Tribunal Procedure Committee

Consultation on the proposed Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2013 and amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008

Questionnaire

We would welcome responses to the following questions set out in the consultation paper. Please return the completed questionnaire by **Tuesday 2 July 2013** to:

The Secretary, Tribunal Procedure Committee, Post point 4.38, 102 Petty France
London SW1H 9AJ
Email: tpcsecretariat@justice.gsi.gov.uk
Fax: 020 3334 2233

Respondent name	Dr Adeline Trude
Organisation	Bail for Immigration Detainees

We have limited our comments to those areas of Tribunal procedure which fall within our area of expertise.

Applications in relation to bail – Rule 37

Comment

- We note that the requirement noted at 38 (d) in the current AIT Procedure Rules, namely the application notice [the B1 bail application form] must contain "the address where the applicant will reside if his application for bail is granted, or, if he is unable to give such an address, the reason why an address is not given" has not been included in the 2013 draft FTT Procedure Rules.

  It is not clear whether this is an intentional omission from the Draft FTT Procedure Rules. BID is of the view that this requirement should be retained in the Draft Rule 38 to avoid confusion, given that release on Tribunal bail must be to a specified address. A proposed release address may require checks to be carried out with relevant probation services and the police if the applicant is still

within the period of a release licence following a criminal conviction.

- We also note that the requirement at 38 (3) that "the [bail] application must be signed by the applicant or his representative or, in the case of an applicant who is a child or is for any other reason incapable of acting, by a person acting on his behalf" has not been included in the 2013 draft FTT Procedure Rules.

  BID is of the view that this requirement should be retained in the 2013 draft FTT Procedure Rules. At the very least it provides a safeguard of sorts in the form of reminder to the Tribunal that it will be dealing with the case of a person lacking the capacity to deal with their own affairs, a factor that is surely relevant where loss of liberty for administrative purposes is concerned. We note that the detention of acknowledged minors for anything other than very limited periods is no longer Home Office practice, but alongside that the fact that a small number of age-disputed individuals are held in immigration detention each year.

Repeat applications for bail -- Rule 38

(1) Do you think that there should be restrictions on the ability of an applicant to make repeated applications for bail?

No.

(2) If there are to be such restrictions, do you agree with the approach taken in Draft Rule 38?

We do not agree with the proposed restrictions. We disagree with the approach taken in Draft Rule 38.

See further comments below.

(3) Do you agree that an applicant should be required to set out any change of circumstances that has occurred since any previous application for bail?

The current B1 bail application form already requires this of applicants.

To be fair to both parties, the Secretary of State should also be required to set out any change of circumstance in the applicant's case. The burden of proof for continued detention lies with the SSHD. This should not be a requirement solely for the detained applicant.

We note that it will continue to be difficult, if not impossible, for unrepresented detainees to meet this requirement to the same standard as an accredited immigration advisor.

See further comments below

Comments:

Q21: Do you think that there should be restrictions on the ability of an applicant to make repeated applications for bail?

No.

At it simplest, BID takes the view that so long as people continue to be held in detention for periods exceeding 28 days without having been removed or deported from the UK then they should have the option to make an application for release throughout their period of detention and for that application to be heard at a full hearing.

Home Office, Immigration Statistics, January to March 2013 show that for the year ending March 2013, 28,735 people entered immigration detention in the UK. of those leaving detention in Quarter 1 2013 60% were removed from the UK, meaning that 40% were released to the community. 8% of people released from detention during Q1 2013 had been detained for 12 months or more.

Of the 74 detained for 12 months or more who were released from detention during Q1 2013, 24 (32%) were removed, 17 (23%) were granted temporary admission or release, 30 (41%) were bailed and 3 (4%) left for other reasons [this would include death in detention].

The importance of bail is seen to rise with length of detention. In BID's experience there comes a point where if removal can be achieved it will have been, beyond which the Home Office appears to be reluctant to release from detention on temporary admission or release. This has been recognised by the Independent Chief Inspector of Borders & Immigration who noted in recent inspection report:

> *"There was genuine fear and reluctance to release, given the potential implications of a foreign national prisoner committing a further offence, but no evidence that a detailed assessment of the risk of reoffending had taken place in each case. There was also a disparity between the number of people released from detention by the Agency and the number released on bail by the courts. Between February 2010 and January 2011, the Agency released 109 foreign national prisoners from detention compared with 1,102 released on bail by the courts"*

BID considers that as a general principle, immigration detainees should continue to have the ability to make periodic applications for release on bail without the option for the Tribunal to impose new restrictions on their current access to a full hearing of their application.

A full bail hearing before the Tribunal allows the detained applicant an appearance in person before the decision-maker (generally by videolink), the option for their legal representative to be present, and for counsel to be instructed. A full hearing allows for the First-tier judge to assess the demeanour of the applicant, and for the applicant and sureties to be questioned. A full hearing allows for inaccuracies in bail summaries to be brought to the attention of the judge at the time the decision on release is made rather than at subsequent bail hearings, and for the judge to put such challenges to the Home Office Presenting Officer.

Recent research by BID into bail decision making found that in a cohort of 80 bail hearings observed during 2011-12 31% of bail applicants who had pro bono legal representation and where pro bono counsel had been instructed were granted

release on bail, while only 11% of unrepresented bail applicants were granted release[1]. While acknowledging that this is a complex area, BID does not see how it can be considered fair to remove the representation premium from people held in administrative detention.

If there are to be such restrictions, do you agree with the approach taken in Draft Rule 38?

We do not agree with the proposed restrictions. We disagree with the approach taken in Draft Rule 38.

This consultation on the proposed Tribunal Procedure (First-tier Tribunal)(IAC) suggests the following Draft Rule 38(2):

> "Where, within 28 days of an application to be released on bail being refused, another application to be released on bail is made, the Tribunal **may** decide the application without a hearing, unless there has been a change in circumstances" (TPC, 2013)

However, the current bail guidance for judges[2] states at paragraph 67 that where an immigration bail hearing takes place within 28 days of the previous (refused) bail hearing or there has been no change of circumstance and no new evidence is offered that the First-tier judge **will** restrict the length of a bail hearing, the evidence that will be heard, and the opportunity for an applicant to have a period of consultation over a video link prior to the hearing.

> "In the following situation the Tribunal will restrict the length of a bail hearing, the evidence that will be heard and the opportunity for an applicant to have a period of consultation over a video link prior to the hearing. The first condition is that immigration bail has previously been refused by an First-tier Tribunal Judge after a full hearing of the application within the previous 28 calendar days and the second is that the fresh application contains no new evidence and no new ground. The Tribunal will issue directions to the parties in such cases with the notice of hearing setting out the restrictions."[3]

"No new circumstances", the passage of time, and further detention

In the absence of any other new circumstances or new grounds in a bail application where the detained applicant applies for release less than 28 days after a refusal, there will have been a further period spent in detention during which the SSHD has not removed the applicant from the UK.

We understand that the Procedure Rules must be kept simple and be simply expressed. For that reason *inter alia* we do not propose that the FTT Procedure Rules should go beyond the term to expand on what the term "new circumstances" may encompass in terms of the facts, nor do we believe that reference should be made in the Rules specifically to the further passage of time and the resulting additional time spent in detention. We acknowledge that each case must, as the President's bail guidance for judges notes, "turn on its own facts and must be decided in light of its particular circumstances" (Tribunals Judiciary, 2012: paragraph

[1] Bail for Immigration Detainees, (2012), '*The Liberty Deficit: long-term detention and bail decision-making*'. See Table 3 'Outcomes of bail hearings in this study', p.22.
[2] Tribunals Judiciary, (2-12), '*Presidential Guidance Note No 1 of 2012. Bail Guidance for Judges presiding over immigration and asylum hearings, implemented on Monday 11 June 2012*'. Available at http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/bail-guidance-immigration-judges.pdf
[3] ibid: paragraph 67.

19).

However, BID has serious concerns that time spent in detention without removal since a previous bail refusal may, over time, no longer be characterised by the Tribunal as a "new circumstance" if the option of a bail decision made on the papers is introduced by means of FTT Procedure Rules.

The consultation document itself is of some concern in this regard. The Tribunal Procedure Committee notes at paragraph 101 that it is:

> "Considering introducing Rules in relation to repeat applications for bail. The TPC is aware that there are concerns that many repeat applications are simply re-applications, where there has been no real change of circumstances. **It is suggested that, essentially, a second Judge is asked to examine the same evidence and submissions as have already been considered by another Judge**" (TPC, 2013)(emphasis added)

And goes on to state at paragraph 102:

> "We are told that this is **not a good use of judicial time or other resources**" (ibid) (emphasis added)

Leaving aside the proposed 28-day cut-off point, we note that it is indeed entirely possible for "a second Judge to be required to examine the same evidence and submissions as have already been considered by another Judge". The only new factor in such a bail application may well be that further time has passed during which the applicant has remained in detention and has not been removed from the UK by the SSHD.

We do not believe this is a reason to view such applications for release as merely "repeat" applications, worthy only of a cheaper version of scrutiny on the papers alone. This is especially so given that the onus lies with the SSHD to demonstrate the continuing need for detention, and with both the SSHD and the Tribunal to consider at bail whether or not an alternative to detention such as release with electronic monitoring may be sufficient.

The phrase "repeat application" is something of a misnomer. Further bail applications are rarely simply a repeat of a previous application, at the very least because further time has passed in detention without removal. They are "repeat" applications only in the sense that continued detention is the result of "repeat' decisions each month on the part of the SSHD to maintain detention.

The failure to provide detailed evidence referred to in the consultation document may lie with the UKBA (as was). Evidence required may have been requested from the Border Agency yet despite repeated requests have not been disclosed. For example, evidence of steps taken by the Border Agency to expedite the procurement of travel documents (assuming cooperation on the part of the detained applicant); evidence to support statements about the level of criminal risk or harm to the public deemed to be posed by the applicant if released on bail. In BID's experience of legal casework, in cases where the Border Agency fails to disclose the evidentiary basis of its decisions, this may be sought from it by means of a request under the Data Protection Act, but this takes time (often in excess of six months).

It cannot be fair, we believe, for First-tier Tribunal Procedure Rules effectively to hold routine failure on the part of the UK Border Agency to disclose evidence over long

periods of time against detained bail applicants. To repeat, the fact that no new evidence has been offered to the Tribunal by a bail applicant over several months may be due to a failure to disclose on the part of the SSHD. This cannot be used as a reason to somehow downgrade such applications for release.

Turning to the proposed 28-day cut off point, we demonstrate below that there are a number of scenarios in which a bail application with merit may be submitted before 28 days has passed since a refusal of release on Tribunal bail at a full hearing. We demonstrate that bail applications cannot always neatly and fairly be fitted into such a schema.

As the senior courts have indicated, even very short periods of detention – sometimes a matter of days - may be found to be unlawful under certain circumstances. The most recent version of the President's guidance to judges hearing bail applications in the First-tier Tribunal now lays great emphasis on the weight to be given to time spent in detention, noting that:

> *"…it is generally accepted that detention over three months would be considered a substantial period of time and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months"* (Tribunals Judiciary, 2012: paragraph 19)

Paragraph 21 of the bail guidance (2012) further notes

> *"A period of weeks might be disproportionate where one of the effects of detention is to keep a parent apart from young children*"[4]

This emphasis on length of detention was largely absent from the previous (2005) version of the bail guidance. BID takes the language used by the President of the First-tier Tribunal (IAC) and the senior courts as an indication that every additional day spent in detention must be given proper weight and be taken into consideration not put aside by relevant parties, nor must a risk be created that additional days spent in detention fail to be considered.

BID has concerns about the use by the Tribunal Procedure Committee in the consultation document of terms such as "no new circumstances". As a number of scenarios noted below demonstrate, there are borderline-type bail applications, and applications that do not fit neatly into the proposed 28-day re-application schema proposed, for which it could be argued that there is clear justification for a further full hearing within a period of 28 days of an earlier hearing at which release was refused. We take the view therefore that the existing option, outlined in bail guidance to judges at paragraph 67 of a truncated but full hearing where a bail application has been refused within the previous 28 days, remains the fairest and safest option for the Tribunal and immigration detainees appearing before it.

Circumstances under which a bail application may be made within 28 days of a previously refused application, with no new circumstances, no new evidence.

BID has extensive experience of legal casework on bail matters, and has carried out two major pieces of work on immigration bail decision-making. It may be helpful for the Tribunal Procedure Committee to consider the types of scenario in which, in BID's experience, a bail application may be lodged within 28 days of a previous

[4] With reference to the case of MXL and others [2010] EWHC 2397 (Admin), para.45ff.

refusal to release. In BID's view, a number of such scenarios do not sit neatly within the category proposed in Draft Rule 38, and would in our view require a full bail hearing to ensure fairness. Cases with these features are listed below as Group A. In other scenarios, listed below under Group B, these types of applications may be dealt with by the Tribunal expeditiously but in BID's view must still be heard at a full bail hearing. These two groups of scenarios are not mutually exclusive.

Group A: Scenarios in which a <28 days bail application are nonetheless likely to require full consideration at a full bail hearing

We consider that the types of cases listed below should be considered as borderline cases in which, strictly speaking there may be no new evidence and aside from further time spent in detention without removal there are no new circumstances, but which nonetheless require consideration again at a full bail hearing before a further 28 days has elapsed. This may be due to the facts in the case, and in any case because the consequence for detained applicants is further loss of liberty, which may come after many months or years in detention without removal. Further unnecessary time spent in detention should, we believe, always be treated as a matter of urgency.

These types of bail applications would include

- Cases where the Tribunal appears to have
  i) Done something very different to what is suggested in the Procedure Rules. For example, reliance for decision-making on evidence not made available to both parties, or not made available even to the tribunal.
  ii) Done something very different to what is suggested in the Bail Guidance (2012).
  iii) Failed to deploy options outlined more clearly and more strongly in the recently revised Bail Guidance (2012), such as the use of bail in principle
  iv) Been lacking in judicial knowledge of local/specialist type to a degree that it could be seen to jeopardise the fairness of a bail decision.

  In such cases there is clearly no new evidence or new circumstances beyond further time spent in detention, but the applicant should not have to wait a further four weeks in detention for a new hearing.

  Mr F had been detained for nearly three years at the date of hearing. He was without travel documents and therefore unremovable until this was resolved. He had a significant history of self-harm and suicide attempts in detention. He was refused bail at a hearing in 2012 because the First Tier judge did not know that Home Office initial accommodation ['Section 4 bail accommodation'] at Barry House in southeast London had the facility to monitor electronic tags where they were fitted as a condition of bail. The Tribunal was not dissuaded of this view by the Home Office Presenting Officer. Counsel for the applicant had stated that monitoring was possible (Barry House was after all the release address for most detainees bailed in the south east), and was able to telephone Barry House and ask the manager to fax through confirmation of this to the hearing centre within minutes. Despite this bail was refused.

  Counsel's attendance note stated: "It was submitted by the HOPO in answer to a question by the IJ that Barry House did not allow electronic monitoring. I contacted Barry House while still at the hearing centre to confirm the tagging point but was told by the manager that they do permit electronic tagging and in fact they had residents with

tags on there currently. I asked him to send a fax to the Tribunal immediately confirming this since bail had been refused on the false basis that tagging was unavailable at Barry House. He agreed to this and did indeed send the fax. I immediately told the usher of the Court to inform the IJ who was dealing with another application that this confirmation was coming through and that I wished her to reconsider the application in light of this. IJ received the fax but refused to reconsider the application stating that she would add the fax to the file for the next application.

"When I told the HOPO about my telephone conversation and that I was awaiting confirmation she went and took instructions and maintained her position that Barry House does not permit electronic tagging. This is either dishonest or a very severe case of the left hand not knowing what the right hand is doing. Either way it is unacceptable.

"In my opinion the IJ should have reconsidered the application in light of the correct information about tagging at Barry House being provided within minutes of her refusal. She had commented that tagging provides certainty and she refused bail because she considered the applicant was a substantial risk of absconding".

- Cases where the bail applicant has waited several weeks or months to obtain a bail address as part of Home Office Section 4 (1)(c) bail support, in order to be able to lodge an application for release on bail[5]. In our view this is unlikely of itself to be the sole factor in the need to reapply for bail within 28 days, but such a scenario should be considered a powerful contributing argument towards the need for an early reapplication where other relevant factors exist.

  i) Liberian national Mr M was detained in November 2009 after serving a 42-month sentence. Two and a half years later on 23rd March 2012, in preparation for making a bail application, he applied for a Home Office Section 4 bail address. In July 2012, by which time Mr M had been waiting four months, BID wrote the first of series of letters of complaint at the delay, in line with the Home Office complaints process. A telephone call to a UKBA Section 4 caseworker on 20th November 2012 revealed that UKBA was still unable to provide a bail address. Mr M was then granted a bail address on 28th November 2012 ***eight months after application during which time he had not been removed by the Home Office****.*

  ii) Iraqi male, Mr H, was detained in June 2012 after serving a prison

[5] Where a detainee has a criminal conviction of any sort the Home Office must carry out a risk assessment that will involve coordination between two divisions of the UK Border Agency (as was) and the National Offender Management Service (NOMS). As a result of this, the length of time taken for a Section 4 bail address to be granted, and hence the length of the 'bail cycle' has increased from around ten working days maximum in 2008 to several weeks or months at the time of writing. The Probation Trust element of this process itself may take up to 9 weeks, often considerably longer, and there is a lack of disclosure by the Probation Trusts of reasons for failure to approve addresses. This generally necessitates a further address being sourced by UKBA and checked, adding a further 2-3 months to the bail cycle for that individual. Delays in the provision of Section 4 bail accommodation prior to a bail application can, in some cases familiar to BID, be longer than the time spent by the same individual in prison serving their sentence. Where Home Office Section 4 bail addresses are subsequently granted following such delays, they are then only valid for 14 days (for self-contained accommodation for applicants considered by UKBA to pose a higher risk of some kind) or one calendar month for shared accommodation (suitable for low risk bail applicants). Delays in provision of Home Office-supplied bail addresses are routine, and have been the focus of ongoing and longstanding discussions between BID and UKBA, the National Offender Management Service, and more recently with representatives of the First-tier Tribunal.

sentence of 12 months. He applied for a Section 4 bail address in July, and sent a letter of complaint when an address had not been provided by 23rd August 2012. The Border Agency replied to him on 13th October 2012 saying that they were still trying to source accommodation for him from their commercial provider, and by 3rd December 2012 (five months later) told BID by phone that there was a waiting list for bail addresses but would not disclose what position our client had reached on that list. Further contact from BID on 18th December revealed that no bail accommodation was yet available, and complaint letters were issued the following day. Mr H was finally ***given a bail address on 22nd January 2013 six months after he had applied for it.***

iii) Iranian national Mr J applied for a Section 4 bail address on 18th December 2012 so that he cold apply for release on bail after 5 months in detention. By March 28th 2013 only part of the risk assessment process had been completed by UKBA. On 2nd April 2013 ***BID issued a pre-action letter in relation to the delay, and a Section 4 bail address was issued the same day, enabling our client to apply for bail after a wait of more than three months****.*

iv) Mr A, an Algerian national, has been detained since December 2011. He served a sentence of 12 months, and entered the removal centre while still within his licence period. He made an application for Section 4 (1)(c) bail accommodation and support on 20th February 2012. Subsequent correspondence from UKBA indicates that a bail address was eventually obtained for Mr A on 17th December 2012 (almost ten months after he had submitted his application for a bail address). However, as UKBA noted in correspondence, "this address requires approval by the probation services (NOMS) and was sent to the applicant's caseowner on the same day so that he could obtain a NOMS decision. A reminder was sent on the 6 February 2013, and a further reminder was sent by management on the 19th February and then on the 24th April. As yet no NOMS decision has been received". As of early May 2013 Mr A was still waiting for NOMS approval of his bail address after four months. A ***Section 4 bail address had not yet been provided to him fifteen months after he applied for it, meaning that he has been unable to apply for release from detention on bail. During this time the Home Office has not effected his removal from the UK.***

- <u>Cases where failure by the Tribunal to act judicially in relation to the manner and atmosphere in which proceedings are conducted might amount to a material error of law or at the very least procedural unfairness</u>. Such cases would include those where Inappropriate personal conduct, in creating an impression of partiality on the part of the tribunal, jeopardises procedural fairness in tribunal decision making.

Mr P had been detained for over two years at the time of the bail application, and had a longstanding history of mental illness. He had attempted suicide while in detention and had made "an enormous number of cuts" on himself in one day according to an independent medical report. During the bail hearing the judge was taken to photographic evidence of self-harm while in detention including a

scarring diagram, and an independent medical report detailing clinical evidence of multiple suicide attempts while in detention and the opinion that detention had caused deterioration in mental state rendering him unfit for detention. Mr P himself showed the judge the extensive scarring on his body via the videolink. The judge noted that further evidence was required of both self-harm and suicide risk, and went on to note that Mr P had not been successful in any of his suicide attempts to date, saying

> *"Well he has not actually done it though has he? Well he has not actually committed suicide, he has only tried to do it".*

Once the application had been withdrawn, counsel's attendance note shows that the judge then said that in his experience "suicide has the potential to be self-serving". BID wrote to the Tribunal to raise concerns about the conduct of the bail hearing, including comments made about Mr P's previous suicide attempts that had prompted counsel to withdraw the application in the belief that Mr P was not receiving a fair hearing. BID lodged a further bail application for Mr P without waiting for 28 days despite having no new grounds other than the passage of time and further time spent in detention.

In the context of judicial concerns about the volume of so-called "repeat" bail applications, BID's recent research on bail decision-making[6] addressed the role of the lack of an appeal process for bail, and the difficulties in making effective complaints, in driving applicants, whether represented or not, to take the most direct route to possible release which is almost always to make a further bail application.

We followed in detail the progress of three complaints made by BID to the First-tier Tribunal about personal conduct in the Tribunal, or circumstances where the Tribunal appears to fail to follow its own rules. These complaints were prompted either by a recommendation from counsel instructed for a particular bail hearing, or as a result of the preparation of a bail application. We concluded that the high proportion of repeat bail applications and high rate of withdrawal[7] of bail applications may in part be related to the fact that the complaints process for bail hearings is something of a dead end since they do not appear not to be dealt with quickly or openly by the Tribunal, and in any case do not allow for the overturning of a bail decision[8].

An appeal is not an option in relation to immigration bail decisions: First Tier Tribunal bail decisions are listed as excluded decisions in the Excluded Decisions Order under the bail paragraphs of the Immigration Act 1971. This leaves the option of judicial review where an error of law has been made, or a further bail application, as the only remedy. When faced with apparent unfairness, the easiest and quickest route by far is simply to make a further bail application, and indeed First-tier judges routinely suggest this option[9].

[6] Bail for Immigration Detainees, (2012), '*The Liberty Deficit: long-term detention and bail decision-making*'.

[7] Statistics on withdrawal of bail applications show a rate of 34% for July to December 2011 (HMCTS)

[8] Where the issue at stake is the conduct of the judicial office holder this falls within the remit of the Office for Judicial Complaints.. 'Judicial Appointments & Conduct Ombudsman, (undated), 'How to complain about the handling of complaints concerning the personal conduct of the judiciary. Available via Ministry of Justice website at http://bit.ly/S40Zc5

[9] For further information please refer to Bail for Immigration Detainees, (2012), '*The Liberty Deficit: long-term detention and bail decision-making*', Chapter 6: Easier to apply again: complaining about bail hearings.

BID's view is that the enabling role required of any Tribunal, including the Immigration & Asylum Chamber, requires that in those rare - but not entirely unknown - instances where a First-tier Tribunal decision-maker fails to act in a judicial manner, detained bail applicants should not be required to wait for a full 28 days before having the opportunity for a full hearing of their case, particularly if there were additional factors in the case such as an expiring Section 4 bail address obtained only after several months' delay.

<u>Group B: Scenarios in which a <28 days bail application can most likely be dealt with expeditiously at a full bail hearing</u>
These may include cases in which:

- An unrepresented applicant, or applicant with little or no ability to read or write English or who is otherwise illiterate or lacks capacity, does not understand the procedure at Tribunals[10].

- An applicant is being advised incorrectly or by someone who is not an accredited immigration advisor (including other detainees) in the absence of legal aid for bail.

- The applicant is mentally ill - possibly severely mentally ill - and as a means of addressing his frustration at his ongoing detention lodges bail applications every week or so. BID is aware of people in detention who take this approach, typically against legal advice or in the absence of any legal advice at all.

<u>Other factors that support the argument against any bail applications being heard on the papers only</u>

- Fairness to unrepresented Tribunal users and the overriding objective

  The Tribunal system is required by both the existing Procedure Rules and the Tribunals, Courts & Enforcement Act 2007 to be fair and accessible to all parities, including those who have no legal representation. In BID's experience it will be beyond the ability of the vast majority of unrepresented applicants to prepare a bail application in such a way as to demonstrate the existence of new circumstances or new evidence.

- Under use of bail in principle by legal representatives and advocates and the First-tier Tribunal

  The current President's guidance to judges hearing bail applications (2012) lays greater emphasis than the previous bail guidance (2005) on the use of bail in principle at paragraphs 46 and 48. However, in BID's view while bail in principle would seem to offer the opportunity to reduce the number of what the Tribunal characterises as "repeat" bail applications, BID's 2012 research[11] shows that at the present time First-tier judges are cautious about the use of bail in principle. We also understand more recently and informally from the First-tier Tribunal that legal representatives have proven reluctant to request bail in principle. While bail in principle remains underused, in our view it is essential to ensure that bail applications made within 28 days of a previous

[10] NB: If the proposed residency test for legal aid is introduced as outlined in 'Transforming Legal Aid' (Ministry of Justice, 2013) in the autumn of 2013, there will be no legal aid for bail applications for the majority of immigration detainees.
[11] Bail for Immigration Detainees, (2012), '*The Liberty Deficit: long-term detention and bail decision-making*'.

refusal and with no new grounds are given a full hearing, even if that hearing is very short.

Why should there be a full hearing for bail applications submitted within 28 days of a previous refusal and with no new ground? Some general comments
The difficulty for the First-tier Tribunal will always be, in BID's view, how it can ensure that decision-makers are not contributing – however indirectly – to a further period in detention which may later turn out to be unlawful, without a full hearing on the merits of release with the applicant and any legal representatives present and available to be questioned by the judge, and with the ability to challenge the stated position and any inaccuracies of the SSHD in relation to their continued detention. We do not consider that a move towards the option of paper-only bail hearings for bail applications that fall into the categories outlined in the consultation document could offer sufficient safeguards against this.

While the language in this proposal seems to suggest that a hearing on the papers only for bail applications with no new grounds made within 28 days of a refusal of release is an option ("may" not "will"), BID is concerned that there is a risk that a decision on papers only might become the norm under current circumstances where, understandably, HMCTS is seeking cost savings.

The TPC notes that judges report a number of bail applications with no new evidence nor circumstances, made within 28 days of a previous refusal, but does not offer information on the proportion of bail applications falling into that category. We believe that any step towards paper-only decision-making on decisions on whether or not to release from detention is a step too far away from accessibility and demonstrable fairness towards this particular group of Tribunal users.

Unrepresented bail applicants, and those who cannot speak or write English, must always get the opportunity to explain their circumstances and be questioned by the Tribunal, through an interpreter if required, allowing the Tribunal to examine the application to determine what the applicant may be unable to express clearly or adequately in written English. It is not at all clear that the Tribunal could discharge its duty of fairness if it cannot question unrepresented bail applicants where a decision has been taken to decide the application on the papers only.

BID believes that all people held in administrative detention must get the chance to have representation at the hearing; the choice to take a decision on release on the papers only is in effect to disallow representation in court when there may be very strong reasons to return before the Tribunal in less than 28 days. In borderline cases it is not uncommon for there to have been a series of errors by all parties, and it is essential to maintain the option for a hearing in person (via videolink) where a person comes back to the Tribunal very quickly.

We believe that the option outlined in the current President's guidance on bail to judges (2012) allows for rapid consideration of such cases within a truncated hearing, while retaining the option of appearance (generally via videolink, with an interpreter if required) for the applicant. In BID's view this would allow the Tribunal to determine quickly whether the re-application fell into the borderline category described above, and continue to deliver fair and defensible decision making to Tribunal users who are detained for administrative convenience.

The 28 day Rule for bail applications
The TPC notes in the consultation document at paragraph 104:

> "If the TPC decides to introduce such a Rule, it will need to consider whether 28 days is the appropriate length of time" (TPC, 2013).

And at paragraph 102:

> "The TPC is conscious… that bail applications, by their very nature, involve vital issues of personal liberty. Any restriction must be considered extremely carefully."

For all the reasons we have noted above, BID does not consider it appropriate, safe, or fair to introduce a Rule in relation to bail applications made within 28 days of a refused bail application, and where there are apparently no change of circumstances, that would allow for decisions to be made on the papers alone without a hearing. As we have shown, there are too many scenarios in which bail applications may on the face of it fall into such a category, but closer examination of the facts, possibly necessitating oral examination of the applicant, would show that fairness dictates that there must always be a full hearing for bail applications. To allow the possibility for this not to be the case is to court unfairness.

Any change in the bail process that has the potential to further disadvantage unrepresented detainees, is surely to be resisted. BID's regular survey of the detention estate to determine detainees' experiences of seeking and receiving immigration advice, carried out every six months since 2010)[12] has shown that there has never been a clear link between lack of legal aid advice in detention and lack of merit in a case as defined by the legal aid guidance, due to a mismatch between capacity and need for immigration advice across the detention estate. That link is set to be broken entirely if the residency test for legal aid proposed in 'Transforming Legal Aid' is introduced later in 2013 or early in 2014. Detainees of modest or limited means with viable and arguable immigration matters, including applications for release on bail, may in the future be left entirely without access to legal advice other than from not-for-profit organisations such as BID, where there can only ever be limited capacity. We do not consider this is the right moment for the First Tier Tribunal to be reducing in any way the level of scrutiny given to applications for release on bail.

Q23: Do you agree that an applicant should be required to set out any change of circumstances that has occurred since any previous application for bail?

BID shares the frustration of the First-tier Tribunal at the need for detainees to keep returning to the Tribunal to seek release from detention where removal has not taken place after a reasonable period of time. Our motivation to seek a solution has been the desire to avoid the need for detainees to repeatedly make the same arguments in the absence of supporting evidence from the SSHD. As the lengths of time spent in detention have increased over recent years, and the numbers of people facing extremely long-term detention has also increased, the Tribunal is faced with increasingly complex detention cases.

BID attempted to engage with the issue of so-called "repeat" bail applications in our recent research report 'The Liberty Deficit: long-term detention and bail decision-making' (2012). For the benefit of the Tribunal Procedures Committee we reproduce

[12] For the latest findings from BID's twice-yearly survey across the detention estate in the UK please go to http://www.biduk.org/820/news/bids-legal-advice-in-detention-survey.html

below a extract from this report in which we describe an 'adjourn and direct' culture that would, we believe, end the often fruitless re-rehearsing of the same arguments in bail hearings in the absence of the Tribunal and applicant having the benefit of detailed evidence from the SSHD.

AN 'ADJOURN AND DIRECT' CULTURE

We would like to propose an additional option for resolving evidential issues at bail, an option that would not require a subsequent bail application for consideration of the evidence once it had been disclosed but rather a resumed hearing. Turning back to the example given above at […] of a disputed and unsubstantiated assertion by the SSHD about behaviour in detention as part of her argument against release on bail, under the new bail guidance (2012) there are a number of options open to the Tribunal and the applicant during the hearing. Let us assume that this bail applicant has already been detained for at least 12 months, and removal has not been achieved in this time.

Table: Options available to the Tribunal to curtail the need for further bail applications on the same issues[13]

OPTIONS AVAILABLE TO THE TRIBUNAL	**Requires subsequent bail hearing**	**Requires subsequent bail hearing**	**Requires subsequent bail hearing**
Dismiss the application	yes, because lack of evidence not dealt with	yes, because lack of evidence not dealt with	yes, because lack of evidence not dealt with
Withdraw the application	yes, because lack of evidence not dealt with	yes, because lack of evidence not dealt with	yes, because lack of evidence not dealt with
Direction to SSHD to substantiate assertion by producing evidence by the time of any subsequent bail hearing	yes, regardless of nature of evidence		
Grant bail in principle until such time as information required to complete the conditions to be imposed is provided to the Tribunal (Bail guidance para 46)			
Grant bail in principle for 48 hours pending the disclosure of documents to the Tribunal not available at the time of the hearing (Bail guidance para 48) (NB: unfair to applicant if evidence required of SSHD who fails to comply)	Only if evidence not produced, bail then treated as refused (para 50).		
Adjourn the hearing on the	Maybe,		

[13] The passage of time in detention without removal should be considered as a change of circumstance. The reference here is to repeated disputes between parties over unsubstantiated grounds.

application of either party, combined with directions for the production of evidence relating to a matter in dispute, or where fairness dictates the substantiation of assertions.	depends on nature of the evidence and decision taken at resumed hearing		

What becomes quite apparent in diagrammatic form is that where disputed grounds are asserted without evidence, the Tribunal must begin to take steps to sort out the evidential base of assertions in order to stop a potentially limitless series of applications for release on bail against which the SSHD is free to make the same arguments on any number of grounds regardless of whether evidenced or not. This puts both the Tribunal and the applicant at a disadvantage, as they are often the two parties in possession of the least amount of evidence in relation to the application [for release].

These options noted in the bail guidance apply for the Tribunal where the issue under dispute is the imminence of removal, or steps taken by the UKBA towards obtaining travel documents for removal. They apply equally where assertions are made of a high risk of harm to the public on release, a high risk of re-offending, or a high risk of absconding.

The use of an adjournment, where an application is made by either party, with directions to parties to provide evidence of assertions in relation to risk levels and their potential for management in the community, or some other material issue in dispute, is allowed for in the Asylum and Immigration Tribunal (Procedure) Rules 2005[14]. Rule 47 of the procedure rules state that:

> *"Subject to any provision of these Rules, the Tribunal may adjourn any hearing"*

The Procedure Rules continue at Rule 21 'Adjournment of appeals':

> *(1) Where a party applies for an adjournment of a hearing of an appeal, he must -*
> *(b) show good reason why an adjournment is necessary; and…*
>
> *(3)The Tribunal must not, in particular, adjourn a hearing no the application of a party in order to allow the party more time to produce evidence, unless satisfied that -*
> *a. The evidence relates to a matter in dispute in the appeal;*
> *b. It would be unjust to determine the appeal without permitting the party a further opportunity to produce the evidence; and*
> *c. Where the party has failed to comply with directions for the production of evidence, he has provided a satisfactory explanation for that failure."*

In a speech to a judges' conference in 2010 Mr Justice Blake noted the use of an adjournment where it would be helpful, for example that the Tribunal might "adjourn the application for bail for further information to be presented to the IJ"[15]. If the IAC were to disallow withdrawal of a bail application without the consent of the Tribunal,

[14] The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No.230 (L.1)), as in force from 19 December 2011Part 5: General Provisions. Available at http://bit.ly/S2NLfK . The Procedure Rules are currently under revision.

[15] Mr Justice Blake (President, Upper Tribunal Immigration & Asylum Chamber), transcript of presentation given at immigration judges' conference 2010, *'Immigration bail: problems and practice'*. Paragraph 34 (iv).

but by means of compensation allow for an adjournment of a bail hearing on application, combined with the use of directions to either party, this would have the effect of allowing for all parties - though in practice generally the applicant and the Tribunal - to have sight of the evidence supporting arguments made against release. It is reasonable to think that the use of adjournments at bail hearings has the potential to contribute to a reduction in the overall number of repeat bail applications, as well as delivering a message to all parties that arguments must be substantiated.

Fast Track

(4) Should there be a separate set of rules for Detained Fast Track cases? Why?

No. BID agrees with the Tribunal Procedure Committee that there should not be a separate set of Procedure Rules for people held under immigration powers at specific removal centres. For reasons see the comment section immediately below.

(5) If there is to be a separate set of rules, should there be any change to the existing Fast Track Rules?

If the Fast Track Procedure Rules are not abolished, BID supports ILPA's position that it would ask the Committee to consult separately on draft new Rules. It is very difficult to comment in the abstract and obviously decisions that are made in response to the Committee's consultation on the main Rules may well affect decisions that are made about the Fast Track Rules.

See further comments in the section immediately below.

Comments:

Q. 25 and 26

Bail for Immigration Detainees (BID) is a member of the Immigration Law Practitioners' Association (ILPA). Our Legal Director co-convenes the ILPA Detention & Fast Track sub-committee. We agree with the ILPA position that there should not be a separate set of Procedure Rules for Fast Track cases.

Should there be a separate set of rules for Detained Fast Track cases? Why?

1. No. Instead, as proposed by the Committee, the Tribunal should be empowered to exercise its discretion in the handling of appeals resulting from Detained Fast Track (DFT) asylum cases in accordance with the standard Procedure Rules. The Fast Track Procedure Rules should be abolished.

2. BID agrees with ILPA's concerns that it may not be lawful for the Committee to make separate rules for the Fast Track as any such rules would not be consistent with the Committee's statutory purpose.

3. Individuals placed in the Detained Fast Track should normally expect a decision on their asylum claim within 10-14 days (although in practice the timescales are often much longer). The purpose of the Fast Track is to allow speedy and efficient processing of asylum claims and cases are selected on the basis of specific criteria set out in the DFT/DNSA selection policy which is separate from the Home Office's general policy on detention. These can lead

to detention of persons for processing in the fast track who would not be detained under the general detention policy.

4. However, once a decision is made by the Home Office on the asylum claim, a decision about continued detention is supposed to be made in accordance with the general policy on detention, rather than on the specific fast track criteria. According to statements made when the Detained Fast Track process was first established in 2003:

> "If the claim is refused or for any reason cannot be dealt with in accordance with the pilot timescales, a decision about further detention will be made in accordance with existing detention criteria. Detention in this category of cases will therefore normally be where it has become apparent that the person would be likely to fail to keep in contact with the Immigration service or to effect removal." (18 March 2003 per Beverley Hughes MP for the Government)
>
> "We may also detain claimants after we have made and served a decision in accordance with our general detention criteria". HL 16 September 2004 WS130 per Baroness Scotland for the Government.

5. Thus:

   (a) Initial detention, which is for administrative convenience, flows from an initial decision that a case is suitable for the fast track process;

   (b) Once an initial decision on the asylum claim is made by the Home Office, the individual is no longer detained as a matter of administrative convenience, but the general detention criteria apply. A specific decision ought to be made as to whether the person's continued detention pending their appeal and subsequently removal from the UK is justified under the general detention criteria.

6. If persons are detained under general criteria post the initial decision, then who or what determines who has a fast-track appeal? In practice the group is all those who went through the initial pre-decision fast track in the named detention centres and have not left, but that describes practice not the decision.

7. Thus the description of the group whose appeal will be subject to the Fast Track Procedure Rules (see current Rule 5) is simply that they are detained in a particular detention centre when they receive notice of their decision, and one looks in vain for any decision that a particular individual should get a fast track appeal, still less any criteria for the selection of those individual appeals as suitable.

8. The Committee's purpose, as set out at section 22 of the Tribunals Courts and Enforcement Act 2007, is difficult to match with making separate Fast Track Procedure Rules on this basis. What exactly is the Committee trying to achieve by making these Rules? Speedier justice for those in detention? Is that a lawful purpose for the Committee- and if so why does it not apply across the detention estate but only to particular detention centres? Or shorter timescales for those who do not have any evidence to proffer- in which case why would the Committee choose only those in detention? The

Committee must only make those rules that are compatible with and rationally designed to achieve the purposes at section 22.

9. The Fast Track Procedure Rules promote speed of decision-making at the expense of procedural fairness. The Secretary of State claims at paragraph 109 of the consultation paper that they offer 'clear' and 'consistent' procedural parameters when, in practice, the result is a rigid and inflexible set of criteria that do not properly allow for the preparation and consideration of often complex cases.

10. In practice, the rigid application of the Fast Track Procedure Rules regularly leads to procedural unfairness in appeal hearings. Unfairness, in turn, increases the likelihood of onward appeals, fresh claims, and urgent applications to the High Court seeking judicial review and/or injunctions. Thus any savings gained by rushing through proceedings in the First Tier Tribunal are often lost down the line by further legal challenges, which often can and should be avoided.

11. Asylum applicants in the detention system face difficulties obtaining corroborative evidence, for example from sources in their country of origin, expert witnesses, or medical practitioners. There are further difficulties in promptly accessing legal representation ahead of Detained Fast Track asylum interviews. Cases are often referred to duty solicitors with no more than 24 hours notice (and frequently less than this). This means that no effective preparatory work can be done. The net effect is that applicants are interviewed before they have been advised about what evidence they might try to obtain.

12. Refusal decisions by the Home Office are generally made within 36 hours of interview, with an appeal case coming before the Tribunal within 5-6 days of the decision. This is an extremely short timescale in which to obtain any type of supporting evidence. The applicant is then in the position of having to request an adjournment, which is where the Fast Track Procedure Rules become crucially important.

13. First-tier Tribunal Judges considering the Fast Track Procedure Rules have an unnecessary incentive to refuse adjournments based on those separate rules. This incentive is not present in the non-detained appeals system, and is wholly unnecessary for the efficient administration of justice.

14. It has been recognised by the Court of Appeal that First-tier Tribunal Judges' concern to follow the Fast Track Procedure Rules has, in some cases, led to unfair decision making. In the case of SH (Afghanistan) [2011] EWCA Civ 1284[16], an adjournment application, made in order to obtain crucial evidence, had been refused in the First Tier Tribunal (FTT) because the Judge saw it would necessitate removing the case from DFT altogether, which he did not want to do. As Lord Justice Moses held in the Court of Appeal:

> The mere fact that under the Rules an adjournment can only be given where there is an identifiable future date not more than ten days later provides no justification for refusing an adjournment where there are good grounds for doing so. After all, Rule 28(d) itself contemplates taking a case out of the Fast-Track procedure in circumstances where it cannot otherwise be justly determined. (para 8).

[16] http://www.bailii.org/ew/cases/EWCA/Civ/2011/1284.html

15. Lord Justice Moses then went on to state the proper legal test for considering an adjournment:

> Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? (para 14).

16. The fact that the Fast Track Procedure Rules allow for a case to be taken out of Fast-Track where 'it cannot otherwise be justly determined' does not adequately reflect this test, and creates an unfair and unnecessary incentive to keep unsuitable appeals within the DFT system.

17. The effect of the existing rules is that the burden for securing a fair hearing is in effect placed upon the Appellant and/or their representatives, rather than the independent judgement of the Tribunal judge. There is, in fact, no reason why the Tribunal should not have the freedom to deal with the particular and unique evidential factors presented in each case, and to address each case by reference to what fairness demands.

18. Were the Tribunal to develop its use of discretion in the way it conducts the determination of appeals stemming from the DFT process, it would have the added advantage of making clear the independence of the Tribunal from the Secretary of State, thereby increasing the trust placed in the Tribunal by appellants, who would perceive that their case has had a fair hearing.

19. The Secretary of State would, in turn, be required to more carefully consider the suitability of complex cases for inclusion in the DFT process in the first instance. At present, decision-making on DFT inclusion appears to be led by policy rather than fact-based analysis. This was a key issue in the recent Court of Appeal case *JB (Jamaica), R (on the application of) v Secretary of State for the Home Department* [2013] EWCA Civ 666[17]. As Lord Justice Pill stated:

> The principal ground on which the respondent sought to justify the decision to treat the appellant's claim as one that could be decided quickly so that his detention would comply with the DFT/DNSA policy was that, having been in this country since May 2010, the appellant had already had enough time to obtain any evidence in support of his case that might be available to him. On that view of the matter allowing him further time was unlikely to result in his obtaining additional evidence of any value and therefore unlikely to assist her in making a fair and sustainable decision. In some cases there might be force in an argument of that kind, but in this case it fails to take proper account of the particular circumstances of the appellant's case…[I]t should have been obvious to anyone who considered the claim with care that the decision was not a simple one because of the difficulty of ascertaining where the truth lay. In my opinion no reasonable person in possession of all the information about the appellant that could and should have been available if his case had been assessed in the manner required by the DFT/DNSA policy could have been satisfied at the time of his detention that a fair and sustainable determination of his claim could be made within a period of about two weeks. (para 30).

[17] http://www.bailii.org/ew/cases/EWCA/Civ/2013/666.html

20. The increased case management powers set out in draft Rule 4 would still permit the Tribunal to list appeals for hearings quickly, where it is fair and justified to do so.

21. We reject the Secretary of State's concerns (as set out in paragraph 109 of the Consultation document) that a consequence of removing the Fast Track Procedure Rules would be to increase the length of detention for those within the Detained Fast Track, with corresponding increases in detention costs, and more legal challenges to the legality of detention. We believe that the opposite is true.

22. More appeals would be decided fairly in the first instance before the FTT following the abolition of the Fast Track Procedure Rules. Consequently the number of fresh claims, judicial review applications, and urgent injunctions sought in the High Court would fall. Such claims and applications create legal barriers to removal and demand the time of judges, lawyers, and civil servants alike. They furthermore extend periods of detention, increasing the associated costs.

23. In fact, if there were no separate Fast Track Procedure Rules then the DFT process would effectively end once an asylum decision has been made. Continued detention after that time would have to be justified on an individual basis, in line with existing law and policy; it would not be detention for the purpose of the DFT. Presently, the fair consideration of bail is obscured by the concern for keeping a case within the DFT system.

24. The Secretary of State's concerns (as set out in paragraph 109 of the Consultation document) would only be borne out if she maintained detention following a decision to refuse asylum in circumstances where it was unlawful and/or unreasonable to do so. There would no longer be a general power to detain during the appeal process merely because an individual had been detained pre-decision for the DFT process.

25. The draft Rules propose more extensive case management powers (draft Rule 4), and do not provide any fixed time frame for listing asylum appeals, unlike the current Rule 23A. Allowing a longer and flexible time frame for listing appeals following the refusal of asylum would allow for bail applications to be made and heard prior to the main hearing, such that

    (a) detention would not necessarily be prolonged, and

    (b) appeals could proceed in the same way whether or not the appellant remained in detention.

19. At present, when bail applications are heard prior to the DFT appeal hearing, the experience of practitioners is that many judges are reluctant to grant bail as they are aware that the effect of doing so would be also to remove the applicant from the DFT process and they consider this a matter to be more properly considered by the Judge hearing the substantive appeal. However, if there were no separate procedure rules, then release on bail should not affect the progress of the appeal. In turn this should result in detention only being prolonged when it can be justified for reasons other than inclusion within the DFT. This should also mean that there would not be

prolonged detention with the resulting increased costs and reduced capacity that concern the Home Office.

26. As detention post-decision would no longer be authorised under the DFT process, there is no danger of DFT procedures being held incompatible with Article 5 should the Tribunal rules be removed.

(6) If there is to be a separate set of rules, should there be any change to the existing Fast Track Rules?

If the Fast Track Procedure Rules are not abolished, BID supports ILPA's position that it would ask the Committee to consult separately on draft new Rules. It is very difficult to comment in the abstract and obviously decisions that are made in response to the Committee's consultation on the main Rules may well affect decisions that are made about the Fast Track Rules.

However, should the Committee decide to publish Fast Track Rules without further consultation, BID agrees with ILPA's proposal that the following amendments to the existing Fast Track Rules are necessary:

1. Extension of the time limit for giving notice to appeal from 2 days to 4 days; (Rule 8 (1)).
This would enable a greater opportunity for unrepresented (and detained) applicants to be able to seek legal advice and representation; and it would increase fairness insofar as appellants will have greater preparation time before a hearing.

2. Extension of the period of time for the listing of appeals by the Tribunal from 2 days to 6 days following receipt of notice; (Rule 11 (1)).

This will increase the available preparation time so that around 2 working weeks are available to the appellant to prepare their appeal. It will also, again, allow bail matters to be separately considered by the Tribunal affording realistic time frame for a prior bail hearing. This may well reduce periods of detention and increase efficiency early on.

3. Bail summaries to be served earlier in the day, with the time specified in draft Rule 39(a) should be changed to 12pm.

This will allow bail applicants sufficient time to answer the points raised by the Secretary of State to justify their ongoing detention.

4. An expanded and comprehensive duty of disclosure under Rule 10.
This would give effect to the duty under the Data Protection Act 1998 so that complete records are made available to appellants within the diminished DFT timescale.

5. There should be additional time for applications to the Upper Tier Tribunal; (Rule 17); from 2 days to 6 days.

This will enable unrepresented Appellants additional time to obtain legal representation; or alternatively to draft grounds of appeal themselves. For

detained appellants who cannot read or write any English, a mere 2 working days is an entirely unrealistic period of time to do either.

6. Adjournments (Rule 28).

This provision does not sufficiently interact with Rule 30 in order to make plain that where an adjournment (or crucially *successive adjournments* when taken together) exceed 10 days, the presumption should then be that cases would be removed from the DFT procedures.

As a consequence of this the Tribunal's practice has often granted successive back-to-back adjournments of 10 days; and thereby fail to engage with whether continuing detention and inclusion within DFT remains appropriate.

7. Removal of onerous "exceptional circumstances" - Rule 30, (1) (b)

This onerous requirement is odds with ensuring fair proceedings and it should be removed and reconsidered as according to the clear guidance as within SH **(**Afghanistan**)** [2011] EWCA Civ 1284 (para 14)[18].

[18] http://www.bailii.org/ew/cases/EWCA/Civ/2011/1284.html