Written evidence from Bail for Immigration Detainees (NBB0043)

About BID:

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

Summary of our submission:

Our submission begins by examining the potentially harmful impact of strict procedural requirements in the Bill, which will punish late evidence or any behaviour deemed not to have been 'in good faith'. Secondly, we argue the introduction of a two-tier system of rights and demonstrates that this would be harmful, discriminatory and contrary to our international obligations. Thirdly, we demonstrate that proposals to remove asylum seekers to "safe countries" while their claims are pending would be disastrous. Fourthly, we assess the Bill's reinterpretation of the exclusions from the Refugee Convention on the basis of criminality, finding that the reinterpretation of the meaning of "particularly serious crime" is irrational and incompatible with the Refugee Convention, with potentially devastating consequences for people who have been found to be refugees. Fifth, we examine the impact of diminished protections for victims of trafficking, which will lead to more victims being detained, for longer, and excluded from protections afforded to them under the Modern Slavery Act. Finally, we show that in the context of immigration detention, Home Office decision-making is not sufficiently independent and rigorous to ensure that human rights are properly respected.

Do proposed changes to the application and appeals process for asylum applicants provide adequate human rights protection, including provisions providing for credibility and the weight given to evidence to be affected by the timeliness of applications and supportive evidence?

There are clauses in this bill which introduce strict procedural requirements that some applicants for various legitimate reasons may find difficult to meet whilst the consequences of failing to do so could not be more serious. Those who fall foul of the new procedural requirements could find their evidence is given limited weight or disregarded altogether resulting in their claims being refused culminating in them being detained and removed. This will reduce fairness in the system and create a barrier to justice. The Home Office and the courts should consider the merits of the claim and the strength of the evidence regardless of when it was submitted

People submit fresh evidence late for various legitimate reasons including changes of circumstances, a child is born or the situation in the individual's country of origin changes. Some people are unable to secure timely adequate legal representation and may not be aware of the need for evidence such as expert reports. There is also a wealth of evidence demonstrating the widely accepted fact that people who have experienced psychological trauma (such as victims of torture or human trafficking) may be unable to disclose a detailed and consistent description of their experiences at an early date[1]. Too often, some refugees are not given the time they need to build

[1] Medical Justice "The Second Torture": The immigration detention of torture survivors

trust with lawyers and disclose what has happened to them. Late disclosure or inconsistent accounts of torture or traumatic experiences should not necessarily be taken to be evidence of dishonesty[2].

- *There are also logistical obstacles to be navigated and people in immigration detention or in 'reception centres' will face obstructions to gathering the necessary evidence or prepare their claim.*
- *The bill criminalises people who enter the UK via irregular routes to seek asylum and if imprisoned will face significant and potentially insurmountable obstacles in preparing their asylum claim.*

Of particular concern is clause 24 which introduces 'Accelerated Detained Appeals'. Under this clause certain applicants are placed in an asylum process with truncated timescales. Applicants will only have 5 days to lodge an appeal after receiving a negative decision. This process also puts pressure on judges to make fast decisions rather than correct decisions.

This proposal is similar to the Detained Fast Track which was found to be unlawful - in July 2015 the Court of Appeal declared that the Detained Fast Track system, which provided strict time limits for preparing appeals alongside mandatory detention, was structurally unfair, and thereby unlawful[3], primarily because individuals and their lawyers did not have enough time to prepare for appeal hearings[4]. Many thousands of cases were handled unfairly and it is not known how many people were wrongfully denied asylum and removed from the UK as a result of the process.

The government previously tried to introduce an expedited appeals process through the Tribunal Procedure Rules, this was rejected by the Tribunal Procedure Committee[5]. The Committee found that there was no way to reintroduce the fast track in a way that was both efficient and fair. *"In order to ensure that such a system would deal with cases fairly, it would need to include rigorous procedural safeguards"* such as a case management hearing, to ensure that complex cases such as those involving vulnerable people were taken out of the fast track. It found that *"such hearings would absorb a substantial amount of judicial and administrative resource, which would then not be available to be used to resolve cases"*.

The government should cease trying to resuscitate the detained fast track system, their arguments having been rejected by the Court of Appeal and the Tribunal Procedure Committee. However Clause 24 seeks to place this structurally unfair system on a statutory footing, putting it beyond the reach of systemic legal challenges.

Good faith requirement:

The bill requires decision-makers to consider whether the applicant has 'acted in good faith'. This proposal appears designed to justify refusals in cases where the applicant has acted in a manner that does not conform with Home Office expectations. Moreover legal representatives are already

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[2] . For instance, one study involving 27 asylum seekers found that the majority faced problems with disclosure in asylum interviews and that this was not an indication of dishonesty. People experienced psychological symptoms during Home Office interviews, such as dissociative experiences, flashbacks and avoidance behaviours. Bogner et al (2007) 'Impact of sexual violence on disclosure during Home Office interviews', British Journal of Psychiatry, 191, 75-81

[3] *The Lord Chancellor v Detention Action* [**2015] EWHC 1689 (Admin)**

[4] Lord Dyson said at Paragraph 45 that "the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases" ([45], per Lord Dyson).

[5] Tribunal Procedure Committee
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf

bound by strict codes of conduct as set out by their regulators. The credibility of people seeking asylum is already assessed by both the Home Office and the courts and those found not credible have their cases dismissed. This is an unnecessary piece of legislation designed to create the impression that people seeking asylum, and their representatives, are dishonest and abusive rather than to address a real problem.

Any existing requirements to act in good faith should apply equally to all parties. It is our experience from providing representation in hundreds of bail hearings for the past two decades that Home Office Presenting Officers often appear to be poorly organised for bail hearings, make assertions that are unsupported by evidence, and in some cases mislead the court about the facts of a case. This can lead to adverse outcomes for our clients and prolonged detention. .

Consequences for those that cannot comply with strict procedural requirements and timescales

For those that are unable to comply with the strict procedural requirements and timescales set out above, the consequences could not be more severe including being denied status, prevented from working, kept in limbo for many months or years, vulnerable to extreme poverty and exploitation, and possibly detained and removed to a country where they fear persecution, or a country that they have no connection to.

We are also particularly concerned about how these strict procedural requirements interact with clause 45 of the Bill, which requires decision-makers (either the Home Secretary or an Immigration Judge) to consider, when deciding whether to grant immigration bail, whether "the person has failed without reasonable excuse to cooperate with any process". Therefore those who have failed to meet the many new standards and procedures introduced by the Home Office are likely to find it harder to get released from detention.

As the committee is all too aware from its detailed report into immigration detention, the Home Office uses detention excessively and with far too few safeguards (such as judicial oversight or a time limit). This proposal only further weakens the meagre safeguards that exist in the system and further shifts the scales in favour of continuing detention. This undoes years of progress in reducing the number of people in detention. We oppose any proposal that seeks to expand the use of detention, particularly a proposal such as this one which appears designed to use detention to punish whatever the Home Office deems to be 'non-cooperation'.

Does introducing a two-tier system of rights for refugees meet the UK's obligations under refugee law and human rights law?

This proposal is discriminatory and incompatible with our obligations under the refugee convention. This was made clear by the UNHCR in its response to the 'New Plan For Immigration', who stated "*At the heart of the Plan is a discriminatory two-tiered approach to asylum, differentiating between those who arrive through legal pathways, such as resettlement or family reunion visas, on the one hand, and those who arrive irregularly on the other hand*"... and that "*resettlement and other legal pathways cannot substitute for or absolve a State of its obligations towards persons seeking asylum at its borders, in its territory, or otherwise under its jurisdiction, including those who have arrived irregularly and spontaneously*."

Refugees should be offered meaningful protection including the opportunity to integrate into the UK and rebuild their lives. The clause discriminates between different groups of refugees at various stages.

Clause 10 of the Bill provides for the UK government to treat 'Group 1' and 'Group 2' refugees differently solely on the basis of their method of entry. Those in Group 2 and their family members may be treated differently (less favourably) in terms of the length of leave they are granted, the requirements they must meet in order to be granted leave, and any conditions attached to their leave. This will leave people in a harmful limbo situation, where people who have fled persecution by a route that the government does not approve of will only be offered limited form of protection.

Clause 11 introduces discrimination between different groups of asylum claimants on the basis of the stage and admissibility of their claim and previous compliance, and allocates different types of accommodation on that basis. Clause 11(6) will expand the use of Accommodation Centres to failed asylum seekers, while Clause 11(8) will allow the Secretary of State to not only concentrate asylum seekers and failed asylum seekers in Accommodation Centres, but to no longer be constrained from extending their stay in such centres indefinitely.

The APPG on Immigration Detention recently released a report[6] into the use of former military barracks to house asylum seekers – which will likely serve as a model for the use of 'accommodation centres'. The report found lack of access to healthcare and legal advice, chronic levels of sleep deprivation, intimidation and mistreatment of residents and NGO workers supporting them, ineffective safeguarding and high levels of mental health problems. We agree with the APPG's view that such accommodation can be referred to as 'quasi-detention' due to the fact that it shares many features with immigration detention – such as crowded prison-like conditions at the site, visible security measures, shared living quarters, reduced levels of privacy, and isolation from the wider community – while the profoundly adverse health impact was comparable with those seen in immigration detention.

The use of this type of accommodation, especially when used indefinitely, is profoundly harmful. It amounts to a form of detention, only lacking the meagre safeguards that exist in the immigration detention system. Being housed indefinitely in accommodation centres will deny people the opportunity to integrate into the UK. Children may be forced to grow up in accommodation centres, isolated from the rest of society.

Do the proposed powers to remove asylum seekers to "safe countries" while their asylum claims are pending, with a view to supporting the processing of asylum claims outside the UK in future, comply with the UK's obligations under refugee law and human rights law?

Clause 26 of The Nationality and Borders Bill opens the door for offshore detention; by permitting the removal of asylum seekers from the UK while their claim is determined, or while the UK decides whether to take responsibility for the claim. It should be deleted.

This would seek to emulate the Australian system as a model and it has been reported that the Home Office is in talks with Denmark to share the cost of an offshore detention centre in Rwanda. In 2015 a United Nations Report found the Australia's offshore detention regime to be systematically violating the international Convention Against Torture. Additionally in 2020 the International Criminal Court's prosecutor found it to be "cruel, inhuman or degrading treatment" unlawful under international law. The Government's plans to emulate, on an even wider scale, a failed system that has been widely condemned for its human rights abuses is deeply concerning.

[6] APPG on immigration detention interim report: https://appgdetention.org.uk/wp-content/uploads/2021/09/210907-APPG-Inquiry-Interim-report-Summary-of-oral-evidence-sessions.pdf?x78463

Australia: Looking to a failed model

In 1992 the Australian government introduced mandatory indefinite detention for asylum seekers who arrive by boat (a policy which remains in place). In 2001 it introduced the 'Pacific solution' whereby boats were intercepted by the navy and taken to processing centres on Manus or Nauru. This practice was ended in 2008 by a Labor government that branded it an 'abject policy failure', only to reintroduce offshore detention in the early 2010s. Approximately 4,180 people were transferred offshore between 2012 and 2014, at which point the transfers stopped.

Conditions and events inside the centres were highly secretive with journalists and legal representatives generally banned from entering. This created the conditions for systemic abuse of asylum seekers by those running the facilities. In 2016 the Guardian released records of over 2,000 'incident reports' from Nauru – known as 'the Nauru files' – which document widespread abuse and neglect in offshore detention, including systematic physical and sexual assault on children and adults, use of blackmail by guards, and attacks and harassment by people on Nauru or Manus island. At least 12 people are reported to have died in the camps with causes of death including medical neglect, suicide and murder by centre guards.

Aside from the immeasurable human cost, this is a failed system that has been dismantled by its own architects. A recent research report by the Kaldor Centre finds that there is no evidence that the policy achieved its stated aim of 'stopping the boats' and that since 2014 the government has been trying to distance itself from the policy (they find that boat arrivals fell as a result of maritime pushbacks). Thanks to the powerful stories of people affected, it has been increasingly rejected by the Australian public. It has cost billions. On whatever metric you use the policy has failed disastrously.

Impact of offshore detention on mental health

Conditions in offshore detention centres have been inhumane and unfit for human habitation. The mental and physical health impact of offshore detention has been colossal. In 2014, the Australian Human Rights Commission found that 34 per cent of children in detention suffered from mental health disorders of a seriousness that would require psychiatric referral if the children were in the Australian population, and Paediatricians reported that children transferred to Nauru were among the most traumatised they had ever seen. Medical experts working with UNHCR found rates of mental illness in offshore detention "to be among the highest recorded in any surveyed population"; and Médecins Sans Frontières (MSF) reported that suffering on Nauru was some of the worst it had ever encountered.

Financial cost

The financial cost of the Australian system is astronomical, and regularly more than $1 billion per year. The Refugee Council of Australia compiled a detailed breakdown of offshoring costs and found that it has cost the Australian government $8.3 billion between 2014 and 2020. The annual cost, per person, of holding someone offshore in Nauru or PNG has been estimated to be $3.4 million.

Will the proposed instructions to decision-makers on how to interpret the Refugee Convention secure or restrict the protections that Convention guarantees?

These proposed instructions will restrict the protections that the convention guarantees. In particular we have focused on clause 35, which relates to exclusions from the Refugee Convention on the basis of criminality. Clause 35 redefines "particularly serious crime" for the purpose of article 33(2) of the Refugee Convention.

Clause 35 seeks to lower the threshold length of prison sentence at which an individual can be excluded from the Refugee Convention on the grounds of criminality, from 2 years to 12 months. It also changes the rebuttable presumption that any crime accruing such a sentence is a 'particularly serious crime' into an assertion that cannot be challenged. This will mean that every single individual who receives a 12 month sentence for whatever crime is automatically deemed (rather than presumed) to have committed a 'particularly serious crime', and face being excluded from the Refugee Convention on that basis.

It is irrational and grossly disproportionate to create a blanket assertion that every crime accruing a 12-month sentence is a 'particularly serious crime'. In addition, such a blanket exclusion is incompatible with the Refugee Convention. The UNHCR's Handbook[7] states that Article 33 paragraph 2 of the convention is for 'extreme cases'. The Joint Committee on Human Rights has previously considered this issue when the government introduced a list of "particularly serious crimes" for the purposes of article 33(2), in 2004[8]. In that instance, the Committee stated that

"*Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual—a threat such that it can only be countered by removing the person from the country of asylum*."

The committee recommended that *"the exceptions to the principle of non-refoulement in Article 33(2) should be given a restrictive interpretation, not an interpretation which expands their scope and correspondingly weakens the principle itself."*

In *EN (Serbia)*[9]*,* the Court of Appeal found that the Secretary of State's regulations defining what constituted a "Particularly Serious Crime" included several offences that could not rationally be described as "particularly serious" – including theft or trespassing offences.

Clause 35 of the Nationality and Borders Bill goes further than previous government attempts that were also incompatible with the Refugee Convention, because it includes every single crime that leads to a 12 month sentence.

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[7] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

[8] *Joint Committee on Human Rights, Twenty-Second Report,* ***Session 2003-04*** *https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/190/19002.htm*

[9] EN (Serbia) v Secretary of State for the Home Department & Anor [2009] EWCA Civ 630

In practice this provision could exclude many people from the protections afforded to them under the refugee convention, As the JCHR has pointed out, those individuals would still be likely to be protected against return by Article 3 ECHR provided that they are aware of their right to rely on it. However, even if such individuals cannot be returned due to Article 3 ECHR, this clause would still deny them the protections and entitlements that flow from access to refugee status. It would allow for the officials to apply the Home Office restricted leave policy in which leave and conditions on leave are granted at the discretion of the SSHD for a maximum of 6 months with a view to 'removal as soon as possible' [10]and would leave people trapped in a harmful limbo situation.

Do the changes that the Bill would make to the law regarding modern slavery ensure appropriate protections for victims? What will be the consequences of the presumptions that compliance with procedural requirements should affect a person's credibility as a victim?

The changes that the Bill would make to the law regarding modern slavery will greatly diminish protections for victims and will lead to more victims of trafficking having their claims wrongfully refused and being detained more frequently and for longer periods. Clause 51 of the bill seeks to disqualify people from the protections available under the Modern Slavery Act. 51(2) states that where an individual is disqualified, there will be no requirement to make a conclusive grounds decision and there will be no prohibition on removing that individual from the UK. This includes people who are deemed to be a 'threat to public order' or who are supposed to have made a claim 'in bad faith'. Where the latter is disturbingly vague, the definition of a person who is a 'threat to public order' given at 52(3) is concerning in its specificity, as it includes any foreign national who has received a 12 month sentence. This will remove protections from hundreds, potentially thousands of people, including those whose criminal offences are directly attributed to their trafficking. Those individuals are often the most vulnerable and are likely to spend longer periods in immigration detention with even fewer rights. There is no reason why people should be excluded from the protections available to others in the Modern Slavery Act solely due to having committed an offence in the past. This will considerably undermine broader attempts to apprehend the perpetrators of human trafficking.

Moreover, clause 47 of the bill pushes potential victims to present all evidence up-front, and states that late evidence will be seen to damage credibility. It is well documented that survivors of traumatic experiences such as human trafficking may be unable to immediately disclose a coherent and consistent account of their experiences. This is even recognised in Home Office's own published guidance on Modern Slavery, which states:

"Victims' early accounts may be affected by the impact of trauma. This can result in delayed disclosure, difficulty recalling facts, or symptoms of post-traumatic stress disorder."

Despite accepting that late disclosure may be a result of trauma, the Home Secretary is bringing in legislation which decrees that late disclosure damages credibility. This bill directly punishes the most vulnerable or traumatised, because it is those people who are least able to disclose at the earliest opportunity and are therefore more likely to have their claim refused.

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[10]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711142/restricted-leave-v3.0ext.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711142/restricted-leave-v3.0ext.pdf

Is Home Office decision-making in immigration matters that raise human rights concerns sufficiently independent and rigorous to ensure that human rights are properly respected?

Home Office decision-making on detention is poor and leads to people being detained unlawfully and unnecessarily. Detention for immigration purposes is an administrative and not a criminal process. As the JCHR found in its inquiry into immigration detention published in 2019, "*While there are strict safeguards to ensure independent decision making and fair processes for detention in the criminal justice system, there are far fewer protections for people caught up in the immigration system*[11]".

First, the decision to detain an individual is taken by an immigration officer and not overseen by a court. Subsequent decisions to maintain detention are also not subject to automatic independent judicial oversight[12]. Second, unlike people suspected of a criminal offence, there is no automatic legal advice or representation to challenge immigration detention. Third, where a detainee seeks bail (other than from the executive) bail hearings are ordinarily heard in the Immigration and Asylum Chamber of the First-tier Tribunal, which does not have the same safeguards to ensure a fair trial and prevent wrongful deprivation of liberty as those which exist in the criminal justice system[13]. Fourth, there is no time limit.

Detention decision-making is frequently incorrect or unlawful. In last year, 77% of people detained were released back into the UK, detention having served no purpose whatsoever. The Home Office paid out total of £9.3m compensation for 330 cases of wrongful detention in 2020/21 - up from £6.9m in 272 cases in 2019/20. This means that in the last 3 years, the government has paid out a total of £24.4 million to 914 people it was found to have locked up unlawfully.

Not only is Home Office detention decision-making poor quality and lacking in independence, there is no effort to learn lessons from previous mistakes. BID submitted a Freedom of Information Request asking whether there had been any assessment of the reasons for the rise in unlawful detention payouts. The response simply said

"*There has been no formal assessment of the reasons why the number of people found to have been detained unlawfully, and the amount of compensation paid, has risen sharply in the last year. Individuals have six years to bring a claim for unlawful detention and consequently current costs do not necessarily relate to incidents of unlawful detention that year*."

The lack of curiosity about why so many unlawful decisions are made, and the sharp increase, is staggering. It is therefore not surprising that we repeatedly see the same Home Office failings coming before the courts. Before seeking to portray migrants and their legal representatives as abusive, the Home Office should seek to learn lessons from its own mistakes and improve decision-making.

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

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

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

Clearly the Home Office's powers of detention are excessive and need to be curtailed. However the Nationality and Borders Bill will make it easier for the government to detain people, for longer.

Access to Justice:

It is also important to consider diminished access to justice and reduce people's chances of challenging Home Office decision-making through the courts. Cuts to legal aid brought about in 2013[14], which removed non-asylum immigration work from the scope of legal aid, have been particularly catastrophic. This has had a devastating impact on the immigration legal aid market[15] and has been disastrous for people subject to immigration control. [16]. The government's LASPO post-implementation review showed an 85% reduction in legal help for non-asylum immigration matters since LASPO (from 2012-13 to 2017-18), and a 62% reduction in full representation[17].

Access to advice in immigration detention is poor. In November 2010, BID began to conduct surveys every six months regarding immigration detainees' access to legal representation from within detention. In BID's legal advice survey 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 has only been one year where the number of people with a legal representative was above 60% and in a number of years this figure has been below 50%. For those held in immigration detention, the situation is worse still, as the JCHR recognised in its report on immigration detention[18] . The lack of immigration advice available to time-served foreign national offenders detained in prisons is well-documented and was recently declared unlawful by the High Court[19].

Although the bill contains provisions to improve access to justice and provide for claimants to access seven hours' free legal advice at the end of their case, this is insufficient and will not compensate for the decimation of the legal aid immigration sector that has occurred since LASPO.

17/09/2021

[14] under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO)

[15] For more details see Dr Jo Wilding's report on the immigration legal aid market, *Droughts and Deserts* (2019),

[16] https://www.freemovement.org.uk/immigration-legal-aid-cuts-to-remain-in-place-following-major-government-review/

[17] https://www.freemovement.org.uk/immigration-legal-aid-cuts-to-remain-in-place-following-major-government-review/

[18] Joint Committee on Human Rights *Immigration Detention* Sixteenth Report of Session 2017-19 pg 20 https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf

[19] *SM v Lord Chancellor* [2021] EWHC 418 (Admin)