

Memorandum of Evidence to the Joint Committee on Human Rights: Human Rights Judgments 2012/13

Bail for Immigration Detainees

Bail for Immigration Detainees (BiD) is a registered charity that provides free legal advice and representation to asylum seekers and migrants held in immigration detention to secure their release. BiD supported a total of 3,367 people in detention in the last year, of whom at least 413 were released.

Executive Summary

We note that the Committee has specifically requested evidence on the deportation of foreign national offenders and the right to family life. This submission provides evidence on cases where foreign national ex-offenders who are parents are held in immigration detention while the Home Office seeks to deport them:

- In two cases, the High Court has found that single mothers were unlawfully detained and separated from their children.¹
- Since these judgments, a number of cases of this type have been settled out of court in return for payment of substantial damages and legal costs by the Home Office. In one case which settled in early 2013 the parent and child were given £68,500 in compensation.
- This submission sets out the parallels between the case of *MXL & Ors v SSHD*, where the High Court found a single mother was detained unlawfully, and subsequent cases which Bail for Immigration Detainees has dealt with. In particular we consider :
 - Article 8 and child welfare
 - Visits between parents in detention and children in the community
 - Imminence of parent's deportation from the UK during their detention
 - Home Office assessments of risk that parents will abscond or re-offend

In addition to the cases which have settled, there will be further case where detainees have not been able to access legal representation to challenge the legality of their detention. BiD is concerned that as a result of cases not being brought before the court, and in the absence of satisfactory alternative investigative mechanisms, there will be little or no independent scrutiny of these cases, with the result that culpable and discreditable conduct by the Home Office will not be brought to light; dangerous practices and procedures which led to the failures in these cases will not be rectified; and important lessons will not be learned. At the end of this paper we set out practical recommendations to address the problems with Home Office decision-making.

Introduction

At the time of writing, the High Court has on two occasions found that clients of BiD were unlawfully held in immigration detention and separated from their children.² Both cases concerned single mothers who had committed criminal offences, as a result of which the Home Office was seeking to deport them. In the case of *MXL & Ors v SSHD*, the court found that the mother's rights

¹*MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) and *NXT, R (on the application of) & Ors v Secretary of State for the Home Department* [2011] EWHC 969 (Admin)

²*MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) and *NXT, R (on the application of) & Ors v Secretary of State for the Home Department* [2011] EWHC 969 (Admin)

under Article 5, and the mother and children's rights under Article 8 of the European Convention on Human Rights (ECHR) were violated. In the case of *NXT & Ors v SSHD*, the court found a violation of Article 5 ECHR, and the final order stated that the children's rights under Article 8 ECHR had been breached.

Despite the unlawful practices highlighted by the High Court in those cases, many of the flaws which were revealed continue to be features of cases which BID has subsequently dealt with. BID regularly refers cases of this type to solicitors, for both private and public law actions against the Home Office in respect of the legality of their detentions. We are aware of a number of recent cases where legal proceedings were commenced but the cases settled in return for payment of substantial damages and legal costs by the Home Office. In one case which settled in early 2013 the parent and child were given £68,500 in compensation, and several of BID's clients have ongoing cases.

We are concerned that there are likely to be yet further cases where the individuals concerned have suffered similar treatment to the individuals in the cases referred to above, but have for whatever reason been unable to access adequate legal representation in order to pursue their cases. In addition, the current practice of the Home Office in detaining individuals in prisons rather than Immigration Reception Centres greatly restricts their access to organisations such as ours, as well the duty immigration legal advice services available in Immigration Removal Centres. This may mean that there are many individuals who do not know their rights or cannot access advice or assistance about their detention.

There are, therefore, a significant number of cases the Home Office is aware of but which are effectively hidden from public scrutiny. BID is concerned that as a result of the cases not being brought before the court, and in the absence of satisfactory alternative investigative mechanisms, there will be little or no independent scrutiny of these cases, with the result that culpable and discreditable conduct by the Home Office will not be brought to light; dangerous practices and procedures which led to the failures in these cases will not be rectified; and important lessons will not be learned.

Home Office practice following *MXL & Ors v SSHD*

This paper will now set out some of the parallels between the case of *MXL & Ors v SSHD*, where the High Court found a single mother was unlawfully detained and separated from her children, and subsequent cases which Bail for Immigration Detainees has dealt with.

Article 8 and child welfare

In the case of *MXL & Ors v SSHD*, Mr. Justice Blake underlined the importance of considering the impact of a parent's detention on their children in the context of Article 8 ECHR, and Article 3 (1) of the UN Convention on the Rights of the Child:

'82. I accept that normally Article 8 would add little to Article 5 in terms of the justification of detention. However, where children of tender years dependent on their mother are concerned, the impact of detention on them is a consideration best examined within the context of Article 8. UKBA's guidance on this at 55.1.4.2 (see para 32 (i) above) recognises that in such circumstances detention may engage Article 8. I agree with the guidance and conclude that it does. This means that the detention of the mother must be compatible with Article 8 in order to be in accordance with the law and proportionate under Article 5.

83. Once Article 8 is engaged, the exercise of judgment in a case falling within its ambit must comply with the principles identified by Strasbourg. In a case where the interests of children are affected this means that other principles of international law binding on contracting states should be complied with. In the case of children those principles are reflected in Article 3 (1) of the UN Convention on the Rights of the Child 1989 to which the UK is now a party without any derogation in respect of immigration decision making.'

Mr. Justice Blake criticised the Home Office's failure to take into account the best interests of MXL's children when deciding to continue her detention, for example stating that:

'63. Further it is difficult to understand in the light of: i. the previous history, ii. the material deployed by the claimant for this application, and iii. the coming into force of s.55 Borders Citizenship and Immigration Act 2009, that there is no reference in the bail summary either to the interests of the children in being able to be with their mother or to the impact that the children would have on the claimant in cooperating in the appeal and with the conditions of bail.'

At paragraph 84 of the judgment he sets out that the best interests of the child are a 'consideration of the first importance' and goes on to say that the Home office's failure to take the best interests of MXL's children into account rendered her continued detention unlawful:

'85. In my judgment, the failure of the decision maker or the IJ [Immigration Judge] to take account of a consideration of the first importance in a case that obviously had serious implications for the welfare of the children is unlawful. On this basis alone it might be said that the decision to continue the detention and thereby interfere with the right to respect for family life is not in accordance with the law and therefore incapable of justification.'

Unfortunately, this was not the last case which BID has dealt with where the Home Office has failed to take proper account of the welfare of children when detaining their parent.

By way of context, it may be helpful for the Committee to be aware that BID works with large numbers of families where parents have been detained without their children, and our 2013 report 'Fractured Childhoods' examined the cases of 111 parents who were separated from 200 children by immigration detention. Many, but not all, of the parents in the study had been convicted of criminal offences before being held in immigration detention.

- 85 of the 200 children in the study were in fostering arrangements or local authority care during their parent's detention. Some children were neglected and placed at risk of serious harm.
- Parents were detained without time limit, for an average of 270 days. Children described the extreme distress they experienced – they reported losing weight, having nightmares, suffering from insomnia, crying frequently and becoming deeply unhappy and isolated.
- In 92 out of 111 cases, parents were eventually released, their detention having served no purpose.

As part of this research, we looked in detail at the Home office's consideration of child welfare for a small sample of cases. BID's legal files for a qualitative sample of 12 cases were analysed to assess whether child welfare was taken into account in Home Office Monthly Progress Reports or bail summaries.³

- In 11 out of 12 cases, there was no mention whatsoever of child welfare in the Monthly Progress Reports which were contained in the parent's BID file.
- In 10 out of 12 cases, there was no evidence in the bail summaries in the parent's BID file that the Home Office considered any information about how the parent's continued detention was affecting their children.
- In seven out of 12 cases, there was no evidence in bail summaries that the Home Office contacted Children's Services to gather information about the children's situation.
- In three out of 12 cases, bail summaries contained inaccurate statements relating to child welfare.
- In every case these Home Office documents failed to mention significant information about child welfare which was included in the parent's BID file.

³ These 12 cases were a sub-set of the 27 cases in our small quantitative sample – it was not possible to carry out in-depth analysis on all 27 cases due to resource constraints.

We set out below a case example of a mother who was detained in 2011, following the MXL judgment. The Home Office settled this case out of court by offering the family substantial compensation.

Case study: Beth and Daniel

Beth's grandfather, who was caring for her and her disabled brother Daniel during their mother's detention, became seriously ill and was admitted to hospital three times. Beth had to stop attending school to care for her brother and grandfather and missed her GCSE exams.

Beth found it extremely difficult to look after her seven year old brother, who has very limited motor control and severe behavioural problems. During their mother's detention, a Children's Services assessment found that:

'Daniel has found it very difficult being separated from his mother, he is keen for her to return home and often states that she is "coming home today" when she is not and becomes upset when he realises this is not the case.

[A] concerned neighbour rang to report that Daniel was playing alone in the road at 8pm, he was seen to fall and lay in the road, which is a bus route... he walks into people's houses and has poor awareness of danger and his own safety.'

Two months after his mother's detention Daniel was hit by a car. Despite receiving reports about the children's welfare, the Home Office detained their mother for 160 days before she was released on bail by the Tribunal. She subsequently successfully appealed the Home Office's decision to deport her and received substantial compensation for her detention.

Visits

In paragraph 52 of his judgment in the case of *MXL & Ors v SSHD*, Mr. Justice Blake commented on the difficulty the claimant faced in having contact with her children while in detention, and the Home Office's apparent failure to consider the impact this would have on her relationship with her children:

'From the end of April 2009 the claimant was detained at Yarl's Wood Detention Centre outside Bedford. She makes the point that it was much more difficult for Ms Ellis to take the two children to visit her there from East London as train fares and taxi fares to Yarl's Wood (in a remote location not readily accessible by public transport) became disproportionate for someone on a modest budget. There appears to be no consideration by the defendant of the impact on the relationship with the children that detention in such a location causes.'

BID's subsequent research into the cases of parents who were detained between 2009 and 2012 found that:

'The parents who participated in this research rarely saw their children once they entered immigration detention, despite in many cases having had regular visits during their prison sentence. Parents were often held in detention centres which were much further geographically from their children than their prison had been. In addition, unlike people serving criminal sentences, immigration detainees are not provided with financial support to pay for children and carers' travel for visits.'⁴

⁴ Bail for Immigration Detainees (2013) *Fractured Childhoods: the separation of families by immigration detention*, p53

In the 26 cases where we were able to obtain this data, 10 parents saw their children less than every three months, and eight parents were never able to see their children during their detention.

Imminence of removal

In the case of *MXL & Ors v SSHD*, Mr. Justice Blake stated that the claimant made ‘compelling’ criticisms of the Home Office’s failure to release her from detention, despite the likelihood that her immigration matter would not be resolved for a long period:

‘69. Once again the claimant has some compelling criticisms of the decision made:

i) The order for the reconsideration was likely to lead to delay before the appeal could be determined and (if unsuccessful) removal could be effected. The strength of the case for release on bail grows with each passing month.’

BID’s subsequent research into the cases of parents who were detained between 2009 and 2012 found that parents continued to be detained for lengthy periods despite barriers to their removal from the UK:

‘Parents in this study were detained for long periods for the purpose of being deported or forcibly removed from the UK. However, data from the small quantitative sample of 27 parents shows that, in most cases, these parents were detained despite barriers to their removal from the UK which meant that it was not possible, lawful or in their children’s best interests for them to be removed or deported. In the majority of cases directions were never set for the removal of these parents during their detention... parents were often detained while lengthy processes relating to their deportation took place. Where it was possible to obtain full data about parents’ legal situation, it was found that they had pending immigration or asylum applications for the overwhelming majority of their time in detention. Post-detention data were obtained in 15 cases; in 11 of these cases, parents’ immigration or asylum cases were ongoing six months after their release, and in the remaining four cases, parents had been granted leave to remain in the UK by this point.’⁵

Assessments of risk

In the case of *MXL & Ors v SSHD*, Mr. Justice Blake was critical of the methods used by the Home Office to assess the risk of the claimant absconding and reoffending, and said at paragraph 94:

‘I conclude that continued detention was disproportionate and not necessary in a democratic society. Both the risk of absconding and the risk of committing further offences of theft on release from the first experience of custody were not unusually high ones and did not require mother to be detained to the prejudice of the family links with the children that it was intended should be restored and maintained.’

In relation to risk of re-offending, Mr. Justice Blake noted that the Home Office had misled an Immigration Judge by stating that MXL presented a medium risk of harm to the public:

‘69. (iv) The reference to the medium risk of harm to the public presented to the IJ [Immigration Judge] contradicted by the low risk assessment consistently made by UKBA over the previous five months was positively misleading. The proper assessment was low risk and the failure to relate this assessment to the UKBA policy Manual is particularly unfortunate.’

In relation to risk of absconding, Mr. Justice Blake notes the Home Office’s apparent failed to consider MXL’s strong family ties when assessing her risk of absconding:

‘69. (iii) The evidence of the AIT, the London Borough of Waltham Forest, Ms Ellis, the Children's Society, and the representations of the claimant itself point to the strength of the relationship between the two children and the mother. In the light of the previous findings of fact there seems

⁵ Bail for Immigration Detainees (2013) *Fractured Childhoods: the separation of families by immigration detention*, p107

no reason to reject this evidence. It amounted to a powerful factor as to why she would honour the conditions of her release in order not to lose contact with her children. That powerful factor against the possibility of absconding does not seem to have been considered at all.

He goes on to say that the Home Office failed to consider the effect which a criminal sentence and license conditions would have on MXL's risk of absconding:

'69. (v) The risk of the claimant's absconding had been based entirely on her criminal conduct before she was remanded in custody in April 2008. There appears to have been no assessment of what the effect of that remand and the two year sentence had been on her, or the likely impact of the licence conditions to which she would be subject if released.

Furthermore, Mr. Justice Blake expressed concern at the Home Office's reasoning that because they were seeking to deport MXL she had no incentive to comply with the terms of bail:

'71. I am also troubled by the reasoning that because the claimant's deportation is being sought there was no incentive to comply with the terms of bail. The claimant had no adverse immigration history of going to ground. To apply such reasoning generally would suggest that nobody should be granted bail in a deportation appeal. That is not the law or the policy.'

BID's subsequent research into the cases of parents who were detained between 2009 and 2012 revealed very serious problems with the methods used by the Home Office to assess risk.

We found that the Home Office repeatedly made assessments of parent's criminal risk which were at odds with those made by the National Offender Management Service. Detailed quantitative data were obtained for a sample of 27 families, who BID submitted bail applications for between November 2010 and April 2012. In 14 out of 27 cases it was possible to obtain information about how the National Offender Management Service had assessed parents' risk of reoffending or risk of harm to the public on release. In 10 cases, parents were assessed by the National Offender Management Service as posing a low risk of reoffending or harm on release, and four parents were assessed as posing a medium risk. However, the Home Office repeatedly argued that these parents needed to be detained as they posed a 'significant' and 'unacceptable' risk.⁶

In relation to risk of absconding, BID's research found that:

'The Border Agency repeatedly argued that it was likely that parents in this research would abscond if they were released from detention. Post-detention research with 15 parents showed that all these parents subsequently complied with the terms of their release and maintained contact with the Border Agency. Parents explained that it would be extremely difficult for them to abscond because of their need to access support, healthcare and schooling for their children. Examination of the files of the 12 parents in the qualitative sample showed that, in these cases, the Border Agency routinely failed to take into account factors which indicated that parents posed a low risk of absconding, such as long histories of reporting regularly or complying with criminal bail conditions... [and] family ties.'⁷

⁶ Bail for Immigration Detainees (2013) *Fractured Childhoods: the separation of families by immigration detention*, p113

⁷ Bail for Immigration Detainees (2013) *Fractured Childhoods: the separation of families by immigration detention*, p113-114

Recommendations

In summary, it appears from the available evidence that the Home Office has not adequately dealt with the systemic problems which lead to poor decision-making on the detention of parents and separation of families. Compensation has been awarded to families in some individual cases, but many parents will be prevented from bringing unlawful detention actions by factors including the dearth of quality publicly funded legal advice. In some cases parents will be removed or deported from the UK and will face serious barriers to bringing a case from abroad.

BID is opposed to the separation of families by immigration detention. While this practice continues, we are calling on the Home Office to address the systemic problems with decision-making on the separation of families. We recommend that:

- A time limit should be introduced on the separation of families by immigration detention.
- Decisions to detain parents should be reviewed on a weekly basis.
- The Home Office should carry out an urgent and comprehensive review of its guidance and training to staff on the assessment of best interests of children affected by detention, deportation or removal action against their parents.
- Before individuals enter immigration detention, the Home Office should, without exception, take proactive steps to find out whether they have children, and what the care arrangements for the children are.
- Before a parent enters immigration detention, when their detention is reviewed, and when a decision is made about their removal from the UK, a best interests assessment should be carried out with their children. This assessment should be carried out by a child welfare specialist who is independent of the Home Office, and shared with parents, children and legal representatives. Government resources should be allocated to enable this to take place.
- The Home Office should recognise that the deportation or removal of parents with or without their children is often a complex and lengthy procedure requiring the most careful scrutiny. Clearer policy guidelines should be introduced to ensure that parents are not detained for long periods, and a realistic and evidence-based assessment of the timeframes involved should be conducted prior to any decision to detain and thereafter at every detention review.
- Where parenting capacity assessments are required to progress cases, parents should be released from immigration detention to enable these to take place.
- The Home Office should amend its policies to ensure that, where children are to be removed with parents who they have been separated from for any significant period, parents are not detained and can re-establish their relationship with their child in a planned and appropriate way before any removal takes place.
- Decisions to release parents and reunite families should not require authorisation at a higher level in the Home Office than decisions to detain parents.

