



Detention Action Submission to the Home Affairs Select Committee inquiry on immigration detention

April 2018

About Detention Action

Detention Action is a national charity established in 1993 that aims to change the way that migrants are treated by immigration detention policy in the UK. Detention Action defends the rights and improves the welfare of people in detention by combining support for individuals with campaigning for policy change. Detention Action works in Harmondsworth and Colnbrook Immigration Removal Centres (IRCs), near Heathrow Airport in London, and in prisons in London. It also worked in the Verne IRC in Dorset until its closure in December 2017.

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Executive summary

Despite growing criticism and ministerial pledges, the Home Office has yet to substantially reform a bloated and dysfunctional detention system. Tens of thousands of migrants are detained every year, yet the majority are released. The UK remains unique in Europe in having no time limit. The new adults at risk policy is structurally flawed, failing to address the shortcomings in identifying vulnerable people whilst increasing Home Office discretion to keep in detention people who are identified as vulnerable. Alternatives to detention remain under-explored, despite the evidence that they can meet the objectives of detention at a fraction of the cost and without the harm to migrants.

Recommendations

- The Government should introduce a time limit of 28 days on the length of time any individual can be detained for immigration purposes;
- Detention should only ever be used as a last resort and for the shortest possible time;
- There should be automatic and regular judicial oversight of detention for all detained migrants;
- Any adults at risk policy should ensure that vulnerable people are promptly identified and routed out of detention, through a clear and transparent process to bring vulnerabilities to the attention of the Home Office, and an assessment process not weighted towards detention;
- A clear monitoring process should assess how the adults at risk policy is fulfilling the Government's commitments to safeguard the most vulnerable people;
- Policy should clearly prohibit the use of detention where it risks causing significant harm, including to ex-offenders with sentences of more than four years;

- The Home Office should develop alternatives based on specialist case management that can support migrants with vulnerabilities or complex situations to resolve their cases in the community;
- Alternatives to detention should be based on evaluation and learning from existing national and international models, and should themselves involve thorough evaluation.

A time limit on detention

1. There is an urgent need to introduce a time limit on detention, in line with the rest of Europe and most comparable States internationally. Detention Action calls for a time limit of 28 days. Any time limit should apply to all migrants in detention; exemptions for categories of complex cases are likely to exclude migrants who currently experience the longest periods of detention.
2. A time limit is essential to establishing a culture change in the Home Office that would limit the use of detention to a genuine last resort. Despite repeated criticisms, including by the Home Affairs Committee and the Shaw Review, commissioned by the Home Secretary, progress in detention reform has been limited and piecemeal.
3. The Shaw Review in January 2016 urged the Government to begin the process of reducing detention ‘boldly and without delay’. The review called for a range of changes, including the application of ‘much greater energy’ to exploring alternatives to detention, including community support.
4. In January 2016, the Government outlined in response a number of reforms that the Minister expected to ‘lead to a reduction in the number of those detained, and the duration of detention before removal, in turn improving the welfare of those detained.’¹ However, the strong words of the former Minister have not been matched by substantial steps in practice.
5. Despite policy guidelines prescribing a presumption in favour of release rather than detention, which should also be used sparingly for the shortest period necessary, long-term detention remains routine: of 2,545 people detained at the end of December 2017, 70% (1,792) had been detained for longer than 28 days, 349 people for longer than six months, and one man had been in detention for 1,698 days.
6. The use of detention continues to be highly inefficient as a means of effecting returns. Fewer than half of migrants who leave immigration detention do so because they have been removed. The majority are released on immigration bail. In 2017, only 47% of people leaving detention were removed from the UK, the majority being released back into the community.
7. It is clear that minor organisational changes have not significantly shifted the Home Office’s entrenched reliance on detention, which has long-standing structural underpinnings. At around 3,000 places, the UK detention estate is larger than any

¹ James Brokenshire, Minister for Immigration, Immigration Detention: Response to Stephen Shaw’s report into the Welfare in Detention of Vulnerable Persons: Written statement - HCWS470, <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-01-14/HCWS470>

comparable EU country. The UK is unique in Europe in detaining migrants for indefinite periods, having opted out of the EU Returns Directive, which limits detention to six months, extendable to 18 months in certain circumstances. In practice, many Member States have much shorter maximum periods of detention, e.g. 42 days in France.²

The treatment of vulnerable persons subject to immigration detention

8. In response to the Shaw Review in January 2016, the Government made a commitment to Parliament to 'strengthen the approach to those whose care and support needs make it particularly likely that they would suffer disproportionate detriment from being detained'.³ The central plank of this new approach was a new adults at risk policy.
9. Detention Action continues to meet vulnerable people in detention on a daily basis, many detained for several months or even years. It appears that immigration factors are being used to justify the continuing detention of the majority of identified adults at risk, yet few are ultimately removed. The flawed implementation of a flawed policy is leading vulnerable people to continue to suffer unnecessary harm in detention.
10. While the adults at risk policy expands the categories of people considered vulnerable and therefore not usually suitable for detention, it actually weakens safeguards in certain areas. The policy explicitly allows for the risk of significant harm to people who have served a sentence of four years or more. This means, for example, that the policy would do nothing to prevent the harmful detention of extremely mentally unwell ex-offenders like *BA*, whose detention was found to be in breach of the Article 3 prohibition on inhuman or degrading treatment.⁴
11. While the recognition of the dynamic nature of vulnerability is to be welcomed, the way in which this is put into effect reduces the protection afforded to vulnerable people. Vulnerable people now have to show that they are being harmed by detention, instead of the Home Office taking a preventative approach to ensure that harm is not done. For example, rather than not detaining a torture survivor simply because there is an increased likelihood that they could be vulnerable due to their past experiences, the Home Office now requires evidence that there is a significant risk of harm to that particular individual. In practice, this usually means producing evidence of a deterioration in their mental or physical health, i.e. that harm has already been done.
12. The adults at risk policy balances vulnerability against immigration factors, and makes clear that in many circumstances the latter will trump risk of harm to the individual. Negative indicators of non-compliance, including irregular presence in the UK for some time, failing to comply with voluntary return or making a late asylum claim, and any history of offending are weighed against the risk of harm to the individual. This often means that an adult at risk continues to be detained unless they can provide

² All-Party Parliamentary Groups on Refugees and Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the UK', March 2015, p16.

³ Brokenshire.

⁴ *R (on the application of BA) v Secretary of State for the Home Department*, [2011] EWHC 2748 (Admin), 26 October 2011

independent evidence of a significant risk of harm. Such independent evidence is difficult to obtain for a highly vulnerable person in detention.

13. Within the policy, there is little scope for Home Office caseworkers to consider how to mitigate the risks of absconding or re-offending, for example through alternatives to detention, with the result that detention is usually maintained. Where an adult at risk is likely to abscond, including for reasons related to their vulnerability, their detention is frequently considered necessary.
14. As a result, it appears that many vulnerable individuals continue to be detained even after the Home Office has recognised them to be adults at risk. Of the 48 cases identified by Detention Action as having triggered the policy between May and August 2017, detention was maintained in 85% cases (41 of 48 clients). 29% of those kept in detention by the Home Office were subsequently released by the Tribunal (12 of 41 individuals). These vulnerable people were detained for weeks and months despite having been found to be at risk, before eventually being released.⁵
15. It is difficult to properly assess how effective the adults at risk policy is in reducing the detention of vulnerable people given the lack of baseline monitoring of the initial decision to detain and subsequent reviews of detention. The Home Office should monitor and publish information on how the adults at risk policy, including data on the numbers of individuals considered under the adults at risk policy, the numbers found to be adults at risk, and the numbers who not detained or were released as a result.
16. The policy and related operational guidance remain opaque, confused and fragmented. Crucially, there is no transparent, straightforward process to provide information to the Home Office of an individual's vulnerability. Instead, the policy relies on existing mechanisms that are already fundamentally flawed.
17. The principal means for the Home Office to receive information about an individual's vulnerability remains the much-criticised Rule 35 process. Rule 35 reports are rarely completed unless the individual is a victim of torture, although in theory they should be completed when a person's health is likely to be injuriously affected by continued detention or when there are concerns about suicidal intentions. Since Rule 35 is the main route to being considered an adult at risk, vulnerable people who are not victims of torture are often not considered under the adults at risk policy.
18. Detention Action's monitoring suggests that the Rule 35 process is particularly ineffective in ensuring consideration of the impact of detention on mental health. In Detention Action's sample group, 94% (45 of 48 identified adults at risk) had Rule 35 reports, while only three people had triggered the policy without a Rule 35 report. 80% of the Rule 35 reports were on the basis of possible torture. Only 20% of Rule 35 reports were on the grounds of risks that health would be injuriously affected by continued detention, and none were because of possible suicidal intentions. It appears unlikely

⁵ A full set of relevant data was available for 18 individuals, of whom 3 were released after being found to be an adult at risk and a further 15 were released at a later date.

that there are in reality so few vulnerable people in detention without histories of torture; the likelihood is that other vulnerable people are being missed because of a focus on torture in the Rule 35 process.

19. A detention gatekeeper function was also introduced as part of the new approach following the Shaw Review. The gatekeeper “assesses vulnerability and provides challenge to decisions about who enters immigration detention”.⁶ However, the detention gatekeeper only reviews information already on the individual’s file when considering the decision to detain. There is no proactive screening process and, as a result, vulnerable people who would be considered adults at risk are routinely routed into detention.
20. The UNHCR’s Vulnerability Screening Tool is a useful starting point to develop an effective screening process which can prevent vulnerable people from being detained and ensure their vulnerability is regularly and proactively assessed if they are detained.⁷
21. There is no process for identifying individuals who lack capacity to make decisions in relation to their immigration case and other matters. Unlike other comparable institutions, immigration detention has no process for assessing capacity or arranging access to independent advocates. In the case of *VC*, the Court of Appeal found that mentally ill detainees are at a “substantial disadvantage” because they may be unable to make representations in relation to their detention due to their mental illness.⁸

Alternatives to detention

22. The Home Office has made little structured use of alternatives to detention to address the specific problems of detention described above. While there is a requirement to use less coercive measures than detention wherever possible, there has been little investment in developing alternatives to detention that are effective in addressing the needs and risks driving the overuse of detention. There is scope to develop a much wider range of alternatives to detention, with direct or indirect involvement of civil society, to enable case resolution without the use of detention.
23. The UK’s use of alternatives to detention is limited to consideration of immigration bail, usually with a requirement to live at a designated address and report regularly to the authorities. Tagging and curfews have been used for ex-offenders. Bail with reporting restrictions can be considered a successful alternative to detention in the sense that the vast majority of irregular migrants facing return are subject to it instead of detention, and absconding rates appear not to be high.
24. However, there is little evidence that they are effective in addressing the objectives of detention: compliance and return. Indeed, overly onerous conditions such as tagging or

⁶ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-02/111230/>

⁷ <http://www.unhcr.org/uk/protection/detention/57fe30b14/unhcr-idc-vulnerability-screening-tool-identifying-addressing-vulnerability.html>

⁸ [2018] EWCA Civ 57

daily reporting may make compliance unpleasant and stressful, incentivising absconding by making migrants feel that they have little to lose.

25. As a result, when there is a risk of absconding or non-compliance, decision-makers are disposed to use detention by the lack of alternative tools to reduce risk. The results can be disastrous, since risks of absconding are often linked to individual circumstances of vulnerability (e.g. mental health issues, histories of trafficking) that can make detention seriously harmful.
26. The Family Returns Process indicates the potential for increasing cooperation through engagement with migrants. It is not normally considered an alternative to detention, yet effectively replaced detention following the 2010 commitment to end child detention. It does not follow international best practice, in that families are only engaged at the end of the process, there is an exclusive focus on return, and currently no structured involvement of civil society. Yet the shift towards engagement with migrants is nevertheless bearing fruit: between April 2014 and March 2016, 97% of 1,470 families who left the UK did so without enforcement or detention.⁹
27. Despite its success, the learning of the Family Returns Process has not been extended to vulnerable adults. The Home Office has not built on it to explore alternatives to detention based on high quality, individualised case management, despite the strong international evidence base of effectiveness in supporting migrants to comply with conditions of release.
28. The International Detention Coalition (IDC) has documented a range of alternatives to detention that prevent unnecessary detention by keeping individuals engaged in immigration and asylum procedures whilst living in the community. The IDC found that migrants were more likely to accept and comply with negative immigration decisions if the decision-making process was seen as fair, they were informed and supported throughout the process, and they were given the option to explore all options to remain in the country legally.¹⁰
29. For example, Australia introduced case management-based alternatives to detention in 2006, enabling it to move away from the mandatory indefinite detention of in-country asylum-seekers and irregular migrants not arriving by boat. These programmes provide early intervention and support to migrants, seeking to understand their circumstances and work with them to resolve their immigration cases. Case managers ensure that migrants have suitable access to welfare assistance, legal advice and advice on voluntary return. Community-based alternatives to detention have become established as a routine part of Australian immigration control. The majority of irregular migrants in Australia have been released on short-term Bridging Visas, which allow them to live in the community pending the resolution of their cases. Some Bridging Visa holders with more complex needs receive intensive case management. For example, the Community Assistance Support Programme provides transitional support to vulnerable people who

⁹ Independent Family Returns Panel, *Independent Family Returns Panel report 2014-16*, January 2017, p7.

¹⁰ IDC.

would otherwise be unable to engage with the resolution of their immigration cases, due to mental or physical health problems, age or other vulnerability. The programmes had a compliance rate of 93%, with 60% of those not granted a visa returning voluntarily, despite often long periods in Australia and significant barriers to return. The programme cost around \$AU38 per day, compared to around \$AU125 per day for detention.¹¹

30. IDC has identified that the key characteristics of successful alternatives to detention include:
- Using screening and assessment to tailor management and placement decisions
 - Providing holistic case management focused on case resolution
 - Focussing on early engagement
 - Ensuring individuals are well-informed and trust they have been through a fair and timely process
 - Ensuring fundamental rights are respected and basic needs are met
 - Exploring all options to remain in the country legally and all avenues for voluntary or independent departure
 - Ensuring any conditions imposed are not overly onerous¹²
31. Case management is a social work approach which is ‘designed to ensure support for, and a coordinated response to, the health and wellbeing of people with complex needs.’ Many countries use this approach in their alternatives to detention programmes, including Sweden and Australia. Case management models involve a case manager, who is not a decision-maker, working with the migrant to provide a link between the individual, the authorities and the community. The case manager ensures that the individual has access to information about the immigration process and can engage fully, and that the government has up-to-date and relevant information about the person.
32. Civil society has a key role to play. NGOs have the specialist expertise to provide case management to vulnerable individuals, since mental health, homelessness and probation organisations, for example, routinely undertake case management with client groups including migrants, albeit without a focus on their immigration situation.
33. For example, Detention Action is already working closely with the Home Office on an alternative to detention pilot for young male ex-offenders who have been released due to intractable barriers to removal. The project is demonstrating that even migrants with the most complex issues can be supported to comply with the conditions of their release in the community, through the provision of specialist one-to-one case management.
34. The Community Support Project has been working since April 2014 with young male ex-offender migrants who have barriers to removal. The project has to date worked post-release with 25 participants. There has been rate of compliance with conditions of at least 80%. Two participants have been reconvicted of minor offences. The project is estimated to save between 83% and 95% of the costs of detention, depending on whether participants need housing from the government.

¹¹ IDC, p52.

¹² IDC, pIV.