditions, whether there is a risk of offending or harm to the public, as well as, if the person is a child or an adult at risk, their potential unsuitability for detention.²⁸ Three key debates arise in relation to this framework.

First, administrative convenience plays a significant role in detention policy and practice. Key case law established that detention does not have to be absolutely *necessary* to prevent entry or effect removal in individual cases, provided that it is 'closely connected' to one of these aims.²⁹ **It is true that there are not supposed to be blanket policies for detention, and the case for detention should be considered on its individual merits.**³⁰ However, the failure of the European Court of Human Rights to apply a test of necessity/proportionality to immigration detention has afforded a large area of discretion for the government, and it is often difficult to discern clear 'legal grounds' for detention in an individual case.³¹ A prominent example was the Detained Fast Track, introduced in 2005 to accelerate asylum decisions and appeals. In 2015, this scheme was found unlawful, lacking sufficient regard to individual circumstances and vulnerabilities (see Section 3.2.2). Another example of the administratively convenient use of detention powers is when a consular official is conducting travel document interviews in a particular detention centre, and the HO detains people of that nationality upon their reporting, ahead of the interview, and keeps them in detention afterwards.³²

Second, HO assessment of the risk of absconding, a key rationale for detention, is highly problematic. Caseworkers are required to consider the person's history of compliance with the immigration authorities; the incentive that having an outstanding claim might give to comply; and the individual's personal/family ties in the UK. Lawyers suggest that HO decisions to detain often give excessive and unjustifiable weight to any history of 'non-compliance' with the immigration authorities. This might for instance include: using a false document when this was the only way available to you to enter the UK to claim asylum; breaching visa conditions while under the control of traffickers; overstaying a visa to remain part of your child's life while trying to regularise your status; missing a reporting appointment because of an emergency. These are the understandable outcomes of people trying to navigate a complex and changing immigration system, and do not automatically imply a greater risk of absconding. The limited statistical evidence also calls into question whether detention is really justified to prevent absconding. Some 80,000 people currently live in the community with some form of reporting restriction. In 2015 compliance rates of 95% were reported.³³ In December 2016, an inspection found that 91% of scheduled reporting events were attended (and many no-shows turn out to be isolated occurrences e.g. for health reasons), despite concerns that these appointments typically do not represent the 'meaningful contact' that they are supposed to entail, due to the minimal time

²⁸ Home Office, *UK Visas and Immigration Enforcement Instructions and Guidance (EIG)* Chapter 55.33.1.

²⁹ *Saadi v UK* (2008) 47 EHRR 17; *CHAHAL v. THE UNITED KINGDOM* - 22414/93 - Grand Chamber Judgment [1996] ECHR 54 (15 November 1996); *Singh, R (on the application of) v Governor of Durham Prison* [1983] EWHC 1 (QB) (13 December 1983).

³⁰ Home Office, *EIG* Ch 55, *Lumba (WL) v SSHD* [2011] UKSC 12 (23 March 2011).

³¹ Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet,' *Current Legal Problems* 68, no. 1 (January 1, 2015): 143–77.

³² Interview with BID (1).

³³ James Brokenshire, Minister for Immigration, letter to the Detention Inquiry, 13 October 2014, cited in Detention Action 'Without Detention'.

allocated.³⁴ Past evaluations specifically focusing on groups of people released from detention on pilot projects or bail have reported compliance rates of around 90%.³⁵

Third, HO assessment of the risk of harm to the public also raises serious issues, the first being the evaporation of the concept of rehabilitation. Foreign nationals who have served criminal sentences may be detained pending deportation at the recommendation of a criminal court or where the Secretary of State has made and served a decision to deport. Moreover, since 2007, all foreign nationals who have served a sentence of 12 months or more are automatically scheduled for deportation, and there is an additional power to detain *'while the Secretary of State considers'* whether automatic deportation provisions apply.³⁶ Administrative guidance steers caseworkers strongly towards detention in these cases; and where a violent, sexual, drug-related or other serious offence has been committed *'release is only likely to be appropriate in exceptional cases.'*³⁷ This means that, unlike citizens, many foreign nationals who have committed crimes are not deemed capable of rehabilitation. But in a Detention Action Community Support Project with ex-offenders who had experienced or were at risk of detention, only 2 of the 21 participants re-offended, suggesting that much may be achieved by community-based case management.³⁸ A recent inspection report, however, voiced concern that hostile environment measures denying accommodation and support to newly released 'Foreign National Offenders', may push some towards re-offending. The report held that criminal casework managers were considering whether it was appropriate in some instances to grant exceptional discretionary leave where conditions in the country of origin made return impossible.³⁹

Another important problem how the risk of public harm is understood in HO decision-making. Lawyers interviewed for this report are concerned that as deportation policy changes, increasingly people are being detained following any offence which leads to criminal prosecution, no matter how minor; indeed, that even long-spent convictions, or past arrests which did not lead to a conviction, are being used as reasons to detain.⁴⁰ As one experienced barrister put it: *'the Home Office does not make any practical distinction between detaining someone with no convictions in the UK, or with only non-violent minor offending, and a serial recidivist with a history of very serious violent offending.'*⁴¹ For example, people are often detained after committing an immigration offence (e.g. entering or working unauthorised); it does not follow that they present a high risk of re-offending causing public harm. As one barrister put it: *'I have represented people who were document offenders or victims of trafficking or drug mules, and the sentencing reflects the mitigation of operating under duress, but the HO just look at a sheet of paper, see you are subject to 12+*

³⁴ David Bolt 'An inspection of the Home Office's Reporting and Offender Management Processes, December 2016-March 2017' Independent Chief Inspector of Borders and Immigration, November 2017.

³⁵ See analyses reported in relation to (1) Detention Action Community Support Project, plus similar schemes in Australia, Sweden and Canada outlined in Detention Action, 'Without Detention: Opportunities for Alternatives' (London: Detention Action, 2016), (2) Irene Breugel and Eva Natamba 'Maintaining Contact: what happens after detained asylum seekers get bail?' Social Science Research Papers, No. 16 (London: South Bank University, 2002) (cited on BID's website <http://www.biduk.org/pages/88#FAQ7>); (3) an internal evaluation of a HO pilot initiative cited in Bail for Immigration Detainees 'The Liberty Deficit: long-term detention & bail decision-making.' (London: BID, 2012).

³⁶ Immigration Act 1971, UK Borders Act 2007, s(36).

³⁷ Home Office, *EIG* 55.3.2, see also 55.2.3, 5.3.A, 55.5.2.

³⁸ Detention Action, 'Without Detention'.

³⁹ David Bolt, 'An inspection of the Home Office's management of non-detained Foreign National Offenders, December 2016 - March 2017' Chief Inspector of Borders and Immigration, November 2017.

⁴⁰ Interviews with barristers (1, 2, 3, 4, 5, 6), Public Law Project (1), email correspondence with 2 barristers November 2017.

⁴¹ Email communication with barrister, November 2017.

*months, we are entitled to deport and detain you, so we do. They skip a step – we are entitled to detain you so we have to. But why are you going to do it in this case?*⁴²

Furthermore, people may be detained while the Secretary of State considers whether or not to deport them, which can take a long time and there have been cases challenging this.⁴³

The Immigration Law Practitioners' Association (ILPA) gave the example of an immigration detainee who served an 11-month sentence for a document offence was held in prison for a further 12 months while the Secretary of State considered whether to deport him – only at that point could a deportation appeal on human rights grounds begin.⁴⁴

There are clearly missed opportunities here. Administrative guidance emphasises the presumption in favour of temporary admission or release; decisions to detain must be subject to rigorous scrutiny; reasonable alternatives to detention must be considered; and detention powers in cases that do not meet deportation criteria be used sparingly.⁴⁵ However, the Chief Inspector of Prisons told the All Party Parliamentary Inquiry in 2014: *'We see little evidence during inspection of casework files that existing alternatives to detention have been considered and assessed prior to a decision to detain and on an ongoing basis when it is reviewed periodically.'*⁴⁶ The question of periodic review brings us to the next issue: length of detention.

2.2 Length of detention

The framework allows detention for initial processing and where removal is imminent. But how short is 'initial' and how soon is 'imminent'? At the international level, there is a body of international guidelines and case law pointing to the importance of a maximum time limit.⁴⁷ **The UK is the only EU member state that has not imposed a time limit on the length of time a person can spend in immigration detention.**⁴⁸ Much UK case law involves challenges to the length of detention, and it has been established that detention is only lawful if the person is detained for a period that is reasonable in all the circumstances for the specified purpose, and the government actively and diligently pursues that purpose.⁴⁹ UK administrative guidance also makes broad statements reflecting these principles and saying that detention must be used *'for the shortest period necessary'*.⁵⁰ This does not, however, point to a clear time limit for detention or clearly define expectations in terms of due diligence.

As a result, there is wide variation in the length of time people are held. Many people are held for relatively short periods. However, at the end of June 2017, 56% of people living in detention centres had been held for more than 28 days.⁵¹ This indicates how liberally 'imminence' and 'reasonable period' are being interpreted by the HO. At the more extreme end, there were 271 people who had been held more than six months, and 80 more than

⁴² Interview with barrister (6).

⁴³ Greg Ó Ceallaigh, 'Detention unlawful when the Secretary of State faffs around' Free Movement blog (London: Free Movement, 2013).

⁴⁴ Interview with ILPA.

⁴⁵ Home Office, *ELG* 55.1.

⁴⁶ Her Majesty's Chief Inspector of Prisons (HMIP), 'Submission to the Parliamentary Inquiry into the Use of Immigration Detention in the UK,' (2014).

⁴⁷ Fordham *et al* 'Immigration Detention'.

⁴⁸ As the UK opted out of the EU Returns Directive (2008), which includes a maximum of 6 months, extendable in certain circumstances to 18 months.

⁴⁹ Singh, R (on the application of) v Governor of Durham Prison [1983] EWHC 1 (QB) (13 December 1983).

⁵⁰ Home Office, *ELG* 55.1.3, 55.1.4.1.

⁵¹ Home Office *Immigration Statistics – April to June 2017*, Detention Tables dt11q.

one year. In the absence of a time limit, some people are held for multiple years. In addition, many people experience more than one detention, which is not captured in government data.

There are various factors that contribute to prolonged detention. Despite the restriction of appeal rights, there are still cases where people are able to engage in lengthy legal battles to secure the right to remain in the UK on asylum or human rights grounds. The HO is often slow to acknowledge that the individual's case is complex, the legal process is likely to be extended, and therefore removal not imminent. Even where there is no bar to removal, people may require travel documents to return to their country of origin, procured via their embassy or consulate, and in some cases this takes a long time to process, or the identity or nationality of the individual is disputed.⁵²

But a major reason for long detentions is simply the fact that there is no time limit.

*'Officials treat detention as an administrative matter which isn't serious, because they have these powers to detain and no incentive to get on with doing the thing they are supposed to be doing... We see people detained for a very long time with nothing happening behind the scenes to facilitate removal. [The HO treats] detention as either a punishment for being there legally, or as a coercive method to try and make them leave.'*⁵³ Since a 2011 legal challenge, internal monthly reviews have improved in regularity, but the quality remains poor, typically failing to indicate a genuine engagement with reasons for prolonging detention.⁵⁴ In 2012, a joint review by the Chief Inspectors of Borders and Immigration and the Chief Inspector of Prisons found that *'There was inconsistent adherence by case owners to the Hardial Singh principles that removal of detained people must occur within a 'reasonable period'.*⁵⁵ Moreover, administrative guidance explicitly suggests that the prolonging of detention is less of a concern where people have served a criminal sentence and meet the deportation criteria.⁵⁶

Living like this is very hard. Research has highlighted the *'temporal anguish'* of detainees, who live in fear of both precipitous return and endless detention.⁵⁷ Anger and frustration is inevitable: it is easy to see how immigration detention is experienced by many people as an unjust punishment.⁵⁸ The official remedy for unauthorised presence is either regularisation of stay or removal from the country, not indefinite incarceration.

The fact that majority of people who leave detention are now released into the community, rather than returned to their country, suggests that detention is an immigration control tool that is failing at considerable and unnecessary human cost. Since 2010, returns from the UK have gradually decreased from 64% (2010) to 47% in (2016) of

⁵² For example, the HO's Travel Document Guidance currently states that Lebanon and Tunisia take 6 months + to organise a travel document, and there is no established timescale for many countries (see Home Office, 'Returns Logistics – Country Returns Guide', October 2017). The details of Memoranda of Understanding regarding returns between the UK and other countries may be viewed as sensitive and not disclosed (Interview with solicitor 3).

⁵³ Interview with barrister (3).

⁵⁴ Home Office, *ELG* 55.8 and *Detention Centre Rules* 2001, Rule 9, Interview with Public Law Project (1) and barristers (1 & 2).

⁵⁵ HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration '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' (2012) p.8.

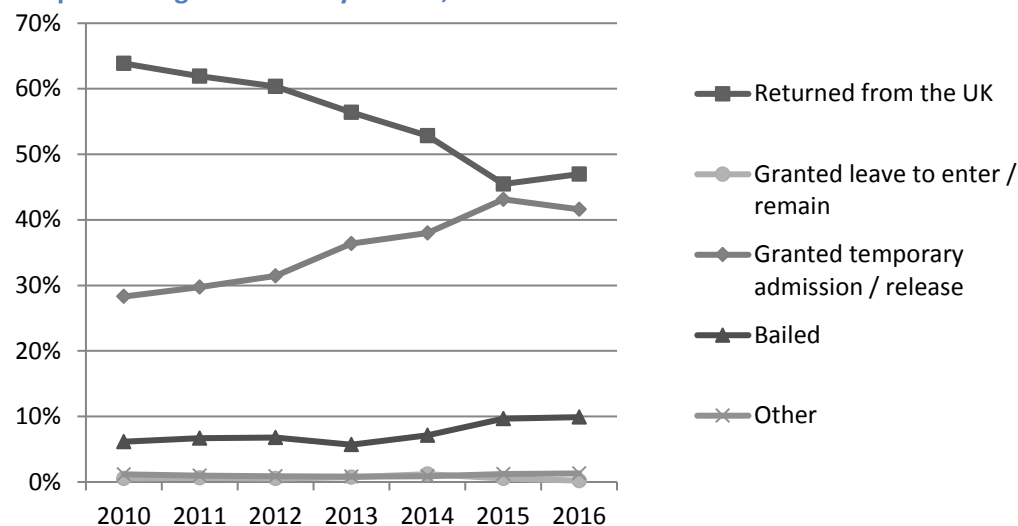
⁵⁶ Home Office, *ELG* 55.

⁵⁷ Griffiths, 'Out of Time', 2005.

⁵⁸ Costello 'Immigration detention'.

people leaving detention; most of the remainder are released by the HO or the First-tier Tribunal.⁵⁹

People leaving detention by reason, 2010-2017



Source: Home Office *Immigration Control Statistics*, Jan to Mar 2017, Detention tables, dt_05.

There is a strong and on-going campaign by civil society and parliamentarians for a 28-day time limit which has so far has been met only with the inadequate concession of four monthly automatic bail hearings in the 2016 Immigration Act (see Section 3.1.3). As one barrister put it, *'A time limit... would change the terms of the debate from how long is reasonable to why haven't you done what you needed to do by now, we are going to let this person out.'*⁶⁰

2.3 Unsuitability for detention

Many argue that deprivation of physical liberty on administrative grounds is a dehumanising way to treat any human being. There is a wealth of evidence on the psychological and relationship damage that detention, and particularly indefinite detention, can cause.⁶¹ However, the recent policy debate has focused on identifying people with particular special needs, whether these emerge prior to or during detention, who are particularly adversely affected by being detained.⁶²

The UK government has been found several times to have breached Article 3 ECHR, the prohibition on torture and inhuman and degrading treatment, in its use of immigration detention in ways that acutely affected people's mental and physical health.⁶³

Past administrative guidance failed to safeguard people against harm in detention, despite stating that certain people, for example, people who had experienced torture, should only

⁵⁹ Interview with barrister (3). There is also the possibility of Chief Immigration Officer Bail, where the officer makes a decision on paper, and which requires two sureties offering very substantial sums of money (although this is rare).⁵⁹

⁶⁰ Interview with barrister (2).

⁶¹ E.g. Stephen Shaw, 'Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw' Presented to Parliament by the Secretary of State for Home Department by Command of Her Majesty (2016).

⁶² Fordham *et al.* 'immigration Detention'.

⁶³ Shaw, 'Review into the Welfare in Detention of Vulnerable Persons'.

be detained in *'exceptional circumstances'*. A barrage of official inspections and research has criticised the detention of torture and trafficking survivors and people with severe mental health problems, and highlighted the serious deficits in physical and mental healthcare in detention, undermining the government's argument that many needs could be managed adequately in detention.⁶⁴

Prompted by this criticism, the Immigration Act 2016 made provision for the HO to develop policy guidance on Adults at Risk in Immigration Detention, which stated the intention *'that fewer people with a confirmed vulnerability will be detained in fewer instances and that, where detention becomes necessary, it will be for the shortest period necessary'*.⁶⁵ The guidance, in brief:

- **Lists indicators of risk:** suffering a mental health condition or impairment or post-traumatic stress disorder; suffering from serious physical disability, health conditions or illnesses; having been the victim of torture, sexual or gender-based violence, human trafficking or modern slavery; being pregnant, aged over 70 or being a transsexual or intersex person, or *'other, unforeseen'* circumstances.
- **Sets out levels of evidence of risk to be considered:** Level 1, the person's own testimony; Level 2, professional evidence that the person is from a vulnerable category; and Level 3, professional evidence that detention will harm the detainee.
- **Provides guidance for making decisions:** affirming the presumption that detention will not be appropriate if a person is considered to be *'at risk'* of harm in detention, but that it will still be possible to detain people at risk where *'immigration control considerations'* outweigh this presumption.

The new Adults at Risk policy has failed to provide a robust tool to protect people at risk of serious harm in detention. Three issues were highlighted by research participants.

First, it is driven by categories. The list includes people who received little recognition or consideration in earlier years, which is to be welcomed. But an approach driven by categories in a hostile bureaucratic culture is likely to reduce attentiveness to individualised risk. ILPA gives the example of a 27-year-old Polish national who was found hanging in his cell at Morton Hall the day his wife had given birth, without there being any information reported on mental health problems prior to detention.⁶⁶

Second, the evidence requirements are demanding. As one expert put it, *'vulnerable has become a term of art for the HO'*.⁶⁷ Level 1 evidence has little impact. Further problems include:

- **Rule 35 reports:** These should be a key tool for protecting people in detention providing an opportunity to obtain Level 2 and 3 evidence. Detention centre medical staff are required to provide a 'Rule 35' report on any detainee whose health is likely to be injuriously affected by detention; who is suspected of having suicidal intentions; or who

⁶⁴ For example, OHCHR Committee against Torture, "Concluding Observations on the Fifth Periodic Report of the United Kingdom, Adopted by the Committee at Its Fiftieth Session (CAT/C/GBR/5)," May 6, 2013; Shaw, 'Review into the Welfare in Detention of Vulnerable Persons'; Medical Justice, 'Detained and Denied: The Clinical Care of Immigration Detainees Living with HIV' (London: Medical Justice, 2016).

⁶⁵ Home Office, 'Immigration Act 2016: Guidance on Adults at Risk in Immigration Detention' (London: Home Office, August 2016).

⁶⁶ ILPA, "Briefing for Westminster Hall Debate on the Detention of Vulnerable Persons in the Name of Anne McLaughlin MP," 14 March, 2017.

⁶⁷ Interview with ILPA.

in their view may have been the victim of torture. Legal professionals interviewed were concerned that there are misperceptions about when Rule 35 reports should be used, that they are under-utilised, and that over time medics may become inured to detainees' problems, or resigned to the limited attention that seems to be paid to these documents.⁶⁸ When they materialise, Rule 35 reports have tended to be taken with a large pinch of salt by HO caseworkers, and are easily outweighed by more minor immigration factors.⁶⁹ Lawyers also voiced concern about the waiting times for a Rule 35 report, and a lack of Rule 35 reports for detainees in prisons.

- **Issues obtaining and attitudes to Level 3 evidence:** Level 3 evidence should, according to the guidance, be afforded 'significant weight', but for those who have served lengthy criminal sentences even this would be unlikely to lead to release. The need to provide evidence of likely deterioration appears to encourage a 'wait and see' approach whereby detainees are left in detention until they have started deteriorating, even to the point of psychiatric hospitalisation.⁷⁰ Moreover, despite the dedicated work of organisations like Medical Justice, Freedom from Torture, The Helen Bamber Foundation and individual medico-legal specialists, obtaining such assessment often takes a considerable amount of time, and if legal aid funding cannot be obtained (see Section 4) it typically depends on charitable funding or pro-bono work.
- **Definition of torture:** The first published version of the Adults at Risk guidance deployed a restrictive definition of torture as severe pain or suffering which must be instigated by or occur with the consent or acquiescence of a public official, which excluded people who had been tortured by traffickers and other non-state actors.⁷¹ This led many people to be ignored, but was recently successfully challenged in court by Medical Justice.⁷²

A third concern is that the Adults at Risk policy does not envisage automatic exclusion from detention, but a balancing exercise between risk to the individual and 'immigration control considerations'. In this, the evidence for risk of harm is carefully tiered, with only Level 3 counting for much, immigration control factors (removability, compliance and public protection) are less rigorously scrutinised.

2.4 Problematic legal framework, problematic government practice

The nature of the legal framework deserves consideration. International human rights law and the HRA stipulate that the law must prescribe any procedure for immigration detention. The rule of law requires that '*The law must be accessible and as far as possible intelligible, clear and predictable.*'⁷³ While official and judicial decision-makers must have some discretion, this must be legally fettered enough to ensure that it will not be potentially arbitrary.⁷⁴

⁶⁸ Interviewees even cited examples of HO staff trying to enlist healthcare practitioners to persuade seriously ill people to agree to deportation. Although detention healthcare is now commissioned by NHS England, many previously worked for the private security contractors. Interviews with solicitors (1 and 3) and barristers (3 & 8), Email correspondence with Medical Justice October 2017.

⁶⁹ Email correspondence with Medical Justice, October 2017. In the year ending June 2016, only 30% resulted in release from detention, and in 2013 and the first half of 2014, around 9% resulted in release. See Bhatt Murphy, "Briefing Note: Challenge to the Adults at Risk Detention Policy," (London: Bhatt Murphy, 2016). In internal review of 340 Rule 35 reports in 2016, 57% were not compliant with policy. See Witness Statement of Tony Moore, in *Medical Justice & Ors v SSHD & Anor* [2017] EWHC (Admin).

⁷⁰ Email correspondence with Medical Justice, October 2017.

⁷¹ UN, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 1984.

⁷² *Medical Justice & Ors v SSHD & Anor* [2017] EWHC 2461 (Admin) (10 October 2017).

⁷³ Bingham, *Rule of Law*, 2010, 37.

⁷⁴ Fordham et al. 'Immigration detention'.

In the UK broad statutory powers to detain migrants are contained in primary legislation, which is highly enabling, leaving many key issues to be governed by the Home Office.⁷⁵ As one barrister put it, *'You don't have... [a] written code that the public can access and understand... it's hard to explain it to other lawyers let alone to detainees... it is an extremely vague thing and the lack of clear written statement of what the law actually is, is a real problem.'*⁷⁶ Administrative guidance changes frequently: *EIG* Ch 55 was amended 21 times between 2008 and 2016.⁷⁷ Immigration detention has been described as *'one of the most opaque areas of public administration.'*⁷⁸

While prolific, administrative guidance on immigration detention is at the same time not very prescriptive and leaves considerable room for manoeuvre on fundamental issues.⁷⁹ For example, we have seen above that the precise inferences to be drawn from the factors to be considered in the initial decision to detain are not spelled out; there is no time limit and what constitutes a reasonable period of detention is ill-defined; and while evidence of individual risk of harm in detention is carefully calibrated, evidence of risk of absconding and public harm is poorly specified.⁸⁰ Much depends on the discretion of HO caseworkers and their supervisors.

HO caseworkers are operating within a working environment that is conducive to control rather than protection of migrants. HO immigration authorities have been criticised from diverse quarters, over many years, as either too draconian, or not draconian enough. In this beleaguered bureaucracy, there is evidence of heavy workloads, poor training, and the application of inappropriate incentives such as shopping vouchers for meeting refusal targets.⁸¹ At the same time, there seems to be little individual caseworker accountability for initiating or prolonging detention.⁸² A member of the Parliamentary Inquiry into the Use of Immigration Detention, Baroness Ruth Lister, commented that there is a *'disconnect between official policy and what actually happens. The current Home Office guidance that detention should be used sparingly and for the shortest possible period is rendered ineffective by working practices and culture.'*⁸³ As one judge put it: *'Too many people are banged up. The EIG bangs on about presumption of liberty in Chapter 55, and connection to removal, but look what happens.'*⁸⁴

In sum, the state has broad powers to detain, with much of the detail being fleshed out in administrative guidance and thrashed out in case law, leaving a legal framework with major flaws, in the view of most research participants. The ways that decisions are made to detain people, the lack of a time limit and the frequent detention of particularly vulnerable people raise serious concerns; moreover, lawyers report many egregious instances of people being wrongfully detained.

⁷⁵ Costello 'Immigration Detention'.

⁷⁶ Interview with barrister (3).

⁷⁷ Shaw, 'Review into the Welfare in Detention of Vulnerable Persons'.

⁷⁸ Association for the Prevention of Torture/UN High Commission for Refugees (UNHCR) *Monitoring Immigration Detention: Practical Manual* (2014) 21.

⁷⁹ Costello 'Immigration Detention', Interview with Public Law Project (1).

⁸⁰ Costello 'Immigration Detention'.

⁸¹ Burrige and Gill 'Conveyor-belt justice', Campbell *Bureaucracy, Law and Dystopia*, Diane Taylor 'Gap year students deciding asylum claims' *The Guardian*, 29 February 2016.

⁸² Interview with barrister (2).

⁸³ Hansard, 'House of Lords debates Detention Inquiry Report', 26 March 2015: Column 1574.

⁸⁴ Interview with judge (1).

Experiences and perspectives of people held in immigration detention

I came to the UK to escape persecution. Because I am stateless I had to use false documents to get here. When I arrived I was put in prison for a short time because of this. I thought when I left prison I would be a free man. I did not think I would be taken somewhere worse. Detention is worse than prison because in prison you count your days down and in detention you count your days up... and up... and up... and up.⁸⁵

*I just want a f*****g decision...there is a war back there [in his country of origin] so they won't be removing me, but they won't make a decision either way... just brings me down...⁸⁶*

You can see that things have happened to me [he pointed to visible scarring on his person]...and I can tell you I was hit with bars and knives...I can say that my family members were killed and that my sister was raped, but if I was to say more...give more detail... then I have to think about it and [it] comes back to me and I can't get it out of my head...I would not be able to function this afternoon...⁸⁷

The sense of injustice swells inside of me when I think about it. I felt like the specifics of my case were completely ignored – my long-term detention came down to the fact I was a foreigner, little else. My experience in detention broke the trust I had in the Government, and the country I have lived in for the last twenty years.⁸⁸

It's sad. I've been living in this country for practically my whole life and suddenly I found myself in detention facing deportation to a country that I don't even know. I've made mistakes in the past but this is home to me. How can I be sent somewhere I don't know, for reasons I don't understand? I'm trying to better myself; I did a Plumbing NVQ in prison and I want to go somewhere with that. The next step for me is to do an apprenticeship but I can't because of the bail conditions. I can be a useful member of society, but instead I'm in No Man's Land under surveillance.⁸⁹

Detention destroyed all my trust in the system. It made me think twice about reporting just in case they handcuff me up again. I absconded. I re-offended.⁹⁰

3. CHALLENGING DETENTION: LEGAL PROCESSES

Against this background, it is not surprising that many people seek to challenge their detention in the courts. People's ability to challenge their detention is intertwined with their ability to challenge decisions in their substantive immigration case, and people may simultaneously be pursuing legal action on both fronts, but this section focuses more on the main legal mechanisms for challenging detention: bail applications and judicial review claims.

3.1 Bail

3.1.1 The process

Independent oversight of the lawfulness of immigration detention that is prompt and automatic is a key safeguard. ECHR Article 5(4) states that *'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is*

⁸⁵ Souleymane, Freed Voices Group, speech to Jewish Community members at JW3 Centre, 8 October 2015.

⁸⁶ Centre for Mental Health 'Immigration Removal Centres in England A mental health needs analysis' (2017), 17.

⁸⁷ Centre for Mental Health 'Immigration Removal Centres', 15.

⁸⁸ Detention Action, 'Without Detention', 5.

⁸⁹ Detention Action <http://detentionaction.org.uk/campaigns/defend-the-right-to-love>.

⁹⁰ Detention Action, 'Without Detention', 6.

not lawful'. The Bingham Centre for the Rule of Law notes that *'There is no reason why immigration detainees, subjected to executive detention and not accused of any criminal offence, should have a lesser degree of protection than applies to criminal suspects.'*⁹¹ It argues that prompt and automatic court control, which exists in many countries across Europe, not only provides appropriate protection for the individual detained but also minimises the scope for later compensation claims against the state.

The UK lacks this safeguard: the most prompt and accessible way to secure release is via a bail application to the First-tier Tribunal's Immigration and Asylum Chamber. This is not an independent or automatic review of the lawfulness of detention. Judicial review considers the lawfulness of detention, but is not automatic, can take some time, and typically considers cases where detention has already become unlawful, rather than being prospective.

Bail is a summary process, which assesses the risks of possible release.⁹² Bail is itself a restriction of liberty, revocable, and typically has conditions attached.⁹³ The judiciary's current guidance for bail hearings, published in 2012, notes that: *'there is no statutory presumption in favour of release in immigration detention cases. Nevertheless, bail should not be refused unless there is good reason to do so, and it is for the respondent [i.e. HO] to show what those reasons are... Given the wide-ranging powers of the immigration authorities in relation to the detention of non-nationals, First-tier Tribunal Judges should normally assume that a person applying for immigration bail has been detained in accordance with the immigration laws. However, it will be a good reason to grant bail if for one reason or another continued detention might well be successfully challenged elsewhere.'*⁹⁴ This suggests that there has been a slight shift over the years: *'The historical view was the First-Tier Immigration and Asylum Chamber should limit their considerations to bail, and not consider at all the lawfulness of detention. But the current bail guidance does actually mention it.'*⁹⁵

The bail process is as follows.⁹⁶ On detention, people must be informed, using an interpreter where necessary, of the reasons for their detention and right to apply for bail.⁹⁷ People can apply after seven days in the UK, or 28 days since their last application unless there is a material change in their circumstances. In the application, you are expected to articulate why you will not run away, why your removal is not going to take place in the near future, and any other relevant issues (e.g. health conditions or past offending). The application is sent to the relevant hearing centre, which should list the hearing within three days, but can be longer. At one major hearing centre, 70-75% of bail applications are listed within three days.⁹⁸ A salaried judge usually hears around six bail applications in a day; to meet waiting time targets, fee paid judges also hear bail applications too.⁹⁹

⁹¹ Although case law found that there were no express immigration detention provisions in human rights instruments that corresponded with these duties. Fordham *et al.* 'Immigration Detention', 112.

⁹² Interviews with barristers (1 & 2) and Public Law Project (1).

⁹³ Such as reporting restrictions, attending immigration interviews with the HO, electronic monitoring, living at a particular address – if such conditions are not complied with the person may be detained again.

⁹⁴ Michael Clements, 'Bail Guidance for Judges Presiding Over Immigration and Asylum Hearings - Presidential Guidance Note 1 of 2012' (London: Tribunals Judiciary, 2012), 3.

⁹⁵ Interview with judge (2).

⁹⁶ Bail for Immigration Detainees (BID) 'How to get out of detention: the self-help guide for detainees' (London: BID).

⁹⁷ Home Office EIG 55.6 and Detention Centre Rules No. 9, Article 5(2) ECHR.

⁹⁸ Interviews with judges (2 and 3) and barrister (7).

⁹⁹ Interviews with judges (2 and 3).

Many concerns were raised about communications in bail hearings. Most hearings are held by video link to minimise cost. In 2013, the Bail Observation Project (BOP) raised issues about the distancing of applicants from the tribunal, the fact that it seemed that judges sometimes could not see the detainee well, and technical problems; video link hearings were also less likely to be successful than those where the detainee appeared in person.¹⁰⁰ Five years on, lawyers still complain about the video links: *'There are consistently technical issues... Sometimes no sound... sometimes echoing so badly you can't hear anything... then the quality of voice of the person who doesn't speak English as a first language means it's not easy.'*¹⁰¹ One barrister mentioned attending bail hearings where detainees were not even connected via the video link.¹⁰² Some judges also have reservations: *'I have some concerns about the more subtle visual cues – when you are all in the same room you can see more easily whether someone is distressed, if they need a break, if they are following what is going on.'*¹⁰³ When the detainee is 'produced' i.e. escorted by security officers to the hearing, lawyers reported problems with transport (no van, no space in the van, being left in vans for long periods of time).¹⁰⁴ The tribunal is required to provide an interpreter where requested. In 2013 one third of the hearings monitored by BOP involved an interpreter, and of these over a third experienced difficulties, ranging from the wrong language or dialect to failure of the interpreters to turn up.¹⁰⁵ An interpreter was listed in around half bail hearings we monitored, and lawyers report similar kinds of problems today, wasting time and resources.¹⁰⁶

All legal professionals interviewed were scathing about the quality of bail summaries, even though they seem to have got longer over the years.¹⁰⁷ The HO prepares the bail summary and should do it to the applicant by 2 pm the day before the hearing – although it sometimes arrives later; occasionally no summary is produced.¹⁰⁸ Lawyers and judges observed both basic inaccuracies in name and nationality as well as misleading statements: as one judge put it, *'elliptical nonsense'*.¹⁰⁹ A barrister summarised key concerns: *'They are appalling documents. Prepared not as a neutral summary but as justification, reasons or excuses as to why someone should be detained. I've seen examples of cut-and-paste paragraphs to cover [two scenarios]... [Not] any kind of genuine review of detention, just a civil servant... coming up with any reason they can for maintaining detention.'*¹¹⁰ One judge pointed out: *'the Home Office is one of the great offices of the state, it has huge resources. In theory, bail summaries should be 100% accurate.'*¹¹¹ There is no evidence of improvement since similar observations were made by BID and BOP five years ago.¹¹²

There have been long-running complaints among lawyers about the Home Office's Presenting Officers. There are 145 HOPOs based around the UK: although many have legal qualifications, they do not act as solicitors or barristers, but as civil servants who derive a

¹⁰⁰ BOP 'Still a Travesty: Justice in Immigration Bail Hearings', (London: BOP, 2013).

¹⁰¹ Interview with barrister (1).

¹⁰² Interview with barrister (1).

¹⁰³ Interview with judge (3).

¹⁰⁴ Interviews with barristers (4 & 5), email correspondence with BID October 2017.

¹⁰⁵ BOP 'Still a Travesty'.

¹⁰⁶ Daily court listings for bail hearings were collected in 3 Aug-3 Oct 2017. 31 days were monitored during a period of 43 days where there were listings. Interview with barrister (1).

¹⁰⁷ Interview with judge (2).

¹⁰⁸ A judge estimated this might occur in 1 or 2 in 20 hearings (Interview with judge 2).

¹⁰⁹ Interview with judge (2, also 3), and speech by Tribunal Judge Nicholas Easterman at Citizen and State event organised by Bar Council, 7 November 2017.

¹¹⁰ Interview with barrister (3).

¹¹¹ Interview with judge (3).

¹¹² BOP 'Still a Travesty' BID 'The Liberty Deficit'.

right of audience from the Immigration and Asylum Act 1999 (s84). Typically, they spend three days a week at the Tribunal, and two days preparing cases, and to ensure consistency, they are given a series of 'lines to take'.¹¹³ The HOPO is not the caseworker and often lacks key pieces of information, although sometimes the judge gives them time to go and make enquiries. There are concerns about media reports of inappropriate incentives to achieve outcomes favourable to the HO - one judge commented: '*Some HOPOS don't see what their role is. They have targets to keep people in detention. But their role should be to assist the tribunal to reach the correct decision in accordance with the law.*'¹¹⁴ They nearly always officially oppose bail: '*There is this stupid code that the HOPO just says 'I have little to say.*'¹¹⁵ One barrister echoed the perspective of many, saying: '*Some are quite good, professional... others are incompetent, and some seem to be on some sort of mission to imprison people... The HO tries to challenge any facts they can... creating uncertainty works in their favour.*'¹¹⁶ Judges also voiced concern that the poor training and supervision of HOPOs wastes legal time and money.¹¹⁷

The importance of having a legal representative for a bail application is clear. Having a legal representative may also mean that your substantive immigration case is being addressed, which can contribute to a positive bail decision.¹¹⁸ Time is short: the applicant often meets their representative for the first time in the ten-minute consultation allowed immediately prior to the hearing, and there may be video links or language issues to contend with.¹¹⁹

However, many detainees do not have a legal representative. The applicant was listed as not having a legal representative in 21% of the 1,585 hearings we monitored.¹²⁰ At Stoke and Birmingham, there was no representative listed in around one-third of bail hearings. In 2013, BOP found that there was no legal representative at 31% of 218 bail hearings observed.¹²¹ The issue of access to representation is discussed further in Section 4.

¹¹³ The Home Office v The Information Commissioner and Mr Colin Yeo [EA/2015/0213].

¹¹⁴ Interview with judge (3), BurrIDGE and Gill 'Conveyor-Belt Justice', The Home Office vs. Information Commissioner & Colin Yeo [EA/2015/0213].

¹¹⁵ Interview with judge (2 & 3).

¹¹⁶ Interview with barrister (3 & 5).

¹¹⁷ Interview with judge (3).

¹¹⁸ Interview with Public Law Project (1).

¹¹⁹ Interviews with barristers (1, 4 & 5).

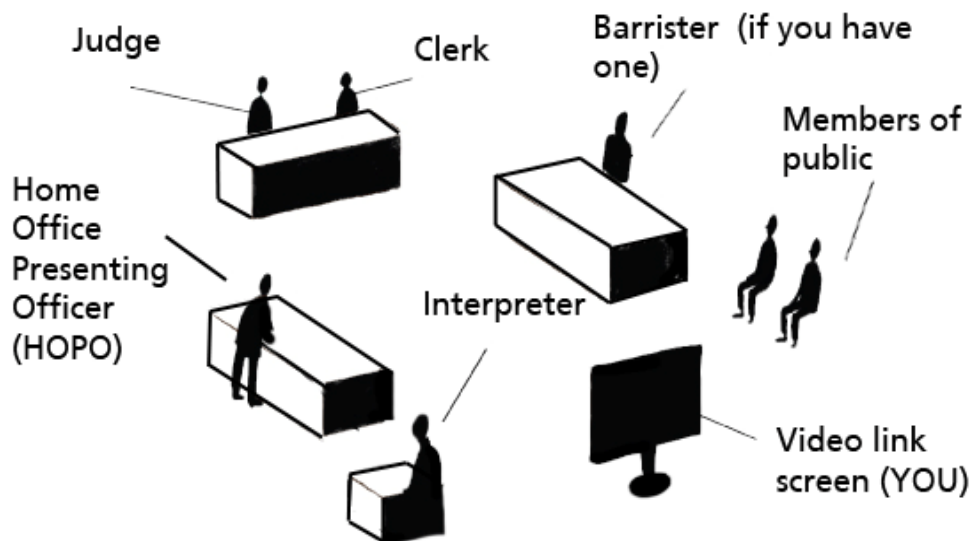
¹²⁰ See footnote 106. Discussions with legal professionals and judges have confirmed that it is only occasionally that a representative will either drop out last minute, or arrive on the case last minute, such that the data can be taken as broadly indicative. There were no significant differences between August and September results.

¹²¹ BOP 'Still a Travesty'.

Taking instructions for a bail hearing

I get ten minutes in court to ask [the detainee] about often several years of immigration history. And many different points within that immigration history are relevant, such as if they have any criminal offences, to what degree held culpable, what the probation officer said about risk assessment, whether they pleaded guilty, when they entered into remand as opposed to when sentenced because that's relevant to the license period, relevance to sureties, what is the relationship, when met, how often, whether it was in detention, or since detained, to what extent the surety was informed about their status, whether or not they are aware of criminal convictions, who else lives in the property they're going to be released to, whether or not the HO has verified that address, whether or not the landlord has given consent for applicant to live with them there, what applications have been made that are currently outstanding, what were basis of those applications, what is a realistic time estimate for those applications to be considered, whether or not that will have right of appeal, whether or not that application has been made previously and refused, whether or not individual has absconded in the past, any legitimate reasons for absconding. If the person is a victim of trafficking, then has the competent authority been informed and have they made a decision – I get ten minutes!¹²²

Diagram of a typical bail hearing room



Source: BID, *How to get out of detention*

¹²² Interview with barrister (1).

Perspectives on bail hearings

Judge: *I conduct bail hearings in a very summary way. I explain based on the papers what my provisional view is and ask them to explain why that provisional view is not a good one.*¹²³

Detainee: *If I am not allowed to state my case, how can I win?... It was so quick, and she [the judge] made her decision so fast. I was shocked.*¹²⁴

Lawyer: *We expect people to be grateful. So if they are aggrieved and outraged of being locked up, they aren't deserving of bail – not the kind of quiet foreigner we can let out onto our streets. So I advise clients to look straight at the judge, don't raise your voice, don't interrupt anyone, address judge as sir, make sure you are respectful. And my client yesterday said "Why should I be locked up? I've done nothing wrong!" And I say "I know, I'm completely with you, but we need to jump through this hoop."*¹²⁵

3.1.2 Criteria and evidence

The bail guidance outlines five criteria: reason(s) for detention; length and likely future duration; available alternatives and their suitability; effect of detention on the person and their family; and the likelihood of compliance with bail conditions.¹²⁶ These are supposed to be considered 'in the round' in each case but to understand how decisions come together; we will consider how each element is dealt with.¹²⁷ Imminent removal, the risk of absconding and risk of public harm are the most common HO arguments against release.¹²⁸

First, the imminence of removal is ill-defined in the legal framework: this is reflected in bail hearings. *'Sometimes you'll look at a case and you'll see that the HO has been trying to remove someone for months or years. They are not making any progress, but... say... removal remains imminent or a realistic prospect. The extent to which judges are willing to interrogate that... can vary.'*¹²⁹ In terms of extremes, *'For some judges, [foreseeable] removability... means Removal Directions have been sent... For other judges, it can be an indefinite indeterminate point sometime in the future, could be ten months away.'*¹³⁰

Participants highlighted three areas of concern in relation to criteria and evidence:

- **Outstanding claims.** These can be taken as evidence that the person's removal is not imminent, because these will take time to deal with. However, lawyers mentioned misleading statements in HO bail summaries, for example: *"The JR is in the process of being expedited"... but if you look further it often just means [the HO] have written a letter to the tribunal asking them to expedite the JR.*¹³¹ The bail file has much less information than a substantive appeal or JR file, so judges sometimes enquire into the detail of the outstanding claim: *'Some of it is garbage it would be obvious to a first-year law student that it's not going to get anywhere. But if the JR is three or four months*

¹²³ Interview with judge (3).

¹²⁴ Bail for Immigration Detainees (BID) and Refugee Council, "Immigration Bail Hearings by Video Link: A Monitoring Exercise," March 2008.

¹²⁵ Interview with barrister (2).

¹²⁶ Clements, 'Bail Guidance'.

¹²⁷ Clements, 'Bail Guidance', 3.

¹²⁸ BID 'The Liberty Deficit'.

¹²⁹ Interview with barrister (7).

¹³⁰ Interview with barrister (1).

¹³¹ Interview with barrister (5).

away, and there's unlikelihood of absconding and willingness to comply, then they are more likely to get bail.¹³² Interpretations vary, however: 'I've had judges who accept that the High Court has ordered that the person can't be removed pending JR, heard me at length on what those are about... and accepted that the substantial JR proceedings would take six to eight months, but didn't consider that that was the end of it... the High Court has understood that to be a good enough case that a stay on removal has been granted, which should suggest this isn't just an attempt to stave off removal, but even if it is, that's not for you to decide. I might have tried to prolong my stay, but that is not the question, the question is am I going to run away.'¹³³

- **Travel documents.** (see also 2.2). 'If you've got to wait six months because Iran isn't going to accept you then you will rarely be detained if there is an alternative.'¹³⁴ The HO may say that the detainee is not complying with re-documentation, which is often disputed by detainees – they were at lunch, or did not receive the appointment information in time – and often there is limited evidence available to substantiate on either side.¹³⁵ One judge said 'I would take that with a great pinch of salt. No doubt it does happen that some people do not cooperate... But often... it's not the bail applicant's fault.'¹³⁶ Similar concerns emerged about HO claims that detainees 'lied about their identity': often these are cases of dual/disputed nationality, or arise because identification systems vary considerably around the world.¹³⁷ Claims of non-compliance are often used to argue that there is a risk the person may abscond. BID noted 'Hardly anyone gets charged under the criminal process [for non-cooperation] because you can just keep giving detention and there's no need for that level of evidence.'¹³⁸
- **Evaluations of the length of detention.** One participant perceived a change in judicial attitudes over the last decade: 'When I first started practising I would come across cases where people had been in immigration detention for over a year. These days, over a year will be seen as an extremely long time... judges are feeling like... six months is long.'¹³⁹ The bail guidance provides a rare 'rule of thumb' regarding length of detention: 'It is generally accepted that detention for three months would be considered a substantial period of time and six months a long period'.¹⁴⁰ Acknowledgement seems to be uneven: 'it's very troubling that the guidelines for bail judges are quite strong on six months being an excessive period of detention when detention is for purposes of removal et cetera and time and time again it's as if judges haven't read the guidelines.'¹⁴¹

The second major issue at bail hearings is assessing the likelihood of absconding, and here concrete evidence is limited, and its interpretation varies. A judge explained: 'The magic words for the judge are 'I am willing to go home'. When people indicate that they are willing to comply you can more easily grant bail. If that individual were to insist on the claim, to say I'm not going back, then they are unlikely to get bail.'¹⁴² Evidence of personal or family connections in the UK, outstanding claims and a good reporting history are considered

¹³² Interview with judge (3).

¹³³ Interview with barrister (2).

¹³⁴ Interview with judge (3).

¹³⁵ Interview with BID (1) and judge (2).

¹³⁶ Interview with judge (2, also 3).

¹³⁷ Interview with judge (2).

¹³⁸ Interview with BID (1), BID 'The Liberty Deficit'.

¹³⁹ Interview with barrister (1).

¹⁴⁰ Clements, 'Bail Guidance', 5.

¹⁴¹ Interview with BID (1).

¹⁴² Interview with judge (3).

favourable factors.¹⁴³ However, the HO sometimes makes misleading statements: *'An important role of the judge is to test the bail summary because they often make assertions about someone being an absconder, and it turns out they didn't show up to a reporting interview.'*¹⁴⁴ *'People may have written or phoned in and one presumes somewhere someone has a record of this, but it will not be mentioned.'*¹⁴⁵ The HO sometimes implies that enforcement activity has taken place when it has not: e.g. the bail summary might say *'Bail applicant next came to our attention having been apprehended'*, when someone was picked up on reporting or at the address they were required to live at.¹⁴⁶ Similarly, the HO sometimes characterises people as having a poor record of compliance and therefore likely to abscond, e.g. based on the fact that they entered unauthorised to claim asylum, or they are an EU national with no compliance record (although EU nationals are not subject to the same immigration controls as third country nationals).¹⁴⁷ According to several lawyers: *'the amount to which a patchy record [of compliance] will affect a decision to grant bail or not does tend to vary quite a lot from judge to judge.'*¹⁴⁸ One interviewee had found that: *'certain judges even if someone has been reporting for three years, they will still find some way to then go backwards and say ok, well, he might have been detained on reporting but prior to that he was here in the country for x amount of time without a valid visa, and therefore I think there is a risk that he could abscond.'*¹⁴⁹

Third, bail hearings must consider whether the applicant with a criminal record presents a risk of harm to the public; again this is often based on limited evidence. Bail hearings reportedly rarely include an official report from the National Offender Management Services' (NOMS) OASys system, which considers the risks and needs of criminal offenders under their supervision.¹⁵⁰ This leaves the assessment of risk of public harm to the HO, although often this is not clearly stated in the bail summary.¹⁵¹ BID has found that: *'As a matter of course UKBA fails to substantiate assertions of high levels of criminal risk or absconding with offender management information provided by the National Offender Management Service (NOMS) to UKBA, despite an obligation to do so under a service level agreement with NOMS to serve this on the tribunal and the bail applicant.'*¹⁵² One judge stated that people who have to have *'a pretty shocking criminal record'* to be refused bail because they were deemed to pose a risk of public harm, e.g. *'More than 18 months' custodial sentence. Repetition of smaller offences, in a frequent pattern... Or further offences committed while on criminal or immigration bail – then you can pretty much forget it unless there is some other really convincing factor at play.'*¹⁵³ However, several lawyers were concerned about how offences are weighed in bail hearings, suggesting that *'A lot of immigration judges I think only see people with repeat but very minor criminal offending behaviour and they can regard it more seriously than [those] who have got a greater experience... in the criminal field, or... [through being] an immigration judge for longer... have more perspective on it.'*¹⁵⁴ In the tribunal hearings, immigration offences appear to be considered more relevant to the risk of absconding than public harm.¹⁵⁵

¹⁴³ Interview with judge (3) and barrister (3).

¹⁴⁴ Interview with judge (3).

¹⁴⁵ Interview with judge (2).

¹⁴⁶ Interview with judge (2) and barristers (2 and 5).

¹⁴⁷ Interview with barrister (2).

¹⁴⁸ Interview with PLP (1).

¹⁴⁹ Interview with barrister (5).

¹⁵⁰ Interview with judge (2).

¹⁵¹ Interview with judge (2).

¹⁵² BID 'The Liberty Deficit', 7.

¹⁵³ Interview with judge (3).

¹⁵⁴ Interview with Public Law Project (1).

¹⁵⁵ Interview with judge (3).

Bail hearings also consider positive factors favouring release, including people's anticipated living arrangements, supportive family relationships, evidence of personal development (note that opportunities for this may be available in prison but generally not in IRCs) and any planned community-based support (e.g. drug rehabilitation) on release.¹⁵⁶ Health is given rather limited consideration, and Rule 35 reports are rarely brought as evidence.¹⁵⁷ Although the bail guidance requires the best interests of the detainees' children to be taken into account, one experienced lawyer noted: *'I have never had a case that has turned on the children.'*¹⁵⁸

Among the more positive factors, 'stabilisation of address' is considered particularly important, which presents issues for some detainees.¹⁵⁹ Where the applicant has friends or family willing to host them, increasingly onerous proof is being required, including evidence of property ownership, tenancy agreements, and landlord/council approval; this may be prompted by increasing penalties for assisting people with precarious legal status.¹⁶⁰ It has generally been relatively straightforward to secure a release address in publicly funded accommodation, prior to the bail hearing, via NASS for asylum-seekers or Section 4 of the Immigration and Asylum Act 1999 for others. However, where a bail applicant has served a sentence for certain violent or serious offences, their release address must be approved by the Probation Service, where it seems to be a low priority, and there are often delays of several months with this - a year was the longest example mentioned.¹⁶¹ In 2016, the cases of three individuals went to JR, and the judge found that there had been unacceptable delays and systemic failures in the provision of bail accommodation.¹⁶² One research participant cited the example of a confirmed victim of trafficking, who had served a prison sentence: the proposed bail address was a safe house run by the Salvation Army, which would not divulge the address; the judge made it clear he would not grant bail without a specified address.¹⁶³

In some circumstances, a bail applicant produces sureties. The surety's main obligation is to ensure that the applicant complies with their bail conditions, attending reporting appointments and so on. The recognizance is supposed to be sufficient to focus the surety's mind on this duty; forfeiture proceedings are not common.¹⁶⁴ Evidence that the surety is in a position to influence the actions and monitor the activities of the bail applicant may increase confidence that bail conditions will be met.¹⁶⁵ The bail guidance stresses that this is not an automatic requirement and should not be expected of new arrivals in the UK. However one experienced bail lawyer was concerned that not having a surety may in practice contribute substantially to a decision to refuse bail.¹⁶⁶ Several barristers complained that sometimes solicitors do not adequately brief sureties regarding what documents they may need to bring, and the bail guidance allows a lot of flexibility on what might be required.¹⁶⁷ One felt that HOPOs' cross-examination of sureties can be overly aggressive: *'Sureties feel under a lot of pressure... ultimately they are there to offer an alternative to this person being detained,*

¹⁵⁶ Interview with judge (3).

¹⁵⁷ Interview with barrister (4) and judge (3).

¹⁵⁸ Interview with barrister (4).

¹⁵⁹ Interview with judge (2).

¹⁶⁰ Interview with judge (3) and barrister (1).

¹⁶¹ Nearly all interviewees mentioned this. Bail for Immigration Detainees (BID) 'No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation' (London: BID, 2014).

¹⁶² Sathanantham & Ors, R (on the application of) v The SSHD & Anor [2016] EWHC 1781 (Admin) (21 July 2016)

¹⁶³ Interview with barrister (5).

¹⁶⁴ Interview with judge (2).

¹⁶⁵ Clements 'Bail Guidance'.

¹⁶⁶ Interview with barrister (5).

¹⁶⁷ Interview with barrister (1 & 7).

*often paying money out of their own pockets to be there, paying money as a recognisance and often offering accommodation and overwhelmingly of good character, overwhelmingly their first time being surety, and often frightened because think they are going to be scrutinised.*¹⁶⁸

Bail hearings may also vary somewhat in terms of the procedure. When a key piece of evidence is missing, the judge may grant ‘bail in principle’, delaying release for 48 hours provided the relevant document is produced.¹⁶⁹ This is helpful when there are delays securing Section 4 accommodation (see above). Some judges are taking an interest in whether accommodation was provided in the time allowed: *‘What [would be better] is a more critical judgement which says I can’t give bail in principle again, but this person should not be detained, they should be granted bail. This means then in High Court it changes the picture... Because you can’t detain for the purpose of accommodating someone.*¹⁷⁰ Similarly, some find it fairer to allow some people to withdraw where there are issues that might be resolved given a little more time, and prior to the usual 28-day re-application timeframe.¹⁷¹ However, procedures vary by hearing centre and individual judges.¹⁷² Apparently, Newport adopted a ‘local policy’ that *‘wherever possible they would allow or dismiss cases.’*¹⁷³

3.1.3 Adjudication, outcomes and planned changes

The former President of the First-tier Tribunal noted that immigration has always made high demands on the judiciary’s “judgecraft”.¹⁷⁴ A key challenge in bail hearings is the lack of evidence. The guidance states that *‘Both parties have a duty to bring to the judge’s attention any relevant evidence in their possession.’*¹⁷⁵ But there is little live evidence in the bail hearing and *‘there are a lot of unanswered question’*¹⁷⁶ On the HO side, the nature of the HOPO’s duty to the court is unclear: the examples of misleading claims reported above suggest that it is distinct from solicitors and barristers who are subject to professional regulations. The judges interviewed exhibited a healthy scepticism about the bail summary and stock HO assertions. On the applicant’s side, legal representatives and detainees often struggle in the short time available to obtain firm evidence to contest erroneous assertions in the bail summary; if they are handling the substantive case and have already obtained a Subject Access file, they may be better equipped. The judges lament the thinness of the bundles often provided with bail applications, and the extent to which key details are often overlooked.¹⁷⁷ However judicial willingness to push for better evidence seems to vary, and is also limited by the time allocated for bail hearings: *‘We also can’t expect the moon and the sun and the stars; it’s a summary proceeding, and you can also make further applications.’*¹⁷⁸

Dealing with people who do not have legal representation is also challenging. In these cases, immigration judges are advised to take an enabling role; but this is poorly defined, has been criticised in asylum appeals, and seems unlikely to succeed any better in the more ‘rough and ready’ bail process.¹⁷⁹ One interviewee reflected: *‘The idea of the enabling role of*

¹⁶⁸ Interview with barrister (1).

¹⁶⁹ Clements ‘Bail Guidance’.

¹⁷⁰ Interview with BID (1).

¹⁷¹ Interview with judge (2).

¹⁷² Interview with judges (2 & 3) and barrister (5).

¹⁷³ Interview with judge (2).

¹⁷⁴ Ryder ‘Senior President of Tribunals’ Annual Report 2016’, 77.

¹⁷⁵ Clements, ‘Bail Guidance’.

¹⁷⁶ Interview with barrister (7), also Public Law Project (1).

¹⁷⁷ Interview with judges (2 & 3) and barrister (7).

¹⁷⁸ Interview with judge (3), BID ‘The Liberty Deficit’.

¹⁷⁹ Burridge and Gill ‘Conveyor-belt justice’.

*the judge is a bit dubious. The HOPO has more resources than the applicant in person and there's a limit to what you can do to correct for that... But it is forced upon us. In practical terms, it may mean slowing things down, translating the bail summary line by line, getting the applicant to talk about relevant issues. You make the best of it but it's not as good as having properly funded representation.'*¹⁸⁰ Another specialist put it more bluntly: *'Bullshit... you cannot graft an inquisitorial system onto an adversarial system... When I have seen unrepresented applicants, the way they were dealt with didn't seem very enabling.'*¹⁸¹

Another challenge is the complex and changing nature of immigration law and procedures, which judges have to keep on top of. Some research participants reflected positively on changes in recruitment and training in recent years, generating a *'more technically professional immigration judiciary'*.¹⁸² A prior generation of judges, some of whom are perceived as particularly reactionary and less legally qualified, have been moving into retirement. The profession has diversified, with 38% of First-tier Tribunal judges female, and 22% identifying as black and ethnic minority.¹⁸³ First-tier judges must now be qualified legal professionals with at least five years' experience; the vast majority have a professional background as a solicitor or a barrister, and there have been investments in continuing professional development. There has been a growth in salaried posts, although owing to the cap on the wage bill and the often volatile workload, 77% are fee-paid.¹⁸⁴ There has been an increase in cross-ticketing of judges from other jurisdictions, particularly employment, social security and mental health, which it was suggested *'tweaks the normative orientation'* of the judiciary.¹⁸⁵

However, bail decisions are subject to very limited oversight: 'essentially immune from scrutiny.'¹⁸⁶ Only brief written reasons for refusal are provided, contrasting with the process in Scotland where there is a summary of each side's arguments and the conclusion.¹⁸⁷ If a bail decision contains an error of law, it can be judicially reviewed, but this is extremely rare. It would typically be of more direct use to the individual to make another application, or a JR claim of unlawful detention.

In the context of an ill-defined legal framework, lawyers repeatedly described bail as a lottery: 'It's totally arbitrary which judge you get and there's a huge discrepancy in their attitudes.'¹⁸⁸ As we have seen, there is considerable room for discretion in how judges interpret and weigh adverse and positive factors and how they approach the detail of the bail hearing. There is a general perception that *'local habit'* gives rise to some variation between hearing centres, some acquiring a reputation of being more or less liberal – although efforts are made to even this out through guidance and training.¹⁸⁹ There is also a widely held perception among barristers is that certain judges rarely grant bail: *'There are some judges where if you see their names you automatically advise your client to withdraw.'*¹⁹⁰ This was disputed: *'even the ones that say themselves I never grant bail, they*

¹⁸⁰ Interview with judge (2, also judge 1).

¹⁸¹ Interview with ILPA.

¹⁸² Interviews with judges (2 & 3) and barristers (2 & 3).

¹⁸³ Statistics on judges from Ministry of Justice *Judicial Diversity Statistics 2017*, Table 2.2.

¹⁸⁴ Sir Ernest Ryder, 'Senior President of Tribunal's Annual Report' (London: Ministry of Justice, 2017) and MoJ

¹⁸⁵ Interviews with judge (2), also judges (1& 3) and barrister (2).

¹⁸⁶ Interview with barristers (3 & 7), judge (2) and BID (1).

¹⁸⁷ Interviews with ILPA, BID (1), judge (2) and barrister (3).

¹⁸⁸ Interview with barrister (1), echoing earlier observations by BID 'A Nice Judge on a Good Day' (London: BID, 2010) and BOP 'Still a Travesty'.

¹⁸⁹ Informal consultations with legal professionals, interview with judge (2).

¹⁹⁰ Interview with barrister (5), echoed by many.

do, because they are judges...¹⁹¹ Predictably, many participants suggested that politics plays a significant role in shaping judicial attitudes (although some felt that some members of the judiciary have a particular concern with liberty and the use of detention, which may not necessarily correspond with a more sympathetic view when they hear a substantive immigration case); others mentioned tabloid media pressure as relevant.¹⁹²

A minority of bail applications are successful, although as the population in detention has grown, it may have become slightly easier to get bail. In 2016 10% of people leaving detention in IRCs were released on bail, with 80% of these positive bail decisions made within the first three months of detention.¹⁹³ Nationally currently roughly 30% of bail applications are granted, 20% are refused, and there is a 50% withdrawal rate.¹⁹⁴ By contrast, in 2010 6% of people leaving detention were released on bail, and data from 2007-2008 that suggested that only around 20% of bail applications were granted.¹⁹⁵

There are other, less obvious, outcomes of bail applications. People get their hopes up: refusal can trigger or exacerbate depression.¹⁹⁶ Removability is a dynamic construct, and applying for bail or JR of unlawful detention appears on occasions to trigger an acceleration of the removal process.¹⁹⁷ Release can help someone to pursue their immigration case, and reconnect with family who may be key to their case for remaining in the UK.¹⁹⁸

There are changes to the bail process pending in the Immigration Act 2016, but these do not address the concerns raised above:¹⁹⁹

- **Consolidated concept of immigration bail:** all forms of temporary admission and bail are to be replaced by a single concept of 'immigration bail' that applies to all people without leave to stay in the UK, even if they have not been detained. The term 'immigration bail' is problematic because it makes a wide range of people sound like criminals when they are not.
- **Management of bail conditions:** where bail is granted by the First-tier Tribunal, the HO is to manage bail conditions going forwards. There are concerns that this diminishes the authority of the Tribunal and gives the HO, which had determined that the person should remain in detention, unfair powers to restrict their lives following release.
- **Support and accommodation to meet conditions of bail:** The Immigration Act 2016 repealed Section 4 of the Immigration and Asylum Act 1999, but gave the HO the power to provide accommodation and support in exceptional circumstances to people leaving detention. This was a necessary power because otherwise some people might never be able to get out of detention, because they did not have a bail address. How it will work remains unclear, and there are concerns that it may delay release after bail is granted.

¹⁹¹ Interview with judge (3).

¹⁹² Individual immigration judges have been 'named and shamed' for how they have handled cases of people with criminal records. Interviews with barristers (3, 2 & 7). See also Colin Yeo, 'The Telegraph's witch hunt for lenient judges', Free Movement Blog 18 June 2012 and 'Judge hung out to dry', Free Movement Blog, 19 July 2012.

¹⁹³ Home Office *Immigration Control Statistics*, Table dt_06.

¹⁹⁴ Interview with judge (2).

¹⁹⁵ Campbell, *Bureaucracy, Law and Dystopia*, Home Office *Immigration Control Statistics*, Table dt_06.

¹⁹⁶ Interview with BID (1).

¹⁹⁷ Interview with barrister (7).

¹⁹⁸ Griffiths, Melanie B. E. 'Invisible fathers of immigration detention' *Open Democracy*, 31 October 2016.

¹⁹⁹ Interviews with ILPA and Public Law Project (1) and ILPA 'Immigration Act 2016: information sheet.' (London: ILPA, 2017).

- **Automatic bail hearings:** for detainees not facing deportation, the HO will have a duty to arrange a bail hearing in the First-tier Tribunal four months after the detention begins and four months after their last bail hearing. On the plus side, this will mean that people will automatically be brought to the tribunal to consider their case at least every four months, avoiding the current situation where *'there are people who are in detention and nobody really knows about it and they are just rotting away.'*²⁰⁰ However, four months is a long time in administrative detention; people facing deportation, who are often detained the longest, are excluded; and it may not be very meaningful if the person lacks legal advice and representation (see Section 4.2).

A certain amount of scepticism exists regarding whether these changes, due to come into effect May 2017, will ever be brought in. Similar provisions in the Immigration and Asylum Act 1999 were never brought into force. Importantly none of these changes addresses the core deficiency of the bail process: that it is not a prompt, automatic and independent review of the lawfulness of detention.

3.2 Judicial review of unlawful detention

3.2.1 The process

Judicial review is the only opportunity to challenge the lawfulness of immigration detention. Under Article 5(4), everyone deprived of their liberty is entitled to take proceedings in order to challenge the lawfulness of their decisions. In the UK there is no statutory appeal against the decision to detain under immigration powers. Challenging the lawfulness of immigration detention can in theory be done through habeas corpus, whereby a court inquires into the reasons for a detention and orders release if it is incapable of legal justification, but it is rarely done, because due to the UK's broad statutory powers in immigration detention, there is nearly always the jurisdiction to detain.²⁰¹ The question with immigration detention is rather how that jurisdiction has been exercised, which makes it a matter for judicial review, an individual right of petition, where the court considers the lawfulness of a decision or action of a public body.²⁰² Judicial review focuses on errors of law (whether the law has been correctly applied and the right procedures have been followed); although in challenges to immigration detention, a more liberal approach is sometimes applied.²⁰³

The process of applying for JR for unlawful detention is staged.²⁰⁴ At each stage, if legal aid is not available, court fees must be paid, or a waiver secured. First, the detainee must send a 'pre-action letter' to the HO informing it of their intention, to give it a chance to withdraw its decision or to correct a mistake. Within three days of a negative response from the HO, the detainee must apply for permission, and within seven days provide a bundle setting out their case. A judge considers the application and may conclude that the case is 'totally without merit', thereby closing the case; or refuse permission on the papers, then the detainee may request an oral hearing to reconsider permission. There has been general debate about the TWM process (see Section 1.2) and some suggest it can also act as a barrier to access to justice in unlawful detention claims. In one example given, an

²⁰⁰ Interview with barrister (5)..

²⁰¹ Clayton *Immigration and Asylum Law*, 553.

²⁰² Fordham 'Immigration Detention'.

²⁰³ Clayton *Immigration and Asylum Law*, interview with barrister (7).

²⁰⁴ For a more detailed explanation, see Home Office, *EiG*, Chapter 60 and Right to Remain Toolkit <http://righttoremain.org.uk/toolkit/jr.html>.

acknowledged torture victim never charged with a crime and deemed a low risk of absconding was deprived of the opportunity to argue a JR case.²⁰⁵ If permission is granted, the HO must file and serve detailed grounds within 35 days, setting out the basis on which they are defending the claim, or explaining that they are withdrawing or changing their decision. Then the applicant provides a skeleton argument to the Court and the HO no later than twenty-one days before the hearing, including a list of the legal points they want to raise, a chronology of events in the case, and a list of essential documents to be read by the Court. Detention JRs are often expedited. The hearing takes place in the relevant Administrative Court. Timeframes for the process have shifted dramatically over the years: an experienced detention lawyer remembered that around 1990 it was possible to obtain listings of immigration detention cases in the Administrative Court within two to five days, indicating the seriousness with which the issue of detention and removal used to be treated.²⁰⁶

In preparing their case, the HO is advised by Government Legal Department (GLD) solicitors. As with the HOPOs, GLD lawyers have developed a series of '*lines to take*' for immigration cases, and have recently come under criticism from judges on various grounds, particularly regarding reluctance to disclose important information.²⁰⁷ One opposing counsel was scathing, saying that although many GLD lawyers are excellent, many just do what the HO tells them, even if the case has no merit: '*we find that especially in certain cases involving unlawful detention and deportation and immigrants that it's not just whether you will win or lose, it's politics, it's politicised. They [i.e. the Home Office via their lawyers] will still push a case even if they think they will lose because they need to be seen like they are tough and trying to get immigrants out and it's courts that are intervening.*'²⁰⁸

Meanwhile, for legal representatives, working with clients in detention is not straightforward. Typically a JR for unlawful detention will form part of other legal work with the client on their substantive immigration case, and it may evolve into a damages claim. Being able to consult with the client is vital. Although detainees in IRCs are allowed basic mobile phones and a minimum credit, some detention centres have poor reception, language issues may hinder communication, and phones may be taken off detainees in segregation.²⁰⁹ To meet face-to-face, the lawyer must book in advance with the detention centre, allow time for travel (many are relatively remote from city centres and public transport). Often the environment is far from conducive to the building of trust: '*your immediate access to the client is limited, it's not very touchy-feely really is it, when you've got to talk to someone through glass. And it's not like in some cases they've done anything particularly bad. It's not like they are going to leap over the desk and bite your throat out!*'²¹⁰ Some detainees struggle with English and so an external interpreter or even another detainee needs to be found to help communicate.

Cases often hinge on securing documentary evidence, which is not easy to obtain. Detainees are separated from their property, and when they have or manage to obtain necessary documents, they will have to fax them to the lawyer: '*a huge portion of time is*

²⁰⁵ Email correspondence with barrister, November 2017.

²⁰⁶ Email correspondence with BID, October 2017.

²⁰⁷ Interview with judge (2) see also Ben Amunwa, 'How not to do disclosure': a government lawyer's guide' *Law Mostly* blog, 9 February 2016, Colin Yeo, 'Tribunal criticises government lawyers for "trench warfare" mentality and "inappropriate" conduct' *Free Movement Blog*, 9 October 2017.

The Home Office v The Information Commissioner and Mr Colin Yeo [EA/2015/0213].

²⁰⁸ Interview with barrister (6).

²⁰⁹ Interview with solicitor (3).

²¹⁰ Interview with barrister (7).

*spent just getting those documents in a visible format on your computer.*²¹¹ Detention medical records are often sparse, even when it is clear that there is some major health issue: independent medical and psychiatric evidence is often key, but obtaining this is complicated by the fact that the person is in detention, so you need to get an appropriately qualified doctor who has the time to travel to the detention centre to make an assessment.²¹² Obtaining full HO records on the case is important for assessing the legality of detention, given the limitations of monthly reviews and bail summaries explored earlier. Internal casework documentation provides a better picture of the pattern of reasoning and action by the HO in relation to someone's case over time. The HO does not readily disclose this documentation, so lawyers have to make Subject Access Requests: the target time is 40 days, and lawyers reported both shorter and longer waiting times (one had a SAR that took 11 months).²¹³ In some instances, lawyers end up bringing a challenge without having seen full internal documentation, because of the urgency of the case, which is inefficient, puts their clients at a disadvantage, and can necessitate adjustments later down the line once the HO documentation is made available.

Getting legal aid is a key issue (see section 4.2). Public funding is only provided if permission to proceed with JR is granted, meaning that legal aid lawyers taking on a JR claim are initially working at their own financial risk. From an administrative perspective, there have been complaints about the LAA's online application system that solicitors use to apply for JR support, its slowness and propensity to errors and crashing.²¹⁴

Bail and JR are distinct processes, but they do interact in certain ways, with interviewees commenting that judges in unlawful detention JRs appear to be checking that detainees have made efforts to get out via temporary admission requests and bail applications, and looking at the reasons for refusal. Concerns were raised about this: *'It's quite surprising the weight which High Court judges put on bail decision given the summary nature of that process.'*²¹⁵ Given the 'lottery' reputation of the bail process, in some circumstances, lawyers even advise their client to sit tight and apply for JR, rather than risking bail refusals, which could give ammunition to the HO to argue that the case has been independently reviewed and detention justified.²¹⁶

²¹¹ Interview with barrister (1).

²¹² Interview with barrister (3 & 7).

²¹³ Amunwa, 'How not to do disclosure', Interview with BID (1).

²¹⁴ Interview with barrister (6), Halsbury Law Exchange 'Can we safeguard access to justice'.

²¹⁵ Interview with Public Law Project (1).

²¹⁶ Interview with solicitor (3).

Challenging removal in detention

Interviewees talked about the urgency of legal work with detainees where removal proceedings have begun. In response to a successful legal challenge in 2010, the HO moved from a system where people were issued with a specific date or no notice of removal, to one where people were generally given notice that from a particular date they could be removed at any time. Because of administrative blockages and legal challenges, this meant that people could wait for removal for a long time. After another successful legal challenge in 2014, the HO introduced the removal window, giving people 72 hours' notice of a removal window of three months.²¹⁷

People recently detained and served with notice of a removal window often go to legal aid and pro bono lawyers having received poor or no immigration advice earlier, with cases that are potentially winnable, because removal may breach human rights. The detainee may be able to submit a fresh claim, or ask for JR of the decision to remove / the decision to certify the claim. But 72 hours is often not enough time to access a Detention Duty Advice scheme appointment. Moreover, if they do find a lawyer it is hard to plan this work when the person could be removed at any point in time over a three-month period, and there is a risky trade-off between preparing a stronger application or lodging the claim sooner.²¹⁸

The HO may defer removal in light of the claim being lodged. However, late representations are often viewed as a groundless effort to stall removal, even if permission has been granted for JR suggesting that the claim is indeed arguable. *'The point of JR is that it should be last resort, and it should be done at the very end point, but if you don't know when that end point is it can be extremely difficult. It used to be with specific removal directions the HO were more responsive, but with the window they can just ignore you. So you're working in the dark.'*²¹⁹ Sometimes the HO will let the lawyer know that they are not going to defer the removal window just before it opens.²²⁰

If removal is not deferred, the detainee can apply for an injunction to prevent removal, from the date the window opens, until the decision is made on the claim. This often means going to a duty judge out of hours, who may or may not appreciate the need for a 'last minute' application when there is no removal date set. There is some professional risk involved, as courts are critical of lawyers bringing injunctions unnecessarily.²²¹

The removal window serves several purposes for the government. It obscures the timing of removal, making it harder for detainees bring a legal challenge, or obstruct removal, and provides considerable logistical flexibility. This is sometimes clear from clients' computer records: *'You see 'Should not serve blah until a certain date, so they can't do anything about it' or "Should issue removal window so they don't plan to subvert this." This is much later. You don't know that at the time, you suspect that's why they do it.'*²²² Knowing that they could be removed at any time causes significant psychological stress for detainees.²²³

²¹⁷ There is some variation: HO *EIG* Chapter 60 outlines current removal arrangements.

²¹⁸ Interviews with solicitors (1 & 3), Public Law Project (2) and barrister (6).

²¹⁹ Interviews with barrister (6).

²²⁰ Interview with barrister (7).

²²¹ Interview with barrister (6 & 7)

²²² Interviews with barrister (6).

²²³ Interview with Detention Action.

3.2.2 Issues and impact

Judicial review claims have played an important role in shaping the governance landscape outlined in Section 2. Successful JRs of unlawful detention can be grouped into three main themes: focusing on the rationale for detention and removability; vulnerability and unsuitability for detention; and procedural points and policy challenges.

JR has been used to challenge the rationale for on-going detention in individual cases.²²⁴

The Hardial Singh principles, the key common law constraint on the use of immigration detention powers, stipulate that people may be detained with a view to removal, but if removal is not possible then they must be released, and how long it is reasonable to detain them depends on a range of factors.²²⁵ Where there are outstanding claims, frequent backlogs and long waits for court hearings of immigration appeals are often a key argument for release.²²⁶ Conversely, a solicitor noted that with the certification system and legal aid cuts limiting deportation appeals, these tend to be listed much sooner now, in a matter of weeks, which can make it easier to justify detention for that period.²²⁷ Where there is no bar to removal, JR may scrutinise how diligently the HO is pursuing removal, which is why disclosure of HO records and information on travel document waiting times is so important. An important case established that detention should not be maintained for purposes of coercing the person into co-operating with the documentation process.²²⁸

The ‘reasonable period’ remains ill-defined in case law. Unusually, a case in 2009 ruled that 30 months was *‘right at the outer limit of the period of detention which can be justified’*, except in the case where someone had committed a very serious offence and may go on to commit similar offences.²²⁹ But this was not taken up in other cases and has not become a rule of thumb; since then, other broadly similar cases have produced different judgements regarding reasonable time periods.²³⁰ Nevertheless, the ECtHR ruled in *JN v. UK* that the UK did not need to have a time limit on detention as this was not required in under Article 5 ECHR and other protections were in place such as bail hearings.²³¹ In the Parliamentary Inquiry, Lord Lloyd of Berwick noted that, with judges interpreting the Hardial Singh principles regarding very long periods as reasonable, relying on case law does not seem an effective way to curb excess. Jerome Phelps of Detention Action amplified this analysis: *‘What we’ve seen with the proliferating unlawful detention litigation over the last five years is judges initially being horrified that migrants are being detained for administrative convenience for these periods and then becoming increasingly inured to it... it’s becoming normalised; this is precisely why we need a clear lead from parliament about what parliament considers acceptable. We can’t simply rely on the very vague case law that makes it impossible in any given case to be sure, either for the Home Office or for the lawyers, whether detention has become unlawful.’*²³²

²²⁴ Interview with barrister (2).

²²⁵ Singh, R (on the application of) v Governor of Durham Prison [1983] EWHC 1 (QB) (13 December 1983).

²²⁶ Thomas ‘Immigration appeals and delays’.

²²⁷ Interview with solicitor (3).

²²⁸ In R (on the application of Babbage) v SSHD [2016] EWHC 148 (Admin) an immigration detainee who was denied a travel document by the Zimbabwean embassy, in accordance with Zimbabwean government policy, simply because he failed to say that he was willing to return eventually. He was released after more than two years in detention.

²²⁹ Wang, R (on the application of) v SSHD [2009] EWHC 1578 (Admin) (05 June 2009).

²³⁰ Detention Action, ‘Indefinite Detention? We Are in the World of Kafka,’ (London: Detention Action, 2015), *JN v. THE UNITED KINGDOM* - 37289/12 - Communicated Case [2014] ECHR 224 (12 February 2014).

²³¹ ECtHR – J.N. v. United Kingdom, Application No. 37289/12, 19 May 2016.

²³² All Parliamentary Groups on Refugees and Migration, ‘The Report of the Inquiry into the Use of Immigration Detention in the UK’, 18.

For the increasing numbers of people in detention who have criminal records and are subject to automatic deportation, case law shows limited concern about length of detention. JR allows for a more rigorous and evidence-based scrutiny of the risk of public harm than internal HO evaluation or the bail process. But, as one barrister noted: *'Hardial Singh used to be a big thing in the early 2000s but less so now because the High Court is becoming inured to long periods of detention – there are lots of deportation cases where people are held for two years, and it isn't Hardial Singh unreasonable.'*²³³ Many of those detained longest are people who have served a sentence for a serious crime but who cannot be removed due to lack of travel documents.

In considering the impact of detention on the individual detainee, JRs have highlighted the UK's failure to protect, and indeed its infliction of harm on, vulnerable people. At the extreme, there have been several breaches of ECHR Article 3: where the HO has been found to have inflicted severe harm on detainees, particularly people who became mentally ill or whose health was allowed to deteriorate severely in detention. More common, however, are cases where the HO has failed to follow its own policy not to detain people with particular vulnerabilities that mean that detention is likely to have a particularly adverse effect on them. Where the HO has refused to accept or consider evidence of vulnerability, or made a perverse decision around it, this may be challenged. Two shocking examples of these issues are given below. Unfortunately, given the obstacles to getting to JR (explored above and further in 4.2) it is likely that there are many other people affected in similar ways whose cases do not come to light.

Examples of harm in detention

MD, R (On the Application Of) v SSHD [2014] EWHC 2249 (Admin) (08 July 2014): a young woman from Guinea came to the UK to join her husband under a policy for family reunion for refugees, but was detained on arrival, when immigration officers became suspicious that she might be an under-age victim of trafficking. She had no pre-existing mental illness, but detention caused a serious breakdown and she suffered major depression and post-traumatic stress disorder. The High Court judge accepted that this was caused by the continued detention and lack of any satisfactory medical treatment, and that she had been unlawfully detained for 11 months, in breach of Article 3. This was the first JR case where the claimant had no pre-existing mental illness, and detention caused the mental breakdown.

R (on the application of MDA by his litigation friend the Official Solicitor) v SSHD, EHRC intervening [2017] EWHC (Admin): a young man arrived in the UK aged 13, having been exposed to serious ill treatment and traumatic violence including sexual violence in the war in Somalia where he was a child soldier. He was soon admitted to a children's psychiatric unit suffering from mental health problems, and the HO granted discretionary leave to remain three years, on the basis that he was too ill to be interviewed about his asylum claim, but his mental ill health and the lack of treatment and care in Somalia prevented return. After years under psychiatric care, suffering psychotic symptoms and complex post-traumatic stress disorder, he committed criminal offences and spent 15 months in immigration detention pending deportation. As a result of intervention by Detention Action, he was admitted to a psychiatric unit where he was assessed as lacking litigation capacity and the capacity to consent or refuse treatment. With the help of his litigation friend the Official Solicitor, MDA claimed unlawful detention, and the court found that the HO had failed to enquire into his mental capacity and disabilities in detaining him, breaching common law rights to fair procedural safeguards.

²³³ Interview with barrister (2).

The HO may be challenged for failing to act in line with its policies and procedures in other ways as well: failing to operate in accordance key statutory principles, e.g. detaining someone without authority; failing to act according to public law principles, e.g. detaining in accordance with a hidden unpublished policy; procedural failings such as detaining someone under the wrong statutory provision; failing to ensure that reviews happened with the correct frequency, or with the correct seniority of officer, or correctly recorded.²³⁴

Finally, some cases challenge an aspect of detention policy. For example, in 2014 Detention Action launched a process of challenging the Detained Fast Track (DFT), which at its height detained one in four asylum seekers and rejected 99% of their claims.²³⁵ The HO had taken previous case law as a *carte blanche* to operate accelerated asylum procedures in detention.²³⁶ Detention Action argued successfully in the Administrative Court that the way that the system was operating was so unfair as to be unlawful, both in common law and as a breach of Article 5(1)(f) of ECHR. In a series of challenges, various elements and HO adaptations of the DFT were found to be unlawful (including inadequate screening for vulnerability and unsuitability for detention; expedited timescales not allowing for due process and proper representation at appeal; the fact that often there was no real risk of the person absconding). The DFT was suspended in July 2015, found to be '*systematically unfair*'. Government efforts to use detention to move asylum seekers promptly through the system to removal continue – 59% of the population in detention are still asylum-seekers - but are tempered by the risk of legal challenge.²³⁷ Strategic litigation has also been key in challenging the restricted definition of torture (see section 2.3) and is expected to continue, e.g. in relation to removal windows and conditions in detention, including segregation and detainee labour.²³⁸

JR provides a vital means for people to challenge problematic aspects of how HO detention policy and practice. However, given multiple barriers to obtaining legal aid representation, addressed in the next section, it is safe to say that there are many instances of unlawful detention that do not generate a JR claim. Furthermore, the HO often settles before hearings to avoid adverse case law; this may lead to release but not a full vindication of the unlawfulness of detention. A successful JR claim can have an immediate individual impact, leading to release and potential compensation payments.²³⁹ In the three years from 2012, the government paid out £13.8 m in compensation for unlawful detention to 573 claimants.²⁴⁰ JR can also have a more collective and cumulative impact: one case on a key issue can make a difference to other people by contributing to case law. If there is a pattern of individual JR claims around, for instance, mental health, it may attune the HO to this issue. But conversely a pattern of JR outcomes favourable to the HO – for instance, the acceptance of very long detentions for former offenders pending deportation – may compound the normalisation of detention as an administrative convenience. Meanwhile, policy challenges have clearly been critical in directly checking some of the most problematic aspects of government detention policy.

²³⁴ *Lumba (WL) v SSHD* [2011] UKSC 12 (23 March 2011), *SK (Zimbabwe) v SSHD* [2011] UKSC 23 (25 May 2011).

²³⁵ Detention Action 'The Legal Challenge' Detention Action website (London: Detention Action, 2015).

²³⁶ Ben du Preez 'After the fast track: What next for the detention of asylum-seekers?' Detention Action blog (London: Detention Action, 2016).

²³⁷ Home Office *Immigration Statistics - January to March 2017, Detention*, table dt_04 and Home Office *Immigration Statistics - April to June 2017*, table dt_13q, du Preez 'After the fast track'.

²³⁸ Interviews with solicitor (3) and PLP (2), Bales and Mayblin "'Paid work" or underpaid labour?'

²³⁹ Pickup, Alison, Martha Spurrier & Harriet Wistrich, 'Private law claims in immigration detention cases' Public Law Project Conference paper, 24 June 2015, Interview with solicitor (3).

²⁴⁰ McGuinness and Gower 'Immigration detention'.

In sum, the legal mechanisms of bail and JR provide important routes for people to challenge their detention. But research participants identify problems with the processes involved and variation in how key issues are evaluated, in the absence of a clear statutory framework. They cannot be a substitute for better public administration, and more robust and humane statutory and administrative safeguards. Moreover, access to these mechanisms is not automatic: as we have seen, the availability of legal representation is an important part of the picture.

4. GETTING HELP IN DETENTION: THE LEGAL SERVICES LANDSCAPE

Given the issues outlined above with immigration law, government practice, and legal mechanisms, people’s ability to pursue their rights effectively in the courts depends a lot on their ability to access legal services. Relevant safeguarding principles for immigration detention include legal representation - ‘prompt, continuing adequate legal assistance, state-funded if unaffordable’ - and contact with the outside world, including legal representatives and other relevant agencies.²⁴¹

This section shows that, despite detention being ‘in scope’ for legal aid, the UK legal landscape is failing immigration detainees. As we shall see, ‘*The whole myth of legal aid, and “we’re OK detaining people because they have access to legal remedies” just doesn’t play out in practice.*’²⁴²

Since 2010, the Detention Duty Advice (DDA) scheme has played a central role in the provision of immigration advice to detainees, so this is where we begin. Through this scheme, a number of solicitors’ firms that have immigration and asylum contracts with the Legal Aid Agency (LAA) obtain additional and exclusive contracts to run regular DDA surgeries in IRCs. This section looks first how people make initial contact with a DDA advisor. Second, it explores how people qualify for legal aid for representation at bail, appeal and judicial review. Third, patterns of geographical differentiation and movement between legal service providers are outlined. The fourth section looks at the nature of legal aid contracts and upcoming changes. Fifth, we examine at what happens when people do not obtain legal aid: options in terms of private and pro bono provision and how people fare without any professional advice. Sixth, key quality issues in legal advice and representation for immigration detainees are outlined. Finally, we explore how awareness, agency and capacity affect how people navigate their legal predicament.

4.1 Detention Duty Advice Scheme: first contact

People are supposed to be informed about the DDA scheme as part of their formal induction at the detention centre. The only publicly available statistical data on legal advice in detention is BID’s regular Legal Advice Survey, which obtains responses of people who have open casework files with the organisation: in May 2017, awareness of the scheme among respondents was around 67%, the lowest since it was introduced in 2010-11.²⁴³ Sometimes people initially struggle to understand the purpose of the scheme and confuse the DDA solicitor with the HO immigration officer.²⁴⁴ Detainees can sign up in the library for a 30-minute appointment in a DDA surgery. Occasionally the welfare officers may identify

²⁴¹ Fordham, *Immigration Detention*, 103 and 126.

²⁴² Interview with BID (1).

²⁴³ BID, *Legal Advice Survey 2010-2017*.

²⁴⁴ Interview with BID (1).

people whom they see as vulnerable and encourage them to sign up.²⁴⁵ Of BID's respondents, 51% had taken part in at least one DDA appointment.²⁴⁶

There is high demand and people often have to wait for an appointment. 75% of BID's respondents waited more than one week, and 39% for more than two weeks. Given the fact that people are being held in detention, and may be facing a real and immediate threat of removal, waiting times are a serious problem.²⁴⁷ There are several possible reasons for these delays. The detained population has grown considerably since the scheme was set up. Where backlogs build up there can be no-shows because people have been removed or released; sometimes people do not attend because they have another solicitor represent them, are called for an interview with the HO that clashes, or made a mistake about the appointment time.²⁴⁸ Although there are ten appointment slots in each surgery, firms are paid a fixed fee for seeing a minimum of five people, and there were reports of some solicitors leaving after seeing this quota.²⁴⁹ Detainees exchange experiences of different law firms: some are oversubscribed, and some people wait for three or four weeks for an appointment with a preferred provider.²⁵⁰

A 30-minute appointment is not long enough to establish the nature and test the strength of a person's case, in the unanimous view of DDA solicitors and other specialists interviewed for this report. Some detention centres are stricter than others about the 30-minute timeframe for the appointment, and some are more organised than others in ensuring that the person is ready for their appointment, and whether they know to bring their documents.²⁵¹ Often people do not have key documents with them, so they need to collect these and send them to the solicitor later on. Sometimes, conversely, people show up with a large number of documents, impossible to review effectively in the time available. Many people in detention have a complicated immigration case, and are getting help rather late in the day. Often people are shocked and distressed; some people need an interpreter, who may or may not be found from among the detainees or via telephone interpreting service.²⁵²

Many people do not get taken on as clients. The solicitors interviewed were not able to clarify the proportion, apart from saying that the 'majority' of the people that they see in surgery were taken on.²⁵³ BID aims to support people who are having problems getting legal aid representation, and in May 2017 only 15% of its survey respondents had gone to a surgery appointment and knew that they had been taken on as a client; take-up rates decreased after LASPO was implemented and have remained low. This demonstrates that although detention is in scope for legal aid, many detainees are not able to access assistance – because of the means and merits test, or because of the ways that the legal landscape operates. There are widespread concerns among research participants that the DDA scheme quite often fails to assist people who are eligible for legal aid. If so, this is a very serious issue, given that legal aid is supposed to be an entitlement, and the DDA scheme is the only

²⁴⁵ Interview with solicitor (2) and BID (2). At one detention centre a solicitor found that staff were trying to filter the list according to a system that they believed fair, giving priority to some and excluding others who had already had an appointment, but this was stopped.

²⁴⁶ BID, *Legal Advice Survey 2010-2017*.

²⁴⁷ Interviews with solicitor (3) and Public Law Project (2).

²⁴⁸ Interview with solicitor (1).

²⁴⁹ Interviews with Detention Action and BID (2).

²⁵⁰ Interview with BID (2).

²⁵¹ Interview with solicitor (1).

²⁵² Interview with solicitor (1). Where a friend interprets the quality may vary, and solicitors reported it sometimes being hard to get the language needed via telephone interpreting, or the line going dead.

²⁵³ Interview with solicitor (1, 2 and 3).

way that most detainees are able to access it. We need to understand how people get taken on as legal aid clients and how decisions are made regarding what work to do on their cases.

4.2 Qualifying for legal aid

The initial form of legal advice is ‘Legal Help’, which involves reviewing the client’s documents, explaining HO communications, advising them on potential courses of action, and often making a temporary admission request to the HO.²⁵⁴ The test for initial Legal Help is one of ‘sufficient benefit’, which relatively easily passed.²⁵⁵ Hours spent on Legal Help must be reported, and the upper costs limit is £500, and any extension must be approved prospectively or the work is not paid.²⁵⁶ Legal work representing clients in appeals or bail hearings in the Immigration and Asylum Chamber of the First-tier or Upper Tribunals is classified as ‘Controlled Legal Representation’, and work on JR in the Upper Tribunal or in the Administrative Courts is classified as ‘Civil Representation’. For this, further ‘means and merits’ tests are required. For Controlled Legal Representation, the application of these tests may be challenged by the LAA on audit; for Civil Representation, the lawyer needs to apply for a legal aid certificate in order to proceed.

The low means test is being monitored by the LAA and applied by firms with increasing rigour, which leads to delays and problems for some detainees in accessing legal aid. The basic requirements are that the person’s disposable income does not exceed £733 per month and their disposable capital does not exceed £3,000.²⁵⁷ Someone in receipt of basic welfare benefits or NASS support is automatically eligible. Clients generally do not have the necessary financial documents with them at their appointment – and certainly not if a partner’s income must also be assessed - and they often have difficulties accessing this information in detention.²⁵⁸ Solicitors find that: *‘The requirements are becoming extremely stringent, and this is a general issue for our casework and a major administrative burden... Because the legal aid doesn’t operate as a way to facilitate access to justice, it operates a way to exclude people; they will look for the tiniest thing so they can say the whole case would be ineligible.’*²⁵⁹ If the LAA does not accept the evidence on financial eligibility, any work done on the case will not be paid for. In cases where there is a hint of complexity: *‘If someone doesn’t come through with income evidence quickly, I am not doing any work on it. And before I might have started the work, whereas now my fingers have been burnt.’*²⁶⁰ An NGO-based interviewee illustrated how demanding the investigation of means can become: *‘currently I’m in battle with a lawyer from DDA where they are saying that a client who is victim of trafficking picked up in a brothel cannot get legal aid because she was receiving £300 a month from a friend who isn’t willing to sign a statement saying she was providing her with that money... you’ll have situations where people have partners in their country of origin, and they say they need to assess their means as well...’*²⁶¹

²⁵⁴ Interview with solicitor (2).

²⁵⁵ Interview with solicitor (2).

²⁵⁶ LAA ‘2013 Standard Civil Contract Specification; Category Specific Rules, Section 8 Immigration and Asylum Specification.’ July 2015, 8.80, 8.82.

²⁵⁷ Partners and children may be factored into these calculations. LAA ‘Controlled Work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation’ April 2015, LAA ‘Civil Representation: Guide to determining financial eligibility for certificated work’ April 2015.

²⁵⁸ Interview with solicitor (1).

²⁵⁹ Interview with solicitor (1).

²⁶⁰ Interview with solicitor (2).

²⁶¹ Interview with BID (2).

The merits test is the next hurdle. The firm must be able to convince the LAA that the case has a 50% chance of success.²⁶² Lawyers need to do a certain amount of investigation to clearly identify the merits of the different appeals and claims the person might be able to make.

Regardless of what is going on in the substantive immigration case, it is very often possible to justify a bail application, on merits; they are fairly standard requests for limited sums of money.²⁶³ Thus the DDA adviser is usually able where appropriate to move from working hourly on legal help to working on a bail application, logging hours of work up to an upper costs limit of £500, with extensions usually granted where necessary.²⁶⁴

However, there are concerns that DDA firms do not always take up viable bail cases. As one detainee put it: *'...in detention I never had a lawyer, never had access to any lawyer. Any lawyer that I tried they all said that my case is weak and they cannot take me. So they were dropping me.'*²⁶⁵ BID commented: *'A clear example of that is our [BID's] success rate, so in terms of the cases that we deal with, we should be picking up the dregs and the cases not eligible for legal aid, but our success rate in bail hearings is 65%.'*²⁶⁶ Even more concerning is that there are reports of some DDA advisers saying that they cannot get legal aid for the person's bail application and offering to do the work privately.²⁶⁷

Beginning a JR claim is more of a financial gamble for the legal aid lawyer. An application must be made to the LAA for a legal aid certificate for civil representation, for which the merits test is more stringent. Preparing the legal aid application, alongside the application for permission to go to JR, can take a considerable amount of legal time, and if permission is not granted to proceed with the case by the court, then none of the pre-permission work will be paid for by the LAA. This leads to a Catch-22 situation: lawyers are cautious about beginning work unless they are satisfied on the merits of the case, but often that is not possible without investigative work, at their own financial risk.²⁶⁸ It is possible under the legal aid scheme to apply for 'investigative help' funding for this sort of work; but it often appears this is not sought, particularly in urgent removal cases.²⁶⁹

This means that viable cases for JR may not be taken up. One barrister described preparing briefs for unlawful detention claims pro bono and trying to get DDA providers to take them on: *'Around five different times we built up a very credible profile with papers and a brief that I wrote with all paginated case papers prepared saying this is a strong case... the response would be that we don't even have capacity to look at the documents I have prepared. And I would say I'm doing this pro bono... and they would say fine, that we may make contact with the individual. And then a week later I would hear that they had spoken to the individual, and they had been told to submit all sorts of documents proving their income... It is nonsensical to say there is legal aid for detention, because the hurdles you have to go through to actually have the lawyer go on record and represent you and make the claim are so tedious and cumbersome that it rarely ever happens... Loads of instances of*

²⁶² The other merits criteria are generally more easily met. Interview with solicitor (1). LAA 'The Civil Legal Aid (Merits Criteria) Regulations' (2013).

²⁶³ Interviews with solicitors (1, 2 & 3) and Public Law Project (2).

²⁶⁴ Interviews with solicitors (1, 2 & 3).

²⁶⁵ All-Parliamentary Groups on Refugees & Migration 'The Report of the inquiry into the Use of Immigration Detention in the UK' - 'J', 1st Oral Evidence Session, 17 July 2014.

²⁶⁶ Interview with BID (2).

²⁶⁷ Interview with BID (2), solicitor (1) and Detention Action.

²⁶⁸ Interview with Public Law Project (2).

²⁶⁹ Interview with barrister (6).

*unlawful detention are going by without any applications being made.*²⁷⁰ Any legal aid immigration practitioner may take up a JR claim for unlawful detention with legal aid - it is not restricted to the DDA contract holders - but given the issues above, it can be hard to identify an external lawyer willing to take on your case.²⁷¹

Problems also arise in terms of dealing with ‘connected matters’ where detention is in scope, but the substantive immigration case is not. It is important that the client raises all the grounds that they have for remaining in the UK in their applications and appeals, as even grounds which are out of scope of legal aid, such as their family life, might have a bearing on the outcome of the legal process.²⁷² Given the efforts to make the immigration system a ‘one-stop’ regime, failure to raise an issue early on usually means that it is excluded from consideration at appeal against a refusal of leave to remain. However, in these mixed cases, any legal work required to research and represent the out-of-scope dimensions of someone’s case will not be funded by legal aid. This creates dilemmas for legal aid practitioners, as in taking on such clients they are professionally bound to represent their interests, but some of the work required may not be funded. Some lawyers *‘try to see how much of the work can be swept up by detention... Can you do your witness statement in detention? Can you do your expert reports, things like that? And try and find the overlap. It’s not easy.*²⁷³ One obvious option, where there are human rights issues involved, is to apply for Exceptional Case Funding.

Exceptional Case Funding (ECF) is the subject of controversy, with participants suggesting that it is an under-used channel for immigration detainees. It is supposed to fund cases that fall outside the scope of LASPO but where major human rights issues are at stake (see Section 1.2). Initially, there were few immigration applications for ECF, and it was near impossible to obtain funding – grants were 2% of applications made in 2013/14 and 2014/15.²⁷⁴ Initial guidance on ECF stated that it should be used in ‘rare’ and ‘high priority’ cases only, and suggested that cases involving Article 8 ECHR (right to family and private life) were not eligible. This was challenged, and the Court of Appeal held that the guidance had gone beyond the wording of the Act (which did not relate to exceptionality of cases, but to cases where there was a right of a breach of ECHR and EU rights) and was therefore unlawful. It also found that the procedural protections of Article 8 apply in immigration cases.²⁷⁵ Since the government issued revised guidance to caseworkers assessing ECF applications in 2015, immigration applications have grown: in 2016/17 immigration accounted for half ECF applications and three-quarters of grants, and numbers of immigration ECF grants were 68% of applications.²⁷⁶ We do not know how many of the 688 grants were for people in immigration detention. However, many interviewees were concerned that legal aid advisers are not always alerting clients that they are eligible for ECF. Some felt that there is poor awareness among lawyers that this is a more fruitful channel of assistance than it was previously; others suggested that lawyers are deterred by needing to complete a separate application form to gain approval.²⁷⁷ Again, there were reports of

²⁷⁰ Interview with barrister (1), also solicitor (1).

²⁷¹ Interview with Public Law Project (2) and BID (2).

²⁷² Adam Griffith, ‘LASPO - What You Need to Know: ASA Briefing,’ London: ASA, 2013.

²⁷³ Interview with barrister (6).

²⁷⁴ LAA *Legal Aid Statistics Tables*, January to March 2017, Table 8.2.

²⁷⁵ Amnesty ‘Cuts that Hurt: The impact of legal aid cuts in England on access to justice’ (London: Amnesty, 2016) and *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin) (13 June 2014)

²⁷⁶ LAA *Legal Aid Statistics Tables*, January to March 2017, Table 8.2.

²⁷⁷ Interviews with BID (2), barrister (1) and Detention Action, Amnesty ‘Cuts That Hurt’, These problems are also consistent with a wider trend whereby legal aid practitioners are increasingly reluctant to take on complex, low-value litigation, see Bar Council ‘LASPO 2012: One Year On’ (London: Bar Council, 2014).

detainees with these kinds of issues being told by some DDA advisers that they cannot get legal aid for the case, and would need to pay privately.²⁷⁸

The most urgent legal work with people in detention is when there is a removal date or window opening very soon, and there are grounds for challenging removal, via an injunction, fresh claim or a JR of the decision to certify an asylum or human rights claim. Previously there were devolved powers for emergency applications so that the lawyer was able to assess merit and begin working without making an application.²⁷⁹ Now the lawyer must apply for an emergency certificate, and then has ten days to apply for a full certificate.²⁸⁰ Many lawyers are understandably unwilling to act until they have confirmed that the LAA will fund their work. It is a hectic process: *'The target turnaround time for emergency applications is 48 hours. If you have a 72-hour window [until removal / a removal window opens], a lot of that is going to be taken up by applying for and getting legal aid... You have to satisfy the LAA about merits, so you have to make sure you have all the necessary documents... The forms... you have to complete are pretty much the same... so it's still quite a time-consuming process. In terms of means information, [for emergency applications] you don't have to provide that, but a lot of solicitors will be reluctant to take a case on without knowing that from the outset they are going to be able to have all the means information. Otherwise, the means testing is so rigorous now, compared with the way it used to be, there is a risk that solicitors might be refused for means, and then you might get an emergency certificate, but that could be cancelled, so you won't get paid for anything.'*²⁸¹

Illustration of difficulty getting help from the DDA scheme

[I knew about the case through the person's ex-partner]. I had anticipated that [when he saw the DDA firm] he would have been advised that he had a judicial review, that... the solicitor would look into it. But he was just told it's not an asylum case, it's something you can do yourself. It was a case actually where it was an individual who had been in the UK for 30 years, he'd had Indefinite Leave to Remain and he lost his passport with the ILR endorsement in it. He then tried to have the ILR stamp replaced. When he made contact with the Home Office they said we have searched our records; we can find no trace that you have been granted ILR. He was granted ILR probably in 1990. And they said you must take steps to leave the UK immediately. They say they served a removal notice on him, which he didn't receive. And that was the beginning of this year.

Then the next thing he knows, [a few months later] immigration officers came to his house early in the morning, he's there with his partner... they detain him, he says I've been here for 30 years, couldn't quite believe any of this was happening, they give him a fresh removal window notice, the other one had expired, and then he was detained pending removal. Even though... He had ILR and they should have looked at their records more thoroughly, but even if they thought he wasn't here lawfully he must have had a strong human rights claim [personal/family life]... But they were still going to take steps to remove him. And when he made the application to replace the indefinite leave [documentation] he had lost, he put forward national insurance records. He managed himself to put forward strong documentary evidence which showed that he's been here, continuously resident, whatever the lawfulness of his status.

The first thing was he couldn't see someone on the DDA scheme within 72 hours [i.e. within notice of removal window opening], then when he did see someone they said legal aid is not available, why don't you just get the records yourself and do it yourself with the Home Office. At that point we're instructed, we're told he's going to be removed I think it was two days from then. We had one working day to try to stop his removal. It took a team of us to do that, and we had to make contact with various people in the LAA... to try to get legal aid in time for him... Just one case illustrates the different problems that you have.²⁸²

²⁷⁸ Interviews with Public Law Project (2) and BID (2).

²⁷⁹ Interview with Public Law Project (2).

²⁸⁰ Interview with Public Law Project (2).

²⁸¹ Interviews with Public Law Project (2) and solicitor (1).

²⁸² Interview with Public Law Project (2).

4.3 Geography and mobility between legal aid providers

It is well recognised that the availability of legal aid advice for immigration and asylum is highly uneven geographically.²⁸³ Some detainees have strong fresh claims and the potential to regularise their status, but have lived for years in a place where there is no community law centre or legal aid firm offering immigration advice.²⁸⁴ Many people's first contact with a legal advisor is through the DDA scheme. Even in detention, it appears that there is some geographical differentiation, with particular concerns about access to legal support in the Verne IRC, where rota solicitors travel from all over the country to do surgeries.²⁸⁵

There is also movement between legal aid firms. If a solicitor has done at least five hours of legal aid work for a client, he or she may continue working on their case while the client is in detention.²⁸⁶ If people are moved between detention centres, often the DDA firm can continue to represent them. However, in some circumstances, the legal aid practitioner deems that distance makes it impractical.²⁸⁷ Detainees moved between Scotland and England are often dropped owing to differences in the legal systems.²⁸⁸ Even if remaining in the same detention centre, someone may wish to switch DDA provider (there are at least two providers in all detention centres), for instance, because the first said that they could not do anything for them, or communications have been slow or inadequate, and they are stressed out: *'of the nine people my colleague saw yesterday, six of them had been seen by [another DDA provider] and never heard from them again.'*²⁸⁹

Switching is not always straightforward. DDA providers may be reluctant to take on clients after a different DDA provider has refused, as it may mean it is hard to justify to the LAA. Before a DDA provider takes on a client who is signed up with a different legal aid practitioner (whether external or a different DDA provider) for help with their immigration problem, the previous solicitor must sign a CW4 form to confirm that they are no longer acting for the client on the issue in question, which can take some time to obtain.²⁹⁰ If you move detention centres, and your existing firm also serves the new detention centre, transferring files between offices is not always a seamless process: *'I have seen letters from firms saying to people we can't act for you anymore because you have moved detention centre, [and telling them that they] might want to contact their own firm [the existing provider, different office] to get legal advice.'*²⁹¹

There is also the issue of what happens if someone is released. Many people are dispersed to NASS or Section 4 accommodation, or homes of friends or family far from the detention centre. If the solicitor has an office in the vicinity, it is easier to maintain contact. Some maintain contact long-distance, mainly via phone, but this is not guaranteed. If travel is required, where there is legal aid the lawyer will need to apply for prior authority for a disbursement to pay travel expenses which adds complication; where there is no legal aid, it is hard to justify the travel cost.²⁹²

²⁸³ See BurrIDGE and Gill 'Conveyor-belt justice' – see also Law Society campaign to end legal aid deserts: <https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/>.

²⁸⁴ Interview with solicitor (3).

²⁸⁵ Interview with solicitor (2) and Detention Action. The Verne is to be closed in December 2017.

²⁸⁶ Interviews suggest few people retain prior legal aid advisers in detention, but there are no statistics.

²⁸⁷ Interview with solicitor (1).

²⁸⁸ Interview with Public Law Project (2) and BID (2).

²⁸⁹ Interview with solicitor (3).

²⁹⁰ Interview with solicitor (1).

²⁹¹ Interview with BID (2).

²⁹² Interview with barrister (6) and solicitor (2).

4.4 Detention contracts, business models and the new tender

From the business perspective, DDA contracts offer some key benefits. Interviewees were quick to point out that with DDA contracts firms get paid for the work they do on hourly rates; and that they do not need to obtain real-time LAA approval for Legal Help and Controlled Legal Representation, but can bill the time straight away subject to later audit. This contrasts with mainstream legal aid contracts for immigration, which are based on graduated fees, and require more approvals from the LAA. Another advantage is that through the DDA scheme, legal aid solicitors often pick up ‘good, worthwhile cases’, which have both immigration and detention dimensions, are satisfying to work on, and may offer opportunities for high-level, influential litigation.²⁹³

However, the LAA’s approach emphasises cost efficiency over access to justice. The way firms are monitored imposes a discipline on the system that goes beyond the basic questions of whether a matter is in scope, whether the client has low means, and their case has merit. *‘Firms go above and beyond what is required of them by the Legal Aid Agency because they are so scared of not being paid at the end of the work.’*²⁹⁴ If necessary means evidence is not secured, but a DDA provider bills the LAA, when files are later audited: *‘The LAA will stop and just say I won’t pay you, they will put a contract notice on you, and... want to see a large amount of other files. So you cannot risk that.’*²⁹⁵ Interim auditing seems to have increased: *‘The LAA have this week requested two random files and that is very typical, they do request a random selection of files to audit to look and see if we do means assessment correctly and whether we record our time appropriately...’*²⁹⁶ This has led to a high level of self-policing.²⁹⁷ There are also performance measures: *‘If you don’t win a certain amount of your appeals that can go against your KPIs, and could be a breach of your contract... put your contract at risk. That means that merits testing [for Controlled Legal Representation]... is harder.’*²⁹⁸ The financial consequences for a firm can be severe, in terms of losing a percentage of the money earned from the contract: *‘if they find a flaw they will extrapolate that... to a huge caseload in an entire firm, so you’re running very scared.’*²⁹⁹

As a result of the financial risks involved, there are major advantages to scale. Those tendering for the DDA scheme have had to demonstrate that they have the capacity to take on a high volume of detention centre cases (ten clients per surgery), and have the necessary expertise in immigration law.³⁰⁰ The largest provider of Detention Duty Advice works in every detention centre and covering 50% of the surgery weeks; the next largest provider covers five centres and 16% of surgery weeks; and the smallest only one centre and 3% of surgery weeks.³⁰¹ By operating at significant scale, with supervisors in charge of teams of caseworkers and consultants providing additional capacity, the largest provider, Duncan Lewis, is able to take considerable financial risks. For example, in issuing JR proceedings: *‘We have to issue a court fee, disbursements, council fees, et cetera, spending a lot of time and money to get a JR up and running, you are talking a lot of hours at risk if a judge decides*

²⁹³ Interview with barrister (7).

²⁹⁴ Interview with BID (2).

²⁹⁵ Interview with solicitor (3).

²⁹⁶ Interview with solicitor (2).

²⁹⁷ Interview with solicitor (1).

²⁹⁸ Interview with Public Law Project (2).

²⁹⁹ Interview with ILPA and BID (2).

³⁰⁰ Interviews with ILPA, solicitor (2) and barrister (1).

³⁰¹ DDA surgery rota for Oct 2017 – March 2018 available on AVID website: www.aviddetention.org.uk. Other DDA firms are Fadiga & Co, Lawrence Lupin Solicitors, Wilson Solicitors LLP, Halliday Reeves Law Firm, Thompson & Co, Turpin & Miller Solicitors, and Parker Rhodes Hickmotts.

there's no case. So a massive financial risk there... [many] LA practitioners... can't take [so much of] that risk because they're a smaller practice, they can't take a financial hit on issuing ten JRs that can't get paid, they may not have a relationship with barristers [willing to take the risk]'.³⁰² At the same time, however, concerns were raised about the implications of this kind of large-scale model for the quality and consistency of more basic service provision, explored in section 4.6.

Immigration and asylum legal aid contracts are up for renewal in 2018, with the tendering process already underway.³⁰³ The changes anticipated will affect how legal advice reaches people in immigration detention. Firms tendering to deliver larger volumes of work must conduct a full range of work – whereas currently providers only have to carry out Controlled Legal Representation, which may give greater scope to help detainees seeking JR of their detention. The scheme is to align more closely with Law Society's professional standards via their Immigration and Asylum Accreditation Scheme (IAAS), including requiring direct supervision by senior caseworkers of casework assistants. The system of having organisations bid for 'lots' continues: this means that the organisation will have a defined volume of matter starts that they can work on in a particular procurement area, with some flexibility in that they are allowed to 'self-grant' an additional 50% of their allocated matter starts each year. Under the new arrangements, work in detention centres will no longer be procured separately and competed to secure a fixed maximum number of contractors. All organisations bidding for higher lots of work will be able to bid for detention centre work. Organisations bidding for detention centre work will be committed to delivering this at any site in their procurement area – which means that if a new detention centre is established in that area they will have to provide legal advice there. Overall, this may make detention work less exclusive, but it seems that there will still be considerable advantages to scale.³⁰⁴

It is clear that while the DDA scheme is a central component in detainees' access to justice, the experience can be 'quite hit and miss' and many people have to turn elsewhere for help.³⁰⁵

4.5 Alternatives: private services, pro bono provision and DIY justice

As legal aid contracts, the use of private and pro bono provision appears to be increasing. Strictly representative statistics are not available on extent and type of representation of people in detention centres. BID's surveys of its open casework files since 2010 shows (1) a dramatic drop in the proportion of respondents who had a legal aid representative immediately following the implementation of LASPO, then settled at around 30%, (2) a fairly steady increase in the private funding of solicitors, to around 20% (3) the proportion of respondents with no legal representative decreased with introduction of the DDA scheme in 2010 but shot up after the implementation of LAPSO, and have stayed high, at around 50%.³⁰⁶ Although BID's sample is likely to be biased towards people having problems with representation, the broad patterns - drop in legal aid representation post-LASPO, increased private representation, increased lack of representation - are consistent with the qualitative accounts of the lawyers, judges and NGO specialists, and are the logical consequence of legal aid restrictions.

³⁰² Interview with solicitor.

³⁰³ LAA, 'Headline Intentions for Civil Legal Aid Contracts from April 2018,' January 20, 2017.

³⁰⁴ Interview with ILPA.

³⁰⁵ Interview with barrister (3).

³⁰⁶ Proportions are for November 2016.

There are several reasons people go private. Some have been turned down on their means and merits assessment by a legal aid firm; others put their name down for a DDA surgery regarding an urgent issue, but cannot afford to wait for the appointment.³⁰⁷ In prison, there is no free immigration advice scheme. Some people – or their families – make a choice to bypass legal aid and ask a trusted private solicitor. There is also lack of awareness and some misconceptions about legal aid: *‘people in vulnerable situations... who may be asylum seekers or may have entered the UK clandestinely and who have paid the agents, see the lawyers as additional agents, to be paid. They’re just another cog in the wheel of giving money up in order to gain a legitimate right to stay in the country so they can work here and be accepted.... A lot of immigrants... think that if you’re not paying, [it’s]... not a good lawyer... Other people... thought if I’m not paying you money, how are you going to pay any of the relevant people who need to be paid to get me out or to get status.’*³⁰⁸ This can lead to *‘almost a hierarchy of legal advice... often detainees will be almost smug about the fact they have a private solicitor... half my battle is usually trying to explain to people that legal advice in detention is one of the few things in the world which is better for free than paying for it.’*³⁰⁹

People find a private solicitor through various routes. Some solicitors advertise in detention or via word of mouth among detainees.³¹⁰ Often people seek a solicitor from their own language community, either via detention contacts or family and friends outside. Tamil Sri Lankans and Afghans, in particular, tend to rely on community contacts, and some of these community-based solicitors have in turn established strong relationships with particular chambers or barristers.³¹¹ *‘Some communities are very well-established, very well-organised.... They have solicitors within them who are good and have a clear agenda to help their community.’*³¹² Often the detainee has very limited means, and relatives pay the fees.

Barristers are cautious about direct requests for public access work from detainees, given the complications of obtaining immigration documents and securing payment.³¹³ The Bar’s Public Access Scheme has grown, but there are limits on the extent of preparation that is allowed, and the Bar Council’s Direct Access Portal is not well-used by immigration detainees.³¹⁴

It is clear that many people held in detention fail to get either legal aid or private representation. Arguably, some element of pro bono legal work is often hidden within legal aid cases: lawyers argue that legal aid fees do not adequately cover costs. Moreover, as we saw, some lawyers work for free on elements of cases that do not attract legal aid funding.

Pro bono legal services and non-profit organisations are increasingly over-stretched. People struggling to get a solicitor often contact a detainee welfare support group which will refer them to specialist NGOs BID and Medical Justice, or volunteer legal clinics such as the University of Law or the Bar Pro Bono Unit. These organisations are playing a vital role in securing many people’s access to legal services. Referrals to barristers, which used to come nearly always from solicitors, now increasingly also come through NGOs.³¹⁵ BID is the only specialist provider of free legal advice and representation to immigration detainees. During

³⁰⁷Interview with barrister (1 and 2) and Detention Action.

³⁰⁸ Interview with BID (1).

³⁰⁹ Interview with BID (2).

³¹⁰ Interview with barrister (7) and Detention Action.

³¹¹ Interview with barrister (7), solicitor (3) and Public Law Project (2).

³¹² Interview with barrister (7).

³¹³ Interviews with immigration clerk and barrister (2).

³¹⁴ Interview judge (1 & 2) and Detention Action; <http://www.directaccessportal.co.uk>.

³¹⁵ Interview with barrister (2).

2016, it helped detainees prepare 438 bail applications, with a 66% success rate, and referred 78 cases for unlawful detention claims.³¹⁶ The organisation often deals with people with Article 8 claims facing deportation. Lawyers and judges interviewed praised the efforts of BID's volunteers and caseworkers *'their bail grounds are really detailed, they will put in details of policy and case law, and will have properly advised their clients. So even though BID's cases are more difficult factually, they are really well prepared.'*³¹⁷

There are some other free resources. BID also has a self-help guide to bail applications translated into key languages and in 2016 it carried out 142 legal advice sessions to 2,135 people in detention. Many websites provide legal contacts and advice; but many - including BID, Detention Action, the Association of Visitors to Immigration Detainees, and the Free Movement blog – have been blocked periodically in IRCs, contrary to the Detention Services Orders, which require centre management to ensure easy access to websites of legal help organisations.³¹⁸ These intermittent blockages are completely incompatible with access to justice.

However, challenging detention without professional legal support is very difficult. Many may not make it to court in the first place. When they do, it is a difficult experience. One lawyer commented: *'people are very hopeful that a judge will be sympathetic and that is the wrong approach – you need to put forward the legal arguments, and if you can't do that properly the judge will have to hand-hold you through all the issues and the tribunal doesn't have the time or resources for that. And the HO isn't going to structure their argument in a way that makes it easy for you to respond.'*³¹⁹ One judge noted that since LASPO: *'We see far more litigants in person. It is shocking when you consider that this is about liberty, a key human right.'*³²⁰ Prospects for unrepresented detainees are poor. In 2013 BOP found that 31% of bail applicants were unrepresented, and had a 10% success rate compared with 48% for represented applicants.³²¹ Unrepresented litigants also cost the courts in terms of time, transport and administration.³²²

4.6 From charlatans to corner cutting: quality issues

A number of issues were raised regarding the quality of legal advice and representation that people are able to access in detention. Participants felt unanimous that professional legal representation was required to navigate the system, given the widely acknowledged complexity and constant changes to the legal and policy framework, and the legal procedures required to challenge detention: *'In this system you need good quality representation. Poor quality representation is not going to tip the balance.'*³²³

³¹⁶ Bail for Immigration Detainees (BID) 'BID's Achievements in the Last Twelve Months,' 2017.

³¹⁷ Interview with barrister (5).

³¹⁸ Home Office, *Detention Services Orders* 04/2016: Detainee Access to the Internet; interview with Detention Action, BID (2) and barrister (3).

³¹⁹ Interview with barrister (4).

³²⁰ Interview with judge (2).

³²¹ BOP 'Still a Travesty'. Burridge and Gill 'Conveyor-belt justice' had similar finding in asylum appeals.

³²² Amnesty 'Cuts that Hurt', Bar Council 'LASPO 2012'.

³²³ Interview with barrister (7). See also Amnesty 'Cuts that Hurt'.

The lack of immigration advice in prisons

A significant minority of immigration detainees are held in criminal prisons. At the end of 2016 there were around 558 people detained under immigration powers in prisons in England and Wales.³²⁴ This is one of the toughest corners in the UK's 'hostile environment.' The legal framework governing the deportation of ex-offenders was set out in 2.1. The decision on location of detention is taken by the HO's Detainee Population Management Unit, and administrative guidance provides considerable room for manoeuvre.³²⁵ HMIP is concerned that the reasons for detention in prison need to be better documented, regularly reviewed, and better communicated in writing to detainees.³²⁶ Detainees in prison are not covered by the *Detention Centre Rules* and *Detention Service Orders*; information on the population is sparse; they are scattered across the country; there is little change in treatment when they move from criminal custody to immigration detention.³²⁷ It is little surprise that the UK practice of holding immigration detainees in prisons has drawn international criticism.³²⁸

Notice of deportation often arrives late in the custodial sentence. According to BID some ex-offenders are bewildered by their on-going detention: *'People would write to us and say I don't understand what's happening, I'm in prison, I'm British, and I've been detained under immigration powers, and our legal staff will start to investigate and find out that they weren't British citizens, even though they thought they were and have lived here all their lives... The automatic deportation orders have led to a lot of kids in care, who end up taking drugs, discovering at the end of their criminal sentence that they are not British.'*³²⁹ People are given an opportunity to say if they have a human rights claim that would need to be considered prior to deportation. But to reply effectively, they need to marshal evidence for their claim, which is difficult if their English is poor or they do not have legal advice.³³⁰ There is often little time: BID found that most ex-offender immigration detainees it surveyed were given less than two weeks' notice, and many were told on the day of their release.³³¹ Deportation cases are prioritised and can move fast; any human rights claim may be certified as unfounded and right to in-country appeals curtailed; until recently it was not possible to challenge the certification.³³²

There is no immigration advice scheme in prisons, significantly undermining access to justice. BID's survey of its casework files found only 6% of those who had been held in prison received any immigration advice during that period: people rely on word-of-mouth recommendations, prison newspaper adverts, or family help.³³³ Travel times and funding uncertainty puts immigration legal aid practitioners off prison-based detainees. Many have to pay privately, or get no advice. In the words of one specialist: *'It's a scandal that the LAA doesn't seem to feel it has to do anything about it.'*³³⁴

This is exacerbated by poor communications.³³⁵ Telephone provision is restricted; internet access is completely restricted; the internal post is slow. As one person put it, *'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.'*³³⁶ This undermines the ability to access legal resources; gather evidence and demonstrate the strength of family ties for Article 8 claims; assess or organise a voluntary return, and obtain bail summaries and accommodation letters on time. Participation in court is also compromised. In deportation appeals and bail hearings, there are reports of delays due to capacity limitations in the 'production courts'; video links are subject to a 60-minute maximum time limit; bail hearings may continue without applicants even if they are cut off.³³⁷

³²⁴ BID 'Mind the Gap', 1.

³²⁵ Home Office, *EIG* Chapter 55.10.01..

³²⁶ Her Majesty's Chief Inspector of Prisons (HMIP), 'People in Prison: Immigration Detainees'. A Findings Paper by HM Inspectorate of Prisons," November 2015.

³²⁷ BID 'Denial of Justice: The Hidden Use of UK Prisons for Immigration Detention', (London: BID, 2014) and interviews with barristers (4 & 5).

³²⁸ Council of Europe, '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 from 18 November to 1 December 2008. CPT/Inf (2009) 30 "' (Strasbourg, Council Of Europe, 2009)

³²⁹ Interview with BID (1).

³³⁰ Interviews with barrister (4, 5 & 7).

³³¹ BID 'Denial of Justice', interviews with barristers (4 & 5).

³³² Kiarie and Byndloss, R (on the applications of) v SSHD [2017] UKSC 42 (14 June 2017).

³³³ HMIP 'People in Prisons', 1.21., BID 'Mind the Gap', 1.

³³⁴ Interview with ILPA.

³³⁵ HMIP 'People in Prisons', 1.25, 29, BID 'Denial of Justice'.

³³⁶ BID 'Denial of Justice', 21.

³³⁷ BID 'Denial of Justice'.

First, there is widespread acknowledgement that rogue and incompetent practice exists.

There are many high street solicitor firms in immigration, often sharing a language or cultural background with people in detention. As noted, some of these firms are recognised to be very good. However, in some others, worst practice flourishes and detainees' trust is misplaced, with lawyers who *'don't know the law. They don't speak or write English well. They put in generic grounds. They may not meet the clients. They don't tell the client the truth. They don't do Rule 15 [client care] letters. Their arguments are nonsense.'*³³⁸

Second, cutbacks and the way they are being implemented are eroding the quality of legal aid work with detainees, encouraging defensive practice and corner cutting.

Although the LAA has peer review mechanisms for quality and qualification requirements, overall the emphasis is on controlling costs.³³⁹ Thus, *'It pits your interests against your client by giving you so many financial disincentives, the work at risk, the JR, the ECF application... it is predicated on people working for free...'*³⁴⁰ As one judge put it: *'Legal aid cuts are having real consequences on quality. If you want to sneeze, a quality representative needs permission from the LAA but many people are having to fall back on their communities and it makes it easier for the charlatans.'*³⁴¹

Specific quality concerns noted by research participants include:

- **Lack of competency and appropriate training of advisers.** There were concerns that, particularly in larger legal aid firms and private work, less qualified and junior staff do lots of the detention work, to cut costs, with inadequate supervision and varying levels of quality.³⁴² The LAA requires that those attending surgeries are minimum IAAS Level 2 qualified caseworkers for immigration (whether or not a qualified solicitor) so should be competent to provide initial immigration advice, but detainees often get the impression the person is just taking their documents and unable to provide basic legal advice.³⁴³ Lawyers working privately are less restricted: any qualified practising solicitor or barrister may set up an immigration practice.³⁴⁴ Worse, there are reports that a *'substantial number'* of people holding themselves out to be regulated barristers who are not.³⁴⁵ As ILPA put it: *'There are people who are doing their incompetent best and it is not good enough.'*³⁴⁶
- **Poor communication between client and DDA firm** is a common problem: *'All my friends in here have the same problem as me. We meet the lawyers, they tell us not to worry, and then they never come back or even tell us if they've taken our case or not – and for a few months we are hopeful and think they have. They don't respond to our calls and we lose hope. I have no money, so I have nothing to do but wait.'*³⁴⁷

³³⁸ Interview with judge (1) also barrister (5) and judge (2).

³³⁹ Interview with solicitor (2), Toynbee Hall *'Trusting the Dice: Immigration Advice in Tower Hamlets'* (London: Toynbee Hall, 2015).

³⁴⁰ Interview with ILPA.

³⁴¹ Interview with judge (2).

³⁴² Interview with ILPA, barrister (5) and Public Law Project (2).

³⁴³ Interview with Detention Action, ILPA and BID (1 and 2).

³⁴⁴ Interview with barrister (6), BSB *'Immigration Thematic Review'*, Toynbee Hall *'Trusting the Dice'*

³⁴⁵ BSB *'Immigration Thematic Review'*.

³⁴⁶ Interview with ILPA.

³⁴⁷ (BID) *'Bail for Immigration Detainee's submission to the APPGs on Refugees Migration's parliamentary inquiry into the Use of immigration detention in the UK'* September 2014, also interview with solicitor (2).

- **Failure to acknowledge that complex cases might be eligible for legal aid** due to practitioners' lack of knowledge of LAPSO; the disincentive of added work involved in engaging with the LAA on complex cases; or, worse, practitioners' preference for charging higher rates on a private basis.³⁴⁸
- **Inappropriate advice on the course of action to be taken**, for example pushing cases with no merit; or taking money to do fresh claims instead of challenging detention, because the latter involved litigation.³⁴⁹
- **Slipping of standards in preparation of cases.**³⁵⁰ Conscientious practitioners were uneasy about the erosion of what used to be seen as good practice in the context of legal aid cuts, e.g. visiting the client to take a witness statement might be done on the phone, because legal aid is not covering it; or an application for prior authority for an expert report might be delayed until after the asylum refusal, because of the time and effort required to make the legal aid application; evidence of address and or preparation of clients and sureties for bail hearings may be inadequate owing to time limitations; and some barristers felt there was a tendency for solicitors to shift more of the thinking and development of the case to counsel than in the past. Then, at the rogue and incompetent end of the spectrum: *'I have seen grounds which are an A4 page, no mention of any substantive law, just 'what I think' dressed up in legal language. And our clients are intimidated by the legalese but a judge looking at that is just... it would be funny if it wasn't someone's life.'*³⁵¹
- **Cutting corners in urgent cases.** *'The client has told you this morning that they are being removed tonight, and if you have the time to get a claim properly evidenced it would be wonderful, but you have five hours... just having to deal with fax machines and everything ... you [don't] have a perfect product when you go to a judge, and that is very much linked to HO policy.'*³⁵²
- **Dropping clients before hearings** – which can have disastrous consequences on clients, who are often unable to find another representative in time. The example was given of a spate of instances where lawyers prepared the grounds for JR, but detainees to submit the application, and then withdrew, so that any wasted costs orders were directed to the detainee.³⁵³
- **Overbooking of barristers** - while there may be good reasons for taking on two cases listed in the same day, i.e. it can save the client money and sustain the viability of immigration practice on diminishing legal aid fees, and the judges accommodate it where feasible, where barristers take three bail briefs, or a bail plus a substantive appeal, this can seriously disrupt the schedule.³⁵⁴

The desperation that many people experience in detention makes them acutely vulnerable to poor service: 'You are dealing with people who will take a 0.1% hope of winning. They will

³⁴⁸ Interview with judge (1), Public Law Project (2), BID (2), barrister (6).

³⁴⁹ Interviews with judge (3), solicitor (3) & barristers (1 & 6).

³⁵⁰ Interview with judge (2), barristers (1, 5, 6 & 7), immigration clerk; BSB 'Immigration Thematic Review'.

³⁵¹ Interview with solicitor (3).

³⁵² Interview with solicitor (3).

³⁵³ Interview with BID (1). Similar problems regarding the dropping of clients were observed in asylum appeals, Burridge and Gill 'Conveyor-belt justice'.

³⁵⁴ Interview with judge (2), barrister (5) & Public Law Project (2); BSB 'Immigration Thematic Review'.

*take that and pay for that because what is at stake for them is everything... If the alternative is deportation or separation from your family or return to a country where you will be in poverty, a small grain of hope is better than nothing.*³⁵⁵ In this context people may seize false hope and often hand over large amounts of money without understanding how it is spent: private fixed fees for bail applications can be expensive – often ranging up to £1,500 (the highest amount cited was £4,000) with little guarantee of quality; BID noted that a good legal aid barrister might charge £300 - £600.³⁵⁶

Poor immigration advice can have disastrous consequences: *'A number of clients have come to us for bail or even for deportation who have actually had their entire cases ruined because they have had a bad solicitor and then you can't very often undo what is done before.'*³⁵⁷ As DDA solicitor commented: *'you do see people who are incredibly upset, they have had terrible immigration representation, terrible advice, but there is no justice for that, things can't be remedied through some new application, it's gone.'*³⁵⁸

At the same time, complaints from detainees are few, reflecting a wider pattern in immigration practice.³⁵⁹ Reasons include the fear that complaining to the authorities could accelerate deportation; dependency on the legal adviser due to the complexity of immigration law; loyalty to towards legal professionals sharing a language, ethnicity and social networks; cultural deference to authority; and because someone is unlikely to complain after deportation.³⁶⁰ Barristers' insurance premiums are relatively low for immigration.³⁶¹

This prompts serious questions about the regulatory framework. It is a criminal offence to provide immigration advice unless you are a practising solicitor, barrister, legal executive or someone regulated by Office of the Immigration Services Commissioner. Because immigration law is acknowledged to be a specialist area, generalists are not allowed to provide advice. Demand from people with immigration issues appears to exceed the supply of immigration advice (although many prospective clients cannot pay because of legal aid cutbacks). Thus, although very concerned about rogue and incompetent practice and the protection of migrants, interviewees were also concerned that any increased regulation could further restrict the supply of advice and migrants' access to justice. As Alison Harvey (ILPA) notes: *'A system with the potential to protect persons in need of immigration advice from exploitation or incompetent advice, when alternative sources of advice are available, increasingly appears to put bureaucracy and uncertainty in the way of good generalist or pro bono advice without an adequate quid pro quo of protection.'*³⁶² Apart from vigorous enforcement of existing penalties and supervision for irresponsible practice, professional standards and guidance, and better specialist immigration law training and mentoring were mentioned as constructive ways forward.³⁶³

³⁵⁵ Interview with barrister (1), also ILPA.

³⁵⁶ Interview with BID (1), Interview with Detention Action.

³⁵⁷ Interview with BID (1).

³⁵⁸ Interview with solicitors (1 & 3) and ILPA.

³⁵⁹ In 2015-2016 OISC had 3,478 registered advisers: there were 225 complaints (across all kinds of immigration cases), 103 were substantiated, 14 people prosecuted.

³⁶⁰ BSB 'Immigration Thematic Review', Interview with BID (1).

³⁶¹ Interview with barrister (6).

³⁶² Cited in Halsbury Law Exchange 'Can we safeguard access to justice', 5.

³⁶³ See interview with judge (2) and barrister (5); BSB 'Immigration Thematic Review'. Note that the Bar Standards Board, Solicitors Regulation Authority and the OISC recently collaborated to develop guidance documents on immigration legal services both for the public and professionals.

4.7 People’s awareness, agency and capacity to engage

People held in immigration detention have varying levels of awareness, agency and capacity to understand their rights, engage with legal professionals and pursue their case through the courts. Several characteristics emerge as particularly relevant in securing access to justice:

- **Language, literacy, confidence and cultural familiarity:** people who are educated, speak good English, and are good self-advocates stand a substantially better chance of challenging their detention successfully.³⁶⁴ Linguistic isolation is a major problem: *‘if you are the only Vietnamese-speaking detainee... you might... not be in a position to share anything with other detainees, and might have not realised there is a service available allowing you to apply for bail.’*³⁶⁵ People from violent or repressive contexts may be wary of authority: *‘There are some communities where... someone in a suit who says they are your lawyer might actually be someone from the state.’*³⁶⁶
- **Financial resources, family and social networks outside detention.**³⁶⁷ Having some funds may enable people to pay private legal fees, although as shown above this is sometimes a risky enterprise. Having family and friends who can support people emotionally, get information, help find a decent lawyer and so on can be a significant help. Sometimes they can help pay the lawyer or provide a bail address and sureties. In this respect, people newly arrived in the UK are often at a disadvantage.
- **Mental health.** Many people in detention experience mental health problems. For some people the experience of detention compounds mental health problems, for others their problems emerge as a result of detention. High rates of depression and anxiety and self-harm have been recorded; there are examples of mental incapacity.³⁶⁸ Mental health seriously affects people’s capacity to challenge immigration detention.
- **Connections in detention.** Many people held in detention are organised and active, making friends and acquaintances who help translate and explain the system. Ad hoc and more organised groups coalesce to support each other and protest their detention. Visiting groups try to build bridges with detainees, providing emotional and practical support and facilitating referrals to solicitors and specialist NGOs. This dynamic does not exist in prisons, where immigration detainees are a small and scattered population.³⁶⁹

In general, people in a stronger socioeconomic position are better placed to avoid detention in the first place, and if detained, better able to research their legal situation and navigate the system. People with intersectional vulnerabilities – where precarious migrant status is compounded by poverty, language barriers, mental health problems, and social isolation – stand a much poorer chance of challenging their detention effectively.³⁷⁰

³⁶⁴ Interview with barristers (1, 5 & 7), ILPA, Detention Action.

³⁶⁵ Interview with barrister (5).

³⁶⁶ Interview with barrister (5).

³⁶⁷ Interview with barrister (7) and Detention Action.

³⁶⁸ Bosworth, *Inside Detention*, Shaw, ‘Review into the Welfare in Detention of Vulnerable Persons’, interviews barristers (1, 3, 5, 7, 8) with barrister (8).

³⁶⁹ Interview with ILPA.

³⁷⁰ See also Amnesty ‘Cuts that Hurt’

5. CONCLUSIONS

Immigration detention should be seen as part of a wider context. While acknowledging that movement is an inevitable feature of human life, we need to combat the global inequality and violence that propels a significant part of international migration. Domestically, we need a legal and policy framework that more effectively integrates and protects migrants' rights, and provides more constructive ways of dealing with people who have sought work, sanctuary and a settled family life in the UK. Expensive efforts to create a hostile environment, including the extensive use of immigration detention, are pushing people into precarious situations and causing significant human distress, while failing to address the root concerns of citizens. Such resources and energies would be better directed at policing labour market exploitation and addressing pressures on public services where they arise.

As people increasingly struggle to navigate a complex and constantly changing immigration system, the numbers of migrants in immigration detention have increased. This raises deeply controversial issues. Immigration detention can have devastating human consequences. The taxpayer pays a high price. Despite being one of the largest in Europe, the effectiveness of the UK detention system as a means to secure removal or to prevent unauthorised entry is increasingly questioned. Over a number of years, more and more people and their families and friends in this diverse society have been affected by detention; there has been increasing public awareness, civic mobilization and parliamentary concern. This is not an issue that is going to go away.

This report provided some analysis of the grave issues that immigration detention raises in terms of the rule of law and access to justice, drawing on official documents, available research and statistical data, and interviews with legal professionals. As long as detention persists as a feature of immigration control, it needs to be subject to much stronger safeguards. Key findings are outlined below. The lack of a time limit stands out as a particularly important cross-cutting issue, and is addressed last.

- 1. The legal and policy framework for immigration detention is flawed.** There are broad statutory powers to detain people to prevent unauthorised entry and with a view to deportation. This leaves much to be defined by administrative guidance, which leaves considerable room for discretion on the part of Home Office decision-makers. This is inappropriate given that immigration detention involves deprivation of people's physical liberty. Moreover, people are held on administrative, not criminal grounds. A more robust statutory framework is needed to govern the use of immigration detention in the UK.
- 2. Poor standards of public administration have been normalised.** Lawyers report that evidence of imminence of removal, risk of absconding and public harm is often poorly reasoned or evidenced; immigration decision-makers often fail to act diligently and expeditiously; mistakes are made with serious consequences for the individuals involved and their families. Too much depends on access to the courts. This is not good public administration. It is also deeply inappropriate given the deprivation of liberty involved. The perspectives of legal professionals collected suggest that a major overhaul of the public administration of detention is long overdue.

3. **A genuine, robust framework to prevent harm in detention is needed.** In many ways everyone is vulnerable in detention. Despite several breaches of ECHR Article 3 and a barrage of criticism, the new policy guidance on Adults at Risk has failed to protect people from serious harm in detention. Serious welfare concerns persist; indeed research participants working closely on these issues were concerned that the policy guidance may actually have made things worse, and the policy has already been subject to legal challenge.
4. **Home Office assessment of the risk of absconding and risk of public harm on release is problematic.** In particular, having an outstanding claim represents a major reason for people not to go underground. As the government seeks to restrict migration, there are pressures on the reporting system. But the available evidence suggests fairly high rates of compliance with community-based reporting restrictions in general, including among people previously detained. This suggests that there are typically alternative and more humane ways to address the concern about absconding. Lawyers were also concerned that assessments of risk of public harm on release rely too much on the interpretation of the immigration caseworker and too little on the evaluation of the Prison and Probation Service, and that the focus of detention should be on addressing risks of more serious forms of harm.
5. **Many people detained for long periods have some kind of criminal record, but there are legal or logistical barriers to deportation.** Currently, some people spend longer in immigration detention than they served in their prison sentence. People should not be held in criminal prisons beyond the end of a custodial sentence. There is no reason why notifications of liability for deportation could not be sent to people a few months prior to the end of their criminal custodial sentences (instead of towards the end, as tends to happen currently), to allow for necessary representations and legal challenges, and where these are unsuccessful, the arranging of travel documents. This would avoid the present situation of double punishment.
6. **There is a lack of prompt, automatic court control, a key safeguarding principle.** The most prompt and accessible mechanism to obtain release is by making an application for bail, a summary process, experienced as a lottery by many legal professionals and detainees. Home Office representation in the bail process regularly includes errors and misleading assertions; standards of evidence are poor; judicial interpretation of key factors under consideration (including imminence of removal, public harm, and risk of absconding) can vary considerably. Changes pending in the 2016 Immigration Act are inadequate to address the concerns raised.
7. **Judicial review provides a way to challenge detention for some, but not all the people who are detained unlawfully.** JR judgements have generated a body of case law that checks some of the excesses of the detention system, and the JR process has allowed some particularly problematic aspects of detention policy to be challenged. But it remains vague on key issues like reasonable length of detention, and there are a number of barriers that prevent cases getting to court. It is not a substitute for a clear statutory framework and better public administration.
8. **Many people struggle to secure the free legal representation they need to challenge their detention in court.** Access to publicly funded immigration advice much earlier would help many people resolve their immigration status or make plans to leave the UK, avoiding detention. The Detention Duty Advice scheme provides much-needed initial

legal help to many people, and also assists many with legal representation. However, lawyers' accounts suggest not everyone succeeds in obtaining legal aid that they are entitled to, as promptly as they need. This is due to capacity problems; the increasingly rigorous enforcement of means and merits test by the Legal Aid Agency; and law firms' resulting caution. The financial risks that lawyers face in the current system favour large-scale business models, which get mixed reviews from detainees and practitioners; the new LAA tender seems unlikely to change this. Use of private and pro-bono services seems to be increasing, but access to these is uneven. Outcomes for detainees without legal advice and representation are poor. Given what is at stake for individuals, much better legal aid provision is needed for immigration matters in general and particularly for everyone detained under immigration powers. Consideration should be given to 'polluter pays' measures whereby the Home Office pays costs in cases it loses.

Each of these issues is important to consider in themselves, but they also interact with each other, as do the recommendations for change. Importantly, however, one issue cuts across and offers potential to address concerns in many different areas:

- 9. There should be a time limit on detention.** This exists in many other prosperous and democratic societies. The 'legitimate aims' of immigration detention in the UK – for initial processing of unauthorised entrants, or pending imminent removal – already acknowledge that time matters. But what constitutes a reasonable period for detention and standards of due diligence are ill-defined within the current legal and policy framework. Many detentions last months and even years. The lack of a statutory time limit helps immigration detention to slip into the realms of convenience, punishment and deterrence. It causes significant psychological distress. A time limit – many support 28 days - puts the onus on public authorities to make more careful decisions and act diligently, as seen with historic changes in the UK's criminal justice and mental health systems. Too often days slip into months slip into years of people's lives – it is high time that the administrative detention of people under immigration powers is taken more seriously.

APPENDIX: INFORMATION ON INTERVIEWS

This primary research was reviewed and approved by SOAS University of London's Research Ethics Committee. 21 interviews were carried out, some with more than one person:

- **An initial meeting** was convened by the Bar Council of barristers working pro bono on immigration detention, including from: 1 Gray's Inn Square, 1MCB, 1 Pump Court, 4 Kings' Bench Walk, 36 Civil, 39 Essex, Doughty Street, Garden Court, Goldsmiths, Guildhall, Hirst Chambers, Lamb Buildings, Matrix and No. 5.
- **Barristers** were contacted from this meeting, and others were identified through referral and independent channels, making efforts to include in the sample a range of levels of experience, specialisation, and size of chambers. Eight practising barristers and one immigration clerk were interviewed.
- **Solicitors** specialising in immigration detention were identified via the Detention Duty Advice rota, organisational websites, and referrals. Five solicitors working for a firm with a Detention Duty Advice contract were interviewed.
- **Other specialists** in access to justice and immigration were contacted via Bail for Immigration Detainees, Detention Action, Immigration Law Practitioners' Association and Public Law Project. Seven were interviewed.
- **Judges:** Permission was sought from the Ministry of Justice to interview a small number of Immigration and Asylum Chamber judges. Individual judges were nominated by the Presidents of these Tribunals for an interview. Three judges were interviewed.

Interviews were digitally recorded, with the exception of the judges where the researcher was requested to take hand-written notes. The material was analysed using the qualitative research software NVivo. Information is only used with the consent of research participants. The report maintains anonymity except where it is relevant to identify a participant or organisation, with their permission. Semi-structured interviews were carried out based around the themes below, adapted as appropriate for particular interviewees.

- *Thinking about the government's powers to detain, and the constraints on these, how do you see these reflected in how the government practises immigration detention? Prompts:*
 - *Nature of the legal framework*
 - *Reasons given for detention*
 - *Factors mitigating against detention including questions of 'unsuitability' for detention*
 - *Length of detention*
 - *Other protections such as internal review, judicial oversight*
- *What significant changes have there been to rights of detainees in recent years? How have these affected their situation? What kinds of changes might lie ahead?*
- *Thinking about how people may challenge their detention through the legal processes of bail applications, and judicial review claims, what is your role? What works well, what is problematic? Prompts:*
 - *What are the barriers to engaging in these processes?*
 - *How do you prepare? What kinds of issue are considered?*
 - *Role of the Home Office*
 - *Role of the legal representative*
 - *Role of the judges*
 - *Court process – communications, technology, treatment of immigration detainees*
 - *Outcomes and impact of these processes*
- *What significant changes have there been to legal processes in recent years? Have there been any improvements or deteriorations, in your view? What kind of changes might lie ahead?*
- *Thinking about how immigration detainees access legal services, what works well and what is problematic? Prompts:*
 - *Tell me how the Detention Duty Advice system works*
 - *How do people obtain legal advice through other channels – legal aided, pro bono, private?*
 - *How does the means and merits test work, and exceptional case funding?*
 - *How do you view the quality of legal advice and representation?*
- *What are the biggest challenges you encounter in ensuring immigration detainees are able to challenge their detention effectively?*
- *What are the most important changes in recent years in this legal services landscape? What has been the impact on people in immigration detention? What kinds of changes might lie ahead?*
- *Thinking about the awareness and capacities of people held in immigration detention, what barriers exist? Prompts:*
 - *People's awareness of their rights*
 - *Engagement in legal processes*
 - *Obtaining legal advice and representation*
- *How do you find doing this work? In terms of the access to justice of immigration detainees, is there anything else that you think is important which we have not covered?*

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REFERENCES

- All Parliamentary Groups on Refugees and Migration 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom' (London: House of Commons, 2015)
<https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf>.
- Amnesty 'Cuts that Hurt: The impact of legal aid cuts in England on access to justice' (London: Amnesty, 2016).
- Amunwa, Ben 'How not to do disclosure: a government lawyer's guide' *Law Mostly* blog, 9 February 2016.
<https://lawmostly.com/2016/02/09/how-not-to-do-disclosure-a-government-lawyers-guide>.
- Association for the Prevention of Torture/UN High Commission for Refugees (UNHCR) *Monitoring Immigration Detention: Practical Manual* (2014).
- Bail for Immigration Detainees (BID) 'Mind the Gap: Immigration Advice for Detainees in Prison' (London: BID, 2017),
'Legal Advice Survey' (London: BID, various dates 2010-17),
'Denial of Justice: The Hidden Use of UK Prisons for Immigration Detention', (London: BID, 2014),
'No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation' (London: BID, 2014),
'How to get out of detention: the self-help guide for detainees' (London: BID),
'BID's Achievements in the Last Twelve Months', 2017, <http://www.biduk.org/pages/15>,
'The Liberty Deficit: long-term detention & bail decision-making.' (London: BID, 2012),
'Bail for Immigration Detainee's submission to the APPGs on Refugees Migration's parliamentary inquiry into the Use of immigration detention in the UK' September 2014,
<https://detentioninquiry.files.wordpress.com/2015/02/bail-for-immigration-detainees-access-to-legal-advice-bid1.pdf>,
'A Nice Judge on a Good Day'. (London: BID, 2010).
- Bail for Immigration Detainees (BID) and Refugee Council, "Immigration Bail Hearings by Video Link: A Monitoring Exercise," March 2008.
- Bail Observation Project (BOP) 'Still a Travesty: Justice in Immigration Bail Hearings', (London: BOP, 2013).
- Bales, Kate and Lucy Mayblin "'Paid work" or underpaid labour? The labour exploitation of detainees within immigration detention' *Discovery Society*, 2 August 2017 <https://discoversociety.org/2017/08/02/paid-work-or-underpaid-labour-the-labour-exploitation-of-detainees-within-immigration-detention>.
- Bar Council 'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On' (London: Bar Council, 2014).
- Bar Standards Board, 'Immigration Thematic Review Report' (London: Bar Standards Board, 2016).
- Beqiraj, Julinda and Lawrence McNamara "International Access to Justice: Barriers and Solutions," (London: Bingham Centre for the Rule of Law, 2014).
- Bhatt Murphy, "Briefing Note: Challenge to the Adults at Risk Detention Policy," (London: Bhatt Murphy, 2016), http://www.bhattmurphy.co.uk/media/files/Med_Justice_Briefing_Note_221116.pdf.
- Bingham, Thomas "The Rule of Law," *The Cambridge Law Journal* 66, no. 1 (2007): 69.
- Bolt, David, 'An inspection of the Home Office's Reporting and Offender Management Processes, December 2016-March 2017', Independent Chief Inspector of Borders and Immigration, November 2017.
- Bolt, David, 'An inspection of the Home Office's management of non-detained Foreign National Offenders, December 2016 - March 2017' Chief Inspector of Borders and Immigration, November 2017.

- Bosworth, Mary, *Inside Detention* (Oxford: Oxford University Press, 2014).
- Breugel, Irene and Eva Natamba 'Maintaining Contact: what happens after detained asylum seekers get bail?', *Social Science Research Papers*, No. 16 (London: South Bank University, 2002).
- Brokenshire, James, Minister for Immigration, letter to the Detention Inquiry, 13 October 2014.
- Burridge, Andrew and Nick Gill, "Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals," *Antipode*, 49, no. 1 (2017) 23–42.
- Campbell, John. *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* (Abingdon: Routledge, 2017).
- Cappelletti, Mauro and Bryant G. Garth, *Access to Justice*. 1, B. (1978).
- Clayton, Gina. *Textbook on Immigration and Asylum Law* (Oxford: Oxford University Press, 2016).
- Clements, Michael 'Bail Guidance for Judges Presiding Over Immigration and Asylum Hearings - Presidential Guidance Note 1 of 2012' (London: Tribunals Judiciary, 2012) <https://www.judiciary.gov.uk/wp-content/uploads/2014/07/bail-guidance-immigration-judges.pdf>.
- Council of Europe, '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, Council of Europe, 2009) <http://www.cpt.coe.int/documents/gbr/2009-30-inf-eng.pdf>.
- Costello, Cathryn 'Immigration Detention: The Grounds Beneath Our Feet,' *Current Legal Problems* 68, no. 1 (January 1, 2015): 143–77.
- Detention Action 'The Legal Challenge' Detention Action website (London: Detention Action, 2015) <http://detentionaction.org.uk/campaigns/end-the-fast-track-to-despair/legal-challenge>, 'Without Detention: Opportunities for Alternatives' (London: Detention Action, 2016), 'Defend the Right to Love' *Detention Action* <http://detentionaction.org.uk/campaigns/defend-the-right-to-love>.
- du Preez, Ben 'After the fast track: What next for the detention of asylum-seekers?' Detention Action blog (London: Detention Action, 2016) <http://detentionaction.org.uk/after-the-fast-track-what-next-for-the-detention-of-asylum-seekers>, 'Indefinite Detention? We Are in the World of Kafka,' (London: Detention Action, 2015).
- EU Parliament and Council, 'Directive on common standards and procedures in Member States for returning illegally staying third-country nationals' 2008/115/EC, 16 December 2008.
- Fordham, Michael with Justine N Stefanelli and Sophie Eser 'Immigration Detention and the Rule of Law: Safeguarding Principles' (London: Bingham Centre for the Rule of Law, 2013).
- Griffith, Adam 'LASPO - What You Need to Know: ASA Briefing,' London: ASA, 2013, http://asauk.org.uk/wp-content/uploads/2013/08/LASPO-What-you-need_to-know.pdf.
- Griffiths, Melanie B.E. 'Invisible fathers of immigration detention' *Open Democracy*, 31 October 2016. 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' *Journal of Ethnic and Migration Studies* 40, no. 12 (2014): 1991–2009.
- Hague Institute for the Internationalisation of Law, 'Measuring Access to Justice in a Globalising World: The Hague Model of Access to Justice,' (Hague: HIL, 2010).
- Halsbury's Law Exchange, 'A State of the Nation Report on Legal Aid: Can We Safeguard Access to Justice?' (London: Halsbury's Law Exchange, 2016) <http://www.halsburyslawexchange.co.uk/wp-content/uploads/sites/25/2016/09/SA-0916-016-HLE-Event-Access-to-Justice-Paper-Final.pdf>
- Hansard, 'House of Lords debates Detention Inquiry Report' 26 March 2015: Column 1574 <https://publications.parliament.uk/pa/ld201415/ldhansrd/text/150326-0002.htm#15032625000576>.
- Her Majesty's Chief Inspector of Prisons (HMIP), "Submission to the Parliamentary Inquiry into the Use of Immigration Detention in the UK," (2014).
- Her Majesty's Chief Inspector of Prisons (HMIP), 'People in Prison: Immigration Detainees'. A Findings Paper by HM Inspectorate of Prisons," November 2015.
- HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, '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' (2012) p.8.
- Home Office, 'Immigration Act 2016: Guidance on Adults at Risk in Immigration Detention' (London: Home Office, August 2016).
- Home Office, 'Returns Logistics – Country Returns Guide', October 2017.
- Home Office, *UK Visas and Immigration Enforcement Instructions and Guidance* (London, Home Office, regularly updated).
- Home Office, *Detention Services Orders* (London, Home Office, various dates).
- Home Office, *Detention Centre Rules* (London, Home Office, 2001).
- ILPA 'Immigration Act 2016: information sheet.' (London: ILPA, 2017).
- ILPA, "Briefing for Westminster Hall Debate on the Detention of Vulnerable Persons in the Name of Anne McLaughlin MP," 14 March, 2017.
- Lampard, Kate and Ed Marsden 'Independent investigation into concerns about Yarl's Wood immigration removal centre A report for the chief executive and board of Serco plc' (2016).

Legal Aid Agency (LAA) '2013 Standard Civil Contract Specification; Category Specific Rules, Section 8 Immigration and Asylum Specification.' July 2015.

Legal Aid Agency (LAA) 'The Civil Legal Aid (Merits Criteria) Regulations' (2013).

Legal Aid Agency (LAA) *Legal Aid Statistics Tables*, January to March 2017.

Legal Aid Agency (LAA) 'Controlled Work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation' April 2015.

Legal Aid Agency (LAA) 'Civil Representation: Guide to determining financial eligibility for certificated work' April 2015.

Legal Aid Agency (LAA), 'Headline Intentions for Civil Legal Aid Contracts from April 2018,' January 20, 2017.

McGuinness, Terry and Melanie Gower, 'Immigration Detention in the UK: An Overview' House of Commons Briefing Paper No. 7294 (2017).

Ministry of Justice, *Reform of Legal Aid in England and Wales: The Government Response*, (London: MoJ; 2011).

Ministry of Justice *Judicial Diversity Statistics 2017* (London: MoJ 2017).

Ministry of Justice *Tribunal and Gender Recognition Certificates Statistics*. April to June 2017.

Ó Ceallaigh, Greg, 'Detention unlawful when Secretary of State faffs around' Free Movement blog (2013) <https://www.freemovement.org.uk/detention-unlawful-when-secretary-of-state-faffs-around>.

OHCHR Committee against Torture, "Concluding Observations on the Fifth Periodic Report of the United Kingdom, Adopted by the Committee at Its Fiftieth Session (CAT/C/GBR/5)," May 6, 2013.

Pickup, Alison, Martha Spurrier & Harriet Wistrich, 'Private law claims in immigration detention cases' Public Law Project Conference paper, 24 June 2015.

Right to Remain Toolkit <http://righttoremain.org.uk/toolkit/jr.html>.

Ryder, Ernest, *Senior President of Tribunals' Annual Report* (London: Ministry of Justice, 2016 and 2017).

Shaw, Stephen, 'Review into the Welfare in Detention of Vulnerable Persons A report to the Home Office by Stephen Shaw' Presented to Parliament by the Secretary of State for Home Department by Command of Her Majesty (2016).

Souleymane, Freed Voices Group, speech to Jewish Community members at JW3 Centre, 8 October 2015 <https://detentionaction.org.uk/indefinite-detention-this-is-happening-on-your-doorstep>.

Taylor, Diane 'Gap year students deciding asylum claims' *The Guardian*, 29 February 2016.

Thomas, Robert 'Immigration appeals and delays: on the verge of a crisis?' Blog for the UK Administrative Justice Institute, 18 May 2017. <https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis>.

Thomas, Robert 'Immigration Judicial Reviews: Resources, Caseload, and 'System-manageability efficiency' *Judicial Review*, 21, no.3 (2016), 209-220.

Toynbee Hall 'Trusting the Dice: Immigration Advice in Tower Hamlets' (London: Toynbee Hall, 2015).

UN, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 1984. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

Yeo, Colin 'The Telegraph's witch hunt for lenient judges', Free Movement Blog 18 June 2012.

Yeo, Colin 'Judge hung out to dry', Free Movement Blog, 19 July 2012.

Yeo, Colin 'Tribunal criticises government lawyers for "trench warfare" mentality and "inappropriate" conduct' Free Movement Blog, 9 October 2017.

Cases

CHAHAL v. THE UNITED KINGDOM - 22414/93 - Grand Chamber Judgment [1996] ECHR 54 (15 November 1996).

Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin) (13 June 2014).

Home Office v The Information Commissioner and Mr Colin Yeo [EA/2015/0213].

JN v. THE UNITED KINGDOM - 37289/12 - Communicated Case [2014] ECHR 224 (12 February 2014).

Kiarie and Byndloss, R (on the applications of) v SSHD [2017] UKSC 42 (14 June 2017).

Lumba (WL) v SSHD [2011] UKSC 12 (23 March 2011).

MD, R (On the Application Of) v SSHD [2014] EWHC 2249 (Admin) (08 July 2014).

Medical Justice & Ors v SSHD & Anor [2017] EWHC 2461 (Admin) (10 October 2017).

R (on the application of MDA by his litigation friend the Official Solicitor) v SSHD, EHRC intervening [2017] EWHC (Admin).

Sathanantham & Ors, R (on the application of) v The SSHD & Anor [2016] EWHC 1781 (Admin) (21 July 2016).

SAADI v. THE UNITED KINGDOM - 13229/03 [2008] ECHR 79 (29 January 2008).

Singh, R (on the application of) v Governor of Durham Prison [1983] EWHC 1 (QB) (13 December 1983).

SK (Zimbabwe) v SSHD [2011] UKSC 23 (25 May 2011).

Wang, R (on the application of) v SSHD [2009] EWHC 1578 (Admin) (05 June 2009).

Wasif v The SSHD [2016] EWCA Civ 82 (09 February 2016).