RWA0022 Bail for Immigration Detainees

BID submission to the House of Lords International Agreements Committee inquiry into the UK-Rwanda memorandum of understanding

BID is an independent national charity established in 1999 to challenge immigration detention. We assist those held under immigration powers in removal centres and prisons to secure their release from detention through the provision of free legal advice, information and representation. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice. BID has provided legal advice and representation to 21 people facing removal to Rwanda.

1. ***What are the implications of signing an agreement that asserts that it is not binding on either Party in international law? Is the MoU an appropriate vehicle for this agreement?***

An MoU is not an appropriate vehicle for this type of agreement. There are a number of reasons for this.

Firstly, as a MoU, the agreement is not legally binding and the UK government will not be able to ensure that Rwanda honours the commitments it has made in the MoU. This means that there can be no reliable guarantees or assurances that people deported to Rwanda will not have their ECHR rights breached, or that people will be returned to the UK if the terms of the MoU are not honoured by Rwanda.

The non-enforceability of the MoU was cited by the ECtHR in its Rule 39 interim measure, in which it stated that "In light of the resulting risk of treatment contrary to the applicant's Convention rights as well as the fact that Rwanda is outside the Convention legal space (and is therefore not bound by the European Convention on Human Rights) and **the absence of any legally enforceable mechanism for the applicant's return to the United Kingdom** in the event of a successful merits challenge before the domestic courts, the Court has decided to grant this interim measure to prevent the applicant's removal until the domestic courts have had the opportunity to first consider those issues." (emphasis added).

As pointed out by Arabella Lang, Head of Research at Public Law Project, a second consequence that flowed from the decision to use an MoU to underwrite the policy was that it did not receive the same kind of scrutiny that a binding treaty would have received. There would have been prior parliamentary scrutiny of the "merits, practicality, lawfulness, implications or costs" if it had been introduced as a binding treaty[1].

[1] Rwanda MoU: scrutiny is the oxygen of democracy https://www.lawgazette.co.uk/commentary-and-opinion/rwanda-mou-scrutiny-is-the-oxygen-of-democracy/5112806.article

There are a number of reasons why this policy has a particular need for rigorous scrutiny: it will have a monumental impact on the lives of many people; is perceived by many (including the UNHCR) to breach international law; marks a fundamental change in the entire UK asylum system; and was not included in the Conservative election manifesto.

3. How do you assess the assurances and safeguards included in the MoU, particularly those relating to inspection and monitoring, a relocated individuals' access to legal assistance, and data protection?

We do not place any meaningful faith in the assurances and safeguards in the MoU, particularly concerning inspection and monitoring. That is because the government was prepared to charter a flight with asylum-seekers to Rwanda before a monitoring committee had been set up. If it had not been for legal challenges and the interim order from the ECtHR, asylum seekers would have been deported to Rwanda without a monitoring committee in place. It is clear, therefore, that the UK government does not see the monitoring committee as an essential or indispensable safeguard.

4. Given Article 5.1 of the MoU does not impose an obligation on the UK to provide legal assistance during the screening of asylum seekers before relocation to Rwanda, what mechanisms are there for legal advice to be provided to the individuals selected for relocation?

It is very difficult to access high quality legal aid immigration advice from within immigration detention. Since 2010, BID has been carrying out 6-monthly surveys with people held in immigration detention to document their experiences of accessing legal advice while in detention, and to better understand the barriers they face[2].

Even outside of immigration detention, it is very difficult to access high quality immigration advice. Legal advice in immigration detention has undergone a number of changes in the last decade. Cuts to legal aid brought about in April 2013 under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO 2012) removed non-asylum immigration work from the scope of legal aid. This has had a devastating impact on the immigration legal aid market as well as being disastrous for people subject to immigration control[3]. The government's own review of LASPO showed an 85% reduction in legal help for non-asylum immigration matters post LASPO, and a 62% reduction in full representation[4]. LASPO reduced the rates paid for legal work and led to a reduction in the number of legal aid providers. It is no longer sustainable for firms to only provide high quality legal aid immigration advice, meaning that practitioners are

[2] See, for instance, BID's Legal Advice Survey 10-year review: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1293/10_Years_of_Legal_Advice_Survey.pdf
[3] For more details see Dr Jo Wilding's report on the immigration legal aid market, Droughts and Deserts (2019) https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf
[4] LASPO post-implementation review https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf

either required to provide a lower quality service or seek to offset the loss from this type of work through carrying out more lucrative private work alongside.

BID's legal advice surveys show a declining rate of legal representation since LASPO. In November 2012, before the legal aid cuts came into force, 79% of respondents had legal representation, of which 75% were legal aid. In May 2013, immediately after the introduction of LASPO cuts to legal aid, the proportion of those surveyed with a legal representative fell to 43%. In total, under a third (29%) had a legal aid solicitor. Since then there have only been 2 surveys where the number of people with a legal representative was above 60% and the figure has frequently been below 50%.

Many people lose their solicitor as a result of being transferred from one solicitor to another. Crucial websites for researching and preparing an immigration or asylum case are frequently blocked from within detention. Waiting times for accessing a solicitor are often lengthy. All of these concerns are heightened for people facing removal to Rwanda, most of whom do not have English language skills or familiarity with the immigration and asylum system, and are more likely to have complex vulnerabilities that make accessing legal representation or self-representation more difficult.

The quality of legal advice in immigration detention is often woefully poor. In September 2018, the Legal Aid Agency made sweeping changes to the contractual arrangements governing the provision of legal advice in immigration detention, under the Detained Duty Advice (DDA) scheme. Under the DDA scheme detainees can book a half-hour appointment with a legal aid immigration lawyer, and each firm that is contracted to give advice in that detention centre is responsible for the provision of advice for a week at a time. Lawyers staffing the DDA legal advice scheme or surgery agree, and are required, to take on all cases that have merit. The main feature of the changes has been a sharp increase in the number of providers. Prior to September 2018 there were eight or nine firms delivering the DDA in seven IRCs, after the changes there were 77 firms. The vast majority of providers have never run DDA surgeries in the past and lack experience of detention work which is a very complex, fast-changing and specialist area of immigration law. Under the previous system firms were delivering regular surgeries, whereas now firms are unlikely to deliver more than 3 weeks of surgeries over a 2 year period in any given IRC. Such irregularity means that newer firms cannot build up expertise and those with experience risk losing their expertise. This has had a negative effect on the quality of legal advice in immigration detention and many people that BID speaks to report that legal surgeries in immigration detention are desperately poor quality. Others report that legal aid lawyers in detention view the surgery scheme as an opportunity to charge extortionate rates on a private basis, to exploit people who are vulnerable and desperate and lack legal expertise. BID encounters this type of practice with alarming regularity.

6. Is the MoU consistent with the UK's obligations under international law, including (but not limited to) the 1951 Refugee Convention, the

European Convention on Human Rights, and the Council of Europe Convention on Action against Trafficking in Human Beings?

The policy itself breaches the refugee convention. Under international refugee law, the responsibility to provide protection to asylum seekers rests with the state in which asylum is sought – in this case, the UK. Article 31 of the Refugee Convention provides that those individuals should not be punished for entering through irregular means, and there is no requirement for asylum seekers to claim asylum in the first safe country that they reach. The UNHCR has stated that the policy is "incompatible with the letter and spirit of the refugee convention" and is unlawful[5]; contains inadequate safeguards to guarantee international protection, and "shifts responsibility for identifying and meeting international protection needs from the UK to Rwanda, against the principle of burden sharing".

The UNHCR further clarifies that "In the context of initiatives involving the transfer of asylum-seekers from one country to another for the purpose of processing their asylum claims, transferring States retain responsibilities under international refugee and human rights towards transferred asylum-seekers. In the current case, neither the arrangement entered into between the UK and Rwanda nor the fact of transfers conducted under it would relieve the UK of its obligations under international refugee and human rights law towards asylum-seekers transferred to Rwanda."

European Convention of Human Rights:

As demonstrated by BID's casework evidence presented below, the people being removed to Rwanda are very likely to be genuine asylum seekers. Many are survivors of torture or trafficking or have other serious mental or physical health problems. Those individuals in particular are particularly likely to face Article 3 ECHR breaches if they are removed to Rwanda.

Rwanda itself is not a safe country. Its Human Rights regime is frequently criticised, including by the Central Africa director at Human Rights Watch who recently stated that arbitrary detention, ill-treatment, and torture in official and unofficial detention facilities is commonplace. The UK's own Foreign and Commonwealth Development Office has highlighted its disappointment in Rwanda's unwillingness to improve its trafficking prevention system. In 2021, the UK granted asylum to four Rwandan refugees.

A report by Asylos demonstrated highlighted gaps and inconsistencies in the UK government's designation of Rwanda as a safe third country. The report highlighted weaknesses in Rwanda's asylum determination system.

[5] Full analysis available here: *UNHCR Analysis of the Legality and Appropriateness of the Transfer of AsylumSeekers under the UK-Rwanda arrangement* https://www.unhcr.org/uk/62a317d34.pdf

Rwanda was previously involved in receiving people removed from Israel under a "voluntary departure" scheme between 2014 and 2017. Around 4,000 people were deported under that scheme to Rwanda and Uganda and almost all are thought to have left the country almost immediately, many attempting onward travel to Europe. asylum seekers deported to Rwanda were detained, and found themselves in a situation of 'indirect refoulement' – whereby they were coerced or forced by hardship into leaving Rwanda.

"testimonies collected by IRRI (International Refugee Rights Initiative) suggest that the majority, if not all, are being smuggled out of the country by land to Kampala within days of arriving in Kigali. They are not given an opportunity to apply for asylum[6]". The fact that people were forced to use smugglers indicates that the Rwanda policy will in fact contribute to the very human trafficking and people smuggling 'business model' that the policy is putatively designed to undermine.

In the first few months of the policy the Home Secretary appeared to be using a blanket policy of detaining every individual subject to removal to Rwanda. It is likely that detention was unlawful and breached those individuals' right to liberty under Article 5 ECHR. In each case, there was no prospect of removal taking place within a reasonable timescale (evidenced by the fact that every individual was released at the end of detention), and the individuals being detained had no history of noncompliance with immigration law. It is difficult to see how detention in this instance could be justified as a necessary and proportionate infringement on the individual's right to liberty.

Characteristics of individuals facing removal to Rwanda – BID's casework evidence

BID has provided representation to 21 people who were issued with a 'notice of intent' by the Home Office for removal to Rwanda. All were detained on arrival and held in an IRC. We were successful in securing bail for all individuals – 18 were granted bail by the First-tier Tribunal whereas a further 3 were released by the Home Office before a bail application could take place. Those 21 individuals spent a total of 1127 days in immigration detention, an average of 54 days each – with one individual being held for 90 days.

The overwhelming majority came from countries where asylum claims have a high prospect of success.

[6] A Commentary on the UK Home Office Country Policy and Information Asylos https://www.asylos.eu/Handlers/Download.ashx?IDMF=3ba1b57d-65ca-44c7-8b18-68e20bf8be50

Nationality	Number of clients
Sudanese	8
Syrian	7
Iraqi	2
Eritrean	2
Egyptian	1
Albanian	1

All the individuals that we support are particularly vulnerable to harm in detention as a result of having experienced torture or trauma, or having ongoing physical or mental health problems. All except 5 had independent professional evidence demonstrating that they were particularly vulnerable, including 10 individuals who had 'Rule 35' report was accepted by the Home Office as constituting independent professional evidence of torture. 15 individuals had long term physical or mental health conditions.

Of 21 individuals, 20 displayed clear indicators of trafficking. In the majority of cases this was due to their experience in Libya, with people having been held in debt bondage and exploited, forced to work, held in captivity, subjected to starvation or torture, beatings, threats to their family in their home country. 14 individuals had been referred into the NRM to be recognised as a survivor of trafficking while the other 6 individuals had requested a referral. Of the 14 individuals that had been referred, 13 had received a decision while in detention. In 7 cases the Home Office accepted there were reasonable grounds for concluding that the individual was a victim of trafficking. 6 individuals received negative reasonable grounds decisions and in those cases the individual's legal representatives had submitted a reconsideration request with supplementary evidence in relation to their experience of trafficking.