REPORT

A nice judge on a good day:

immigration bail and the right to liberty

JULY 2010

BiD Bail for Immigration Detainees

‘It’s horrible isn’t it, thinking you want a nice judge on a good day.’

Regina, a British citizen, talking about the bail hearings of her partner Joseph who was held as an immigration detainee in prison.[1]

1 BID, Out of sight out of mind: experiences of immigration detention in the UK, July 2009, p. 44

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Bail for Immigration Detainees

Bail for Immigration Detainees (BID) is an independent charity that exists to challenge immigration detention in the UK. Since 1998, BID has worked with asylum seekers and migrants in immigration removal centres and in prisons to secure their release. At least 1,500 people have been freed from detention in the last ten years with assistance from BID. In the past year, our three offices have supported 2,481 people held in immigration detention, a 44% increase on the year before. Most were helped to prepare and present their own bail applications. We also prepared 248 bail applications ourselves for some of the most vulnerable, including families with children and long-term detainees. Using our casework experience, we carry out research and gather evidence to challenge the use of immigration detention, improve access to bail, and end the detention of children and their families.

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Immigration was said to be the burning topic in the lead up to the General Election 2010, and it was chosen as the lead question in the first of the Prime Ministerial Debates. As usual it generated more heat than light, excited alarmist posturing and jaundiced misinformation.

In this climate, therefore, it is a joy to find an oasis of reasoned argument and evidence based propositions provided by BID's report, on one of the most important but often neglected aspects of this issue – namely how asylum seekers and immigrants are handled in relation to detention and the right to bail. The Coalition Agreement reached on May 11 2010 contained core values about 'fairness' and 'civil rights'. If it is to be worth more than the paper upon which it is written, a good place to start is with the untoward numbers of people, including children, who are detained without limit of time and without automatic judicial oversight.

This is entirely unacceptable, and flies in the face of the spirit of Article 5 of the European Convention. There ought to be a presumption in favour of bail, unless detention is avoidable or absolutely necessary, solely for the purposes of immigration control. Statutory amendment may be required to achieve this (viz Immigration Act 1971).

The implementation of a meaningful process which can reflect points of principle lies at the heart of any system. It hardly needs saying that the moment of arrival for an immigrant is one of the utmost vulnerability. The likelihood is that there will be a feeling of isolation exacerbated by a language problem. Even without such a disadvantage the rules and regulations are a complex maze to navigate. In such a situation the detainee can hardly be expected to mount a cogent challenge to the detention, let alone progress a substantive application, especially if without legal representation.

To offset this it is essential that certain basic safeguards are in place, inherent in the system, and not necessarily dependent upon the detainee. The most obvious is a statutory maximum time limit of 28 days subject to judicial oversight as recommended by the Joint Committee on Human Rights in 2007. In one sense this is a reflection of Article 5(4) of the ECHR wherein 'it is mandatory for the detainee to be able to take proceedings by which the lawfulness of his detention shall be decided speedily by a court'. Subsection 2 of the same Article also declares that it is mandatory that the detainee be informed of the basis of his detention in a language he understands. This needs to be carried through to the provision of information about bail, as well as to the effective use of interpreters ensuring that the detainee and the interpreter are intelligible to each other. Given the advent of video bail hearings these aspects have become ever more significant.

Underpinning the whole process must be clear reasoning clearly communicated. The grounds for a Home Office decision to detain as well as the reasons for a Tribunal's decision to refuse bail should be recorded in full and provided to all the parties. If the stumbling block is, for example, accommodation, where the bail address and especially Section 4 provision, is unacceptable, the precise nature of the shortcoming should be spelt out in order that it can be rectified in a rolled over or deferred application. None of this is rocket science and all of it is merely trying to incorporate basic standards of fairness and human rights.

In this context I am confident that this report will provide valuable information for all those working in the field and will make a contribution to the formulation of new Guidance Notes for immigration judges.

Michael Mansfield QC

Acronyms

AIT- Asylum and Immigration Tribunal, also referred to as 'the Tribunal'
BID – Bail for Immigration Detainees
ECHR- European Convention on Human Rights
FNP – Foreign National Prisoner
FTTIAC – First Tier Tribunal Immigration and Asylum Chamber, also referred to as 'the Tribunal'
IRC – Immigration Removal Centre
HOPO – Home Office presenting officer
NASS – National Asylum Support Service, now called Asylum Support
SSHD – Secretary of State for the Home Department
UTIAC – Upper Tier Immigration and Asylum Chamber, also referred to as 'the Tribunal'
UKBA – UK Border Agency

1 Introduction

'There is no doubt that the power to detain is wide and the safeguards, while significantly enhanced by the requirement to apply stated policy and as a result of the incorporation of Article 5 ECHR, are often inadequate in practice.' - Macdonald's Immigration Law and Practice, chapter 17.8

Every year in the UK, the government detains around 30,000 people for the purposes of immigration control. Most people in immigration detention are either seeking sanctuary in the UK and are detained while their asylum claims are processed, are asylum seekers or migrants who have had their claims refused and are awaiting removal from the UK, or are foreign nationals who have served a custodial sentence in the UK and are awaiting deportation. The use of immigration detention is increasing, and in May 2008 the former government announced plans to expand detention capacity by a further 60%.[1] Immigration detention for particular purposes, for example to effect the removal or deportation of foreign nationals from the UK, is permitted by primary legislation.[2] While the legislation gives no statutory time limit to immigration detention, the government's power to detain is not unfettered and judicial mechanisms exist for immigration detainees to challenge their detention.

A bail application to an independent immigration judge at the First-tier Tribunal of the Immigration and Asylum Chamber or FTTIAC (formerly the Asylum and Immigration Tribunal or AIT) is the most accessible way for most detainees to seek their release from detention. While the FTTIAC can only assess eligibility for bail, and not the issue of the legality of detention, as the only independent review of detention (short of making an application to the higher courts) FTTIAC bail is a crucial check and balance on the use of immigration detention in the UK.

For the last ten years BID has supported immigration detainees to make their own bail applications and has taken on the cases of some of the most vulnerable, including children and their families and long-term detainees. As a result of our casework we have become increasingly concerned about aspects of the bail process and the outcome of many bail applications. For example during its 2007 inquiry into the treatment of asylum seekers the Joint Committee on Human Rights reported

'BID told us that there was a shortage of legal representation available to assist detainees in accessing bail. They stated that although public funding was introduced for bail applications in January 2000, there were too few solicitors able or willing to take on bail applications, and that there were serious flaws in the bail process which reduced access to the courts. These included the requirement for sureties, the merits test for public funding for legal representation and the lack of accommodation for asylum seekers. As a result, the demand for advocacy and training services provided by BID was very high.'[3]

1 Home Office, Large Scale Expansion Of Britain's Detention Estate, 19 May 2008

2 The original powers of detention are to be found in the Immigration Act 1971 with subsequent amendments and additional powers.

3 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 290

Our own concerns have also been shared by some of the pro bono barristers we instruct, by detainees representing themselves, by other groups supporting immigration detainees[4], by regulatory bodies[5], and increasingly by the courts[6]. During evidence given to the Joint Committee on Human Rights in 2007, the then President of the AIT also voiced his concerns about the bail process and the need for reform, saying

> *'We have argued for a long time that the whole bail system within the immigration and asylum world needs a proper rethink. [...]If somebody ever asks about bail we will always say that somebody needs to have another look at it.'*[7]

In particular BID is concerned that the bail process remains inaccessible for too many detainees and that for those who do secure a bail hearing, there are too few safeguards to check against unfair practices that impact negatively on the outcome. As a result of legislative changes since the 2006 foreign national prisoner scandal, we have also become increasingly concerned that the 'automatic deportation' regime permits detention for a growing number of people issued a deportation order post-criminal sentence, as well as people for whom the Home Office is still considering whether deportation proceedings apply.[8] BID caseworkers and the pro bono barristers we instruct often comment that it seems harder to obtain bail for a person with a deportation order due to the impact of such an order on judicial decision-making.

The immigration bail process, the decisions of immigration judges in bail hearings and the impact of deportation orders on bail outcomes are under-researched areas. There is a growing body of work on decision-making in substantive asylum and immigration cases, and the impact of the application process on application outcomes, mostly conducted by academics, NGO researchers and regulatory bodies.[9] To date, publications on immigration bail have focused largely on advising people how to make applications,[10] rather than critiquing the process itself.

Drawing upon our 2008 research with the Refugee Council, monitoring the roll-out of video linked bail hearings,[11] BID has undertaken this study of the bail process to explore whether the concerns arising from our own casework practice are in fact more systemic. In presenting our research findings our aim is to increase the fairness of the bail process by

(i) identifying practices in the bail process that impact negatively on the fairness of bail outcomes

(ii) recommending safeguards that should be incorporated into the bail process to identify and prevent unfair practices

(iii) increasing access to structures which can challenge unfair bail outcomes.

4 London Detainee Support Group, Detained lives: the real cost of indefinite immigration detention, January 2009; Amnesty International UK, Seeking asylum is not a crime: detention of people who have sought asylum, 19 June 2005; Haslar Visitors Group, Applications for bail and other cases observed at Havant Magistrates Court; the Campaign to Close Campsfield Bail Observation Project, forthcoming.

5 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 269; Independent Asylum Commission, Deserving Dignity: the IAC's third report of conclusions and recommendations, July 2008, p.1

6 A series of recent High Court cases have forced the Home Office to disclose previously secret detention policies and brought the censure of the court: see R (WL and KM) v SSHD [2010] EWCA Civ 111, para 6 and R (Abdi) v SSHD [2008] EWHC 3166 (Admin), para 1. The cases established that between April 2006 and September 2008 the Home Office was secretly operating a policy not to release any foreign nationals at the end of any prison sentence until they could be deported (irrespective of their individual circumstances).

7 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, excerpted from Q445 and Q446

8 See sections 32-39 of the UK Borders Act 2007 which contain powers for 'automatic deportations' for foreign nationals sentenced (i) to a period of imprisonment of at least 12 months or (ii) sentenced to any period of imprisonment specified in section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002. Implications of these provisions include the Home Office losing the ability to act with discretion on these matters and widening the range of people affected by deportation proceedings.

9 Medical Foundation for the Care of Victims of Torture, Right first time? Home Office interviewing and reasons for refusal letters, 2004; Amnesty International UK, Get it right: how Home Office decision making fails refugees, September 2004; Independent Asylum Commission, Saving Sanctuary: the IAC's first report of conclusions and recommendations, May 2008, UNHCR, Quality Initiative Project

10 For example, BID and the Immigration Law Practitioners' Association, Challenging immigration detention: a best practice guide, October 2003

11 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008

Based on our findings we have made recommendations to the FTTIAC and to other relevant agencies about reforms that in our view must be made to ensure that immigration bail is a meaningful and effective process for detainees to challenge their detention. We remain convinced of the importance of immigration bail as an essential mechanism for detainees to contest the continuation of their detention. In April 2010 the Tribunal indicated that a new set of guidance for immigration judges on bail hearings was forthcoming but said that there would be no formal consultation period prior to publication. We hope that this research and its recommendations will nevertheless contribute to the development of the Tribunal's thinking about immigration bail, increase informed discussion about the use of bail, and lead to a fairer process in which immigration detainees are better able both to challenge their detention and access their right to liberty.

1.1 Methodology

The aim of this research was (i) to document BID's concerns and (ii) to test our hypothesis that the immigration bail process is not subject to adequate safeguards and this allows some unfair decision-making to go unchecked at bail hearings. In total BID examined 65 bail applications – 36 applications were prepared by BID and were represented by a pro bono barrister[12], and in 29 applications the applicants were representing themselves. In a small number of cases prepared by BID two bail applications made by the same applicant were examined, as they were both heard during the research period. All the represented bail hearings in the research sample took place between October 2009 and February 2010 and the unrepresented bail hearings took place between January and March 2010, i.e. over a six-month period in total.

Meaning of 'fairness'

'Fairness' of decision-making is, of course, a relative concept. For the purposes of this research we have used published criteria from the FTTIAC, the AIT and where appropriate the Home Office, as benchmarks against which to analyse the treatment of bail applications.[13] In particular we have used the May 2003 'Bail Guidance Notes for Adjudicators from the Chief Adjudicator' to interrogate practices at bail hearings. The Guidance Notes were produced by the former President of the AIT, then Chief Adjudicator, Henry Hodge OBE. It is our understanding that they were removed from the AIT website in 2007 and according to the Tribunal have since been under revision, with a new edition being prepared for publication in the summer of 2010.[14] However, despite their removal from the website, until February 2010 the Guidance Notes remained current practice by virtue of a statement in the AIT's Practice Directions that until the Tribunal formulated its own guidelines, the Guidance Notes should continue to be followed.[15] Since February 2010, when the AIT transferred into the unified tribunal established by the Tribunals, Courts and Enforcement Act 2007 (and since when bail hearings have been heard by the FTTIAC), the statement has not been replicated in the 'Consolidated Asylum and Immigration (Procedure) Rules 2005' for the First-tier Tribunal and there are no Bail Guidance Notes on the website of the FTTIAC in the list of 'Guidance notes for the former AIT that are now relevant to FTTIAC'. This therefore leaves a gap in the guidance that is available to immigration judges about the expected conduct of a bail hearing. In the absence of any current guidance, and because for all but the last month of the research period the 2003 Guidance Notes were in force through the AIT's Practice Directions, we have used the 2003 Guidance Notes as a benchmark of fair practices. We have examined the extent to which the Guidance is followed in practice as well as exploring any gaps in the areas covered by the Guidance. The aim of the research was not to decide whether the individual bail hearings examined were 'fair' or 'unfair', but to examine the individual building blocks of the bail process to determine whether safeguards, particularly those set out in the 2003 Bail Guidance Notes to ensure fair decision-making, were adhered to and whether based on our observations other safeguards were required.

12 17 cases were prepared by BID's office in London, 15 cases by BID's office in Portsmouth and four by BID's office in Oxford.

13 See Annex 1

14 See AIT stakeholders' meeting minutes, July 2008, para 9 (iv) and September 2007, para 11 and discussion at the April 2010 meeting (no minutes available at the time of writing).

15 Macdonald and Webber, Macdonald's Immigration Law and Practice, para 17.62

Bail hearings with legal representation

Much of the data for this research relies on information supplied by pro bono barristers representing cases prepared by BID in bail hearings. Barristers were chosen as the best conduit through which to acquire information about bail hearings because of their knowledge of the bail process and because of their '*overriding duty to the Court to act with independence in the interests of justice*'.[16] Pro bono barristers were requested to complete a structured attendance note that asked a number of quantitative questions about events at the bail hearing, with space also given for qualitative answers. For example,

> *'Did the Home Office produce any evidence to support contested facts in the bail summary? YES/ NO (delete as appropriate)*
>
> *How did the immigration judge deal with any lack of evidence from the Home Office to support contested facts?'*

The questions were based on the requirements of the 2003 Bail Guidance Notes and, for actions undertaken by the Home Office, chapters 55 and 57 of the UK Border Agency's Enforcement Instructions and Guidance. A detailed breakdown of how the questions asked of barristers were pegged to these two documents and other guidance, is available in Annex 1.

The thirty six bail applications prepared by BID were analysed through pre-hearing documents

- the bail application (B1 form)
- the applicant's grounds for bail and witness statement where available
- the notice of hearing from the Tribunal
- the bail summary provided by the Home Office
- the brief to a pro bono barrister written by a BID caseworker

and documents from the hearing itself

- the attendance note of the bail hearing supplied by a pro bono barrister
- the notice of grant of bail or notice of refusal of bail written by an immigration judge

For documents to be used in the research, a statement of consent had to be signed by BID caseworkers to confirm that standardised information about the research had been read over the phone to the bail applicant, that the applicant understood the information and had consented for their documents to be used. Cases without signed statements of consent were not analysed. Pro bono barristers were also provided with standardised written information about the research and given the following options: to represent the bail applicant but not participate in the research; to represent the bail applicant and to participate in the research anonymously; or to represent the bail applicant, participate in the research and to be acknowledged as having taken part. The hearings included in the research sample were those that took place during the research period where both the applicant and the barrister consented to participate. Seven hearings took place at the Tribunal's hearing centre at Birmingham, seven at Hatton Cross, one at Sutton and twenty one at Taylor House. All information gathered through represented bail hearings is presented anonymously.

16 Bar Standards Board, 8th Edition of the Code of Conduct of the Bar of England & Wales, para 302

Bail hearings without legal representation

Recognising that there may be differences in the process of represented and unrepresented bail applications we also observed twenty nine bail hearings where the applicants had no legal representation and were representing themselves. The hearings were observed by a BID researcher who has an academic background in anthropology. The observer entered the hearing room and took notes as a member of the public.[17] When requested to do so he identified himself to the court clerk as a BID researcher. Bail hearings were identified for observation from the bail cases on the daily court lists posted on the Tribunal's website a day in advance of the hearing. Fifteen hearings were observed at Taylor House and fourteen at Hatton Cross. The observer used the same structured attendance note used by pro bono barristers – the only amendments were to omit questions that could only properly be answered with access to the applicants' documents. No documents associated with these hearings were available for analysis as the majority of the applicants were not BID clients. As the information recorded by the observer was heard in a public hearing centre, consent was not obtained from the parties involved. All information gathered through hearing centre observations is presented anonymously.

Table 1 – Location of the bail hearings examined in this research

Hearing centre	Cases prepared by BID	Unrepresented cases
Birmingham	7	0
Hatton Cross	7	14
Suttton	1	0
Taylor House	21	15

Table 2 –Outcome of the bail hearings examined in this research

Cases prepared by BID

Hearing Centre	Granted	Refused	Withdrawn
Birmingham	2	4	1
Hatton Cross	1	5	1
Sutton	1	0	0
Taylor House	13	7	1
	Total granted: 17	Total refused: 16	Total withdrawn: 3

Unrepresented cases

Hearing Centre	Granted	Refused	Withdrawn
Birmingham	0	0	0
Hatton Cross	1	12	1
Sutton	0	0	0
Taylor House	3	7	5
	Total granted: 4	Total refused: 19	Total withdrawn: 6

17 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 54(1) states *'[s]ubject to the following provisions of this rule, every hearing before the Tribunal must be held in public.'*

Table 3 – Length of the bail hearings examined in this research

	Cases prepared by BID[1]	Unrepresented cases
Average length of hearing	58 minutes	19 minutes
Shortest length of hearing	5 minutes	3 minutes
Longest length of hearing	2 hours 20 minutes	1 hour 4 minutes

1.2 What is immigration detention?

Over the last fifteen years, the ability to detain asylum seekers and immigrants has been a central and increasingly used element of UK government policy, regarded as an essential tool of immigration control.[18] For example, the former Labour government referred to the Immigration Removal Centre at Oakington as '*a central plank of asylum policy*', and since the 2006 foreign national prisoner scandal Home Office press releases have talked about the ability to '*return those who have no right to be here [...being dependant] on detaining them*'.[19] Immigration detainees are mostly held in one of eleven immigration removal centres, and also in short term holding facilities at ports and airports, in prisons or for time-limited periods in police cells.[20] The management of all eleven immigration removal centres has been outsourced by the Home Office either to private companies or, in three cases, to HM Prison Service. Since the 1990s the number of bed spaces available for the use of immigration detention has increased dramatically and new building programmes are underway to increase bed space further still.[21] Unlike detention in the criminal justice system, immigration detention is purely administrative - it is not supposed to be punitive and is not sanctioned by a court. It exists for the convenience of the government to allow it to more easily carry out its administrative functions with regard to immigration control.

18 Macdonald and Webber, Macdonald's Immigration Law and Practice, para 17.1; BID and the Immigration Law Practitioners' Association, Challenging immigration detention: a best practice guide, October 2003, p.ix; Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 205

19 Home Office, Secure Borders, Safe Haven: integration with diversity in modern Britain, 2002, para 4.69; Home Office, Immigration and asylum statistics released, 24 February 2009

20 Immigration detainees can be held in any of the places listed in the Immigration (Places of Detention) Direction 2008. Home Office policy states that immigration detainees should only be held in prisons for reasons of national security, because they have committed particular criminal offences, as a result of their behaviour in custody, for reasons of security or control, or where ongoing health treatment is not available in an immigration removal centre. UKBA, Enforcement Instructions and Guidance, chapter 55.10.1

21 The Home Office has sought planning permission to build a 500-bed centre in Bedfordshire and an 800-bed centre in Oxfordshire. UKBA website, Expansion of the detention estate, accessed 20 April 2010.

Table 4 – Immigration Removal Centres in the UK

- **Brook House**
  Built to Category B prison standards next to Gatwick Airport with bed spaces for 426 men
- **Campsfield House**
  Located in Oxfordshire with bed spaces for 216 men
- **Colnbrook**
  Built to Category B prison standards next to Heathrow Airport with bed spaces for 308 men
- **Dover**
  Run for the Home Office by HM Prison Service with bed spaces for 314 men
- **Dungavel House**
  Located in Lanarkshire with 190 bed spaces, including some which have been used for families
- **Harmondsworth**
  Located next to Heathrow Airport with bed spaces for 259 men, some of which are used for fast-tracking asylum cases. An additional 364 bed spaces will come on stream during 2010.
- **Haslar**
  Located near Portsmouth and run for the Home Office by HM Prison Service with bed spaces for 160 men
- **Lindholme**
  Located near Doncaster and run for the Home Office by HM Prison Service with bed spaces for 112 men
- **Oakington**
  Located in Cambridgeshire with bed spaces for 408 men, some of which are used for fast-tracking asylum cases
- **Tinsley House**
  Located next to Gatwick Airport with bed spaces for 116 men, five women and four families
- **Yarl's Wood**
  Located in Bedfordshire with 284 bed spaces for women (some of which are used for fast-tracking asylum cases) and 121 bed spaces for families

Most of the government's detention powers stem from the 1971 Immigration Act and its subsequent amendments. They allow for the detention of different groups of people including those

- arriving in the UK, who can be detained awaiting examination by an immigration officer to see whether they should be allowed to enter the UK
- refused permission to enter the UK, who can be detained while arrangements are made to remove them from the UK
- who have entered the UK and have claimed asylum, who can be detained for their claim to be processed or, if their claim is refused, can be detained while arrangements are made to remove them
- found in the UK who do not have permission to be in the country, who can be detained while a decision is made to remove them or while arrangements are made to do so
- who have entered the UK with permission but have not observed all the conditions attached to their permission, or have overstayed their permission, or have obtained their permission by deception, who can be detained while a decision is made to remove them or while arrangements are made to do so

- who have been recommended for deportation by a criminal court as part of a criminal sentence, or who the Secretary of State believes should be deported for the good of the UK public, or who have been either given notice of the intention to deport them or a deportation order, who can be detained while arrangements are made to do so
- who have completed a period of imprisonment, who can be detained while the Secretary of State considers whether the 'automatic deportation' regime applies.

Despite the government's ability to detain for the purposes of immigration control, its powers are not unfettered. As Macdonald's Immigration Law and Practice points out

> *'The right to liberty is a fundamental right and in the domestic common law there is a presumption of liberty which flows from the Magna Carta. It is a pre-eminent right and a foundation stone of freedom in a democracy.'*[22]

Through domestic and international caselaw, principles have been developed which set limits to detention powers. The government's obligations under the European Convention on Human Rights, incorporated into domestic law through the Human Rights Act 1998, allow for the use of detention for specific purposes only – any use of detention for reasons outside of these purposes is straightforwardly not permitted. The Convention specifically states that a person can be deprived of their liberty if '*in accordance with a procedure prescribed by law*' they are lawfully arrested or detained '*to prevent [him/her] effecting an unauthorised entry into the country*' or if '*action is being taken with a view to deportation or extradition*'[23] (deportation includes for the purposes of removal).

The concept of proportionality and the use of alternatives to detention have in particular been the subject of litigation to explore the boundaries of the government's obligations under Article 5 of the European Convention on Human Rights.[24] The key domestic case exploring the limits of detention powers has resulted in what are commonly referred to as 'the Hardial Singh principles'[25] which state that

- powers to detain must be exercised in accordance with the law and must be used for that purpose only i.e. for the purposes of removal or deportation.
- lawful detention is limited to the period reasonably necessary to achieve the purpose set out in law. If it becomes clear that removal/deportation is not able to be effected in a reasonable time, the person should be released or their detention will become unlawful. The specific time at which this tipping point occurs depends on the particular facts of a case.
- it is incumbent on the Home Office to undertake expeditiously all reasonable and necessary steps to ensure the removal/deportation of the detained person takes place within a reasonable time. Failure to take the necessary steps, or to take them with sufficient promptness, would again render detention unlawful.

Through the courts the limits of detention powers continue to be refined, exploring in particular, given the absence of a statutory time limit, when detention ceases to be lawful because it has outlasted the time deemed reasonable to achieve its original purpose. For example, the 2003 Bail Guidance Notes refer to Lord Justice Dyson's comments in a Court of Appeal case[26] that examined the question of how long it was reasonable to detain a person pending deportation. He noted that while it is not possible to

22 Macdonald and Webber, Macdonald's Immigration Law and Practice, para 17.38

23 European Convention on Human Rights, Article 5(1)(f); UNHCR's 1999 Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers also make clear that while '*[a]s a general principle asylum-seekers should not be detained*' if necessary, in exceptional circumstances, asylum seekers may be detained to verify identity, to determine the basis of an asylum claim, where the asylum seeker has destroyed their documents or has used false documents, to protect national security and for public order (Guidelines 2 and 3).

24 BID and the Immigration Law Practitioners' Association, Challenging immigration detention: a best practice guide, October 2003, p.5

25 Taken from R (Singh) v Governor of Durham Prison [1983] EWHC 1

26 R (I) v SSHD [2002] EWCA Civ 888, para 48

provide an exhaustive list of relevant factors, the following may have a bearing:

(a) the length of detention

(b) the obstacles that stand in the way of removal

(c) the speed and effectiveness of any steps taken by the Home Office to surmount such obstacles

(d) the conditions in which the applicant is detained

(e) the effect of detention upon the applicant and his/her family

(f) the risk of absconding and

(g) the danger that if released he/she will commit criminal offences.[27]

Recent litigation has addressed the relevance of a detainee being able to voluntarily return to their country of origin as a way of bringing an end to their detention[28]; the relevance of a detainee's refusal to cooperate with the process of re-documentation for the purpose of removal/deportation[29]; the relevance of the Home Office not following its own detention policy, rather than not following legislation, in determining the lawfulness of detention[30]; and the award of damages as the result of the abuse of detention powers.[31]

In the cases of many detainees supported by BID, while powers may have existed to lawfully detain at the point at which they were taken into detention, the legality of their continued, and often prolonged, detention is cause for serious concern given that it has arguably continued for longer than reasonable for the purpose of removal/deportation. In our view this makes detainees' access to mechanisms to challenge their detention of paramount importance.

1.3 What is immigration bail?

Article 5(4) of the European Convention on Human Rights states that

> *'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'*

27 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2

28 See R (Abdi and Others) v SSHD [2008] EWHC 3166 (Admin) which at the time of writing is before the European Court of Human Rights with BID intervening (application no. 27770/08, case of Abdi v the UK); see also R (I) v SSHD [2002] EWCA Civ 888, para 51 where Lord Justice Dyson said: '*Of course if the appellant were to leave voluntarily he would cease to be detained. [But] the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of time that would otherwise be unreasonable. [Otherwise] the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect deportation.*'

29 See FR (Iran) [2009] EWHC 2094

30 See SK (Zimbabwe) v SSHD [2008] EWCA Civ 1204 where the Court of Appeal ruled that, of themselves, failures to follow policy on detention did not render detention unlawful but noted that failures to follow policy might mean that the SSHD was evidentially unable to establish the legality of detention in a particular case. In February 2010 the Supreme Court heard the appeal in SK (Zimbabwe) – in which BID intervened – and at the time of writing a decision is pending.

31 See Muuse v SSHD [2010] EWCA Civ 453, in particular para 84 where Lord Justice Thomas described the actions of the Home Office in unlawfully detaining a Dutch national of Somali origin as '*an arbitrary abuse of executive power which can readily be characterised as outrageous*' and paragraph 86 where Sir Scott Baker said '*[i]t might be said that the Secretary of State is fortunate that the finding against his Department must be of incompetence and negligence rather than reckless indifference to legality.*'

There are a number of ways for immigration detainees to challenge their continued detention. One approach is to challenge the legality of the government's decision to detain (for example through applications to the High Court for judicial review or Habeas Corpus[32]); another is to ask the Home Office to reverse their decision to detain (through applications for temporary admission or release); yet further mechanisms examine the applicant's eligibility for bail (for example, applications for immigration bail made to the FTTIAC or to the Home Office).

The right to apply for immigration bail applies to almost everyone in immigration detention, the remaining gap being for certain categories of people who have been in the UK for less than seven days and who are only able to challenge the legality of their detention through applications to the High Court. The statutory powers granting the right to apply for bail are found in the amended Immigration Act 1971[33] – the same piece of legislation containing most of the government's powers to detain.

Applications for bail can be made to the Home Office as the detaining authority (through a Chief Immigration Officer during the first eight days of detention and to the Secretary of State thereafter[34]) and to an independent immigration judge at the FTTIAC. Guidance setting out the requirements on the Home Office for hearing a bail application include an expectation that '*any decision to grant bail will normally be dependent upon the availability of nominated sureties*' and that a recognisance '*of between £2,000 and £5,000 per surety will normally be appropriate.*'[35] These statements in the guidance mean that the vast majority of immigration detainees make applications for bail to an immigration judge rather than to the Home Office.

The Consolidated Asylum and Immigration (Procedure) Rules 2005,[36] the Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal,[37] and the Practice Statements of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal[38] set out the required rules and procedures for the Tribunal to administer and hear a bail application. These had, until February 2010, been augmented by the advice contained within the Tribunal's 2003 Bail Guidance Notes but as they have not been adopted by the FTTIAC/UTIAC, there is currently a gap in the guidance available to immigration judges while new Guidance Notes are being prepared.

The bail application form

The Procedure Rules state that an application for immigration bail should be made on a form prescribed by the Senior President of the Tribunal[39] (although the 2003 Guidance Notes conceded that if there was only a minor infringement of this Rule that would not prejudice the Home Office the hearing should proceed[40]). The form, known as a B1 form, is available on the Tribunal's website[41] and the Rules require that it is used to provide information about

- the applicant's full name, date of birth, and date of arrival in the UK
- the place of their detention
- any appeals pending before the Tribunal

32 The Home Office sees detainees' ability to access these two legal challenges as satisfying the requirements of Article 5(4) - UKBA, Enforcement Instructions and Guidance, chapter 55.1.4.1.

33 Immigration Act 1971, Schedule 2 paragraphs 22, 29 and 34

34 UKBA, Enforcement Instructions and Guidance, chapter 57.1.1-2

35 UKBA, Enforcement Instructions and Guidance, chapter 57.6

36 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, sections 38-42

37 Tribunals Judiciary, Practice Directions of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, 10 February 2010, section 13

38 Tribunals Judiciary, Practice Statements of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, 10 February 2010, section 2.1(7)

39 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38.1

40 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.1

41 Tribunals Judiciary, Practice Directions of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, 10 February 2010, section 6(1)(b)

- the proposed bail address where the applicant will live if released, or a reason why such an address cannot be given
- whether the applicant is willing to be electronically tagged on release
- the amount of applicant's recognisance offered
- the full names, addresses, occupations and dates of birth of any sureties offered and the amount of recognisance they are willing to offer
- grounds for the application including any change in circumstance since a previous refusal of bail
- whether an interpreter will be required and if so in which language or dialect.[42]

The form has to be signed by the applicant or by their representative and submitted to the Tribunal.[43] It is available only in written English.

Pre-hearing paperwork

The Procedure Rules then require the Tribunal to serve a copy of the application on the Home Office as soon as possible and to fix a date for the hearing.[44] Notice of the hearing date is given to the applicant, any sureties and the Home Office. The Tribunal's Practice Directions state that if practical, applications for bail must be listed within three working days from receipt of the application – applications received after 3:30pm are treated by the Tribunal as having been received the following day.[45] If the Home Office then wishes to contest the application, in other words to oppose bail and argue that the applicant should remain in detention, both the Procedure Rules[46] and the Home Office's Enforcement Instructions and Guidance[47] require that written reasons for opposing the application (known as a bail summary) must be given to the applicant and to the Tribunal no later than 2pm on the business day before the hearing is scheduled. If the Home Office was informed of the hearing date with less than 24 hours notice they should serve the bail summary as soon as reasonably practical. The 2003 Guidance Notes observed that where no bail summary is produced it should be assumed that bail is not contested and the application should be granted. If the bail summary is served late the Guidance Notes stated that it should be considered but, if facts are contested, the evidential weight afforded the bail summary should be affected by its late service and the lack of opportunity for the applicant to gather evidence to counter it.[48] The Tribunal's notice letter to applicants, their representatives and sureties requires the applicant's representative to serve on the Tribunal and the Home Office no later than 2pm on the day before the hearing the documents upon which they will rely at the hearing.[49] In practice this requirement is only loosely adhered to, with many representatives bringing copies of documents relied on to the hearing itself.[50]

The bail hearing

Bail hearings are heard in one of the Tribunal's hearing centres, usually in front of a single First Tier Tribunal immigration judge[51] or by an Upper Tribunal judge where the applicant has an appeal before the Upper Tribunal.[52] The hearing centre where an application is heard is determined by the applicant's place of detention. Each immigration removal centre and prison is paired with a Tribunal hearing centre and

42 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38.2

43 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38.3

44 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 39(1)

45 Tribunals Judiciary, Practice Directions of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, section 13.1-13.2

46 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 39(2)

47 UKBA, Enforcement Instructions and Guidance, chapter 57.7.1

48 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.2

49 FTTIAC, Bail applications: Notice to applicants, their representatives and sureties, para 8.

50 BID and the Immigration Law Practitioners' Association, Challenging immigration detention: a best practice guide, October 2003, p.87

51 Tribunals Judiciary, Practice Statements of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, section 2.1(7)

52 Tribunals Judiciary, Practice Directions of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, section 13.4

unless representations are made as to why a different hearing centre should be used, the designated hearing centre is where the bail hearing will take place. BID's experience of applying for bail hearings to be heard at a different hearing centre has been mixed and at some hearing centres our experience is that such requests are never allowed. This has also been the experience of some applicants

> *'I asked for bail hearing to be held in Birmingham because knew two sureties (including wife) would be unable to get to Newport: they live in Birmingham. Letter from court simply said hearing would be by video link with Newport – no explanation.'*[53]

Applicants have the right to attend the bail hearing (although this is now mostly done through a video link), to have a legal representative present (although this is not the same as an automatic right to legal representation), and to have an interpreter if needed.[54]

There is very little information within the Tribunal's Procedure Rules, Practice Directions or Practice Statements about how the hearing itself should be conducted. The main body of information available on the conduct of bail hearings was contained within the 2003 Bail Guidance Notes, underlining their importance. The Notes suggested that immigration judges conduct the hearing in three stages: firstly making a decision on whether bail should be granted in principle subject to suitable conditions; secondly, if bail in principle is granted, deciding whether sureties are necessary or whether other conditions will suffice; and thirdly, if sureties are deemed necessary, deciding whether the offered sureties and recognisances are satisfactory.[55]

The burden of proof at the hearing rests with the Home Office.[56] There is no statutory presumption in favour of immigration detainees in the way there is for those in criminal detention,[57] but the 2003 Guidance Notes drew attention to the common law presumption in favour of bail, UNHCR's view that there is a '*presumption against detention*', and the government's obligations regarding the right to liberty under the European Convention on Human Rights.[58] The Home Office's own policy also states that there is a presumption in favour of liberty[59] which suggests that it is incumbent upon the Home Office presenting officer (HOPO) to demonstrate why bail is not appropriate, rather than for the bail applicant to demonstrate why they should be released. For example, the 2003 Bail Guidance Notes stated

> *'As detention is an infringement of the applicant's human right to liberty, [the immigration judge has] to be satisfied to a high standard that any infringement of that right is essential. [...]It is suggested [that an immigration judge] adopt the "substantial grounds for believing" test which would be higher than the balance of probabilities but less than the criminal standard of proof.'*[60]

The Immigration Act 1971 does provide some circumstances under which an immigration judge is not obliged to grant bail. These are where the applicant (i) has previously failed to comply with immigration bail conditions, (ii) is likely to commit an offence unless kept in detention, (iii) is likely to cause a public health danger, (iv) has a mental illness so that detention is either in his/her own interests or for the safety of others, and (v) is under 17 years old and satisfactory arrangements for release are not available.[61] These categories are replicated as a tick box check list on the front page of the notice used by judges to refuse bail with one additional category which states '*I am satisfied that there are sufficient grounds for believing that if granted bail the applicant will abscond.*' A page is also attached for the reasons for the decision to be explained.

53 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p.8
54 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.1.2
55 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.4
56 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.5.1
57 BID and the Immigration Law Practitioners' Association, Challenging immigration detention: a best practice guide, October 2003, p. 14
58 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 1.4
59 UKBA, Enforcement Instructions and Guidance, chapter 55.3
60 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, paras 2.5.1 and 2.5.3
61 Immigration Act 1971, Schedule 2 para 30(2)

The decision

The immigration judge's decision about the outcome of the hearing must be given in writing to the applicant, to the Home Office and to the place of detention where the applicant is held.[62] A bail application can have three outcomes: it can be refused (and the applicant remains in detention); it can be withdrawn (so that the applicant can make their case again when circumstances are more likely to bring a favourable outcome, for example if the applicant can acquire sureties); or the application can be granted (and the applicant is released). Immigration judges have the power to release with the condition that the applicant surrenders to an immigration officer or the Tribunal at a designated date (known as the primary bail condition). The immigration judge may also apply '*conditions appearing [...] to be likely to result in the appearance of the appellant at the time and place named.*'[63] These so-called secondary bail conditions commonly include sureties, recognisances, residence restrictions, reporting requirements or electronic monitoring. The 2003 Bail Guidance Notes stated that prohibition of employment as a bail condition is not acceptable.[64] If bail is granted, it is only by breaking the primary bail condition that bail is breached,[65] although the Home Office has the power to re-detain people on bail if a condition of bail is breached or is thought likely to be breached.[66]

Where a bail application has been successful, the written notice of the decision must include the conditions of the applicant's bail and the amount of recognisance to which the applicant and any sureties are bound – this must be signed and filed with the Tribunal.[67] A refusal notice must include the reasons for the refusal.[68] As well as the written notices provided to both parties, the immigration judge must also keep a record of proceedings for the Tribunal, paying particular attention to the evidence given during the hearing, the main arguments for and against bail, their decision and reasons for it.[69] The Bail Guidance Notes advised that

> *'It has been suggested that the arguments for and against bail as well as the reasons for the decision should be incorporated in the written notice of decision. Provided such arguments are set out in your record of proceedings and the reasons for the decision are set out in your written decision, then the requirements will have been satisfied.'*[70]

Table 5 – Percentage of bail applications granted at the AIT/FTTIAC

- January – December 2006: 25%
- January – December 2007: 22%
- January – December 2008: 18%
- January – December 2009: 18%
- January – March 2010: 18%[71]

62 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 39(3)

63 Immigration Act 1971, Schedule 2 para 29(5)

64 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.4.6

65 UKBA, Enforcement Instructions and Guidance, chapter 57.8

66 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 1.5; UKBA, Enforcement Instructions and Guidance, chapter 57.14

67 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 39(4) and 40

68 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 39(5)

69 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.7

70 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.10

71 Figures taken from a Ministry of Justice response on 5 May 2010 to a Freedom of Information Act request made by BID

Video-link bail hearings

Since spring 2008, virtually all immigration bail hearings have been heard by video link. This means the bail applicant remains at their place of detention and the immigration judge, the Home Office presenting officer, and the legal representative, interpreter and sureties (if the applicant has them) attend the hearing centre. The change to video-linked bail hearings came about as a result of problems with private contractors used by the Home Office to transport bail applicants to their hearings. It was common for the contractors not to take detainees to the Tribunal on time, or at all, for their bail hearings; too often the contractors' vans did not turn up to collect the applicant, turned up late or failed to arrive at their destination. As a result, detainees were obstructed from accessing the Tribunal, court time was wasted, and the friends and families of applicants, who had often traveled long distances to stand surety, were unnecessarily and expensively inconvenienced.[72]

In December 2006, the AIT announced its intention to introduce bail hearings by video link. Both the AIT and the Home Office argued that video hearings were a way of addressing the long running problems with contractors while saving time and money. A pilot of bail hearings by video link for immigration detainees held in prisons started in April 2007. In September 2007, the AIT confirmed that on the basis of the pilot in prisons, which involved twenty two cases, video-link hearings would be rolled out to immigration removal centres. Now nearly all bail hearings are video-linked and only in 'exceptional circumstances' are requests for an in-court hearings accepted.[73] As there is no guidance on how the meaning of 'exceptional circumstances' should be interpreted, many bail applicants, and their legal representatives, remain unclear about what it means and in practice bail hearings are in the vast majority of cases conducted by video-link.

The timing of bail hearings

There is no right to an automatic bail hearing after a set number of days in detention. Instead it is incumbent on the applicant to know about bail and to make an application, with the help of a legal representative if they have one and on their own if not. The Immigration and Asylum Act 1999 introduced powers for the government to enact automatic bail hearings for immigration detainees after they had been detained for seven days and 35 days.[74] This was the cause of great excitement among those supporting immigration detainees. It was hoped that there would be a diminishing need for the services provided by BID as legal aid lawyers would soon be automatically making bail applications in line with the legislation. However in the very next piece of primary immigration legislation, the Nationality, Immigration and Asylum Act 2002, these powers were repealed before they came into force.[75] As Macdonald's notes, this

> *'is to be regretted as a lost opportunity to provide greater access to scrutiny of decisions to detain, particularly for those held in long-term detention, many of whom are inadequately represented.'*[76]

While there remains no right to an automatic bail hearing, there is no limit on the number of bail applications that can be made by a detainee.[77] The Tribunal's Procedure Rules state that repeat applications should demonstrate any change of circumstance since the previous application[78] – such as the applicant having acquired sureties or having signed up to a voluntary return scheme. The 2003 Bail Guidance Notes also stated that if 28 days had passed since a previous bail application, old evidence should be treated by the immigration judge as fresh evidence due to the passage of time and owing

72 See BID, Briefing on failure to produce bail applicants at court and AIT proposal for video conferencing of applications for immigration bail, June 2007

73 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008

74 Immigration and Asylum Act 1999, sections 44-52

75 Nationality, Immigration and Asylum Act 2002, section 68

76 Macdonald and Webber, Macdonald's Immigration Law and Practice, para 17.8

77 UKBA, Enforcement Instructions and Guidance, chapter 57.7.3

78 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38(2)(h); AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 3.1

to the seriousness of the deprivation of liberty.[79] Many of the applicants whose hearings we examined during this research had previously applied for bail on numerous occasions, including one applicant who was making his thirteenth application, one who was making his tenth application and one who was making his ninth application.[80]

Legal aid is available for immigration detainees to access legal advice and representation to challenge their detention, although the experience of many detainees is that legal aid exists in name alone.[81] Bail applicants who manage to find a legal aid lawyer have to pass both a means test, to assess their financial eligibility, and a merits test, to assess the merit of their application, before the provision of legal aid is agreed. Immigration detainees who have had the merits of their substantive asylum and immigration case refused should have the merits of their bail case reviewed separately. Given the direction in the 2003 Bail Guidance Notes that old evidence should be treated as new every 28 days, BID believes there is good reason for the legal aid merits test to be passed in bail cases at least every 28 days and more frequently where fresh evidence emerges.[82]

Appealing bail refusals

There is no route within the Tribunal to appeal a decision to refuse bail. It is possible for an applicant to judicially review the immigration judge's refusal of bail in the High Court, but in practice it is often quicker and easier to apply for bail again. Many bail applicants are unaware that the option of judicially reviewing a bail refusal exists and/or feel that it can only be pursued with a legal representative, which many detainees do not have. For these reasons judicial reviews of bail refusals are rare. In the cases examined in our research many barristers recommended referring the case they had represented for an application to judicially review the legality of the applicant's detention,[83] and several specifically stated they were putting their energy into this rather than judicially reviewing the bail refusal itself or complaining to the Tribunal about inappropriate judicial actions or decision-making.

Other routes to challenging detention

There are specific jurisdictional differences between challenging the legality of detention and examining eligibility for bail.[84] For example bail is not an alternative remedy that must be exhausted before an application to judicially review the decision to detain can be made, and a bail refusal does not mean the decision to detain is itself lawful. However in practice '*the issues of eligibility for bail and lawfulness of detention are sometimes difficult to separate*',[85] an example being a recent, seemingly erroneous, statement of the Court of Appeal that

> *'We also bear in mind also (sic) that the claimants had the right to apply for bail to an independent tribunal, at which it was possible for the continuing reasonableness of their detention to be challenged.'* [86]

The lawfulness of the decision to detain can be challenged by making an application to the High Court either by way of a judicial review (where the power to detain exists but the challenge is to the exercise of that power) or a Habeas Corpus application (where the challenge is to the power to detain). In practice these High Court challenges are inaccessible to many detainees, in particular those without legal representation.

79 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 3.3
80 Cases 5, 8 and 16
81 BID, Out of sight out of mind: experiences of immigration detention in the UK, July 2009, pp.39-44
82 See BID, The right to legal aid in bail cases: BID bulletin for immigration detainees number 29, December 2009
83 Cases 8, 9, 11, 12, 13, 19, 27, 28, 34,
84 See R (Konan) v SSHD [2004] EWHC 22 (Admin), para 30
85 Macdonald and Webber, Macdonald's Immigration Law and Practice, para 17.56
86 R (WL and KM) v SSHD [2010] EWCA Civ 111, para 122

1.4 Who would need to apply for immigration bail?

Amidst the legal jargon and references to case law it can be hard to remember that at the heart of the bail process are human beings denied their right to liberty. Detainees' physical isolation in places of detention, and the serious deficiencies in the official data collected and published on immigration detention, render them for the most part invisible to the general public and under-consulted in the formulation of public policy that affects them.

The broadening of powers to detain has meant that the range of people who experience immigration detention in the UK is now very diverse and includes people who only a few years ago would not have expected to be detained. For example, inside immigration removal centres there are

- the family members of British citizens including wives, husbands and partners, mothers and fathers, and children
- long-term UK residents with indefinite leave to remain, including men and women who came to the UK as small children, who have served a custodial sentence and have been notified that the Home Office intends, or is considering whether, to deport them
- children born in the UK to asylum seekers and migrants, who routinely end up in immigration detention for weeks at a time
- asylum seekers, including torture survivors, who have come to the UK seeking sanctuary but end up having their claims decided in detention
- recognised refugees who have had their refugee status revoked as the result of a custodial sentence
- people with serious medical conditions including those who are HIV positive, who have experienced strokes and heart attacks, or who suffer from serious mental ill-health

All these groups, with the exception of children detained with their families, were represented in the bail cases we examined for this research.

The people whose cases we examined were detained in six of the UK's eleven immigration removal centres. None were detained in prisons or any other detention facilities at the point at which the bail applications examined for this research were made. On average they had spent nearly sixteen months in immigration detention, although the average period of detention in the bail cases BID prepared was over eighteen months. They came from over twenty four countries – mostly in Africa, the Middle East and Asia – and included eight people whose nationality remained in dispute. The country whose nationals were most represented was Algeria (n=9) followed by Somalia (n=4) and then China (n=3), India (n=3), Iran (n=3), Iraq (n=3), Jamaica (n=3), Nigeria (n=3), Sierra Leone (n=3) and Sri Lanka (n=3). In all of the unrepresented bail hearings BID observed, the bail applicants were men. In the cases prepared by BID 19% (n=7) were women.

Over half of the thirty six cases prepared by BID (n=20) had claimed and been refused asylum at the point the bail application examined for this research was made – this was also the case for at least 24% of the unrepresented bail applicants (n=7). A quarter of the BID cases (n=9) had outstanding asylum or human rights applications. Over 20% (n=8) of the BID cases had previously been granted some form of discretionary leave to remain – most commonly as a result of claiming asylum in the UK as an unaccompanied child and being granted discretionary leave to remain until they turned eighteen, or under previous country policies that granted exceptional leave to remain to particular nationalities. In 8% of the BID cases (n=3) the applicants had previously been granted indefinite leave to remain and this was also true for 3% (n=1) of the unrepresented applicants. One of the unrepresented applicants had been recognised as a refugee but at the point of his bail application had spent over five months in detention while the Home Office considered whether to revoke his status as the result of a criminal

conviction.[87]

Over 90% of the BID cases (n=33) had been given a deportation decision, either by the courts or the Home Office. This was also the case in just under half of the unrepresented cases (n=14). In 97% of the BID cases (n=35) and in two-thirds of the unrepresented cases (n=19) the applicant had served a custodial sentence for a criminal offence. In the sample of BID cases, the offences for which people had served a sentence included false document and immigration offences (n=11); robbery, theft or shoplifting offences (n=10); drug offences (n=7); violent offences (n=4); and driving offences (n=1). In the sample of unrepresented cases the most common offences were false document and immigration offences (n=10), followed by drug offences (n=4), robbery, theft and shoplifting offences (n=3) and sex offences (n=1).[88]

There were no children in detention in the bail applications we examined for this research but over 10% (n=3) of the unrepresented applicants and 22% (n=8) of the applicants whose cases were prepared by BID had children in the UK, including British citizen children and British citizen stepchildren. The period of detention in these cases ranged from four months to two years and nine months, although five of the eight cases with children in the UK had been in detention for more than a year and two of the eight cases had been in detention for over two years.

The research data highlights both the length of time that people had spent in the UK at the point at which the bail application examined for this research was made, and the expanding nature of detention and deportation powers. For example, the sample included a significant number of people who had previously been given some form of limited leave, indefinite leave, or refugee status; a high number of people who were in detention as the result of deportation proceedings; and a considerable proportion of people who had children in the UK, including some with children who were British citizens.

While the proportion of people who had passed through the criminal justice system before entering detention was high, and the range of offences committed was wide, it is significant that the most common offences in both the unrepresented cases and the cases prepared by BID were false document and immigration offences. Typically those convicted of false document offences were given a twelve-month prison sentence and the time they actually served in prison was less than this. Over 20% of the total research sample had spent more time as an immigration detainee than they had serving their prison sentence.[89] This included a mother with two children in the UK who had been given a two year sentence for drug offences but had since spent a further two years and five months in immigration detention.[90] A man, who had doctored his asylum identity card (ARC card) so that he could obtain employment, was sentenced to six months in prison with a recommendation from the court to deport him from the UK. Since the end of his sentence he had been held in immigration detention for a further one year and eight months.[91] In another case, the immigration judge (before going on to refuse bail) voiced his concern that the amount of time the applicant had spent in immigration detention was equivalent to a four year sentence. The applicant's original criminal sentence was for 20 months.[92]

Although each of the bail applicants had their own distinctive experiences, one set of experiences was particularly prevalent in the research sample: young men who arrived in the UK as small children with their families fleeing war-torn countries and who were given leave to remain in the UK, which often resulted in some family members choosing to become British citizens. As teenagers the young men became addicted to drugs or alcohol and began a pattern of juvenile offending – usually petty theft and shoplifting to feed their drug habit, and possession of drugs with intent to supply – which escalated until they were eventually sentenced to a term in an adult prison. As a result of their criminal conviction

87 Case V

88 Where people had served more than one custodial sentence the offence which incurred the longest sentence is listed.

89 Cases T, AB, 3, 4, 16, 20, 23, 25, 26, 27, 31, 35 and 36

90 Case 4

91 Case 35

92 Case 27

the Home Office initiated proceedings to deport the young men from the UK or decided to detain them pending a decision on whether the 'automatic deportation' regime applied. At the end of their prison sentence they were not released but became immigration detainees and as a result of problems enforcing returns to their country of origin, or a lack of travel documents, they remained in immigration detention for prolonged periods, sometimes for several years. Successive bail applications were refused on the grounds that their criminal history displayed a disregard for the law and that if released they would inevitably abscond or re-offend. This was broadly the experience of 25% of the bail applicants whose cases were prepared by BID.[93]

For example, the applicant in Case 12 came to the UK as a young child to join a parent who had been granted refugee status. He was originally from Somalia but his family are now all in the UK and he was granted indefinite leave to remain. While he was growing up his family structure broke down. He developed a drug habit and was sentenced to two years in a young offenders' institution (YOI) for theft. Further offending resulted in him being sentenced to four years in an adult prison for possession of Class A drugs with intent to supply and the Home Office issued a deportation order. At the time of the bail hearing we analysed, which was refused, he had spent two years and four months in immigration detention. His father and brother, both UK nationals, were standing surety in his bail application. The Home Office failed to serve a bail summary for the hearing but the judge refused bail in principle due to his risk of re-offending, risk of absconding and failure to cooperate with the deportation process. The barrister representing his case reported

> *'the applicant is Somali and it is therefore very unlikely that he is going anywhere any time soon. In my view this matter should be referred to a solicitor for an assessment of the merits of judicially reviewing the lawfulness of the detention [...] as a matter of urgency.'*

93 Cases 11, 12, 13, 16, 17, 18, 19, 20 and 34

2 What are the barriers to people applying for bail?

In BID's casework experience, by the time a bail application is heard the applicant has already faced many barriers to challenging their detention. This section examines the building blocks of the bail process leading up to the bail hearing and identifies what we believe are the systemic barriers that impact on detainees' access to bail. While the issues identified here relate to processes and procedures rather than decision-making, it is our view that these pre-hearing barriers have a cumulative, tangible impact on the outcome of bail hearings.

2.1 Lack of knowledge about bail

> *'My name is Dennis. I was detained at Dover Immigration Removal Centre for about three months. I was given bail forms by the immigration officer but I did not apply for bail because I felt that there was no hope of getting it. I had no sureties and no address. One of my cellmates applied for bail and he did not get it. I thought if my friend cannot get bail with £1,500 there was no hope for me with £1. I then saw an advert for the BID workshop in the library. When I was at the workshop I started to think I could get bail. They helped me understand the way to get bail and the reasons I should give to the immigration judge. The workshop also made me understand that I could apply for bail many times.' – taken from BID, How to get out of detention: a free guide for detainees, October 2009*

The repeal of the automatic bail hearing provisions in the 1999 Act before they were ever enacted means that in order to use bail to challenge their detention, the many immigration detainees without quality legal representation must themselves know that the bail process exists, what it means, how it works and how to make an application. The situation causes particular problems for people who do not speak English (not least because the form used to make a bail application is only available in English), for those who are illiterate, detainees who are held in prisons (as communication with lawyers and support groups such as BID is restricted) and for detainees with mental health problems. At the end of its 2007 inquiry into the treatment of asylum seekers, the Joint Committee on Human Rights recognised the impact of this situation on detainees' ability to access bail, stating

> *'We have heard considerable evidence that although the right to apply for bail is available to all detained asylum seekers after seven days, in reality many detainees are unaware, or unable to exercise, this right because of language difficulties, a lack of legal representation and mental health issues.'*[94]

Home Office guidance states that when a person is given written reasons for their detention they must also be '*informed of their bail rights*' by an immigration officer.[95] The guidance says that the reasons for detention must be explained to the detainee using an interpreter if one is needed, but it is unclear whether this provision extends to an explanation of bail rights. Furthermore because immigration officers are not legally trained they can only 'inform' the detainee about their bail rights rather than 'explain' them. It remains the case that very many immigration detainees do not know about bail or

94 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 280

95 UKBA, Enforcement Instructions and Guidance, chapter 55.6.3

understand how to access the bail process. BID legal staff are regularly contacted by detainees asking them to explain the bail information given out by the Home Office.

Lack of accurate information about the bail process also means that myths about bail are common within immigration removal centres and prisons. As a result people do not always make a bail application as quickly or as effectively as they could do. It is common for BID's legal staff to meet people who have been detained for two or three months but who have not yet made an application for bail, often as a result of language or literacy problems. For example, when BID staff begin to work with detainees and ask why they have not previously made a bail application, reasons given have included '*you can only apply for bail every six months*', '*it costs £500 to make a bail application*', '*you have to have thousands of pounds of recognisance before you can apply*', '*you have to have two sureties before you can apply*', '*you have to have family in the UK to stand as sureties*', '*you will be refused if you have a criminal conviction*'. None of this is true but in the closed environment of an immigration removal centre or prison, these bail myths can quickly establish themselves as facts, particularly given the well-documented problems for detainees in acquiring high-quality legal advice.

Lack of knowledge about bail percolates throughout the bail process. Even if someone knows enough about bail to make an application, their lack of knowledge may still present a barrier at the hearing itself. For example, in one of the unrepresented cases we examined, the applicant told the immigration judge that he did not know how to properly fill out the B1 form. He was unaware that sureties should put up a recognisance and as a result his two sureties had not done so. In his verbal reasons for refusing bail the immigration judge noted that '*[t]he sureties have put up no recognisance in spite of one being an accountant and one a hairdresser.*'[96]

2.2 Difficulties accessing high-quality legal advice

There is a clear connection between lack of accurate knowledge about bail and the problems detainees face in accessing high-quality legal advice. BID's very existence, providing information about bail and empowering detainees to make their own bail applications, is testament to the continued unmet need for legal advice among immigration detainees. Far from being able to quietly disband with the advent of the proposed automatic bail hearings, the demands upon BID's services are growing year on year. The serious gap between the demand for and supply of legal advice in immigration removal centres has been recognised by Her Majesty's Chief Inspector of Prisons, who in evidence to the Joint Committee on Human Rights stated that '*as a general rule, it remains extremely difficult for detainees to find a competent and available legal representative [...] less than half of the detainees we have surveyed have had a legal visit in detention*'.[97] The implications for the judiciary of applications without legal representation have also been commented on by the former President of the AIT who in evidence to the same parliamentary committee commented that '*more people were appearing unrepresented than before legal aid cuts, and the quality of legal representation in general had gone down*'.[98] In July 2008 he told a meeting of AIT stakeholders that '*the administration had informed him approximately 80% of applicants were represented and 20% unrepresented in bail hearings, although these figures fluctuated.*'[99] In research conducted by BID and the Refugee Council in 2008, 50% of applicants in the bail applications examined were not legally represented and none of the cases without legal representation were successful.[100]

The vast majority of people held in immigration detention rely on publicly-funded legal aid to access a lawyer. However despite its overwhelming importance, legal aid in the immigration system has been subject to successive cuts and restrictions which have heightened the barriers to detainees accessing

96 Case AC

97 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 286

98 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 288

99 Minutes of AIT stakeholders' meeting, July 2008, para 3

100 Bail for Immigration Detainees and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p.6

free advice.[101] This has left large numbers of immigration detainees relying on a handful of committed lawyers, turning to overstretched charities, scraping together money to pay private lawyers who charge for their services, or representing themselves. For example, one of the hearings we examined was the applicant's seventh bail application - two were made with solicitors, in three he had represented himself and this was his second application prepared by BID.[102] In December 2005 a scheme was set up by the Legal Services Commission (the government department responsible for administering legal aid) to provide thirty minutes of free legal advice in immigration removal centres but many of the detainees BID works with continue to be unaware of this service. For example, between August 2008 and July 2009, just 6% of detainees who completed a feedback questionnaire following BID's workshops at Yarl's Wood had been to see the free legal adviser. At Harmondsworth and Colnbrook none of the detainees we asked said they had used the service.[103]

Restrictions on the part of the Legal Services Commission on the provision of legal aid for immigration advice are compounded by the practices of some lawyers in deciding whether cases pass the merits tests required to access legal aid. Any case with human rights concerns, such as a bail case, must be judged as having a 50% prospect of success in order to qualify for legal aid. BID frequently supports people who have been refused legal aid because a lawyer has wrongly applied the merits test, either by failing to judge the merits of the bail case and the substantive asylum or immigration case separately, or by applying the wrong measure of success. This is not helped by the continuing lack of clear, accessible guidance from the LSC about the application of the merits test in bail cases. In many of the cases BID sees where legal aid has been refused, the lawyer has also failed to issue the detainee with an appeal form, called a CW4 form, which leaves them unable to appeal the lawyer's refusal to provide legal aid.[104]

As well as the barriers posed by the legal aid system and the misapplication of the merits test by some legal aid lawyers, two groups of immigration detainees face particular barriers to their search for high-quality legal advice. Firstly, people held under immigration powers in prisons, rather than immigration removal centres, are prejudiced by the added difficulties in communicating with lawyers, sureties and support agencies from within a prison. It is not possible for immigration detainees in prisons to send and receive faxes, use mobile phones or access the internet in the same way as immigration detainees in immigration removal centres. Often the only way that BID can communicate with detainees in prisons is by post. Correspondence can take nearly a week to arrive, resulting in extra time spent in detention while a bail application is properly prepared. Furthermore, some prisons are located in geographic areas where there is not a ready pool of immigration lawyers, for example Dartmoor, the Isle of Wight and the Isle of Purbeck. This means that trying to find and engage an immigration lawyer, who is willing to travel for many hours in order to see their client in detention, is particularly problematic. Talking about the experience of her partner Joseph, an immigration detainee in prison, Regina (a British citizen) told us

> *'You're behind yet another door before you can access anything in prison. He hasn't really been able to access legal advice in prison.'*[105]

The introduction by HM Prison Service in May 2009 of a new 'hub and spoke' arrangement, designed to increase the speed and efficiency with which male foreign national prisoners can be removed from the UK,[106] and Home Office plans to increase detention capacity by using certain prisons for immigration detention, raise additional concerns for detainees' ability to access legal advice.

101 See BID, Out of sight out of mind: experiences of immigration detention in the UK, July 2009, pp.39-44; BID and Asylum Aid, Justice Denied: Asylum and Immigration Legal Aid – A system in crisis – Evidence from the front line, April 2005

102 Case 9

103 BID, Annual Report 2009: Challenging immigration detention in the UK, pp.6-7

104 See BID, The right to legal aid in bail cases: BID bulletin for immigration detainees number 29, December 2009

105 BID, Out of sight out of mind: experiences of immigration detention in the UK, July 2009, p. 43

106 Ministry of Justice National Offender Management Service and Home Office UK Border Agency, Service Level Agreement to support the effective management and speedy removal of foreign national prisoners, April 2009

Secondly, at BID we work with many detainees who have been transferred around a series of immigration removal centres and prisons within the Home Office's detention estate. Transfers mean that links with lawyers, sureties and support groups can be severed. This was the experience of Dilip, a young man supported by BID:

> *'I got a legal aid representative in Dover, but when immigration send me to Oakington my solicitor he called me and said they are moving you to Oakington and it's not my area so I don't do any more your case. After, he said, I am no more your solicitor."*[107]

The implications for people transferred to immigration removal centres across the Scottish/English border can be especially severe. As the judicial system and the administration of legal aid differ on either side of the border, detainees transferred to or from the immigration removal centre at Dungavel in Lanarkshire almost always have to find a new solicitor to represent them. This dislocation from services can have a disastrous impact on a detainee's ability to promptly challenge their detention and frequently leads to extended periods in detention while a new lawyer is sought and a fresh bail application prepared.[108]

In one of the cases we examined the applicant's move across the border and away from her solicitor undoubtedly resulted in delays in her being able to make a bail application. At her last hearing 20 months previously, the immigration judge refused the application but commented '*there may come a time that the length of time the applicant was detained outweighed the risk of her absconding but I did not consider that it did at the present time*'. In the witness statement for the bail hearing examined for this research the applicant stated

> *'I was transferred to Yarl's Wood in September 2008 where I have been for over a year. I have not applied for bail throughout my time here because my solicitor is in Scotland and I didn't know how to do it alone.'*

Her bail application was granted.[109]

2.3 Lack of sureties

> *'"Clearly it would be wrong to require sureties, if there were no need for sureties, but where one reaches a situation where one cannot otherwise be sure that the obligations will be observed, Parliament has rightly provided that that extra ammunition is available to [...an immigration judge] dealing with these matters if, in fact, that will have the consequence that a person who might not otherwise be granted his liberty will be granted it." (ex parte Brezinski & Glowacka, Kay J.)' – taken from AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.2*

One of the most common myths prevalent within immigration removal centres and prisons but also among some lawyers, is that sureties are required before a bail application can be made. Sureties are seen by the Tribunal and the Home Office as one way of exerting control over the actions of a person released on bail because sureties risk losing their recognisance if they do not take all reasonable steps to prevent the released bail applicant absconding or to notify the authorities if they do.[110] However there is nothing in law or in policy that says it is mandatory to have sureties in order to make a bail application, or that a successful bail outcome is dependant on the ability to propose sureties. Instead the Procedure

107 BID, Out of sight out of mind: experiences of immigration detention in the UK, July 2009, p. 39

108 For example see R (Konan) v SSHD [2004] EWHC 22 where despite being detained since June 2002 it was not until September 2002 that the family's solicitor put in a bail application. In paragraph 26 of the judgment Justice Collins comments '*[n]o doubt the removal to Scotland played a part in this.*'

109 Case 4

110 UKBA, Enforcement Instructions and Guidance, chapter 57.6.2; AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.2

Rules require that the bail application form must contain

> *'the full names, addresses, occupations and dates of birth of any persons who have agreed to act as sureties for the applicant if bail is granted, and the amounts of the recognizances in which they will agree to be bound'*[111] *[emphasis added]*

This position was also emphasised in the 2003 Bail Guidance Notes which said

> *'[i]t should be born (sic) in mind that asylum seekers rarely have friends or relatives in the United Kingdom who can act as sureties [...immigration judges] are reminded that sureties are only required where you cannot otherwise be satisfied that the applicant will observe the conditions you may wish to impose.'*[112]

BID has supported many bail applicants to successfully run their own bail applications without offering sureties. However it is true that for some applications, depending on the perceived risk of the applicant absconding upon release, an immigration judge may decide that only one, or even two, credible sureties will suffice in order for them to grant bail. Of the 16 cases prepared by BID that were refused bail, half had no sureties, and of the 17 cases granted bail, ten (59%) had one or two sureties. In the 29 unrepresented bail cases we examined 13 of the 19 refusals were applications with no surety and, of the eight cases where one surety was proposed, four were either withdrawn or refused with the surety not present in court.

Table 6 – Sureties in the bail cases prepared by BID

	Bail granted	Bail withdrawn	Bail refused
No sureties	7	0	8
One surety	8	2	2
Two sureties	2	1	6

Table 7 – Sureties in the unrepresented bail cases observed by BID

	Bail granted	Bail withdrawn	Bail refused
No sureties	0	2	13
One surety	1	3	5
Two sureties	3	1	1

Finding sureties for a bail application is not straightforward. Serious commitments are required of proposed sureties and in many cases, after a series of unsuccessful bail hearings, sureties become disillusioned about the bail process and their role within it. For example sureties are required to take time from work and self-fund long journeys to a bail hearing (often on more than one occasion if bail is not granted at the first hearing), agree to have their personal circumstances (including their finances, any criminal convictions and their immigration history) examined by the Home Office and the immigration judge,[113] enter into a signed undertaking with the court and, if that undertaking is broken, agree to return to court with the possibility of facing significant financial penalties.[114] BID has lobbied the Tribunal

111 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38(2)(g)

112 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, paras 2.2.1-2.2.2

113 The Tribunal requires that sureties bring to the hearing evidence to prove their identity (passport or other means of establishing identity and settlement in the UK), income (wage slips or latest set of accounts, bank/building society statements for the previous three months) and assets (rent book or mortgage statements, evidence of their address, documentary evidence showing the value of their property or other assets). FTTIAC, Bail applications: Notice to applicants, their representatives and sureties.

114 However the 2003 Guidance Notes noted that immigration judges cannot compel sureties to attend bail renewal hearings as '*[t]hey entered into their recognisances for the applicant to comply with conditions, not for them to comply with conditions.*' AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 4.2

for greater flexibility in listing bail applications, advocating the use of video links between hearing centres so that sureties who are on low incomes, but who are otherwise able to provide a meaningful recognisance commensurate with their earnings, are not unnecessarily disadvantaged by having to travel long distances to attend a hearing.[115] For example, BID has experienced particular problems having cases listed at Newport, the hearing centre paired with Campsfield Immigration Removal Centre in Oxfordshire. Travel costs to Newport from London can amount to over £120 and sureties often find that they have to travel very long distances - a half day attendance at court invariably means taking a full day off work and sometimes also having to stay in Newport overnight.

For people detained on arrival in the UK, acquiring sureties who are willing to make these sacrifices is a particular problem. The geographic location of immigration removal centres, government-provided accommodation for asylum seekers, and government provided bail addresses also serve to limit bail applicants' chances of being able to propose acceptable sureties. The majority of asylum seekers are dispersed to government-provided accommodation in the Midlands and the north of England. This is where most people who claim asylum in the UK are housed, sometimes for years, while their claims are processed. It stands to reason that for many detainees this is where their friends, networks and potential sureties are located. In contrast, with the exception of Lindholme near Doncaster and Oakington in Cambridgeshire, all of the ten immigration removal centres in England are situated in the south of the country. This makes it difficult for friends to visit people once they have been detained because of the distances involved and the time and expense incurred. For some people being taken into detention therefore means losing contact with previous networks.

For those who are able to sustain relationships and who have friends who are willing to stand as sureties, at the bail hearing the surety has to explain how they will be able to exert influence on the applicant to comply with bail conditions. This requirement is further complicated by the fact that since June 2009 the vast majority of government provided bail addresses are located in the London area. So, for example, a surety from Liverpool who got to know a bail applicant during the years the applicant was dispersed in the north west of England has to explain to an immigration judge how he/she will be able to exert influence over the applicant's behaviour if they were to be released to a government-provided bail address hundreds of miles away in south London. While the geographic distance between sureties and the bail applicant is not an automatic bar to the sureties being accepted, it is one factor that the judge is likely to examine to assess the sureties' ability to suitably discharge their obligations.[116]

In one of the cases we examined the applicant had met her surety through her church attendance when she was dispersed to live in the North of England. The surety attended the bail hearing but was unable to convince the immigration judge that he would be able to maintain sufficient contact with the applicant if she was released to a bail address in London. This was the reason given by the immigration judge for refusing bail.[117]

115 Correspondence between BID and the AIT, 4 March 2009

116 In the surety check list attached to the AIT's Bail Guidance Notes for Adjudicators from the Chief Adjudicator (May 2003) immigration judges are advised to consider (i) evidence of the surety's identity, (ii) the relationship between the applicant and the surety, (iii) the occupation and income of the surety, (iv) the surety's assets and liabilities, (v) whether the surety has any criminal convictions, (vi) the stability of the surety's lifestyle, and (vii) whether the surety is sufficiently aware of his/her obligations.

117 Case 28

2.4 Difficulties acquiring a bail address

The Procedure Rules require that an application for FTTIAC bail gives the proposed bail address where the applicant will live if released, or a reason why such an address cannot be given.[118] A bail form without an address risks being considered incomplete and not lodged[119] or, if it is lodged, the immigration judge refusing the application or suggesting it is withdrawn. Simply put, no bail address means no real opportunity to challenge detention. This is because immigration judges cannot properly consider any bail conditions, including suitable reporting conditions and the proximity of any proposed sureties, without the address.

Difficulties acquiring a bail address are connected to problems acquiring sureties. Many applicants with sureties put one of their sureties' addresses as their bail address. Where this is not possible, for example where the surety lives in a one-bedroom flat, where another private address is not available, or where the applicant has no surety, they are forced to rely on bail accommodation provided by the government. Accommodation for people '*released on bail from detention under any provision of the Immigration Acts*' is provided under Section 4(1)(c) of the Immigration and Asylum Act 1999 which, because of the government's obligations under Article 5 of the European Convention on Human Rights, is not subject to the same restrictions as the accommodation provided to refused asylum seekers under Section 4(2) and (3) of the same Act.[120]

Historically there have been serious problems at the Home Office with delays in processing applications for bail addresses. The Home Office operates a target of turning around 'Priority A cases', which includes bail cases, in two working days[121] - however in BID's experience this target is frequently not met and bail applicants' detention is prolonged while they wait for the Home Office to process their application for a bail address.

As the result of lobbying by groups supporting detainees, in June 2009 the Home Office changed the process for bail applicants to apply for a bail address. Home Office guidance has been clarified so that all bail applicants are entitled to bail accommodation for the purposes of a bail application. Instead of 'applying' for bail accommodation applicants now use the application form to inform the Home Office of their need for a bail address for a forthcoming hearing.[122] Changes have also been made to the process of administering bail addresses. Previously a bail address was only available for a 14-day window, after which a bail applicant would have to re-apply to the Home Office to acquire a fresh address. Due to the frequent delays at the Tribunal in listing a bail application (see below) and the near endemic delays at the Home Office in processing Section 4 applications, it was often the case that bail applicants, particularly those without legal representation, struggled to line up a valid bail address with a hearing date. Now most bail addresses are valid until the applicant has their bail hearing, however long that might be, and re-applications are only necessary if the hearing is refused and not if it is withdrawn. This change has been achieved because people released on bail are now first housed in accommodation centres before being dispersed to a longer-term individual address. This arrangement, making use of free space in accommodation centres, is a cheaper option for the Home Office and has enabled the offer of a bail address to be extended. While people released on bail face the disruption of moving from an accommodation centre to their individual address, this process has greatly assisted detainees' access to bail addresses. However it remains the case that BID legal staff have to routinely chase the Home Office for bail addresses so that they are provided in time for a listed bail hearing and periodically delays

118 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38(2)(d)

119 An exception is made where the applicant is reliant on a government-provided bail address and notes on the B1 form that the address has been applied for and will be confirmed by the time of the hearing - AIT, Stakeholder Meeting Minutes, January 2009, para 2.

120 These additional restrictions are contained within Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005

121 Letter to BID, London Detainee Support Group and Refugee Council from UKBA Case Resolution Directorate, 14 February 2008; Correspondence between BID and UKBA NAM+, 7 August 2009

122 UKBA, Asylum Process Instruction: Section 4 Bail Accommodation, p.3: '*the only eligibility criteria that a bail applicant must satisfy for the provisional grant of a section 4 bail address is that he/she is currently in detention, and intends to apply to be released on bail under any provision of the Immigration Acts*'.

again become a problem.[123] We remain concerned that for unrepresented bail applicants the need to chase the Home Office for the timely production of a bail address continues to represent a barrier to bail.

There remain two important exceptions to the process improvements listed above. Firstly, the Home Office continues to refuse to routinely provide an address under Section (4)(1) of the 1999 Act for detainees released on temporary admission. This creates an arbitrary and irrational distinction between detainees whose release is opposed by the Home Office and are only released on the orders of the FTTIAC through a bail application (who are routinely provided an address) and detainees who are released on the orders of the Home Office through a grant of temporary admission (who are not routinely provided an address). In correspondence with BID the Home Office has argued that section (4)(1)(b) of the 1999 Act '*gives the UK Border Agency the ability to exercise the power [to provide accommodation to people released on temporary admission], but not the duty to use that power, and the UK Border Agency does not routinely exercise those powers.*'[124] In our view this risks breaching detainees' right to liberty (under Article 5 of the European Convention on Human Rights) where the only barrier to release is the provision of an address. Since the new Section 4 process was introduced, BID has already worked with detainees made destitute upon release on temporary admission because the accommodation centre refused to take them in, and others whose release on temporary admission was delayed by several days because the Home Office had not provided an address for them to be released to.[125]

Secondly, although Home Office policy states that 'asylum accommodation' should also be used to provide a bail address for foreign national ex-prisoners,[126] because accommodation centres also house people who have recently claimed asylum (including families with children) the Home Office has decided that bail applicants who they deem to be 'high risk' cannot be housed there. Despite requests from BID since September 2009, there is no publicly disclosed guidance on how the Home Office judges a case to be high risk, or clarification about whether the perceived risk is of absconding, re-offending, causing harm to others, or a combination of the above. At the time of writing it is only possible to piece together the criteria that determine whether a case is judged high or low risk for the purpose of accommodation allocation on the basis of conversations with Home Office staff. Criteria seem to include whether or not the applicant has previously committed a violent or sexual offence and whether or not the applicant's behaviour in detention has been disruptive.

A Home Office Asylum Process Instruction[127] was amended in January 2010 to state that 'it is imperative to ascertain the nature of any criminal offence committed by the applicant, so to ensure appropriate accommodation is allocated', and that information to make this assessment can be sourced from the Home Office casework database (CID) and a partially disclosed harm prioritisation matrix.[128] However the Instruction does not mention what specific offences would result in a high-risk rating for the purposes of accommodation allocation. Being designated a high risk case is relevant to bail applications because such detainees are given an individual bail address straight away rather than an accommodation centre address. Due to a shortage of housing stock, internal guidance that all bail addresses must be in the same region as the applicant's place of detention, and a desire not to group too many applicants

123 For example, in July 2009 there was a two week backlog of bail address applications (Correspondence between BID and UKBA NAM+, 24 July 2009) and in September 2009 there was a four day backlog (Meeting between BID, LDSG and UKBA London and South East Region Initial Accommodation, 10 September 2009).

124 Correspondence between BID and UKBA NAM+, 7 July 2009

125 Correspondence between BID and UKBA NAM+, 17 September 2009 and between BID and UKBA London and South East Region Initial Accommodation, 16 February 2010

126 UKBA, Enforcement Instructions and Guidance, chapter 55.20.5.5

127 UKBA, Asylum Process Instruction: Section 4 Bail Accommodation, p.13

128 In August 2009 BID made a request for detailed disclosure of the harm matrix under the Freedom of Information Act. This request was finally refused in April 2010 because '[i]n light of our intention to publish the Harm Matrix and staff instructions in future we have decided not to communicate this document and the associated UK Border Agency staff instructions, pursuant to the exemption in section 22 (1) of the Freedom of Information Act 2000. This allows us to exempt information if it is intended for future publication...Publication would undermine ...internal consultation about the revision of the Harm Matrix, including consideration of disclosure of elements which relate to processing of intelligence.' Letter from UKBA Briefing and Correspondence Team to BID, 12 April 2010. Partial details of the three removal categories of the harm matrix were subsequently published in the Home Office, Control of Immigration: Quarterly Statistical Summary, United Kingdom - First Quarter 2010, Section 3.3

together upon release, there are substantial delays in the processing of high risk applications. In February 2010 BID legal staff put the delay at over two months.[129] Despite repeated requests from BID, the Home Office has not provided a target timescale for high-risk cases to be processed. In January and February 2010 BID legal staff had to withdraw listed bail applications solely because the Home Office had failed to provide an individual bail address for cases we understand to have been deemed high risk. BID has also worked with detainees who have not been able to lodge a bail application because their case has apparently been assessed as high risk and the Home Office can give no timescale for the provision of their bail address.[130]

In our view the serious delays in providing bail addresses for high-risk cases, and the failure to disclose the policy upon which these decisions are being made, again risks breaching bail applicants' Article 5 rights and discriminates against certain groups of bail applicants, especially ex-offenders who have already served their criminal sentence. In one of the BID prepared cases examined for this research, the applicant had effectively been delayed in making a bail application for nearly three months because he had been designated a high risk case (the applicant had been placed on the Sex Offenders' Register as the result of an offence for which he was given a number of hours' community service). At a subsequent bail hearing, despite having been provided a bail address by the Home Office one of the reasons given by the Home Office presenting officer for opposing bail was that the '*subject possesses (sic) a risk to woman (sic) and children and is not suitable for section 4 for bail address.*'[131]

2.5 Difficulties listing a bail application

Given the seriousness of the deprivation of liberty, the Tribunal's Practice Directions state that if practicable a bail hearing must be listed within three days of receipt.[132] In practice the Tribunal operates a three-day target for listing most cases with an additional three day tolerance for all cases to be listed within six days.[133] However as the Home Office's use of immigration detention increases, the number of people applying for bail also increases,[134] while the resources allocated to the Tribunal to hear bail hearings have not increased at a comparable rate. This has had a tangible impact on the time many bail applicants must wait to have their bail hearing listed. According to official figures over the last four years around half of all bail applicants have had to wait longer than three days to have their application listed.[135] For example according to Tribunal figures, between April and December 2009 11.5% of bail hearings were listed more than seven days after the application was received.[136] In other words during much of 2009 over one in ten bail applicants had to wait more than a week to have a hearing. There are also spikes in the delays experienced by bail applicants at particular times of the year, the most common being January. For example in January 2008 26% of bail applications were heard seven days or more after they were received.[137] When BID and other agencies have raised this at meetings of the Tribunal's stakeholders, the response has been that the delays are a matter of regret but that there are no resources to meet the increased need. As a result bail applicants have to wait for an opportunity to challenge their detention because the Tribunal is insufficiently resourced to meet the growing need created by the Home Office's use of detention.

129 Correspondence between BID and UKBA London & South East Region Initial Accommodation, 16 February 2010

130 Correspondence between BID and UKBA London & South East Region Initial Accommodation, 16 February 2010

131 Bail summary in Case 30. For further examples of how section 4 addresses are being treated by HOPOs and immigration judges in bail hearings see page 56

132 Practice Directions of the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, section 13.1

133 AIT stakeholders meeting minutes July 2008, para 9(iv)

134 See table on the 'Number of bail hearings at the AIT/FTTIAC'

135 See table on the 'Percentage of bail hearings listed at the AIT/FTTIAC within three days'

136 Figures taken from AIT Stakeholders' Bail Statistics prepared for January 2010 Stakeholders' Meeting

137 Figures taken from AIT Stakeholders' Bail Statistics prepared for April 2008 Stakeholders' Meeting

Table 8 – Number of bail hearings at the AIT/FTTIAC

- January – December 2006: 7,425
- January – December 2007: 8,152
- January – December 2008: 9,294
- January – December 2009: 10,076
- January – March 2010: 2,450[138]

Table 9 – Percentage of bail hearings listed at the AIT/FTTIAC within three days

- January – December 2006: 55%
- January – December 2007: 46%
- January – December 2008: 51%
- January – December 2009: 51%
- January 2010: 53%
- February 2010: 50%
- March 2010: 45%[139]

138 Figures taken from Ministry of Justice response on 5 May 2010 to a Freedom of Information Act request made by BID

139 Figures taken from Ministry of Justice response on 5 May 2010 to a Freedom of Information Act request made by BID

3 What are the barriers to bail experienced at bail hearings?

If bail applicants overcome all of the barriers that exist during the application process, they will attend a bail hearing for their application to be decided by an immigration judge. Bail hearings are conducted by a single immigration judge and the way the judge conducts the hearing has the clear potential to affect the outcome. For example, if two applications with the same set of facts were heard before judges with different approaches to the use of evidence, the role of interpreters, or the burden of proof, then the outcome of the two hearings could be very different. The majority of the published guidance available to immigration judges on the proper consideration of bail hearings was contained within the 2003 Bail Guidance Notes. In the first paragraph the Guidance Notes explained that they had been

> *'issued for the assistance of [immigration judges] when they are considering applications for bail. Although for guidance, they are issued in the hope that you will find yourself able to follow them so that there is some uniformity in both the procedure we follow and the decisions we reach."*[140]

The Guidance Notes did not explicitly state that their purpose was to ensure fairness, but that is the conclusion suggested by a common sense reading of the document.

In our research we analysed five areas common to most bail hearings:

(iv) the use of video links

(v) the use of interpreters

(vi) the service and content of Home Office documents

(vii) actions taken by immigration judges

(viii) immigration judge decision-making

We wanted to see whether safeguards to ensure uniformity and fairness were followed in each of these areas, and whether there were any areas not covered in guidance in which practices worked against fair outcomes.

3.1 Barriers arising from the use of video link bail hearings

> *'Video links make you frustrated. It's like you become actors and it seems that the Judge is watching a movie, rather than considering that this is about a human being's life and his right to freedom.' - UKBA, Detention Services' Video Link Bail Hearings Customer Experience Questionnaire, July 2009*

140 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 1.1

In the current research, 34 of the 36 cases prepared by BID were heard by video link. The Tribunal decided that the other two applications would be heard in-person despite no request being made on the B1 form. However on the day of the hearing transport failures meant the applicants were not brought to the hearing centre and their applications were heard in their absence.[141] Of the 29 unrepresented cases examined, 27 were heard by video link and two were in-court hearings.[142]

When video link bail hearings were introduced, BID was concerned that detainees were not consulted about the impact, informed about the process or given a meaningful choice between a video link and an in-court hearing. As a result we conducted research with the Refugee Council to ask bail applicants about their experiences of video link hearings. The bail applicants who participated in the research had mixed views. Some reflected positively about aspects of video link hearings - for many the new system was better than the problems they had experienced being transported to a hearing - while for others not being in the same room as the immigration judge made them feel unable to properly put their case.[143] The key concerns raised about the video link process were that

- the option of an in-court hearing was not being explained to bail applicants - the overwhelming majority of bail applicants in our sample (87.5%) did not know that they could request an in-court bail hearing
- almost half the bail applicants in our sample said they had not received information about how video link bail hearings work – as a result nearly a third said they did not understand how the process would work before their bail hearing started
- bail applicants' experiences of video link hearings were not being systematically monitored.

As a result of our research, in 2009 the Home Office agreed to carry out its own much larger monitoring exercise of the video link experience with bail applicants. During one month all bail applicants were given the opportunity to participate in the research and roughly a third agreed to do so.[144] The exercise confirmed that over a year later many of the problems raised by our own research remained valid. Key findings included that 18% of respondents did not receive information before the hearing explaining how the video link would work; 17% did not understand the proceedings; 12% did not understand the judge's decision; 13% were not able to see and hear everything in the court room during their bail hearing; 14% were not able to consult with their lawyer prior to the hearing.

In the current research we examined how immigration judges were managing the video link process given that an applicant's ability to participate in their bail hearing is now wholly dependant on the video link technology to ensure all parties can see and hear each other. There is no publicly available guidance for immigration judges on how a bail hearing by video link should be conducted, and the 2003 Bail Guidance Notes predated the introduction of video link technology. Instead we used research questions based on what we considered to be the minimum standards required to ensure the use of a video link did not negatively impact on the outcome of the hearing, namely

- did the immigration judge check the applicant could hear and see everything before the hearing started?
- were there any difficulties with the video link during the hearing, and if so how did the immigration judge respond to these difficulties?
- did the legal representative have sufficient time to consult with the applicant by video link before the bail hearing started?

141 Cases 6 and 7

142 Cases S and T were in-court hearings

143 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, pp.7-8

144 UKBA, Detention Services' Video Link Bail Hearings Customer Experience Questionnaire, July 2009

Checking the applicant can see and hear

In a letter to BID the Tribunal confirmed

> *'All bail clerks are given training on the use and set up of the video link system to ensure the applicant can see the whole court e.g. judge, representative, UKBA representative etc. Before the hearing commences, the Judge also checks the applicant can see and hear clearly. They will instruct the applicant to signal (usually by raising an arm) if there is a problem with sound or vision. Clerks will be reminded to ensure this process takes place before the hearing commences."*[145]

However in this research, in 38% of the cases that were prepared by BID (n=14) the immigration judge did not check that the bail applicant could see and hear through the video link before the hearing started. In one case the barrister observed that the immigration judge did not address the applicant at all[146] and in another the barrister commented that '*the immigration judge introduced himself, asked the applicant to speak up and that was it. The applicant was forced to clutch the microphone.*'[147] The results were more pronounced in the unrepresented bail hearings we observed. In twenty four of the twenty nine hearings the immigration judge proceeded without checking that the applicant could see and hear through the video link. In one case the applicant did not have his glasses with him and the immigration judge stopped him from moving his chair closer to the video screen as he said it would make no difference to the proceedings.[148] In one case it was the Home Office presenting officer, not the immigration judge, who checked whether the applicant could see and hear[149] and in two cases it was the court clerk.[150]

Our research also found that depending on the applicant's place of detention the set-up of the video camera, and therefore the image of the applicant displayed in the hearing room, was different. In some immigration removal centres the camera is set up in a way that the applicant's face in court is larger and more present in the hearing room, in others the applicant appears further away and more distant. It would presumably take little effort to standardise this so that all applicants are clearly viewed by those in court on the television screen. This was a particular concern of applicants in our 2008 research on video link hearings. Applicants' comments included

> *'the judge would not answer me, or listen to anything I said. She did not treat me like a human being. I think in a proper court it is not so easy to ignore the person who is front of you and I might have been able to make my case'*

and

> *'[i]n court it would be more personal. I can see judge, can express myself better. I also feel that it would be better for me if the judge could see me in the flesh'* [151]

Problems with the video link

Our 2008 research on video link hearings also found that in 18.75% of cases (n=3) bail applicants reported difficulties seeing and hearing what was happening in the court room. Two of these problems were with sound and one with vision.[152] In the July 2009 Home Office research, 13% of applicants said they could not hear or see everything during the bail hearing.[153] In the current research there were

145 Letter from the Detainee Operational Support Manager at the (then) AIT to Bail for Immigration Detainees, 26 November 2009
146 Case 28
147 Case 8
148 Case L
149 Case AB
150 Cases M and X
151 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, pp. 7-8
152 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p. 7
153 UKBA, Detention Services' Video Link Bail Hearings Customer Experience Questionnaire, July 2009, p.4

difficulties with the video link in 29% of the sixty five cases examined (n=19). Ten of the cases with video link problems were cases prepared by BID and nine were unrepresented cases. Problems were caused by a mixture of technical difficulties (interference and feedback or the video link breaking down) and human error (the immigration judge making background noise near the microphone or not knowing how to operate the system). In seven cases the barrister/observer specifically stated that despite clear difficulties with the video link the immigration judge did not seek to rectify the problem and continued with the hearing.[154] In other words, in over one in three cases with video link problems the hearing was conducted without the applicant being able to fully see or hear (over 10% of the total sample).

Sufficient time for the pre-hearing legal consultation

The three-day listing target for bail hearings means the deadline for the service of the bail summary is very close to the hearing – the afternoon of the day before. For this reason the ten minute video link consultation period for legal representatives and bail applicants before the hearing starts[155] is a key opportunity to discuss how points raised in the bail summary will be answered in front of the immigration judge. In 56% of the cases prepared by BID (n=20) the barrister felt they had not had sufficient time to consult with the applicant by video link before the bail hearing started.[156] Barristers said they had not had sufficient time to consult due to the length and complexity of the case, problems associated with the bail summary, problems with the quality of the video link and difficulties with interpretation. For example:

- '*10 minutes video link conference is not sufficient. There should be separate video conference booths as in magistrates courts*'
- '*10 mins is not enough time especially given this was the first time I had met him and there was a lengthy background to the case given the length of detention*'
- '*10 minutes is never enough time. Given the length/complexity/inaccuracy of many bail summaries - at least 20 minutes is necessary.*'
- '*the applicant had not seen the bail summary. I was able to briefly check a few key points with her but did not have time to check the accuracy of everything. All of this was made worse by the usual technical barriers (feedback etc.) that go along with the video link.*'
- '*10 minutes is rarely enough time to go through a lengthy bail summary. Also, although the applicant's English was reasonably good, the combination of the video link sound quality and minor confusions owing to language difficulties made communication difficult. It was hard to hear and make sense of the applicant at various points.*'

Two applicants were not available for a pre-hearing consultation because of transport failures which meant that their hearings were conducted in their absence. Seven barristers said they had sufficient time to consult the bail applicant due to

- the documents provided by BID (n=2)
- a facilitative immigration judge (n=1)
- being given more than ten minutes to consult (n=2)
- having represented the same applicant previously (n=1)

154 Cases A, B, P, 10, 11, 12, 13

155 FTTIAC, Bail applications: Notice to applicants, their representatives and sureties, para 11

156 This question was not used by the BID researcher observing the unrepresented bail hearings

3.2 Barriers arising from the treatment of interpreters

> *'Only questions and answers [were interpreted] for me – the rest of the time I was ignored or told to be quiet when I asked a question.' - the views of a bail applicant taken from BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p. 10*

Given that immigration bail applicants are all foreign nationals it is unsurprising that the use of interpreters is common place, although the length of time many bail applicants have spent in the UK prior to being detained has resulted in a growing number of applicants who are fluent in English. The Procedure Rules (and the 2003 Bail Guidance Notes) make clear that a bail applicant is entitled to have an interpreter present at their hearing.[157] Requests for an interpreter, provided free of charge by the FTTIAC, are made through the B1 bail application form.[158] In our research 26 of the 65 cases examined involved the use of a court interpreter – in 23 cases the interpreter was for the applicant and in three cases for the sureties.

Applicants and interpreters do not meet until the hearing begins and according to the FTTIAC's May 2002 'Guidance Notes on Pre-Hearing Introduction' '*it is vital that the [immigration judge] ensures that [both] understand each other. The [immigration judge] must do this in open court*.'[159] The Guidance Note acknowledges that there are several ways for the immigration judge to ensure that understanding between the applicant and interpreter has been reached. It suggests a form of words (tailored to an asylum appeal) the aim of which is to allow the immigration judge to take early control of the hearing, to allow the immigration judge (rather than the interpreter) to ensure the interpreter and applicant understand each other, and to ensure that the applicant understands that they are at the centre of proceedings and have the immigration judge's undivided attention.[160] The suggested form of words includes a question to both the applicant and interpreter:

> *'Do you understand the interpreter? Now to ensure that the interpreter understands you, I would like you tell the interpreter how you arrived at court this morning. Tell the interpreter what time you left and some details of your journey here. (To the Interpreter): Do you understand the witness?'*[161]

It also makes clear that '*[i]t is bad practice to have no form of introduction of the appellant and the interpreter as has happened on occasions.*'[162] The FTTIAC's May 2003 'Guidance Note on Unrepresented Appellants' reiterates that the pre-hearing introduction is particularly important where the applicant is without legal representation.[163]

The Guidance Note on the pre-hearing introduction also acknowledge that '*[i]nterpreters are the only people during hearings who speak all the time*'[164] because all questions, answers and submissions need to be interpreted for the applicant. At a meeting with the Tribunal's stakeholders in January 2008 the then President of the AIT also confirmed that in video link bail hearings '*interpreters should interpret the evidence verbatim, and quietly convey the rest of the proceedings to the applicant*.' However in our 2008 research on video link hearings, in 27% of the cases where an interpreter was used, only the questions directed specifically to the bail applicant, and their response to them, were interpreted.[165]

157 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, section 49(a); AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.1.2

158 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 38(2)(i)

159 FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 2. The Guidance Notes are listed on the FTTIAC website as 'Guidance notes for the former AIT that are now relevant to FTTIAC'.

160 FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 4

161 FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 4

162 FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 3

163 FTTIAC, Adjudicator Guidance Note on Unrepresented Appellants, April 2003, para on the interpreter

164 FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 8

165 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p.10

Without interpretation throughout the hearing, the applicant is a mere bystander in their own bail hearing unable to participate or even comprehend proceedings and, particularly in unrepresented hearings, unable to properly challenge the Home Office's assertions or answer the immigration judge's questions in context.

In this research we examined whether immigration judges are following the 2002 Guidance Note and ensuring that applicants and interpreters understand each other before bail hearings commence. We also examined whether immigration judges ensured that everything that was said at the hearing was interpreted and not just the questions and answers put specifically to the applicant.

The findings were broadly similar in both represented cases prepared by BID and unrepresented cases. In the BID prepared cases where an interpreter was used, one in four immigration judges (n=3) did not establish whether the applicant and the interpreter could understand each other before the hearing started. In half the cases (n=6) only a proportion of the dialogue in court was interpreted for the applicant. Comments from barristers about this stage of the hearing included

- *'It was a lengthy hearing during which there was wide ranging discussion between the barrister, immigration judge and Home Office presenting officer. However the immigration judge did not insist that the interpreter translate everything that was said and on two occasions the applicant did say that he could not understand what was being said.'*[166]
- *'The interpreter was only contributing intermittently if and when the applicant needed assistance. However as a result I suspect that the applicant did not fully understand a good deal of the proceedings.'*[167]
- *'The interpreter only used the Q&As. I imagine this was partly due to the fact that the hearings were running very late by this point in the afternoon and the immigration judge wanted to conclude the hearing fairly promptly.'*[168]
- *'There was no interpretation of the submissions or the to-and-fro between myself and the immigration judge.'*[169]

In the 14 unrepresented cases where an interpreter was used, 28% of immigration judges (n=4) did not establish the interpreter and applicant understood each other before the hearing started, and in half of the cases (n=7) not all dialogue was interpreted for the applicant.

Two troubling incidents were observed relating to language and interpretation in the unrepresented cases. In one case after the proceeding had concluded and the applicant was no longer connected by video link, the immigration judge said '*Mr Interpreter, you were excellent - the weaving of French was lovely*'. The interpreter then told the immigration judge that the applicant was not the nationality he claimed to be but was in fact Algerian or Tunisian because he spoke a different type of Arabic. The Home Office presenting officer responded that he would notify the applicant's caseworker of this and that this explained the difficulties the Home Office was having ascertaining which country to remove the applicant to. The exchange concluded with the immigration judge informing the Home Office presenting officer that she would disclose the interpreter's information in her notice of reasons for refusing bail.[170] The opinion of the interpreter about the applicant's nationality, and the intention of both the Home Office and the immigration judge to act upon it, is highly inappropriate. Not only was the applicant no longer participating in the hearing, and so unable to contest the assertions of the interpreter, but in accepting the interpreter's view that the use of a certain form of Arabic meant the applicant's stated nationality was false, the immigration judge directly contravened the FTTIAC's Guidance Note on pre-hearing introductions which states that '*[i]t is not good practice [...for] interpreters [to] be used as experts or be asked to give advice.*'[171]

166 Case 16
167 Case 18
168 Case 19
169 Case 32
170 Case X
171 FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 5

In another case, the applicant claimed to have been educated in Germany from an early age. The immigration judge asked him to speak German to prove he had been there. He asked both the Home Office presenting officer and the clerk (while smiling and laughing slightly) if they knew enough German to ask the applicant a question. When they said that they did not, the immigration judge asked the applicant to speak to him in German to prove his credibility.[172] It is unclear what purpose this piece of information played in deciding whether the applicant was eligible for bail. However if establishing the applicant's use of German was pertinent to whether the applicant should remain in immigration detention, it should not have been established by an immigration judge trying to find someone in the room during the hearing to cast an opinion on the applicant's linguistic ability.

There were also some examples of good practice in the hearings we analysed. One barrister reported that the immigration judge expressly asked the interpreter to interpret everything and when the interpreter stopped interpreting during the Home Office presenting officer's submissions, allowed the barrister to ask the HOPO to slow down.[173] In an unrepresented case the immigration judge checked the interpreter was interpreting everything and also summarised the proceedings for the applicant,[174] and in two further unrepresented cases the immigration judge told the Home Office presenting officer when to slow down and stop to allow the interpreter enough time to translate.[175]

One unexpected issue arose during our examination of interpreting at video link bail hearings. Barristers commented that their lack of access to the court interpreter during the pre-hearing consultation had in some cases meant they were not able to communicate with the applicant and properly prepare for the hearing. In one case the barrister did unusually have access to the court interpreter for the consultation[176] but two others commented

> *'One never has access to the court interpreter during the conference (although occasionally interpreters will agree to help) and so if the applicant does not speak any or good English it is very difficult to communicate. All of this is made worse by the usual technical barriers (feedback etc.) that go along with the video link.'*[177]

> *'The applicant had very limited English and there was no interpreter present for the pre-court conference so only a short time was required. However, this with the brief time allowed made it extremely difficult to take instructions from the applicant and therefore to identify which parts of the bail summary were disputed."*[178]

3.3 Barriers arising from the service and content of Home Office documents

> *'It is completely unacceptable for a [bail] case to be listed and for the Home Office not to have been able to organise the file and the representation.' – Liam Byrne MP, Minister of State for Immigration, Citizenship and Nationality giving evidence to the Joint Committee on Human Rights inquiry into the treatment of asylum seekers, 21 February 2007*

The timely service of bail summaries is vital if bail applicants are to best make their case at a bail hearing. Just as the bail applicant has disclosed his/her reasons for seeking release on the bail application form, the bail summary discloses the Home Office's reasons for opposing bail. Bail applicants therefore have the opportunity to read the Home Office's arguments prior to the hearing and to

172 Case D
173 Case 27
174 Case P
175 Case S and T
176 Case 16
177 Case 21
178 Case 26

formulate counter arguments and gather evidence. In BID's experience it is often the case that the Home Office does not serve a bail summary in good time before a bail hearing. In the cases examined in our 2008 research on video link hearings, nearly a third of bail summaries were not served.[179] The Home Office's video link research in 2009 found 40% of bail applicants did not receive a copy of the bail summary.[180] Her Majesty's Chief Inspector of Prisons has also highlighted the Home Office's persistent non-service of bail summaries. For example, in her 2009 report on Yarl's Wood, she found that '*[t]here was no system for monitoring and ensuring that detainees received bail summaries before hearings*' and recommended that

> *'UKBA should adopt a national policy that bail summaries are issued by case workers to all detainees, regardless of whether they are legally represented, at least one day before the hearing through the on-site immigration team of each immigration removal centre [and] the centre's UKBA office should implement a system to monitor that bail summaries are received and in time.'*[181]

The seriousness of the Home Office's failure to serve the bail summary was acknowledged in the 2003 Bail Guidance Notes

> *'The [...] Rules require the Secretary of State to file written reasons (the bail summary) for wishing to contest a bail application not later than 2.00 pm on the day before the hearing, or if served with notice of hearing less than 24 hours before that time, as soon as reasonably practicable. If he fails to file a bail summary within the required time, or if there is no bail summary, how should we proceed? If no bail summary is available, then you should proceed without it. This implies that bail would have to be granted.'*[182]

In other words, because bail should be granted '*[u]nless the Secretary of State satisfies [the immigration judge] there are substantial grounds for believing the applicant would fail to comply with the primary condition attached to the bail*',[183] the Guidance Notes suggested that no bail summary (and therefore no arguments from the Home Office opposing bail) should mean that the applicant is released from detention.

If the bail summary is served, the points made within it must be supported by evidence. Adducing evidence is critical where, as often happens, points are contested between the Home Office and the bail applicant. The 2003 Bail Guidance Notes' advice to immigration judges was that

> *'[i]f allegations in the bail summary are contested in evidence then the Secretary of State should adduce evidence, including any documents relevant to the decision to detain, to support such allegations.'*[184]

If the bail summary is served late and its contents are disputed

> *'its late submission and the lack of time given to the applicant to prepare his response to it must affect the evidential weight you can attach to it and any evidence submitted in its support.'*[185]

179 BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p.6

180 UKBA, Detention Services' Video Link Bail Hearings Customer Experience Questionnaire, July 2009, p.4

181 Her Majesty's Chief Inspector of Prisons, Report on an unannounced full follow-up inspection of Yarl's Wood Immigration Removal Centre, 9 – 13 November 2009, paras 3.22, 3.30, 3.31

182 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.2

183 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 8

184 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.5.3

185 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.2

In BID's experience there are systemic problems in the production of bail summaries leading to factual inaccuracies, assertions that are not corroborated by documentary evidence and, in some cases, the court being deliberately misled.[186] Bail summaries are not completed by the same official defending the Home Office's position at the bail hearing[187] and so there is also frequently a disconnect between evidence in the case file, the bail summary and the case knowledge of the Home Office presenting officer at the Tribunal. There is also a significant amount of copying and pasting between bail summaries which leads to mistakes - in one case we examined, parts of the bail summary related to a completely different bail applicant.[188]

The former President of the AIT, giving evidence to the Joint Committee on Human Rights in 2007, spoke candidly about the evidence deficit in many cases where the Home Office opposes bail:

> *'The Home Office come along and say, "We do not think they will turn up. We think there is a danger of them absconding. They are disruptive" and produce those kinds of problems. Quite often, we worryingly think they are not as evidence based as they should be."*[189]

Evidence should also be produced by the applicant so that the immigration judge is able to take a considered view, balancing the two accounts being put. Since the introduction of video link bail hearings this has created a particular problem for unrepresented applicants as they have to fax documents to the FTTIAC in advance of the hearing – previously they would have simply brought copies with them to the hearing centre. In many cases this results in applicants not providing supporting documents to the judge because they did not understand the required procedure. For example, in one of the unrepresented cases we examined the applicant had supporting evidence in his room but had not faxed it to the Tribunal as he did not know he needed to. His documents were therefore not considered (his application went on to be refused).[190]

In the bail hearings we analysed it became clear that the non-service of bail summaries, the late service of bail summaries, the inability of bail applicants to read and/or understand bail summaries, the lack of evidence provide by the Home Office to support assertions made in bail summaries, and the inaction of many immigration judges in forcing the Home Office to provide evidence, all constituted barriers to many applicants properly making their case for bail.

Service of bail summaries

In two of the 36 cases prepared by BID the Home Office had not served a bail summary.[191] In one case the immigration judge gave no response to the non-service of the bail summary and went on to refuse bail. In the other case the bail summary had been served on the Tribunal but not the applicant, and the Home Office presenting officer did not have the bail summary with him. The immigration judge ordered copies of the bail summary to be made and the hearing proceeded (the application was granted). In neither case was it suggested that the non-service of the bail summary should in itself result in the applicant being released, notwithstanding the advice in the 2003 Bail Guidance Notes.[192] In three more cases the bail summary was served very late (in two cases only at the hearing itself),[193] and in a further case the bail summary had been served on the applicant but not the Tribunal.[194]

186 For an example of the judicial recognition of the misleading nature of bail summaries, and a discussion of how inaccuracies in the bail summary can impact on bail outcomes, see R (Konan) v SSHD [2004] EWHC 22 (Admin), paras 26-29.

187 UKBA, Enforcement Instructions and Guidance, para 57.7.1

188 Case 9

189 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, Q456

190 Case K; in Case X the applicant also left evidence of an emergency travel document application in his room.

191 Cases 13 and 18

192 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.2

193 Cases 16, 17 and 30

194 Case 1

In two of the unrepresented cases the bail summary had not been served.[195] In the first case the immigration judge enquired whether the applicant had received the bail summary and upon hearing that he had not said '*[i]t's only fair that you receive one*' and asked the clerk to fax the Home Office presenting officer's copy to the applicant. The hearing was adjourned and restarted after the applicant had been given time to read the document. The immigration judge went on to grant bail. In the second case the Tribunal had only received two pages of the bail summary. When the immigration judge asked the applicant if he had received it, he responded that he had received it a week ago and the immigration judge informed him that the document he had was for his previous hearing. When it was confirmed that the applicant had not been given a bail summary for the current hearing, the judge read out the parts of the document that post-dated the applicant's copy and asked the interpreter to translate. The immigration judge went on to refuse the application. In neither case did the immigration judge suggest that they would grant bail as a result of the non-service of the bail summary.

Understanding the bail summary

It was clear that in some of the unrepresented cases the applicant had little or no understanding of the documents they had been given. In some cases this was because the applicant was either illiterate or did not read English. For example,

- the immigration judge informed the applicant that the bail summary was similar to one he had received before and asked if he disagreed with any of the facts within it. The applicant said a similar document had been read to him but he didn't know if it was the current bail summary. The applicant held up his copy of the bail summary to the video camera and the clerk in the court room said '*that's probably it*'.[196]
- the applicant said he had received the bail summary but had to rely on a friend who works at the Refugee Council to translate it for him (he required an interpreter for the hearing) and help him prepare his bundle of documents to give to the court.[197]
- the immigration judge asked the applicant if he had received a copy of the bail summary and had understood it – the applicant said he had '*understood some of it*'.[198]
- the applicant said he had only received the bail summary at 10pm the previous evening and that he could not read it as he cannot read English. The immigration judge asked the interpreter to translate one part of the bail summary (the immigration factual summary) to the applicant during the hearing.[199]
- the immigration judge asked the interpreter to translate the immigration factual summary for the applicant but then forced him to hurry, which led to some friction between the judge and the interpreter.[200]

Arguments made opposing bail

In just 2% of the 65 bail hearings we examined did the Home Office submit that alternatives to detention had been considered unsuitable for the applicant. In only a third of cases examined did the Home Office presenting officer argue that the bail applicant's removal/deportation was imminent; a finding that sits uneasily with the fact that in two thirds of cases the Home Office argued that detention was proportionate to the purpose being pursued. In 70% of cases the Home Office argued that the applicant would abscond if released – this was the case in 97% of the cases prepared by BID. In half the hearings where the applicant had previously served a criminal sentence, the Home Office argued they would re-offend if released.

195 Cases I and K
196 Case F
197 Case P
198 Case R
199 Case T
200 Case S

Table 10 – Arguments made by the Home Office for opposing bail

	Cases prepared by BID			Unrepresented cases		
	Yes	No	Other	Yes	No	Other
Alternatives to detention considered	1	34	1 (withdrawn)	0	27	2 (withdrawn)
Removal is imminent	13	22	1 (withdrawn)	8	19	2 (withdrawn)
Detention is proportionate	25	10	1 (withdrawn)	18	10	1 (withdrawn)
Absconding risk if released	35	0	1 (withdrawn)	11	15	3 (withdrawn)
Re-offending risk if released	26	7 (all were ex-FNPs)	3 (1 withdrawn, 1 not an ex-FNP, 1 other)	5	18	6 (3 withdrawn, 3 not ex-FNPs)
Other arguments	- drug use in detention - failure to cooperate			- failure to cooperate		

Absconding

By far the most common argument used by the Home Office to oppose bail was the risk of the applicant absconding if released. Home Office guidance lists criteria that should be used by officials as indicators of a person's likelihood of absconding[201] and suggests that these indicators are '*most effective if supported by evidence*' which implies that non-evidence based assertions are otherwise acceptable. This is clearly contrary to the position taken in the 2003 Bail Guidance Notes.[202]

In the cases we examined, the Home Office gave numerous reasons (in oral submissions and through the bail summary) as to why applicants would have no incentive to comply with their bail conditions if released. Many were given as assertions of fact about the behaviour of 'refused asylum seekers' or 'foreign national ex-prisoners' with no evidence to substantiate why that particular individual would not comply. In some cases the reasons given in the bail summary were contradicted in other parts of the same document.[203] Reasons included:

- the applicant has been given a deportation order
- the applicant is aware that he/she will be removed/deported from the UK as all appeal rights in his/her asylum/immigration claim are concluded
- the applicant has shown scant regard for the UK's immigration laws by entering the UK illegally, or by failing to regularise his/her status, or because the timing of his/her asylum claim or judicial review was opportunistic
- the applicant has no surety, the surety is unacceptable, the surety has proposed too low a recognisance, or the applicant has insufficient family ties in UK

201 UKBA, Enforcement Instructions and Guidance, chapter 57.5.1 lists a previous escape or attempt to escape from custody; a previous breach of temporary admission or temporary release; a statement by the applicant or their sponsor indicating an intention to go to ground ; refusal by the applicant's sponsor to stand surety for them, because the sponsor is of a view the person is unlikely to comply, even if other sureties are produced; terrorist connections or other considerations in which the public interest is involved; a previous failed attempt at removal due to the applicant being disruptive or failing to cooperate with the documentation process; an applicant who has failed to avail himself and regularise his stay until he has been apprehended and then makes a last minute application.

202 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.5.3

203 Cases 6 and 26

- the applicant has committed serious criminal offences which shows a disregard for UK law
- the applicant has refused to sign up to a voluntary return scheme, or has refused to comply with the re-documentation process
- the applicant's bail address is to Section 4 accommodation
- the applicant's behaviour in detention has been disruptive[204]

One particularly concerning trend in the bail summaries we examined was the argument that a Section 4 bail address meant the applicant was at risk of absconding. In five of the cases prepared by BID the bail summary argued that a Section 4 bail address for initial accommodation was unsuitable, either because initial accommodation was temporary and the final bail address was not yet known, because it was erroneously believed that electronic monitoring could not be arranged in initial accommodation, because the Home Office maintained the accommodation provider would not enforce compliance with bail conditions, or because the applicants' offence meant they were unsuitable for Section 4 accommodation (despite another part of the Home Office having decided they were).[205] For example,

> *'The applicant has provided Barry House as a bail address. It is noted that this is an initial accommodation address provided by NASS. It is noted that he will subsequently be dispersed from this address and it is not known where the dispersal address would be. Furthermore while the release address will be provided by NASS it is not accepted that accommodation providers will be in a position to ensure that he would comply with any conditions to custody.'*

This appears to be a standard paragraph cut and pasted between bail summaries as it was used word for word in two of the cases we examined.[206] In another case the bail summary read

> *'the applicant's proposed bail address is not a permanent address. The address has been supplied by Section 4 Support and the applicant is only allowed to reside at the (sic) said address for a maximum of 19 working days before they have to find alternative accommodation. We believe that the address provided is not suitable for the applicant.'*[207]

As with the bail summary that suggested that because electronic monitoring equipment could not be installed in initial accommodation '*bail should be refused for this reason alone*',[208] this is a clear misunderstanding of the Home Office's bail address policy.

In our view, one part of the Home Office opposing bail on the grounds that accommodation provided by another part of the Home Office is unsuitable risks a breach of bail applicants' Article 5 rights.

Re-offending

The second most common reason given by the Home Office for opposing release in the bail summaries we examined was the risk that the applicant would re-offend upon release and/or cause a serious risk to the public. Although Home Office guidance now states that there should not be a presumption in favour of immigration detention at the end of their criminal sentence for foreign nationals with a deportation order,[209] it also lists over fifty categories of offences which are '*crimes where release from immigration detention or at the end of custody would be unlikely*'. These include violent offences, sex offences, drug offences, harassment, offences involving cruelty to or neglect of children, burglary,

204 In Case 31 the bail summary used the applicant's history of self-harming as evidence of disruptive behaviour as there were 'several violent adjudication reports from the detention centres, i.e. of self harm'.

205 Cases 14, 23, 30, 31 and 35

206 Cases 14 and 31

207 Case 35

208 Case 23. The use of electronic monitoring in initial accommodation was confirmed in correspondence between BID and UKBA's NAM+ on 7 August 2009.

209 UKBA, Enforcement Instructions and Guidance, chapter 55.1.2

robbery and criminal damage.[210] The guidance also sets out the expectation that the National Offender Management System (NOMS) will conduct individual risk assessments of the potential harm to the public posed by the release of a foreign national ex-prisoner. Where the individual has served more than a 12 month sentence, the expectation is that the assessment will be based on reports from the Offender Assessment System (OASys), and for others that it will be based on sources such as pre-sentence reports or the Offender Group Reconviction Scale (a tool to measure the statistical probability of re-offending that does not rely on details of the individual case). Where NOMS is unable to conduct a risk-assessment there is guidance for Home Office caseworkers to conduct their own assessments.[211] In BID's experience, where the Home Office has indicated its intention to deport a foreign national, there is an expectation that the individual will be transferred to immigration detention at the end of their custodial sentence, and as a result foreign national prisoners are frequently not prioritised for a risk assessment as part of a pre-release plan. Where NOMS has not carried out a risk assessment the Home Office's own assessments frequently resort to information dating from the time of the original sentence i.e. they do not meaningfully take into account changes in circumstance or behaviour that have occurred during the applicant's prison sentence or period in immigration detention.

In a number of the cases we examined the applicant had committed immigration or false document offences but the bail summary referred to the offence as 'serious' and argued that there was a significant risk to the public and/or of re-offending if the applicant was to be released on bail.[212] In one case the bail summary stated that the '*applicant has shown a repeated and prolonged disregard for the immigration rules and the criminal laws of the United Kingdom*' - he had served less than three months for using a forged asylum identity card to obtain work.[213] In two cases where the applicants had entered the UK illegally as children and later served custodial sentences (in one case for offences committed when he was still a minor) the bail summaries made generalised comments about their histories with no account taken of their ages at the time the offences were committed. In one of the two cases the applicant had entered the UK fleeing a conflict in West Africa where he was a child soldier, but his illegal entry into the UK and immigration history were used to present him as an absconding risk.[214]

In a significant number of cases where the applicant had a criminal conviction, the risk of re-offending was attributed to the applicant being prohibited by the Home Office from working or accessing benefits. The bail summaries concluded that the applicants were likely to resort to re-offending to support themselves and therefore their continued detention was justified. For example,

- the applicant has no means to support himself and is therefore likely to resort '*to desperate measures*'.[215]
- there is an unacceptable risk to the public because of the applicant's previous theft offence and the likelihood of re-offending if released as there is no evidence of how he will support himself.[216]
- the applicant '*has no legal basis to remain in the UK and would have limited means to support himself if released. There is therefore a high risk of the applicant absconding and re-offending if released.*'[217]
- there is an unacceptable risk to the public and risk of the applicant re-offending as he had previously been convicted of theft and as he is not entitled to work or claim benefits he is likely to re-offend.[218]

210 UKBA, Enforcement Guidance and Instructions, chapter 55 - annex
211 UKBA, Enforcement Guidance and Instructions, chapter 55.3.2.6-12
212 For example cases 15 and 25
213 Case 35
214 Cases 19 and 20
215 Case 7
216 Case 14
217 Case 18
218 Case 31

Imminent removal

> *'We have also heard concerns that whilst a legal power to detain an asylum seeker may exist at the outset of the detention, the detention becomes unlawful because it continues for longer than was expected or is reasonable. We have been informed that this is most common in removal cases, for example where an asylum seeker is detained for the purposes of removal but then, because of problems in that person's country of origin, or because of administrative delay in obtaining travel documents, the detention continues for many months without the Immigration Service coming any closer actually to removing the person.' - Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 214*

Many bail summaries argued either that detention was proportionate or that the applicant was at risk of absconding because removal/deportation was imminent. Evidence to demonstrate imminence of removal is important in bail cases because it is a key Home Office argument to suggest risk of absconding on release. If the Home Office's arguments are not evidence-based, the absconding argument (at least to the extent to which it rested on the imminence of removal) falls away. However this research found that it was rare for the Home Office to provide the Tribunal with any concrete timescale for forcible return to take place or to indicate what steps were being taken to make it a reality. This is despite the fact that in the case of detainees with a criminal conviction, Home Office guidance gives a clear definition of what should be considered to be 'imminent':

> *'removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks.'*[219]

Instead bail summaries relied on the Home Office's intention to remove or deport applicants, rather than whether they were practically able to do so. Two scenarios repeatedly presented themselves: (i) the use of detention when enforced returns to the detainee's country of origin were not being undertaken and (ii) the use of detention when travel documents were not available.

In five of the cases prepared by BID, the Home Office was either not enforcing, or it was unclear whether it was enforcing, returns to the applicants' countries of origin (in part or in whole). The applicant in Case 7 was from Zimbabwe. He had spent one year and seven months in detention when the bail application examined as part of this research was heard and granted. An analysis of the bail summary showed that over a significant period of time the Home Office was well aware that the applicant could not be forcibly removed to Zimbabwe. An entry from April 2009 stated

> *'Caseowner rang RGDU who confirmed that there are no enforced removals to Zimbabwe so until Mr [applicant's name] is prepared to attend an interview with the Zimbabwean High Commission agreeing to return to Zimbabwe we cannot obtain an ETD [emergency travel document].'*

Another entry from September 2009 said

> *'Assistant Director has commented "Whilst enforced removal to Zimbabwe is currently not possible, Mr [applicant's name] could reduce the length of time he spends in detention by signing a disclaimer and returning voluntarily."'*

Both entries suggest that the Home Office was continuing to detain the applicant in the hope that it would grind him down and he would eventually agree to voluntarily return to his country of origin. According to the bail summary, the applicant had applied for bail four times, all of which had been opposed by the Home Office.

219 UKBA, Enforcement Instructions and Guidance, chapter 55.3.2.4

The applicant in Case 9 was from Baghdad. The bail hearing we examined was his seventh application during his one year and eight months in detention and it was refused.

Again the Home Office's bail summary noted that the applicant was from an area of Iraq to which enforced returns were not possible

> *'Mr [applicant's name] is the subject of a signed deportation order, however as (sic) he is an Iraqi national from an area where enforced removals are not currently undertaken. Accordingly his removal cannot be considered to be imminent but we are have (sic) the required information to secure a travel document so as soon as the situation changes, removal can be effected within a realistic timescale.'*

Since the US-led invasion of Iraq there have been no enforced removals to that area of the country so it is hard to give much credence to the Home Office's optimism about the applicant's return being possible within a realistic timescale. The applicant's BID caseworker was strongly of the view that the Home Office was trying to force him to voluntarily return to Iraq by keeping him in detention. This approach to the use of detention, despite the non-imminence of removal, was also accepted by an immigration judge who had previously heard his bail application and wrote in the bail refusal notice '*[h]e can end his incarceration very quickly by agreeing to return to Iraq voluntarily now!*' (emphasis in the original)

In another application we examined the applicant was also from Baghdad.[220] He had been identified for Operation Rangat in October 2009 (the Home Office's first failed attempt at forced removals to Baghdad since the start of the Iraq war) and only had his removal directions cancelled because of legal action. His bail summary stated

> *'removal directions were cancelled due to a Judicial Review letter and pre-action letter received on [date in October 2009] from the subject's representatives [names very reputable firm of solicitors]. Basically he is frustrating removal. It is submitted that he is solely responsible for his continued detention.'*

Having blamed the applicant for availing himself of his legal rights the bail summary refuses to accept that forced returns were not possible to that part of Iraq. The document gives no timeframe for when the applicant's removal could be effected even though it was written three months after Operation Rangat. The immigration judge hearing the application granted bail.

Two other applicants were from Sri Lanka, a county to where there were no enforced returns during periods of 2009. In one case the bail summary acknowledged that removal would only be imminent once the outcome of the applicant's judicial review was known and '*the country situation allows*'.[221] In the other case the Home Office presenting officer was sent away at the hearing to make enquiries and came back admitting that enforced returns to Sri Lanka were not being undertaken.[222] Both applications were granted by an immigration judge.

For many cases, particularly the unrepresented cases we observed, the barrier to removal/deportation was a lack of travel documents. Without identity documents many countries are unlikely to accept someone the Home Office is trying to forcibly return. This is a particular problem for nationals of countries such as Algeria, Iran and Eritrea whose embassies are either resistant to documenting their nationals overseas or take a very long time to do so. Bail summaries for applicants with travel document problems used circular arguments to justify detention on the basis that removal/deportation would be effected within a reasonable timescale once a travel document had been acquired even though there

220 Case 25
221 Case 21
222 Case 18

was no timescale for acquiring the document. This was also the case in bail hearings where the applicant was cooperating with the re-documentation process. For example,

- efforts are being made to secure travel documents (no timeframe given)[223]
- removal is imminent because the '*High Commission has confirmed that the applicant is a national and we are waiting for emergency travel documents to be issued*' (no timeframe given or evidence offered to demonstrate this is the case).[224]
- an attempt to remove the applicant in October 2009 failed but '*UKBA and the FCO are working closely with the Iraq Government to iron out the issues which lead (sic) to some of the returnees being sent back, and expect to carry out another flight in the future*' (no timeframe given)[225]
- '*his emergency travel document application was re-submitted to the Algerian Embassy on [date in October 2009] and current guidelines show that a decision should be made within a reasonable timescale of six months.*'[226]
- '*whilst it is not possible to give a precise estimate of when a travel document will be available... once received removal directions can be set. [...] we believe that a document will be available within a reasonable period and therefore that removal can be effected within a reasonable timescale*' (no timeframe given)[227]
- the '*intention [is] to remove the applicant as soon as possible and, once travel documents become available, removal arrangements will commence*' (no timeframe given)[228]
- removal will be imminent once travel documents are available although '*it is not possible to give an accurate estimate of when a travel document will be available*'[229]
- the bail summary stated that contact had been made with the Country Targeting Unit who said '*their contact in Algeria confirmed that the [applicant's] birth certificate was genuine but would still be under investigation.*' Later on in the same bail summary in the reasons for opposing bail, this exchange was interpreted as '*on [date in early Jan 2010] we were informed that the applicant's birth certificate has now been confirmed as being genuine and therefore a decision on his travel document should be made shortly*' (no timeframe given)[230]

Response to evidence in support of the bail summary

In only two of the cases BID prepared (6%) did the barrister representing the applicant state that the Home Office had provided evidence to support contested facts. The response of immigration judges to the Home Office's lack of evidence varied widely. In many cases the immigration judge did not challenge the lack of evidence or demand that the Home Office produce evidence as was required by the 2003 Bail Guidance Notes. Comments made by barristers alluded to the regularity with which they see this pattern of behaviour in bail hearings: '*[t]his was not an issue as far as the immigration judge was concerned*'; '*[a]s usual the Home Office presenting officer was not expected to adduce any evidence in support of the bail summary*'; '*[t]here were no concerns [from the immigration judge] whatsoever. The UKBA never produce evidence to support claims in the bail summary and I have never seen this challenged (despite the burden on the UKBA to justify detention.)*'; '*the immigration judge did not force Home Office presenting officer to obtain evidence*'; '*the burden on the respondent to justify continued detention and the common law right to bail appears to be forgotten at most immigration bail hearings.*

223 Cases 11 and 35
224 Case 15
225 Case 9
226 Case 19
227 Case 20
228 Case 23
229 Case 27
230 Case 32

This was one example.' In one case the barrister reported that the immigration judge

> *'placed the burden of proof on the barrister to produce evidence. For example, the barrister was told off for not producing 'evidence' of an ongoing Judicial Review when this fact was not contested. The barrister did have evidence of the Judicial Review in the form of the grounds, which were handed up, but the immigration judge was frustrated that this had not been provided to him prior to the hearing. Overall the immigration judge was very difficult (despite eventually allowing bail).'*[231]

In Case 15 the applicant had been detained for 13 months following a criminal sentence for a false document offence. During the entire period of her detention she had not been given any removal directions and no evidence was given in the bail summary to suggest when travel documents might be available to return her to Nigeria. In refusing her bail the immigration judge found

> *'I am now told that the Nigerian High Commission has now accepted her nationality and it is hoped that a travel document will be issued within about two weeks. I am told that her fresh representations will be considered within a week or so. Bearing in mind these time estimates I consider that her continued detention is reasonable and proportionate to the risk of absconding.'*

The judge cited no evidence in his refusal notice but relied instead on the Home Office's verbal reassurances.

In contrast, other immigration judges adjourned hearings for the Home Office presenting officer to take further instructions. For example, one barrister noted that

> *'The Home Office presenting officer was particularly unprepared and had not thought about any of the issues in the case. The immigration judge asked the HOPO to go and make enquiries the results of which were typically vague. However the immigration judge was firm with the HOPO reminding him on a number of occasions that there was no evidence to support his assertions and putting him on the spot.'*[232]

In another case,

> *'The immigration judge indicated that he would like to see the Home Office presenting officer produce further documentation regarding the whereabouts of the applicant's passport, including whether it was in fact sent by UKBA to the applicant's former solicitors. [The applicant had said that UKBA staff had told him his passport had been sent to his solicitors but they deny having received it.] The hearing was adjourned for the HOPO to make enquiries. The HOPO returned with further documents showing that UKBA had sent the passport to the solicitor following refusal of the applicant's asylum appeal, that the solicitor had confirmed to UKBA that they had never received the passport, and that UKBA had a copy of the passport on file.'*[233]

231 Case 21

232 Cases 16 and 18

233 Case 24

3.4 Barriers arising from the actions of immigration judges at hearings

> *'If I am not allowed to state my case, how can I win? When I was asked about my auntie and sister in this country, she [the judge] would not allow me the time to answer. She turned to the Home Office [presenting officer] every time to get an answer and told me to stop speaking. It was so quick, and she made her decision so fast. I was shocked and even less able to speak.' – views of a bail applicant taken from BID and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise, March 2008, p. 8*

As there is little guidance for judges on the conduct of bail hearings outside the 2003 Bail Guidance Notes, we wanted to examine the actions taken by immigration judges during hearings to determine whether

- applicants were given adequate opportunity to put their case
- a decision was made on bail in principle
- any inappropriate actions were taken by the immigration judge.

Applicants given time to put their case

There was nothing in the 2003 Bail Guidance Notes to suggest that applicants or their representatives should be given adequate opportunity to make their case at the hearing and/or to respond to assertions put by the Home Office. In our view this is a minimum safeguard required to ensure bail applicants are able to present their case. In 89% of the cases prepared by BID (n=32) the pro bono barrister reported that the immigration judge had given them adequate opportunity to speak and answer assertions put by the Home Office. One case was withdrawn before this stage of the hearing was reached and in the three cases where the barristers reported that they had not been given adequate opportunity to speak they commented:

- *'the hearing proceeded with my submissions first. The immigration judge said I would have right of reply to the Home Office presenting officer but went straight to refusal after the HOPO's submissions'*[234]
- *'from the outset the immigration judge was very frustrated at not having been handed, prior to the hearing, medical evidence I had produced for the Home Office presenting officer in relation to the applicant's previous torture. I handed this up as soon as possible at the hearing, but the immigration judge was not happy'*[235]
- *'following extensive questioning about the applicant's [child's] birth certificate (in which the applicant's place of birth is not listed as the DRC) and following the applicant's evidence that he did not know where in the DRC he was born [he had entered the UK aged five], the immigration judge stated 'you do not want to be returned, there is a high risk of you absconding'. She stated that she had decided that bail was refused. Significantly I was not given the opportunity to make submissions. I objected in an attempt to start to make submissions on the relevance of non-imminence of removal etc. but the immigration judge stated that her decision was made.'*[236]

In 72% of the BID prepared cases (n=26) the barrister reported that the immigration judge give the applicant adequate opportunity to speak and answer assertions put by the Home Office. In two cases the applicant was not produced in person or by video link, in one case the application was withdrawn

234 Case 14
235 Case 21
236 Case 34

before this stage of the hearing and one barrister did not complete this question. The six barristers who reported that the applicant had not been given adequate opportunity to speak commented:

- *'the immigration judge did not want to hear from the applicant and was willing to take what she said about the bail summary from the barrister's submissions'*[237]
- *'the applicant gave evidence first and was cross examined but the Home Office presenting officer drew unsubstantiated conclusions and the applicant did not have a chance to respond'*[238]
- *'I was not able to examine the applicant'*[239]
- *'the applicant did not have adequate opportunity to speak or to answer assertions put by the Home Office'*[240]
- *'the immigration judge did not ask the applicant any questions. I offered to call her to give evidence on points made in the bail summary and the immigration judge asked me to make submissions and said he would ask the applicant if anything was unclear. The applicant became very distressed during the Home Office presenting officer's submissions and at one point she started speaking herself. The immigration judge listened to her and did not interrupt what she was saying'*[241]
- *'the immigration judge did not hear from the applicant at all, he simply wanted to hear submissions'*[242]

In two cases the barrister reported that neither they nor the applicant had had adequate opportunity to speak at the hearing.[243]

In the unrepresented cases we examined, the BID researcher found that in all but one case the applicant had been given adequate opportunity to speak (n=27, one case was withdrawn before this stage of the hearing was reached). However, in 20% of cases (n=6) the manner in which the immigration judge spoke with the applicant during this stage of the hearing was considered unacceptable.[244] Words used to describe the immigration judge's tone included inappropriate, confrontational, short, intimidating and dismissive.

Stages of the bail hearing

The 2003 Bail Guidance Notes advised immigration judges to conduct bail hearings in three separate stages: (i) can bail in principle be granted subject to suitable conditions? (ii) are sureties required?, (iii) are the sureties and recognisances offered satisfactory?[245]

A decision on bail in principle is useful not just because it helps explain the immigration judge's reasoning, but because, according to the Guidance Notes,

> *'Although another [immigration judge] is not bound by your findings, if you have recorded in the record of proceedings that you found it appropriate to grant bail in principle and have given reasons for that finding, but that you have not felt able to grant bail because of lack of suitable sureties, then another [immigration judge] hearing the renewed application is likely to take the view that your findings are persuasive.'*[246]

237 Case 1
238 Case 14
239 Case 15
240 Case 21
241 Case 27
242 Case 28
243 Cases 14 and 21
244 Cases D, E, M, S, T, U
245 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.4
246 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.6

In only 40% of the cases we examined was a decision on bail in principle made. Of the cases prepared by BID with pro bono representation in court, 61% of cases had a decision on bail in principle (n=22) but in the unrepresented cases this figure fell to 14% (n=4). Where a decision on bail in principle was made, in all of the unrepresented cases and in 55% of the BID cases (n=12) the decision was that bail should in principle be granted. All four of the unrepresented cases granted bail in principle went on to be granted bail[247] as did nine of the 12 BID cases (three others were refused).[248] Eight other cases prepared by BID were also granted bail but without a decision on bail in principle having been made.[249] The findings suggest that particularly in unrepresented cases, it is largely those cases where the immigration judge is minded to refuse bail where the hearing is not staged according to the Guidance Notes with a separate decision on bail in principle.

In none of the 65 cases examined did the immigration judge grant bail with only a primary bail condition. All the cases granted bail had secondary conditions attached. In eight of the 17 cases granted bail with pro bono representation, the immigration judge granted bail with no sureties.[250] In all four of the cases granted bail without legal representation, the immigration judge granted bail with sureties.[251]

We also examined whether the immigration judge explained to the applicant that he/she could apply for bail again and/or gave the opportunity to withdraw the application (so as to prevent a negative decision and allow for the case to be re-listed). In over a third of the cases prepared by BID the barrister reported that the judge had not explained the reapplication process or given the opportunity to withdraw (n=14).[252]

Inappropriate actions

We asked all the pro bono barristers whether in their view any aspect of the immigration judge's conduct during the hearing was inappropriate. In thirteen of the 36 cases the barrister responded that inappropriate actions had taken place. BID's researcher also concluded that there had been inappropriate conduct in ten of the 29 bail hearings he observed. Reasons given included:

(i) the behaviour between the immigration judge and Home Office presenting officer was inappropriate and raised questions about judicial independence

- there was an overly friendly relationship and chatter between the immigration judge and Home Office presenting officer [253]
- the immigration judge and Home Office presenting officer stayed talking informally after the hearing had finished. The judge said to the HOPO, in the presence of the BID researcher, '*if they don't have papers, they'll just run away*'[254]
- the immigration judge spoke with the Home Office presenting officer about his '*Anglo Saxon name*', and where his family came from as well as other friendly chatter at the beginning of the hearing[255]
- there was informal chatter between the immigration judge and Home Office presenting officer while the applicant was present which the barrister found '*inappropriate*'[256]

247 Cases A, I, L and P

248 Cases 2, 6, 7, 20, 21, 25, 32, 33 and 35 were granted bail; Cases 10, 12 and 28 were refused bail.

249 Cases 4, 16, 17, 18, 22, 30, 31, 36

250 Cases 7, 16, 17, 18, 22, 31, 32, 35

251 Cases A, I, L and P

252 In the remaining cases five immigration judges did explain the re-application process or give the opportunity to withdraw and in seventeen cases this was not appropriate as the application was granted.

253 Case C

254 Case D

255 Case X

256 Case 3

(ii) the immigration judge made culturally stereotyped comments that were not evidence based

- the immigration judge said to the applicant '*[y]ou must belong to a tribe in West Africa because everyone does. So, which is it?'* Despite knowing his country of origin the immigration judge referred to the applicant as '*Mr [applicant's surname] from Africa*'[257]

(iii) there were procedural irregularities in the hearing

- the immigration judge requested that the detainee custody officer (detention centre guard) enter the video link room to take away the applicant while he delivered his decision to refuse bail[258]
- the immigration judge refused to allow the barrister to make submissions saying that he had already reached a decision[259]
- according to one barrister '*it was very unfortunate that at one stage of the proceedings the immigration judge was referring to the bail summary and it was apparent the bail summary was for a different applicant. He did not appear to be in complete control of the papers on file.*'[260]

(iv) the immigration judge interacted inappropriately with the applicant

- when the applicant became increasingly distressed during the Home Office presenting officer's submissions the immigration judge stopped the HOPO and told the applicant that she was '*interfering with procedures*' and should '*control herself*'. After the barrister asked the immigration judge to give the applicant five minutes to compose herself, the judge asked her if she wanted a short break and the applicant confirmed she did. The judge then allowed the HOPO to finish his submissions and sat and considered the case for a few minutes before finally, after further prompting from the barrister, agreeing to rise and give the applicant a few minutes to compose herself. The immigration judge asked the barrister to '*please tell her that she can't keep having a break so she needs to control herself*'.[261]
- one barrister reported that she was '*not happy with the immigration judge's manner of extensive interrogation of the applicant's birth certificate. Many of the questions were irrelevant to the issue of bail. She was clearly looking for reasons to trip him up.*'[262]

(vi) the Tribunal's presumption of in-court applicants' violent behaviour

- Clerks at Hatton Cross told BID's researcher that he might not be let into hearings where the applicant was in court as the applicant or sureties could become violent. In the event the researcher was allowed into the hearing room and found the applicant surrounded by three to four G4S security officers and positioned behind a screen. The attitude of the clerk and treatment of the applicant both suggest an organisational belief that bail applicants are violent or dangerous. Even if this view is not shared by the individual judge hearing the bail application, the fact that the applicant is guarded by several officers and placed behind a screen can do nothing but suggest that the applicant is of a violent or dangerous disposition. It was unclear why the in-court hearings we observed were not conducted by video link or whether an individual risk assessment had been carried out on the applicants' court appearance, resulting in such heavy-handed treatment. Both applicants were immigration detainees in removal centres, not in prisons, and had served sentences for false document offences. It is of concern to BID that bail applicants are being treated in such a securitised manner in a judicial setting, particularly as they are not detained within the criminal justice system.

257 Case D
258 Case C
259 Case 34
260 Case 31
261 Case 27
262 Case 32

3.5 Barriers arising from the decision-making of immigration judges

'This is obvious, but when somebody is applying for bail, our judiciary wants to know: are they likely to turn up on the next occasion that they are required to turn up; are they going to have some fixed address at which they can live; are there usually going to be sureties who will stand for them to make sure that they do attend and are they likely to be removed if they have been through the system very quickly or if they are on the fast track records, and they lose, are they likely to be removed very shortly? If the answer to those is all in favour of the appellant, I hope the judges will be granting bail.' – Henry Hodge OBE, former President of the AIT giving evidence to the Joint Committee on Human Rights' 2007 inquiry into the treatment of asylum seekers (Q455)

The aim of our research was not to assess whether the individual judge's decision in each case we examined was fair or not. As with the other sections of this report we were concerned with the building blocks of the process and so concentrated on areas of decision-making that could be measured either against benchmark guidance or assessed through written documents articulating the judge's decision:

- did the judge consider the length of detention or the impact of detention?
- were clear reasons for the judge's decision given?
- did the oral reasons given for refusing bail at the hearing match the written reasons given?
- did the written reasons for refusal cite evidence to substantiate findings and explain why certain pieces of evidence were preferred over others?
- were there any inappropriate aspects of the decisions made?

Consideration of length and impact of detention

The 2003 Bail Guidance Notes quoted Lord Justice Dyson as suggesting that both the applicant's length of detention and the impact of detention on the applicant and their family were relevant factors that should be balanced against the applicant's risk of absconding if released. All the other factors suggested by Lord Justice Dyson in the Guidance Notes are likely to be raised by the Home Office, as they provide arguments for continued detention, but these two factors are more likely to be raised by the applicant in favour of release. Whether they are directly raised by the applicant or not, the Guidance Notes suggested that these are issues immigration judges should weigh up in forming their decisions. In the cases prepared by BID, 78% of immigration judges (n= 28) considered the length of the applicant's detention in making their decision and 28% (n=10) considered the impact of detention on the applicant and/or their family. In the unrepresented cases these figures fell to 28% of judges (n=8) who considered the length of detention and 10% who considered the impact of detention (n=3).One reason for this difference could be that without the safeguard afforded by the presence of legal representation, in unrepresented cases immigration judges are less minded to consider the length and impact of detention.

Reasons for the bail outcome

Most applicants learn about the outcome of their bail application at the hearing itself. Although there is no statutory requirement to do so, at the end of the hearing immigration judges generally give their decision orally and then summarise the reasons for it.[263] The Procedure Rules stipulate that decisions to grant or refuse bail must also be served in writing on the applicant, the Home Office and the place where the applicant is detained, and that where the application is refused the reasons for the refusal must be given in writing.[264] This is done on a form which has a checklist of reasons relating to the

263 Although in Case 3 the barrister reported that '*[t]he immigration judge gave no reasons for refusal at the hearing simply saying to the applicant "your application is dismissed, please go and get the officer to bring in the next applicant"*'. In Cases S and T the immigration judge adjourned the hearing for ten minutes in order to write her notice of refusal and then returned to give her decision.

264 FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, 15 February 2010, section 39(3) and 39(5)

restrictions on bail in the 1971 Act, with an additional category relating to absconding, followed by space to explain the reasons for refusal. The form is nearly always completed by hand by the immigration judge at the end of, or shortly after, the hearing. Because it does not serve as a complete written record of proceedings,[265] many legal representatives keep detailed notes of the hearing – particularly comments made by the judge about the reasons for the decision.

When asked 'did the immigration judge give clear reasons for agreeing or refusing bail at the hearing?' nearly one in five barristers representing BID cases said no (n=7). By way of example, one barrister responded

> *'In one sense the immigration judge gave clear reasons: no unreasonable delay, now complying so should speed things along, immigration history means substantial grounds to believe will abscond. On the other hand, he did not give any reasons or make any findings about the disputes about the immigration history, or deal with the submission that in fact the Home Office had unreasonably delayed given there had been no progress at all since [five months previously] or any attempts at progress in that time.'*[266]

Pro bono barristers representing BID clients in front of the Tribunal regularly report that the written reasons given for refusing bail do not match those given orally by the judge at the hearing. In the cases we examined for this research, barristers reported that the written reasons did not match the oral reasons given in court in 13% of the refused cases (n=2).[267] In one case heard in October 2009 the Home Office contested that the applicant was not cooperating (despite having accepted his application for voluntary return) as he had given two countries of origin, one where he was born and one where he had moved at an early age. Both countries had failed to provide him with an emergency travel document. One embassy refused his application in 2008 and later confirmed in the summer of 2009 that they would re-document him but had since taken no action, the other embassy refused his application in spring 2009. A new unit within the Home Office had taken over the applicant's case. The immigration judge's refusal notice stated

> *'the applicant could be more helpful with the details of names and events that will enable the Unit to verify his story. If he cooperates with the Unit and neither country will still not issue an emergency travel document then he may have a stronger application in the future. As it is until he can demonstrate that cooperation and gives the Unit an opportunity to work with the application, I am [illegible] that there are grounds for believing he will abscond if released.'*

However the barrister in this case reported:

> *'In refusing the application the immigration judge stated 'I want them [the Home Office] to stop saying that he's from two different places.' This is a reference to the applicant's consistent contention to have been born in [country in North Africa] but to have moved to [another country in North Africa] at an early age. He also stated that the applicant will have more force next time if the Home Office still haven't done anything. These comments do not appear to have made it into the immigration judge's written reasons. The immigration judge's oral comments refusing bail gave the applicant (and me, temporarily) some hope that the Home Office would be forced to do something to accelerate documentation. However these comments were conspicuous by their absence from the written record.'*[268]

The manner in which many of the refusal notices were filled in served to disadvantage the applicant at future bail hearings. For three of the hearings the checklist on the front page of the refusal notice was

265 AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.10

266 Case 1

267 Cases 3 and 8

268 Case 8

not filled in at all and so it was not possible to tell definitively why the judge had refused bail.[269] In other cases the refusal notice contained only cursory information or repeated the applicant's immigration history without explaining why bail had been refused. In many cases it was very difficult to read the immigration judge's handwriting and it was not possible to decipher the judge's decision or reasoning. While the illegibility of judicial handwriting may seem a trivial matter, in real terms the fact that the decisions are handwritten (not typed) and are frequently illegible means bail applicants, most of whom do not speak English as a first language, are unable to understand the reasons why their application has been refused and are therefore unable to gather evidence and argument to counter these reasons at any future hearing. This is compounded by the use of acronyms and jargon which renders some refusal notices incomprehensible to bail applicants, as Her Majesty's Chief Inspector of Prisons has herself observed

> *'We were concerned about the lack of help with bail. A detainee who had just returned from an unsuccessful bail hearing, at which he was unrepresented, showed us the document given to him by the court following refusal which said: `Served with ICD 0350 notice of asylum claim to be refused under S.72 and given 28 days to 14/7 for rebuttal of notice.' He had no idea what it meant and neither did we.'*[270]

Evidence to substantiate reasons for refusing bail

In the cases prepared by BID, where we had access to the documents from the hearing, we found an endemic failure on the part of immigration judges to provide evidence in their written reasons for refusal. Not only was it unclear upon what basis many decisions had been made, but it was also unclear why many judges had chosen to prefer evidence presented by the Home Office despite evidence presented by the applicant which directly countered it. The impression given by the treatment of evidence in very many refusal notices was that Home Office assertions (often themselves presented without evidence) are too readily accepted by immigration judges as accurate without any probing or weighing of counter evidence. Not only does this impact on the outcome of the bail hearing in front of the judge, but the failure of the judge to identify steps to be taken by the Home Office or the applicant stunts the progression of the case and means future bail hearings repeat the same discussions again and again. For example,

- in Case 1 the immigration judge wrote:

> *'I am satisfied there is no unreasonable delay in proceeding to deportation. She has now applied for FRS and will comply with the application for a travel document. I am satisfied the applicant's medical condition can be properly managed at Yarl's Wood. Removal is imminent. I am persuaded by the immigration history that there are substantial grounds to believe that if released she will abscond'.*

No evidence was cited in the reasons for refusal letter to demonstrate why removal was imminent, why the applicant's medical condition could be managed in detention or why there were grounds to believe the applicant would abscond if released.

- in Case 3 no evidence was given by the immigration judge to explain why he reached his conclusions despite counter arguments made by the applicant. For example:
  - removal is cited as being imminent but the applicant had an outstanding judicial review application. He had also made an application for emergency travel documents in spring 2009 and at a bail hearing three months later the Home Office told the immigration judge that travel documents would be ready within a week. The current bail hearing took place a further three months later and the travel documents were still not available.

269 Cases 8, 9, 10

270 HM Chief Inspector of Prisons, Report on an unannounced inspection of Harmondsworth Immigration Removal Centre, 17-21 July 2006, para 3.6

> the judge found there were substantial grounds to believe the applicant was likely to abscond if released. He made no comment about the applicant's previous compliance with police bail for six months prior to a criminal trial, or that the applicant had explained his previous breach of the Sex Offenders' Register as being a result of the police having taken away his documents, him losing his job, becoming homeless and therefore being unable to inform the police of his fixed address as required by the conditions of the Register.

- in Case 5 the immigration judge stated '*over and over again, over a long period of time the applicant failed to cooperate with the [removal] process*' and gave no indication of why he had dismissed the barrister's arguments that the applicant had demonstrable evidence of complying for the previous seven months. Instead the judge wrote '*I am quite satisfied he could make much greater attempts to speedily obtain an identity document*' but he gave no indication of what attempts he would expect to see or why the applicant's recent compliance was judged to be inadequate.
- in Case 11, during the hearing the immigration judge accepted the Home Office presenting officer's submissions that the case was being progressed by hiring a special investigator and putting the applicant's photograph in a newspaper in Ethiopia. This was despite the fact that no timescale for completion of the investigation was given and the judge himself pointed out the problems inherent in hoping that someone might recognise the applicant by putting a photo of him (now aged in his late twenties) in the newspaper of a country which he left as a child. In his refusal notice the judge wrote '*I am told that progress is being made in that regard*' and gave no evidence for why he had reached this conclusion.
- in Case 12 the refusal notice stated that the applicant '*has recently made a fresh claim, in which a decision is expected shortly*' – no evidence was given to support this belief. Instead the barrister's notes of the hearing say that '*the Home Office are waiting for the decision to be served and that the application was not going to be certified [...] the Home Office presenting officer did not give any indication as to the timescale for the decision*', and the bail summary showed that the claim was referred to the Home Office's Country of Origin Information Service for further investigation just three days before the bail hearing. Neither of these pieces of information was referred to in the refusal notice.
- in Case 14 the judge found the applicant was likely to abscond as he '*is the subject of a deportation order*'. However the bail summary says the deportation order cannot be pursued as the applicant had permission to appeal to the Court of Appeal.
- in Case 26 the refusal notice contains three bullet points:
  > 'From [date] to [date] there was a very lengthy history of failing to comply.'
  > The delays are the applicant's own fault and she could do more to assist in the process.
  > In the light of the applicant's failure to cooperate I am not satisfied she would comply with conditions.'

No explanation was given of why the delays were the fault of the applicant, what she could be doing to demonstrate compliance, or why her behaviour rendered her unlikely to comply with conditions.

We were unable to systematically examine the lack of evidence given by immigration judges in the unrepresented hearings because we did not have access to the applicants' documents. However based on our casework experience of supporting unrepresented applicants, and given that they are without the protection afforded by a legal representative, we have every reason to believe that the trend we observed in the represented cases also applies to unrepresented cases. For example, in one case the immigration judge concluded that there was '*no basis for bail*' as the Home Office presenting officer had informed him of a verbal conversation he had had with the applicant's case owner about removal being possible within two weeks. No documentary evidence was provided of this conversation at the hearing

or any evidence that removal was likely within two weeks, but it was used as the basis upon which to refuse the application.[271]

Inappropriate decision-making

It was clear from the attendance notes submitted by some of the pro bono barristers that, in their view, aspects of the immigration judge's decision-making at the bail hearing they attended were inappropriate. This was also the view of BID's researcher who observed the unrepresented hearings we examined. For example,

(i) the immigration judge presumed in favour of detention because of the applicant's criminal record

- in two cases the barrister concluded *'this was not a balanced decision and the immigration judge was obviously of the view that if you have a criminal history this creates a presumption in favour of detention.'*[272] In one case this was due to the judge's failure to consider the length of the applicant's detention, his cooperation with the re-documentation process and his willingness to comply with bail conditions. In the second case it was because the judge *'seriously erred in his finding that the applicant needed thousands of pounds in recognisance in order to be granted bail. In my view this was an outrageous decision, disproportionate, draconian and at odds with the concept of natural justice.'*

(ii) the immigration judge gave reasons to maintain detention for purposes other than those specified in statute

- the applicant had been forced to work in a cannabis factory and had been wounded in a knife attack by his employers. The immigration judge argued that detention was for the applicant's safety to keep him out of harm's way until he was deported.[273]

(iii) the immigration judge used a Section 4 bail address as reason to refuse bail

- in Case 14 one of the immigration judge's reasons for refusal was that the initial bail accommodation provided by Section 4 to Barry House was temporary. According to the barrister '*the Home Office presenting officer submitted that the address was not suitable as it was temporary and the immigration judge appeared to accept this.*'
- in Case F the immigration judge said as '*Barry House is only a temporary dispersal centre, it is not appropriate in these circumstances*'
- in Cases S and W the immigration judge referred to the Section 4 address as being '*only*' or '*merely*' a Section 4 bail address
- in other cases the immigration judge eventually granted bail but not before doubts had been raised about the suitability of the Section 4 bail address. In Case 20 the judge was concerned that the applicant would be dispersed from the address soon after being granted bail. He bailed the applicant to live with the surety rather than at the Section 4 address submitted on the bail application form. In Case 33 the immigration judge had to adjourn the hearing as he was not satisfied that the offer letter from Section 4 meant accommodation would be available. Once both the Home Office presenting officer and the judge were satisfied that accommodation was available the hearing recommenced and bail was granted. In Case 35 the immigration judge was concerned that the applicant might be dispersed from the Section 4 accommodation and become destitute so he renewed bail for three weeks time advising that accommodation should be arranged for then.

271 Case U

272 Cases 11 and 12

273 Case C

(iv) decisions addressing the applicant's circumstances when he/she was sentenced to a term in prison and not their circumstances at the bail hearing

- in Case 12 the bail summary quoted comments made by the sentencing judge and the Probation Service about the applicant's repeat offending to feed his drug habit to suggest he would re-offend if released. The applicant provided evidence that he had been clean for over two years and had been through a detox programme, psychotherapy and counselling. The Home Office's assertions were not challenged in judge's refusal notice which stated the '*applicant has a bad criminal record*.'
- by way of contrast in Case 17 when the Home Office presenting officer maintained that there was a high risk of absconding and further offending, the barrister's submissions that the risk of re-offending was low (because the applicant's previous offending was entirely due to his Class A drug use and after 30 months in detention he was now drug free) were taken seriously. The judge held that any risk of absconding was outweighed by the minor risk of re-offending that could not justify maintaining detention.

4 Key findings and conclusions

In conducting this research we wanted to contribute to a re-thinking of the immigration bail process so that its importance as a check on the use of detention is reflected in structures and safeguards that ensure fairness in bail outcomes. We have examined the use of immigration bail from the beginning of the process as it is our experience that barriers presented before hearings as well as during hearings have the potential to impact on bail outcomes. In using FTTIAC and Home Office guidance as benchmarks to analyse the bail process we have developed a picture of current practice, demonstrated the extent to which existing guidance is being followed and drawn conclusions about areas where new safeguards are urgently required.

Based on BID's own bail casework our original hypothesis was that the immigration bail process is not currently subject to adequate safeguards and this has the potential to allow unfair decision-making to go unchecked at bail hearings. We believe our research has proven our hypothesis is correct. It is certainly not the case that the outcome of all bail hearings is unfair. However too many unfair practices and too much unfair decision-making does take place, and current safeguards within the bail process are not sufficiently able to identify, prevent or challenge them.

The need for a more effective framework of safeguards to govern the immigration bail process has been confirmed by the wide range of practices we have observed on the part of immigration judges, in whose actions we were principally interested, but also on the part of other actors including the Home Office, the Probation Service and legal representatives. As well as highlighting examples of practices that have caused us concern, we have highlighted examples of good practice where we found them. In part this was done in order to demonstrate what we believe should be standard practice in all cases, but also to demonstrate that the current legislative and policy framework governing the bail process allows for unacceptable disparities of practice.

We believe these disparities occur in part because there is no guidance available to immigration judges about some parts of the bail process. It is therefore unsurprising that the practices we observed were characterised by a lack of uniformity. This situation has undoubtedly been exacerbated by the Tribunal's treatment of the 2003 Bail Guidance Notes. The extent to which the Guidance Notes had been used by immigration judges or promoted within the Tribunal since they were removed from the website remained unclear until February 2010, when the Guidance Notes were not adopted as current guidance by the new FTTIAC/UTIAC. Since that time there has been no current, publicly available guidance at all on the bail process apart from the instructions contained in the Procedure Rules, Practice Directions and Statements. The lack of clarity surrounding the status and availability of the Guidance Notes and the lack of any current guidance has no doubt contributed to the diversity of practice we have observed.

In making recommendations for a more effective framework of safeguards we are aware that the use of institutional policy is very different in the judiciary than, for example, the Home Office. However, based on our observations we believe there is a real need for measures to encourage uniformity and fairness in the process behind and decision-making of immigration bail applications. This would be of benefit to individual immigration judges hearing bail applications and to the Tribunal in explaining to bail applicants and to stakeholders the legitimate expectations they can have of the Tribunal's handling of bail applications. Some of our recommendations also build upon current practice in other areas of judicial activity, including the hearing of asylum and immigration cases and the hearing of bail cases in Scotland.

The Tribunal's announcement that the Bail Guidance Notes will be revised and re-published in the summer of 2010 is to be welcomed. However, if the new Guidance Notes are to make a positive contribution to ensuring the fairness of the bail process, they must build upon key lessons from this research. We have made recommendations for action against each of our concerns. Solutions lie not just in a new approach to safeguards but in a fundamental review of how judicial and government departments engage with the bail process. As well as our recommendations listed below, several areas warrant specific mention.

4.1 Amendments required to the statutory bail provisions

The 1971 Act contains a list of restrictions to bail which are replicated on the form used by immigration judges to refuse bail and which shape arguments presented by the Home Office in bail summaries. In our view the list of restrictions contained in the legislation is wholly inappropriate and needs amending so that restrictions to bail relate only to immigration control. For example, we do not believe that people should have their application for bail refused because of their mental ill-health. There is separate legislation governing the use of detention in appropriate clinical settings for people suffering from mental ill-health. Immigration detention is not an environment conducive to mental wellbeing and is certainly not an appropriate environment for someone deemed so unwell that they are a risk to themselves or others. As Macdonald's points out

> *'It is also important to note that place and conditions of detention are relevant to the lawfulness of the deprivation of liberty under Article 5(1) of ECHR and whether the detention is arbitrary [...] a mentally ill immigrant detained in a detention centre or mainstream prison as opposed to a hospital may be unlawfully detained in breach of Article 5.'*[274]

We also believe that the restriction on bail to prevent future offending is inappropriate. Immigration detention is not an extension of the criminal justice system and should not be used to prevent future as yet uncommitted crimes. Foreign national ex-prisoners in immigration detention have served their criminal sentences in prisons and if they were British nationals would have been released. The government's inability to effect a timely deportation at the end of a foreign national's sentence, and the political fall-out of the 2006 scandal, should not be used to restrict access to bail.

4.2 Circle of inaction

Many of our concerns about the bail process are mutually reinforcing and result in too many bail applicants being stuck in the middle of a circle of inaction caused by failures on the part of immigration judges, the Home Office, the Probation Service and legal services. In many of the applications we examined, bail cases had not been sufficiently progressed from one hearing to the next so that subsequent bail refusals showed little or no attempt to move outstanding issues towards a resolution. As a result immigration removal centres and prisons are increasingly becoming full of detainees who have been warehoused for prolonged periods of time because of the failures of various judicial and government departments.

Immigration judge refusals

Most decision notices refusing bail do not cite evidence presented by the parties or give the judge's response to it, are illegible, do not set directions for either party, or are not accurate reflections of the oral reasons for refusal given in the hearing. Judges' bail decisions are in effect just comments, there is no requirement for them to be taken forward by the judge at the next hearing and if directions are set for either party and ignored, no sanction is applied. Bail hearings should be an opportunity for the applicant to put pressure on the Home Office to report progress made with their case. Instead the aforementioned inadequacies in immigration judges' notices and the Home Office's cavalier attitude to

274 Macdonald and Webber, Macdonald's Immigration Law and Practice, para 17.25

preparing for bail hearings means this frequently does not happen. (Applicants are much more likely to get a meaningful written interaction with the Home Office about steps taken to progress a case by making an application for temporary admission.) This situation is exacerbated by the lack of legal representation available to bail applicants, meaning many end up representing themselves, and by some legal representatives who do not approach bail hearings as an opportunity to put pressure on the Home Office to take action.

We believe that the paragraphs of the Tribunal's Practice Directions and Statements relating to the format of decisions in substantive asylum and immigration cases should also apply to bail cases. In our response to the Tribunal's 2010 consultation on its draft Practice Statements and Directions, BID argued that decisions in bail cases should be typed and should detail the Home Office's reasons for maintaining detention, the bail applicant's response and arguments for release, the Home Office's response to these arguments and the immigration judge's conclusions. This would provide a proper record of arguments relating to detention, detail the Home Office's reasoning for maintaining detention, clarify what progress the Home Office was making in being able to resolve any outstanding issues, and assist immigration judges in hearing subsequent bail hearings. Having examined the case files of applicants who have previously been detained at the immigration removal centre at Dungavel, it is notable that immigration judges in Scotland issue typed bail decisions formatted in a similar way to substantive cases (although it is unclear whether there is a requirement for this to be done) and such practices should in our view be adopted throughout the UK.

Home Office case management

The fact that different officials within the Home Office are responsible for different stages of the bail process also results in a profound lack of joined up thinking. One consequence is that the Home Office often only examines the applicant's case with a view to making arguments to maintain detention rather than looking at the case holistically and examining the decision to detain itself. Too often there is a clear disconnect between information in case files, information in bail summaries (as the person writing them has not necessarily seen the whole file) and the case knowledge of Home Office presenting officers (who are often not up to speed with recent actions taken by the case owner). This is compounded by the lack of authority given to Home Office presenting officers to adapt to circumstances as they develop at bail hearings. Unlike a prosecutor in a criminal bail hearing, a Home Office presenting officer is merely acting on instructions to oppose bail. Prosecutors act as an officer of the court on the instructions of the police and have the authority to make decisions based on evidence produced at the hearing. In contrast Home Office presenting officers continue to rely on flawed bail summaries to oppose bail even after a legal representative has explained why the document is inaccurate and/or has given evidence countering the Home Office's arguments opposing bail. As one legal representative told us '*the hearing should be a process of negotiation based on people acting with authority. Instead they are often a waste of court time and money.*'

The needs of foreign national ex-prisoners

There are clearly responsibilities upon both the criminal justice system and the immigration system for managing the transition of foreign nationals with a deportation decision to immigration detention at the end of their custodial sentence. However in practice many foreign national ex-prisoners fall between the cracks. Detained post sentence, but with no immediate prospect of being deported due to problems with travel documents or in enforcing returns to their country of origin, they are not prioritised by the Probation Service for the usual pre-release plans and therefore do not have access to documents that could otherwise help them argue their eligibility for bail in front of an immigration judge. This is one reason why so many of the people who have spent years in immigration detention are foreign national ex-prisoners. Whereas such detainees have experience of both the criminal justice and immigration systems, the legal representatives, immigration judges, prison and probation staff, and immigration officials working on their case are likely only to know one system or the other, not both. There is therefore a significant training issue for people working with this group of immigration detainees that

links together the two jurisdictions. For example, bail applicants who are required to live in a probation hostel as part of their license conditions frequently find themselves without a specific bail address pre-hearing because the Probation Service will not allocate an address until bail is granted. As a result the Tribunal often refuses to list their applications. If an application is listed, immigration judges frequently struggle to understand that if they grant bail with an order that the applicant is to be released as directed by the Probation Service, this means the applicant will not simply be released without a specified address (as responsibility for securing appropriate accommodation for release reverts to the criminal jurisdiction.)

In fact, many of the issues raised by this research require coordination between different areas of the judiciary and civil service. BID's attempts at encouraging the Tribunal Service and the Home Office to work together on concerns arising from the introduction of video link hearings, and which require action from both agencies, has to date been disappointing. Any review of the immigration bail process has to include the organisations outlined above if meaningful positive change is to be achieved.

4.3 The bail jurisdiction

Eligibility for bail and an examination of the legality of the decision to detain are, in theory, addressed through different judicial processes one of which (FTTIAC bail) is much more accessible to detainees than the other (judicial review or Habeas Corpus). If this distinction is to be maintained then efforts must be made to address the inaccessibility of High Court legal challenges, and to ensure that the bail jurisdiction is not artificially restricted to examine only arguments of absconding. In truth, and given the continuing confusion between many bail applicants, Home Office presenting officers and immigration judges about the limits of the bail jurisdiction, we believe it is time to think again about challenges to detention being heard through the bail process. If immigration judges continue to be excluded from examining the legality of detention, then relevant material should still be considered as long as it is made clear that the judge is hearing it in the context of a bail application and is not able to make a decision on the issue of legality. For example, arguments touching upon the legality of detention can clearly be relevant to the consideration of a bail application and there seems little merit in artificially restricting the relevant argument that an immigration judge can hear and consider.

4.4 Recommendations

Our concern: lack of knowledge about bail (pages 21 to 22)

1. The proposals for automatic bail hearings contained with the Immigration and Asylum Act 1999 should be re-introduced.
2. There should be a requirement in the Home Office's Detention Centre Rules for information to be given to all immigration detainees about bail in a language they understand.

Our concern: difficulties accessing high-quality legal advice (pages 22 to 24)

3. Publicly-funded legal advice should be provided to all immigration detainees making an application for bail every 28 days or sooner if fresh evidence arises.

Our concern: difficulties acquiring a bail address (pages 27 to 29)

4. Government-provided bail addresses provided under Section 4(1)(c) of the Immigration and Asylum Act 1999 should be accepted as suitable accommodation by immigration judges and Home Office presenting officers at bail hearings.
5. Immigration judges should be provided with guidance about the Home Office's provision of Section 4 bail accommodation. Where an immigration judge decides that the particular Section 4 accommodation offered is not suitable and presents a barrier to a decision to grant bail, the judge should make this explicitly clear in the written decision to refuse bail and should direct that the Home Office provides alternative, appropriate accommodation that will not serve as a barrier to a future decision to grant bail.
6. The Home Office should provide bail addresses promptly in time for all bail hearings, regardless of the applicant's history of offending. If a bail hearing is refused the offer of a government-provided bail address should roll over to the next hearing without the need to re-apply.
7. If the Home Office insists on operating a separate system providing bail addresses for certain ex-offenders it must be based on published criteria and operated to the same timescales as all other applications.

Our concern: difficulties listing a bail hearing (pages 29 to 30)

8. The Tribunal must be adequately resourced to meet its three-day target for listing bail applications in the light of the Home Office's increased use of immigration detention.

Our concern: barriers arising from the use of video link bail hearings (pages 31 to 34)

9. There should be published guidance and training for immigration judges on conducting video-link bail hearings.
10. The use of video-link bail hearings should only take place where bail applicants are consulted about the impact, informed about the process and given a meaningful choice between a video link and an in-court hearing.

Our concern: barriers arising from the treatment of interpreters (pages 35 to 37)

11. Guidance for immigration judges on the conduct of hearings with the use of an interpreter must be strengthened to ensure the judge checks the applicant and interpreter understand each other before the hearing starts, that everything at the hearing is interpreted, and that interpreters are not inappropriately used as experts.
12. Interpreters should be provided by the FTTIAC for the pre-hearing consultation between legal representatives and bail applicants.

Our concern: barriers arising from the service and content of Home Office documents (pages 37 to 47)

13. The Tribunal's Practice Directions should include a direction to release bail applicants if the Home Office has not opposed bail through the service of a bail summary. The direction should also make clear that the Home Office must defend contested facts in bail summaries through the use of documentary evidence. These directions should be replicated in the Home Office's Enforcement Instructions and Guidance.

14. Home Office decisions to detain/maintain detention must be based upon clear, contemporary evidence.
15. Home Office presenting officers should be empowered to amend the Home Office's position at bail hearings in the light of counter evidence presented by the applicant.
16. The Probation Service must produce pre-release reports for foreign national prisoners subject to deportation proceedings at end of their sentence in the same way as for British citizens and prisoners without deportation action pending. Probation records available for the Home Office (including the risk of re-offending pro forma) must also be available to bail applicants and their legal representatives.

Our concern: barriers arising from the actions and decision-making of immigration judges (pages 48 to 57)

17. The Tribunal's reasons for refusing bail should be typed and disclosed to all parties, as currently happens in Scotland. They must include a written record of the judge's approach to different pieces of information presented by the parties and a clear argument for why a decision to refuse bail has been reached
18. The findings of subsequent bail hearings and any judicial reviews or civil actions should be fed back to immigration judges who have previously heard bail applications from the applicant
19. Legal challenges to appeal refusals of bail and to challenge the legality of the decision to detain must be accessible to detainees. This requires actions to address the imbalance between the demand for and supply of publicly-funded legal advice for actions in the High Courts and the length of time it takes to list a judicial review.

Our concern: the need to re-think immigration bail

20. The bail jurisdiction should not be restrictively interpreted. For example judges should consider how the Hardial Singh principles apply to arguments about the imminence of a bail applicant's removal/deportation and assess the impact on arguments about absconding.
21. The statutory restrictions on bail in the Immigration Act 1971 should be amended so that they relate solely to detention for the purposes of immigration control and not for the protection of people with mental ill-health or to prevent future criminal offending
22. The bail training received by immigration judges should include attending criminal bail training and shadowing in a magistrate's courts.
23. There should be a statutory time limit to detention in line with the 2007 recommendation of the Joint Committee on Human Rights that 'where detention is considered unavoidable [...] subject to judicial oversight the maximum period of detention should be 28 days.'275
24. There must be new guidance notes for immigration judges on the immigration bail process which should reflect the findings of this research. The use of new guidance notes should be monitored by the Tribunal to ensure uniformity and fairness.

275 Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 276

Annex 1: Sources of policy benchmarks used in the attendance note for pro bono barristers and BID's researcher

ABOUT THE HEARING

Name of barrister:

Not completed by BID researcher observing unrepresented hearings

In the final research report do you want to be named in the list of barristers who took part in the research? N.B. comments made will not be attributable to you.

YES/ NO (delete as appropriate)
Not completed by BID researcher observing unrepresented hearings

Name of applicant:

BID Reference: Not completed by BID researcher observing unrepresented hearings

Date of hearing:

Time hearing started:
Time hearing finished:

AIT hearing centre and court room:

Name of immigration judge:

Name of HOPO:

Detention centre where applicant held:

Length of applicant's detention:

Bail GRANTED/ WITHDRAWN/ REFUSED (delete as appropriate)

1. VIDEO LINK

No detailed public guidance was available to use as benchmarks to assess an immigration judge's conduct of a bail hearing by video link. Instead we used the minimum benchmarks we considered necessary to ensure the bail applicant was able to participate in their hearing.

Was the hearing heard by video link?
YES/ NO (delete as appropriate)

If YES:
Did the immigration judge check the applicant could hear and see everything before the hearing started? YES/ NO (delete as appropriate)
Comments –

Did you have sufficient time to consult with the applicant by video link before the bail hearing started?
YES/ NO (delete as appropriate) Comments –
Not completed by BID researcher observing unrepresented hearings

Were there any difficulties with the video link during the hearing?
YES/ NO (delete as appropriate)

If YES:
How did the immigration judge respond to these difficulties?

2. INTERPRETING

Was an interpreter used?
YES/ NO (delete as appropriate)

If YES:
Did the immigration judge check the applicant could understand the interpreter before the hearing started? YES/ NO (delete as appropriate)
Comments –

FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, paras 2 and 3: 'it is vital that the [immigration judge] ensures that the appellant and the interpreter understand each other. The [immigration judge] must do this in open court [...] It is bad practice to have no form of introduction of the appellant and the interpreter as has happened on occasions.'

Did the interpreter interpret everything that was said or just the questions and answers put to the bail applicant?
YES/ NO (delete as appropriate)

If NO:
Did the immigration judge challenge this? YES/ NO (delete as appropriate)
Comments -

FTTIAC, Adjudicator Guidance Note on Pre-Hearing Introduction, May 2002, para 8: 'Interpreters are the only people during hearings who speak all the time'

3. HOME OFFICE ACTIONS

Did the Home Office serve a bail summary?
YES/ NO (delete as appropriate)
Comments –

FTTIAC, Consolidated Asylum and Immigration (Procedure) Rules 2005, section 39(2): 'If the Secretary of State wishes to contest the application, he must file with the Tribunal and serve on the applicant a written statement of his reasons for doing so
(a) not later than 2.00 pm on the business day before the hearing; or
(b) if he was served with notice of the hearing less than 24 hours before that time, as soon as reasonably practicable.'

UKBA, Enforcement Instructions and Guidance, chapter 57.7.1: 'The bail summary must be returned to the POU in time for it to be filed with the IAA no later than 2.00pm on the day before the hearing. If the IAA has given the POU less than 24 hours notice of the hearing then the summary must be filed as soon as is practicable. The bail summary is fully disclosable and indeed a copy of the summary part is sent to the applicant's representatives the day before the hearing. In the event of the applicant not being represented at the bail hearing, the bail summary must be served on the applicant at their place of detention before 2.00pm.'

If NO:
What was the immigration judge's response?

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.2: 'The 2003 Rules require the Secretary of State to file written reasons (the bail summary) for wishing to contest a bail application not later than 2.00 pm on the day before the hearing, or if served with notice of hearing less than 24 hours before that time, as soon as reasonably practicable. If he fails to file a bail summary within the required time, or if there is no bail summary, how should we proceed? If no bail summary is available, then you should proceed without it. This implies that bail would have to be granted. If it is provided late, then you can consider it. However if the allegations contained in it are disputed, its late submission and the lack of time given to the applicant to prepare his response to it must affect the evidential weight you can attach to it and any evidence submitted in its support.'

If YES:
Did the Home Office produce any evidence to support contested facts in the bail summary?
YES/ NO (delete as appropriate)

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.5.3: 'If allegations in the bail summary are contested in evidence then the Secretary of State should adduce evidence, including any documents relevant to the decision to detain, to support such allegations.'

How did the immigration judge deal with any lack of evidence from the Home Office to support contested facts?

Were actions set at the previous bail hearing for the Home Office to take addressed by the judge during the hearing?
YES/ NO/NO ACTIONS (delete as appropriate)
Comments –

4. ACTIONS OF THE IMMIGRATION JUDGE DURING THE HEARING

No detailed public guidance was available to use as benchmarks to assess the actions of an immigration judge during a bail hearing. Instead we used the minimum benchmarks we considered necessary to ensure the bail applicant's case was heard by the judge.

Did the immigration judge give you adequate opportunity to speak and answer assertions put by the Home Office?
YES/ NO (delete as appropriate)
Comments -

Did the immigration judge give the applicant adequate opportunity to speak and answer assertions put by the Home Office?
YES/ NO (delete as appropriate)
Comments -

5. DECISION-MAKING PROCESS

Was it argued by the Home Office that consideration had been given to the use of alternatives to detention?
YES/ NO / NOT RAISED BY HOPO (delete as appropriate)

UKBA, Enforcement Instructions and Guidance, chapter 55.1.1: 'the White Paper [1998] confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention (see 55.20 and chapter 57).'

UKBA, Enforcement Instructions and Guidance, chapter 55.3: 'Decision to detain (excluding pre-decision fast track and CCD cases) [...] 2. All reasonable alternatives to detention must be considered before detention is authorised.'

UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, Guideline 3: 'Where there are monitoring mechanisms which can be employed as viable alternatives to detention [...] these should be applied first unless there is evidence to suggest that such an alternative wll not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives.'

The removal of the applicant was imminent?
YES/ NO / NOT RAISED BY HOPO (delete as appropriate)

UKBA, Enforcement Instructions and Guidance, chapter 55.2: 'Detention can only lawfully be exercised under these provisions where there is a realistic prospect of removal within a reasonable period.'

UKBA, Enforcement Instructions and Guidance, chapter55.3.2.4 (CCD cases): 'In all cases, caseworkers should consider on an individual basis whether removal is imminent. [...] As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks. Cases where removal is not imminent due to delays in the travel documentation process in the country concerned may also be considered for release on restrictions. However, where the FNP is frustrating removal by not co-operating with the documentation process, and where that is a significant barrier to removal, these are factors weighing strongly against release.'

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2 quoting Lord Justice Dyson: 'although it was not possible to produce an exhaustive list of circumstances that are or

my be relevant to a decision to detain pending deportation, they included the following [...] (b) obstacles in that stand in the way of removal.'

The use of detention was proportionate to the purpose and that the Home Office was being diligent in its steps to progress the case?
YES/ NO / NOT RAISED BY HOPO (delete as appropriate)

UKBA, Enforcement Instructions and Guidance, chapter 55.1.4.1: 'To comply with Article 5 and domestic case law, the following should be borne in mind: [...]d) the detaining authority (be it the immigration officer or the Secretary of State), should act with reasonable diligence and expedition to effect removal (or whatever the purpose of the power in question is).'

UKBA, Enforcement Instructions and Guidance, chapter 57.5: 'When deciding whether or not to oppose bail, consider the following: [...] the period of time likely to elapse before any conclusive decision is made or outstanding appeal is disposed of; [...] the diligence, speed and effectiveness of the steps taken by the Immigration Service to effect removal.'

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2 quoting Lord Justice Dyson: 'although it was not possible to produce an exhaustive list of circumstances that are or my be relevant to a decision to detain pending deportation, they included the following [...] (c) the speed and effectiveness of any steps taken by the Secretary of State to surmount such obstacles'

UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999,Guideline 3: 'in assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved.'

The use of detention was necessary to prevent absconding?
YES/ NO / NOT RAISED BY HOPO (delete as appropriate)

UKBA, Enforcement Instructions and Guidance, chapter 55.3: 'Decision to detain (excluding pre-decision fast track and CCD cases)

1. *1. There is a presumption in favour of temporary admission or temporary release - there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.'*

UKBA, Enforcement Instructions and Guidance, chapter 55.3.2.5: 'An assessment of the risk of absconding will also include consideration of previous failures to comply with temporary release or bail. Individuals with a long history of failing to comply with immigration control or who have made a determined attempt to breach the UK's immigration laws would normally be assessed as being unlikely to comply with the terms of release on restrictions. Examples of this would include multiple attempts to abscond or the breach of previous conditions, and attempts to frustrate removal (not including the exercise of appeal rights). Also relevant is where the person's behaviour in prison or IRC (if known) has given cause for concern. The person's family ties in the UK and their expectations about the outcome of the case should also be considered and attention paid to the requirement to have regard to the need to safeguard and promote the welfare of any children involved.'

UKBA, Enforcement Instructions and Guidance, chapter 55.3.2.13: 'In cases where the individual has previously been refused bail by the Asylum & Immigration Tribunal, the opinions of the Immigration Judge will be relevant. If bail was refused due to the risk of absconding or behavioural problems during detention, this would be an indication that the individual should not normally be released unless circumstances have changed.'

UKBA, Enforcement Instructions and Guidance, chapter 57.5: 'When deciding whether or not to oppose bail, consider the following: [...] the likelihood of the applicant failing to appear when required.'

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2 quoting Lord Justice Dyson: 'although it was not possible to produce an exhaustive list of circumstances that are or my be relevant to a decision to detain pending deportation, they included the following [...] (f) the risk of absconding'

(If the applicant was an ex-offender) the applicant is a danger to the public/at risk of re-offending?
YES/ NO / NOT RAISED BY HOPO / APPLICANT NOT AN EX-OFFENDER (delete as appropriate)

UKBA, Enforcement Instructions and Guidance, chapter 55.1.3: 'Substantial weight should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does re-offend, must be considered.' The list of crimes alluded to in this paragraph is in the annexe to chapter 57.

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2 quoting Lord Justice Dyson: 'although it was not possible to produce an exhaustive list of circumstances that are or my be relevant to a decision to detain pending deportation, they included the following [...] (g) the danger that, if released, he/she will commit criminal offences.'

Other issues resulted in the need to continue to detain? (please list)

If YES:
How, if at all, did the immigration judge respond to this argument? Please give details of what evidence was cited by the immigration judge -

Did the immigration judge consider:
– the length of detention?
YES/ NO (delete as appropriate)

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2 quoting Lord Justice Dyson: 'although it was not possible to produce an exhaustive list of circumstances that are or my be relevant to a decision to detain pending deportation, they included the following [...] (a) the length of detention'

– the impact of detention on the applicant/the applicant's family?
YES/ NO (delete as appropriate)

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.6.2 quoting Lord Justice Dyson: "although it was not possible to produce an exhaustive list of circumstances that are or my be relevant to a decision to detain pending deportation, they included the following [...] (d) the conditions in which the applicant is detained, (e) the effect of detention upon the applicant and his/her family.'

Please give details of what evidence was cited by the immigration judge -

Did the immigration judge make a decision on bail in principle?
YES/ NO (delete as appropriate)
Comments –

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.4: 'It is suggested you deal with the application in three stages. First, is this a case where bail is right in principle, subject to suitable conditions if necessary?[…] If you indicate bail is right in principle, make it clear that your decision is subject to there being suitable and satisfactory conditions and sureties if you are going to require them.'

If bail was granted in principle:
Did the immigration judge consider whether a primary bail condition (a bail renewal on a specified date) would be sufficient without further secondary conditions?
YES/ NO (delete as appropriate)
Comments –

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.4.1: 'The primary condition imposed on granting bail is to appear before an adjudicator or immigration officer at a specified place and on a specified date (the primary condition). You then have to decide whether it is necessary to impose further conditions (secondary conditions) to ensure compliance with the primary condition.'

Did the immigration judge consider whether suitable secondary conditions could be imposed without the need for sureties?
YES/ NO (delete as appropriate)
Comments –

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.4: 'It is suggested you deal with the application in three stages. […] Second, are sureties necessary?'

Did the immigration judge consider the relevance of

recognisances	**YES/ NO (delete as appropriate)**
electronic monitoring	**YES/ NO (delete as appropriate)**
residence restrictions	**YES/ NO (delete as appropriate)**
reporting requirements	**YES/ NO (delete as appropriate)**
other bail conditions	**YES/ NO (delete as appropriate)**

Please give details –

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.4.6: 'You are at liberty to impose such other secondary conditions as you may consider necessary to ensure that the applicant answers to his bail. You may be asked to impose a condition prohibiting employment. You have no jurisdiction to impose such a condition as it is not one that is necessary to ensure the applicant answers to bail.'

Did the immigration judge go on to examine the suitability of sureties?
YES/ NO (delete as appropriate)

Please give details, including on the treatment of sureties, what evidence was examined and the reasons why any sureties were rejected by the immigration judge –

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.2.2: '[immigration judges] are reminded that sureties are only required where you cannot otherwise be satisfied that the applicant will observe the conditions you may wish to impose. Where there is clearly no prospect of an applicant being able to obtain sureties, but in principle there is a case for granting bail, then you should consider if more stringent conditions might meet the particular needs or concerns of the case.

AIT, Bail Guidance Notes for Adjudicators from the Chief Adjudicator, May 2003, para 2.7.4: 'It is suggested you deal with the application in three stages. [...] Third, are the sureties and recognisances offered satisfactory?'

6. OUTCOME OF HEARING

Did the immigration judge give clear reasons for agreeing or refusing bail at the hearing?
YES/ NO (delete as appropriate)

If the bail application was granted:
What reasons were given by the immigration judge?
Comments –

If the bail application was refused:
Did the reasons for refusal given in the written record reflect the reasons for refusal given at the hearing?
YES/ NO (delete as appropriate)
Comments -
Not completed by BID researcher observing unrepresented hearings

Did the immigration judge explain that the applicant could apply again or give the opportunity to withdraw the application?
YES/ NO (delete as appropriate)

What did they say?

Did the immigration judge issue any directions for action by either party?
YES/ NO (delete as appropriate)

What were they?

7. INAPPROPRIATE OR COMPLAINT WORTHY ACTIONS/DECISIONS

In your view was any aspect of the immigration judge's conduct or decision-making inappropriate?
YES/ NO (delete as appropriate)
Comments -

In your view did any aspect of the immigration judge's conduct or decision-making potentially warrant a complaint?
YES/ NO (delete as appropriate)
Comments -

8. FURTHER INSTRUCTIONS

Do you have any other comments
– about the hearing:

– about next steps that need to be taken on this case. Please include details of what further casework should be carried out by BID in terms of (a) preparing this case for a further application for bail and/or temporary release and/or (b) in order the challenge the legality of the decision to detain by way of making an application for permission to apply for judicial review or habeas corpus

1 Based on 35 of the 36 cases prepared by BID as data was not available for one case