MAX meeting on Immigration Bill, Wednesday 15th January 2014

BID briefing on provisions relating to release from detention on immigration bail

About BID

BID is a national charity that provides immigration detainees in removal centres and prisons with free legal advice, information, representation, and training, and engages in research and policy work including "*Fractured Childhoods: the separation of families by immigration detention*", (2013) and "*The Liberty Deficit: long-term detention and bail decision-making. A study of immigration bail hearings in the First-tier Tribunal*", (2012). BID won the JUSTICE Human Rights Award 2010. Over the last year BID has assisted 3367 people held in immigration detention. BID also works through advocacy with civil servants via Home Office and HM Courts & Tribunals Service stakeholder groups. BID runs a bi-annual survey of legal representation across the UK detention estate. The domestic and European courts have granted BID permission to intervene in a number of cases raising important issues regarding immigration detention policy and practice, including: Mustafa Abdi v United Kingdom (European Court of Human Rights, Application 2770/08)[1]; SK (Zimbabwe) v SSHD UKSC 2009/0022[2]; Walumba Lumba (Congo) and Kadian Delroy Mighty (Jamaica) [2011] UKSC 12[3], and most recently by the Court of Appeal in the case of David Francis v SSHD (2013/2215/A).

For further information about bail and residential tenancies provisions in the Immigration Bill please contact Dr Adeline Trude, 07890 037896, 0207247 3590, biduk.adeline@googlemail.com

Part 1 Removal and other powers
Clause 3 Bail

- **The Tribunal will be required to dismiss without a hearing applications for release on bail made within 28 days of a previous refusal, unless the applicant can demonstrate a material change of circumstance**

Purpose: to maintain the current position that where loss of liberty is at stake, the First-tier Tribunal (Immigration & Asylum Chamber) retains its independent powers to deal flexibly and fairly with applications for release even where it has previously refused release during the preceding 28 days.

Briefing

Where loss of liberty is at stake it is not safe to completely deny immigration detainees access to an independent First-tier Tribunal judge for up to 28 days. Current bail guidance for First-tier judges (last reviewed in 2012) already provides for situations where a bail applicant applies again for release within 28 days of a previous refusal and on the face of it has no new evidence and no new circumstances (essentially the same thing as the no "material change" of the bill). Current guidance requires judges to offer only a curtailed hearing, the ability to offer up reduced volumes of evidence, and less time for legal representatives to consult with their client during the hearing[4].

[1] The sequel to the Court of Appeal's decision in R(A) v SSHD [2007] EWCA Civ 804

[2] Where the court considered whether a breach of public law duty involves non-adherence to a published policy (and delegated legislation) requiring periodic detention reviews.

[3] Established a breach of a public law duty involving non-adherence to a published policy identifying substantive detention criteria.

[4] "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." Tribunals Judiciary, (2-12), '*Presidential Guidance Note No 1 of 2012. Bail Guidance for Judges presiding over*

The Bill as introduced would create a two-stage bail application process where previously there was only one stage, at a cost to the public purse. In the year to end March 2013 the First Tier Tribunal received 11,971 applications for release on immigration bail[5]. Someone sufficiently legally qualified at the First-tier Tribunal will need to consider for each bail application whether

i) a previous application has been refused within the last 28 days, and
ii) whether or not there has been sufficient "material change in circumstance" to warrant consideration of the application.

Meaning of 'material change in circumstances' is not defined and is anyway highly susceptible to challenge. Decisions by the First-tier Tribunal (IAC) on what constitutes "material change in circumstance" will be susceptible to judicial review.

Further passage of time in detention should always be considered a "material change in circumstances" for the purpose of a bail application. By requiring detainees to wait for up to 28 days before making a further application for release this Bill trivialises both the fact and effect of immigration detention. Detainees in this position may have been held for months or years in detention. The senior courts have indicated that even very short periods of detention – sometimes a matter of days - may be found to be unlawful under certain circumstances.

BID's recent research[6] shows that it is relatively common for the First-tier Tribunal (IAC) to make procedural errors or lack local knowledge in relation to electronic monitoring availability for example. This can be considered an acceptable by-product of rapid access and rapid decision making which are the hallmarks of the tribunal system. The provision in the Bill as introduced is unsafe as it fails to allow the First-tier Tribunal (IAC) to rapidly correct its own errors by means of a new bail application heard within a few days.

> 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.
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> Counsel's attendance note stated: "It was submitted by the Presenting Officer in answer to a question by the [judge] 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 [judge] 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. [The judge] received the fax but refused to reconsider the application stating that she would add the fax to the file for the next application.
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> *"In my opinion the [judge] 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".*
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> As legal representatives Bail for immigration Detainees lodged a further bail application for Mr F without waiting for 28 days, despite having no new grounds other than further time spent in detention. Mr F, an extremely vulnerable detainee, was granted release on bail.

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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

[5] HM Courts and Tribunals Service, HMCTS Presidents' *Stakeholder Group 'Bail Management Information Period April 2012 to March 2013'*.

[6] Bail for Immigration Detainees, (2012), '*The Liberty Deficit: long term detention and bail decision making: a study of immigration bail hearings in the First-tier Tribunal*', 2012. Available at http://www.biduk.org/162/bid-research-reports/bid-research-reports.html

These provisions to weed out bail applications with no "material change in circumstance" simply add an additional layer to the bail application process and additional cost to HM Courts & Tribunal Service. This provision adds complexity and cost, but does not deal with the stated problem

The bill makes provision that detainees seeking release on bail will be required to first make the case to the Tribunal that their application offers new grounds or a change of circumstances, in what will need to be an additional filter process before their case is heard on a separate occasion by the First-tier Tribunal. There is no possibility of rolling both up together as publicly funded solicitors and sureties must be available for a bail hearing, and public interest will presumably not allow for all to be present at an additional filtering decision event. This provision creates a two-stage bail application process where previously there was only one stage.

In the year to end March 2013 the First Tier Tribunal received 11,971 applications for release on immigration bail[7]. Someone sufficiently legally qualified at the First-tier Tribunal will need to consider for each bail application whether

i) a previous application has been refused within the last 28 days, and
ii) whether or not there has been sufficient "material change in circumstance" to warrant consideration of the application.

The First-tier Tribunal (IAC) lists 97% of bail applications for hearing within 3-6 days, recognising the urgency in the context of loss of liberty. Adding an additional filter process will not work in this urgent timeframe.

It is in any case highly unlikely that the Legal Aid Agency will fund an additional element in the bail application process. If access to the First-tier Tribunal is denied, detainees will instead need to seek release by means of application for Judicial Review or Habeas Corpus at greater cost than a bail application. Either way, these Home Office provisions will have the effect of incurring additional cost to the Ministry of Justice (HM Courts & Tribunal Service).

This provision puts up an additional barrier to the First-tier Tribunal for the 43% of detainees who have no legal representative and detainees whose English is poor or non-existent. These detainees may in fact have new grounds or a change of circumstances but their applications for release will be dismissed without a hearing just because the applicant lacks the ability to make the case

BID takes the view that it will be entirely beyond the ability of most unrepresented applicants, assuming they can read and speak English, to prepare a bail application in such a way as to demonstrate the existence of new circumstances or new evidence. Any change to the bail process that has the potential to further disadvantage unrepresented detainees is surely to be resisted.

Not safe – loss of liberty is at stake but the provision does not allow the First-tier Tribunal to correct its own mistakes

The provisions seek to make immigration detainees wait in administrative detention for up to 28 days before making a new application for release even in cases where the First-tier Tribunal (IAC) has made a procedural error, engaged in conduct amounting to a material error of law, or there has been an error of local knowledge on the part of the Tribunal. Research[8] shows that this happens often enough for this provision in the bill to be unsafe, since it fails to allow the First-tier Tribunal (IAC) to rapidly correct its own errors by means of a new bail application heard within a few days.

Current bail guidance for First-tier judges (last reviewed in 2012) already provides for situations where a bail applicant applies again for release within 28 days of a previous refusal and on the face of it has no

[7] HM Courts and Tribunals Service, HMCTS Presidents' *Stakeholder Group 'Bail Management Information Period April 2012 to March 2013'*.

[8] Recent research by Bail for Immigration Detainees ('*The Liberty Deficit: long term detention and bail decision making: a study of immigration bail hearings in the First-tier Tribunal*', 2012) shows that procedural mistakes and errors of law take place frequently enough to make it dangerous to remove completely the option of a decision on an application for release from detention within 28 days of a previous refusal, regardless of whether or not there is new evidence/new ground/material change in circumstances. Available at http://www.biduk.org/162/bid-research-reports/bid-research-reports.html

new evidence and no new circumstances [arguably the same thing as the no "material change" of the bill]. This guidance requires judges to offer only a curtailed hearing, the ability to offer up reduced volumes of evidence, and less time for legal representatives to consult with their client during the hearing[9].

No evidence offered of abuse of bail system

The Minister for Immigration states in the Factsheet on bail accompanying the bill that

> *"Currently there is no limit on the number of times a person may apply to the First-tier Tribunal for bail, which can and does encourage abusive repeat applications. A detainee refused bail is able to reapply the following day on the same grounds".*

No evidence has been offered by the Home Office of the scale of this apparent abuse. This provision suggests that the Home Office does not consider the Tribunal judiciary capable of making sensible decisions. The provision in the Bill remove the decision making power in borderline cases from the Tribunal judiciary and gives it to the SSHD as the detaining power, despite the fact that independent judges are best placed to consider all evidence in a case relating to loss of liberty.

Part 1 Removal and other powers
Clause 3 Bail

- **The SSHD must consent to release where directed by the Tribunal within 14 days of removal date**

Purpose: to maintain the current position that where loss of liberty is at stake, the First-tier Tribunal (Immigration & Asylum Chamber) retains its independent powers to deal flexibly and fairly with applications for release even where a detainee has been served with directions for removal from the UK to take effect within 14 days of the date of application

In the Factsheet[10] on bail accompanying the Bill the Minister says:

> *"We are going to allow the Home Office to maintain detention where removal is scheduled within the next 14 days. …The Secretary of State will be required to consent to a grant of bail where removal is within 14 days of the First-tier Tribunal hearing the application. If the Secretary of State does not consent to bail, the individual will be refused bail"*

This provision makes the SSHD the only adjudicator in immigration bail applications for the 14 days prior to the proposed date of removal once removal directions are set. Applications for release on bail prior to nominal RDs would therefore seem to be futile under these provisions in the Bill.

But as anyone who works with detainees will tell you, the service of RDs does not inevitably result in removal from the UK, and RDs are often cancelled by the Home Office only to be set again, sometimes repeatedly over several months.

Despite RDs being in place, continued detention until removal may not be appropriate, for example where the detainee has a mental or physical illness, they are the primary carers of children, or they are pregnant.

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[9] "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." 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

[10] Home Office October 2013 '*Immigration Bill Factsheet: Immigration Bail (clause 3)*' http://bit.ly/19VCasu

While the existence of RDs will be considered by the Tribunal in a bail application, they will be considered in the round with other factors particular to the individual.

In the experience of Bail for Immigration Detainees, bail may be granted by the First-tier Tribunal for the purposes of sorting out personal affairs and property, or spending time with friends and family prior to scheduled removal, where the judge is confident that it is safe to do so and sufficient safeguards, including financial recognisances, are in place.

RDs should not therefore trigger an automatic refusal of bail. The presumption of liberty is not displaced by imminence of removal, though the Bill seeks to do just this.

It is entirely unacceptable that the Secretary of State seeks via this Bill to override bail decisions of the independent Tribunal, when she herself will have been a party in such cases. The proposals effectively oust the jurisdiction of an independent and impartial tribunal over bail determinations. This is susceptible to challenge on procedural fairness grounds.

The Home Office relies on apparent high rates of absconding when removal is imminent as justification for this provision, yet has been entirely unable to provide data on absconding rates for bailees.

No evidence offered by the Minister for abuse of the bail process in the face of removal directions
The Minister for Immigration states in the Factsheet on bail accompanying the bill that

> *"In certain cases, individuals abuse the system by filing repeat or late bail applications with the hope of avoiding or delaying their removal and the current system does not do enough to discourage this.*

No evidence has been offered by the Home Office of this apparent abuse. This provision suggests that the Home Office does not consider the Tribunal judiciary capable of making sensible decisions. The provision in the Bill removes the decision making power in difficult cases from the Tribunal judiciary and gives it to the SSHD as the detaining power, despite the fact that independent judges are best placed to consider all evidence in a case relating to loss of liberty.

POSITIVE USE OF THE IMMIGRATION BILL

- ## Repeal of statutory ground for refusing release on bail on mental health grounds

Purpose: In the light of several recent findings by the courts that mentally ill immigration detainees have been detained unlawfully and their Article 3 rights (prohibition on inhuman and degrading treatment) breached, to remove a provision in the Immigration Act 1971, via this bill, that allows Tribunal judges to refuse release only on the ground that a detainee is "suffering from mental disorder and continued detention is needed in his interests or for the protection of others"

Briefing
At present a statutory restriction on the grant of bail contained in the Immigration Act 1971[11] may be applied to detained bail applicants who are mentally ill. This provision allows the Tribunal to refuse bail solely on the ground that "the applicant is suffering from mental disorder and continued detention is needed in his interests or for the protection of others". This provision of the 1971 Act allows for the First-

[11] 131 Schedule 2, Part II, s30 (2)(d) Immigration Act 1971. Available at http://www.legislation.gov.uk/ukpga/1971/77/contents

tier Tribunal (IAC) to return the individual to detention ***only*** because they are mentally ill in certain cases: this cannot be considered acceptable[12].

The last two years have seen the first four cases[13] in the UK in which the treatment by the Home Office of severely mentally ill men in detention was found to have been both unlawful and to have breached their Article 3 rights (the absolute prohibition of inhuman and degrading treatment). While the statutory bar to release on bail for reasons of mental health remains, we believe that the Tribunal is now on notice that where the issue of mental health is raised in a bail application great care must be taken before making an assumption that a detainee will be better off remaining in detention. Indeed, it is we believe now safer for the First-tier Tribunal (IAC) to assume that a detainee who is mentally ill would get better treatment if released[14].

The Secretary of State as the detaining power has a positive duty of care in relation to the health - mental or otherwise - of all immigration detainees. But where the Secretary of State fails to fulfil that duty in any individual case in the forward looking manner required of her[15], as in the four cases listed here where it has been found that mentally ill detainees were treated in an inhuman and degrading manner (and in numerous others that continue to be settled by the Home Office in advance of a full hearing), and where that individual comes before the Tribunal seeking release on bail, there can be no justification for keeping that person in detention on the grounds of their health where, were it not for that factor, the applicant would be released.

There is an existing comprehensive statutory framework for the detention of the mentally ill where that is necessary in their interests or for the protection of others, ie the Mental Health Act 1983. The High Court in *R (AA (Nigeria)) v SSHD* [2010] EWHC 2265 (Admin) at para 40 held:

> "In my view, the Secretary of State's attempt to justify detention by reference to the claimant's own well-being must fail, whether as an exceptional circumstance or otherwise. The use of immigration detention to protect a person from themselves, however laudable, is an improper purpose. The purpose of the power of immigration detention, as established in Hardial Singh and subsequent authorities, is the purpose of removal. The power cannot be used to detain a person to prevent, as in this case, a person's suicide. In any event, it is unnecessary to use immigration detention for this purpose since there are alternative statutory schemes available under section 48 of the Mental Health Act 1948 or under the Mental Health Act 1983 .

The Court of Appeal was "prepared to assume the correctness of that proposition" in *R (OM (Nigeria)) v SSHD* [2011] EWCA Civ 909 at para 32.

The statutory restriction on bail is therefore inconsistent with the purpose of the statutory detention powers and the overall statutory framework. BID urges that the statutory restriction on the grant of bail on mental health grounds contained in the Immigration Act 1971 should be repealed via the Immigration Bill 2013-14.

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[12] For a full outline of problems identified with current provision of mental health treatment in immigration removal centres see '*Positive duty of care? The mental health crisis in immigration detention. A briefing paper by the Mental Health in Immigration Detention Project*', May 2012, Bail for Immigration Detainees & Association of Visitors in Immigration Detention. Available at http://www.biduk.org/162/bid-research-reports/bid-research-reports.html

[13] 133 R (HA (Nigeria) v SSHD, HC 2012 available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html ; R (BA) v SSHD [2011] EWHC 2748 (Admin) (26 October 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html ; R (S) v SSHD [2011] EWHC 2120 (Admin) (5 August 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html ; and R (D) v SSHD [2012] EWHC 2501 (Admin).

[14] This is without even considering the well-documented adverse effect that detention of this kind with no end point has on the mental health of people held this way, whether or not they have a pre-existing mental health condition or have been tortured.

[15] This duty may require release from detention, or a transfer to hospital for assessment and treatment under the Mental Health Act. In addition, in line with Hardial Singh principles (implied restrictions on the power to detain for the purposes of deportation) there may be an additional duty on the SSHD to release the individual if the poor state of health of the person makes it impossible to progress his or her immigration case (for example the individual is too ill to be interviewed), making removal within a reasonable period impossible.