

# The Detention Forum



## **Time-served Prisoners**

A policy paper

April 2021

### **Our vision**

We want to live in a society where we are all equal before the law. We want to live in a society where all people can be helped to find new opportunities after they have served their prison sentence.

### **The reality**

Successive changes have been made to the law, started by the last Labour Government with the 2007 UK Borders Act, which means that any non-British person, who is sentenced to 12 months or more in prison, is automatically liable for deportation. And there is an expectation in the forthcoming new Borders Bill that this time period will be reduced to six months.

The Shaw Report on vulnerable people in detention in 2018 urged the Government to stop routinely deporting people born in the UK or who came here at a young age; this recommendation has been ignored by the Government.

This blanket policy includes people with relatively minor offences born in the UK but without citizenship, those arriving in the UK as children, and those with dependent children in the UK, and places a legal duty on the Home Office to deport them. Many of these people have a legitimate right to apply for British citizenship, but have been deterred by the exorbitant cost and complexity or were unaware of their rights. (They may have had such a right prior to offending or may continue to have such a right.)

The recent Windrush scandal has highlighted the impact of these deterrents to people being able to regularise their status

Non-British citizens are more likely to receive custodial sentences, and on average receive longer sentences, than White British counterparts; making it even more likely that they will be triggered for automatic deportation.

After non-British citizens have served a custodial sentence, immigration officials may decide to hold them under immigration powers. Many are held under these powers in prisons where they are much less likely to have access to immigration legal advice. Without legal representation it is difficult for someone to demonstrate any reasons why they should not be removed.

This is why there has been an explosion in the number of deportations and why so many people with past convictions are in immigration detention.

We know that access to health care, legal aid and family members are vital for time-served prisoners held under immigration powers. Yet they often do not have such access and have little or no understanding of their legal position.

We want to see equality before the law and are highly concerned at this double punishment experienced by some people: their initial custodial sentence and then indefinite immigration detention.

The High Court recently found that the failure to provide access to free initial immigration advice for all immigration detainees in prisons — as is provided to detainees in Immigration Removal Centres (IRCs) under the Detained Duty Advice Scheme (DDAS) — is discriminatory.

Giving judgment in [R \(SM\) v Lord Chancellor \[2021\] EWHC 418 \(Admin\)](#), Swift J held that the difference in treatment between detainees in prisons and detainees in

IRCs constituted unlawful discrimination contrary to article 14 of the European Convention on Human Rights (ECHR), read with articles 2, 3, 5 and 8.<sup>1</sup>

There are slightly different issues in Scotland: there is not a probation service, but offenders get support from criminal justice social workers, and there is the difference in the legal system and not a unitary criminal justice system across the UK. In addition, there is not the same issue in Scotland of people being held under immigration powers in prison.

We are also concerned about the government increasingly using its power to strip British people of their citizenship. This was a power which was very rarely used until recently, and there are now fewer constraints on the use of this power.<sup>2</sup>

### **Our approach**

In the short-term we want to see all people who are facing automatic deportation to receive legal support so that they can make the case why they should not be deported.

**But we want to stop this automatic blanket policy of deportation. Every individual case should be supported and assessed on their own merits.**

The problem though is that the process and the law within which the process operates is currently cruel. There should be an end to automatic deportation which removes proper consideration of the individual and their circumstances and places the onus on the individual to show their case requires consideration under human rights parameters.

---

<sup>1</sup>

<https://www.doughtystreet.co.uk/news/high-court-finds-lack-free-advice-immigration-detainees-prison-unlawful>

<sup>2</sup> <https://www.freemovement.org.uk/british-nationals-citizenship-deprivation/>

The process for any deportation, which should start during the custodial sentence, should be that the person in prison should be informed as to the reasons for the deportation and provided with independent legal advice at that stage. The legal advice would relate to the process faced by the prisoner and the ways in which the prisoner could challenge the deportation. This would enable the prisoner to understand their situation and the case against them and gather any relevant evidence in support of their argument against deportation during their sentence.

### **Use of the criminal justice system**

Every person with a past conviction in immigration detention has, by definition, already completed the custodial portion of their sentence, and would already have been released on licence if not for the fact that they happen to be a non-British citizen. A British offender with an identical history and risk profile would, by definition, have been released. The Government calls this category of people 'foreign national offenders' – but they are in fact ex-offenders and indeed time-served prisoners.

The criminal justice system has measures in place to manage ex-offenders, who are released from prison. Indeed, this is a central part of the work of the Probation Service. Most ex-offenders will be on licence, and will be subject to the supervision of the Probation Service, with appropriate licence conditions. The ex-offender will have to live on release at an address approved by their supervising officer. In the highest-risk cases an ex-offender may be required to reside in Approved Premises and/or be subject to a MAPPA risk management plan. In fact, immigration detention may undermine these protective measures, because if an ex-offender is detained for a long time their licence period may have expired by the time they are released.

It is for the criminal courts, not the immigration authorities, to determine what period of detention is necessary for the protection of the public. In the case of the most serious violent offenders, the sentencing court will have had the option of imposing a life sentence (which would mean the offender would not be released until the Parole Board was satisfied that their detention was no longer necessary for the protection of the public). The court's decision to impose a determinate sentence, rather than a life

sentence, will have been taken in the knowledge that the offender would, in ordinary circumstances, be released following the expiry of the custodial portion of their sentence. It cannot therefore be argued that these ex-offenders are “too dangerous” to be released after the custodial portion of their sentence is concluded.

Against this backdrop, it is not appropriate – nor indeed lawful under current law – to use immigration detention as a form of preventive detention to prevent future offending. As the Court of Appeal observed recently in *AC (Algeria)* [2020] EWCA Civ 36, no risk can justify preventive detention. The lawful function of immigration detention is to effect deportation or removal, not to prevent future offending.

And with institutional racism in the criminal justice and immigration systems, there is the inevitable risk that practice in this sector will affect the practice of who is detained under this automatic deportation policy.

In short, if a person is not to be deported or removed imminently, their detention cannot be justified merely on the grounds that they may pose a risk to the public. That risk should be managed by the appropriate agencies, just as it would be for a British citizen former offender with the same risk profile.

### **Issues for women**

We are keen to highlight the particular issues of women who are caught between the criminal justice and immigration system:

- The treatment of these women is discriminatory by the police and the courts (before they even go to prison). They are more likely to receive prison sentences because of their insecure immigration status - twice as likely as white women - and also over 80% of these women committed non-violent offences.
- As single mothers, the impact serving prison sentences and being deported have on their children
- Many are survivors of gender based violence
- Many are survivors of trafficking and are forced to commit crimes by perpetrators. The majority of migrant women in prison are there for fraud or

theft-related offences, both of which are indicators for coercion and modern day slavery.

## **Health and Welfare**

Prisoners held under immigration powers should have the same rights as detainees in IRCs in accessing medical care and support under Rule 35. Rule 35 is not functioning adequately in IRCs, but in the Prison Service the situation is worse.

Prisons are not fully aware that prisoners held under immigration powers are the responsibility of the Home Office. The situation is exacerbated by Covid-19, which has prevented immigration officers and lawyers coming to the prisons.

The experience of some of our members with former detainees, who are also time-served prisoners, shows that probation officers do not always have the best idea of how to manage people who are not British nationals. Post-criminal sentence individuals are very likely to have insecure immigration status, which stops them from being entitled to many things. Yet our members have seen situations where probation officers encourage individuals to apply for Universal credit or advising people that they are not allowed to volunteer when this advice has not been correct. We think that we can do more to raise awareness in support of time-served prisoners.

## **Conclusions:**

At the moment, the policy of automatic deportation means that there is not equality before law – not all people are treated equally in this country.

This unequal practice amounts to racial discrimination. It also discriminates against children who lose their parent.

Prison should not be used for the purpose of immigration detention. We know that people will have their liberty denied them for longer if they are in a prison compared to a detention centre, and they will not have access to the rights of detainees.

People are doubly punished because of their immigration status. Once they have served their prison sentence, they then are detained for a second time but for an indefinite period.

The lack of an address is a major reason from preventing people being released from prison. And in many instances the Home office collaborates with such delay in releasing people as they do not provide an address in a timely manner.

### **Recommendations:**

We want to see:

- An end to the automatic blanket deportation after a 12 month prison sentence for non-British citizens.
- All prisoners not in possession of a British passport receiving individual case resolution support during their custodial sentence, so that they are clear about their future immigration status at the end of their sentence
- All prisoners facing deportation receiving legal advice at the outset of their prison sentence concerning their immigration status
- All people receiving robust legal aid support and immigration advice in prison to ensure proper representation when they become liable to deportation at the end of their sentence.
- That all time-served prisoners, who have served their custodial sentence are released from prison under licence (as with UK citizens) into the community, or moved to a short-term holding facility pending imminent removal.
- No time-served prisoners are held indefinitely in immigration detention at the end of the sentence.
- If there is a continued risk to the public, then this risk is managed by the criminal justice system and not the immigration system.

- A fee waiver provision at every stage of the immigration process/ or a big reduction in the cost for people applying for British citizenship.

ENDS