

BRIEFING – ACCOMMODATION POST DETENTION

Bail for Immigration Detainees (BiD) provides legal advice and representation to people held in immigration detention across the UK to help them get released from detention. Last year we supported 5,840 people. Securing post-release accommodation is extremely important for immigration detainees to make a successful application for bail.

1. Background: the repeal of section 4(1)(c)

Under s4(1)(c) of the Immigration and Asylum Act 1999 (“s4(1)”), homeless detainees could apply for accommodation from within detention if they had nowhere to reside when released.¹ On 15 January 2018, the Home Office implemented a new immigration bail and post-release accommodation system under the Immigration Act 2016. Pursuant to these statutory changes, detainees can no longer apply for s4(1) accommodation.

The new regime has had a significant impact on detainees. The vast majority of our clients are no longer able to apply for accommodation support from the Home Office. As a consequence, many detainees are being indefinitely detained for no other reason than their lack of suitable accommodation. Others have been released by the SSHD to the streets, potentially into destitution.

The information below is based on BiD’s understanding of the bail accommodation system as it currently stands; however, Home Office policy makers and decision-makers are providing contradictory advice and the regime is being implemented inconsistently. When the new regime came into force, the Home Office and the Migrant Help² were unable to provide advice about how the new system was intended to work from within Immigration Removal Centres and whether applications for accommodation would be accepted. These fundamental questions were referred back to the Home Office Bail Policy Team and we are yet to receive definitive advice, almost five months after implementation.

2. The new post detention accommodation regime

Unlike under s4(1), there are now different accommodation provisions available for immigration detainees depending on their immigration status:

- asylum seeker;
- refused asylum seeker; and
- those that have not made an asylum claim.

¹ The s4(1) process had been designed to be quick and simple to administer. In 2008, BiD assisted the Home Office to ensure the section 4 accommodation process was compatible with the bail process. This involved drafting a simple, two-page application form which could be completed and processed efficiently and alongside an application for bail. Legal aid did not (and does not) fund legal representatives to make applications for accommodation for their clients. The process needed to be simple to enable detainees to complete the application form themselves since many detainees do not have legal representatives. The grant of s4(1) accommodation, once granted, was kept open for between 14 and 28 days, to enable the detainee to make a bail application.

² Migrant Help has been contracted to submit applications under s4(2) and s95.



Tab 1.1. Bail accommodation regime post s4(1) repeal				
Status	Accommodation	Application process	Can an application be made from within detention?	Right of appeal?
Asylum seekers	s 95 Immigration and Asylum Act 1999 (“s95”) (as well as temporary accommodation under s 98 Immigration and Asylum Act 1999 (“s98”))	ASF1 through Migrant Help	No	Yes
Refused asylum seekers	s 4(2) Immigration and Asylum Act 1999 (s4(2))	ASF1 through Migrant Help	Home Office has advised yes, but only if the detainee has proof of a release date within 14 days. <i>(Detainees are not given notice of their release date, so BID is yet to have a s95 application accepted from within detention.)</i>	Yes
Individuals who have not made an asylum claim ³	Paragraph 9, schedule 10 of the Immigration Act 2016 (“schedule 10 Bail accommodation”)	There is no application that can be made.	There is no application process. <i>(However, the Home Office policy team have recently advised that representations can be made regarding eligibility alongside an application for bail.)</i>	No

Although these categories of detainees are treated differently on paper, BID’s casework since 15 January 2018 has shown that the end result is the same: the Home Office is not supplying immigration detainees with accommodation post release. Without s4(1), homeless detainees are either bailed onto the streets or ‘accommodated’ in detention because they do not have an address.

2.1. Schedule 10 Bail accommodation

There is no application process for schedule 10 Bail accommodation. Notwithstanding this, pursuant to Paragraph 9, schedule 10 of the Immigration Act 2016 the Secretary of State may provide, or arrange for the provision of, facilities for the accommodation where:

³ And potentially also asylum seekers and refused asylum seekers who are not eligible for support under s4(2) and s95.



- “a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition”⁴ (para 9(1)(a)), and
- “the person would not be able to support himself or herself at the address unless the power in... were exercised” (para 9(1)(b)), and
- “the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power” (para 9(3)).

The bail guidance published for Home Office staff on 12 January 2018 (the bail guidance) states that this power is:

“subject to the caveat that we are also satisfied that the person is neither able to support themselves at the specified address through their own efforts, nor is an asylum seeker or failed asylum seeker otherwise being supported by the Secretary of State under other powers (section 4(2) or section 95 of the Immigration and Asylum Act 1999).”⁵

Schedule 10 Bail accommodation is therefore available to detainees who have not made an asylum claim.

The bail guidance sets out extremely narrow grounds under which the SSHD may exercise the power to provide exceptional circumstances accommodation, as follows:

1. Cases which involve people granted bail by the Special Immigration Appeals Commission (SIAC), where exceptionally strict bail conditions, including a residence condition, are imposed to control the risk posed by the individual;
2. Cases involving people, including Foreign National Offenders (FNOs), who are granted bail and who are currently assessed by HMPPS as being at a high or very high risk of causing serious harm to the public;
3. Cases which infringe a person’s human rights on Article 3 grounds. It is expected “that this will cover people with serious physical or mental health problems who would not otherwise fall to be supported under other arrangements.”⁶

As well as no application process, there is no appeal right for refusals to provide bail accommodation. Further, the Home Office does not provide reasons for refusals.

We have been advised by the Home Office that the intended effect of the new schedule 10 bail regime is that accommodation will be available to detainees only in extremely rare circumstances. Since its implementation, only two BID clients have been provided with bail accommodation under the schedule 10 exceptional circumstances criteria, and these were in cases involving high or very high risk FNOs.

⁴ The Home Office bail policy team have recently confirmed that paragraph 9(1)(a) should be read as meaning “either an address that is already specified or one that is to be specified”.

⁵ Home Office Immigration Bail Guidance published for Home Office staff on 12 January, 2018, retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673954/immigration-bail-v1_0.pdf

⁶ Ibid.

Though it has been made clear that there is no application for schedule 10 bail accommodation, the Home Office has provided conflicting advice on what the process is for a grant of exceptional circumstances accommodation to be made by the SSHD. Sheri Yusuf of the Bail Policy Team stated on 6 March 2018 that:

“In cases in which the individual is making an application for bail, either to the Secretary of State or to the Tribunal, it is for the individual to make clear that a relevant residence condition is sought and that the test in paragraph 9 (including the “exceptional circumstances” test) would be made out if it were granted.”

This can be contrasted with other Home Office correspondence which states:

“Unfortunately, the Home Office cannot accept any ‘applications’ for schedule 10 from representatives. There is no process for a Representative to apply for schedule 10 as it is the Home Office’s decision to decide whether a Residence Condition under Schedule 10 is suitable or not. The Home Office will then explain this on the bail summary when Immigration Bail has been applied for. If the Home Office believe that the Residence Condition is considered suitable, then we will state this in the Bail Summary for the Immigration Judge to agree and grant conditional bail as such”.

2.2. Section 95 – accommodation for asylum seekers

There is now no application process for asylum seekers to apply for accommodation from within detention if they would be destitute when released.

Asylum seekers are advised that they can apply for s98 temporary accommodation and then s95 accommodation once they are released from detention to the streets. The Home Office have further advised that asylum seekers cannot arrange such accommodation from within detention prior to release. The SSHD has taken the position that asylum seekers are unable to apply for accommodation from within detention because they would fail the destitution test. The destitution test requires that an individual demonstrate that he/she is destitute or would be likely to become destitute within 14 days without the provision of assistance.

A ‘release first, apply for accommodation later’ scheme fails to take into account the reality of making a bail application to the First Tier Tribunal (FTT). FTT judges are unwilling to release detainees to the streets. Therefore, applications for FTT bail are being consistently refused due to lack of accommodation. This system is unworkable; the detainee needs an address before they can be released, and they need to be released before they can secure an address.

Unlike the FTT, the Home Office has been releasing asylum seekers and other immigration detainees to the streets on SSHD bail, discussed below.



2.3. Section 4(2) – accommodation for refused asylum seekers

At present, failed asylum seekers are the only group that can in theory apply for accommodation from within detention under s4(2) by submitting an ASF1 form if they can demonstrate that they have a release day within 14 days (and meet certain other criteria).

The requirement that the application be made within 14 days of release is necessary so that the detainee can meet the destitution test, i.e. that they are destitute or are likely to become destitute within 14 days without the provision of assistance.

Although this means on paper that a refused asylum seeker can submit s4(2) applications from within detention, they are unable to do so in practice for the following reasons. Firstly, detainees are not advised that they have a release date 14 days' in advance. Detainees are either simply released by the FTT after a bail hearing or by the Home Office on SSHD bail. Secondly, as above, having an address prior to a bail hearing is vital for a successful bail application, as the FTT will not release detainees to the streets.

3. Article 5: Detention as accommodation

As a consequence of the repeal of s4(1), in many cases detention is being used for the sole purpose of accommodating detainees who have no address. Detention for this purpose is unlawful, irrational and contrary to published Home Office policy. Article 5(1)(f) of the ECHR allows for detention for the purpose of removal or deportation; it does not allow for detention to be used for accommodation. Once there is no longer a legal justification for detention, a detainee should be released.

In the recent High Court judgment of *R (MS) v Secretary of State for the Home Department* [2017] EWHC 2797, Mr Martin Griffiths QC stated:

“I do not think that detention could be justified simply on the basis that release would place the Claimant on the streets. If it is unacceptable to place the Claimant on the streets, he should be provided with bail accommodation. Detention is not a proper substitute for such accommodation once detention cannot otherwise be justified.”

Although caselaw relates to the superseded section 4(1) accommodation regime, the principles still stand. Detention should not be used for accommodation when detention cannot otherwise be legally justified.

Further, and even where continued detention is lawful, detainees should not be prevented from having meaningful access to the FTT bail process simply because they do not have an address and therefore can only be accommodated in a detention centre. The FTT will be unlikely to release someone to the streets unless they are assured that the applicant has accommodation to be released to. Therefore, in order to ensure that detention centres are not being unlawfully used for the purpose of accommodation, the SSHD should provide accommodation and support for homeless detainees when their detention cannot otherwise be justified or they are to be granted bail by the tribunal or the Home Office.

4. SSHD releasing detainees to the streets in breach of Article 3

The Home Office has demonstrated that it does not have the same concerns as the FTT about releasing detainees to the streets. We have had several cases since 15 January 2018 where the Home Office has opposed our client's application for Tribunal bail, citing lack of accommodation as a reason for opposing bail, and bail has been refused. The Home Office has then released these clients to the streets in the days following the hearing.

The SSHD has stated in Court documents that persons would need to be released into the streets before the SSHD would consider their eligibility for support. A recent bail summary stated:

“X would be released to the streets and would need to make an application for Home Office accommodation.”

It should be remembered that there is no application process for applying for bail accommodation, either from the streets or from within detention.

The courts have found that in order to avoid a violation of Article 3 of the ECHR, the SSHD may be required to provide accommodation and support. The SSHD acknowledges this caselaw in its guidance but is releasing homeless detainees into destitution nonetheless. The Bail Guidance states:

“The first step in determining whether accommodation and/or support may need to be provided for human rights reasons is to note that in ordinary circumstances a decision that would result in a person sleeping rough or being without food, shelter or funds, is likely to be considered inhuman or degrading treatment contrary to Article 3 of the ECHR” (R (Limbuella) v Secretary of State [2005] UKHL 66).⁷

Article 3 is an absolute right; the SSHD's violation of Article 3 cannot be justified.

5. Conclusion

The post s4(1) regime is unworkable. Home Office decision-makers are providing contradictory advice and are implementing the regime inconsistently.

As a consequence of the repeal of s4(1), homeless immigration detainees are being released into destitution, or alternatively, indefinitely detained for the purpose of accommodation.

In the former scenario, where individuals are released to the streets by the Home Office they will likely be ineligible for public funds and also prevented from working. They will have very few options but to rely on charities or be forced into destitution. Such an unjust regime is characteristic of the hostile environment policies.

⁷ Home Office Immigration Bail Guidance published for Home Office staff on 12 January, 2018, retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673954/immigration-bail-v1_0.pdf



If detainees without accommodation are not released to the streets, as is the indicated approach of the Tribunal, the situation for detainees is equally wretched. Such detainees will be indefinitely deprived of their liberty, due to their inability to apply for and find post-release accommodation. Our casework at BiD is demonstrating that the repeal of s4(1) has trapped many individuals in detention on this basis.

The application of the new accommodation regime is interfering with immigration detainees' fundamental human rights under Articles 3, 5 and 8 of the ECHR and should be immediately reformed. An accommodation regime equivalent to that which existed under s4(1) should be reinstated.



Appendix 1

Case studies

1. VO

VO is an asylum seeker who has been held in immigration detention for 10 months. VO applied for First Tier Tribunal (FTT) bail and requested schedule 10 bail accommodation. In March 2018, the FTT granted VO conditional bail with a residence condition, conditional upon the SSHD providing accommodation. Despite this, the SSHD did not provide bail accommodation, the grant of bail lapsed, and VO remained in detention.

The Immigration Bail Guidance published for Home Office staff on 12 January 2018 states that the SSHD has the power to provide Bail accommodation under schedule 10. However:

“Decision makers should also note that it will not be appropriate to use this power to accommodate the following categories of migrant:

- asylum seekers: they may be provided with accommodation under the powers set out in sections 95 or 98 of the Immigration and Asylum Act 1999 if they do not have adequate accommodation or the means of obtaining it.”

Accordingly, VO’s representative submitted an application for s95/98 support for VO. The Home Office refused this application on the basis that:

“You are in an Immigration Removal Centre. I am therefore satisfied that your essential living needs, including accommodation, are being met in full. You may submit a fresh application for support if you are released from detention or make an application for bail.”

The decision maker failed to take into account the fact that VO had already been granted bail, conditional upon a grant of accommodation.

VO appealed the decision to refuse s95 accommodation. In the submissions made by the SSHD to the Asylum Support Tribunal **attached**, the SSHD stated that:

- “applicants housed in detention are not destitute by the fact that they are being housed and their dietary needs are catered to. Detention is based around shared facilities (bedrooms, shower rooms & dining rooms) which is not dissimilar to emergency accommodation with lack of liberty being the main difference.”
- “The Applicant should apply for Bail accommodation from the CCD”.

This advice contradicts the advice of the bail policy team and the guidance. There is no application form or process for applying for bail accommodation from the CCD team. Furthermore, VO had



already requested schedule 10 bail accommodation and had been refused, presumably because he is an asylum seeker and could be provided with accommodation under s95.

VO was therefore left with no options. He was not removable, and he should not have been detained. He was being detained solely because he did not have an address outside of detention.

Issues:

- Different departments (eg. CCD, asylum support) appear to be confused about who has responsibility for accommodating homeless detainees and in what circumstances.
- There should be an application process for schedule 10 bail accommodation.
- There should be an appeal right for schedule 10 bail accommodation refusals.
- If asylum seekers are precluded from accessing schedule 10 bail accommodation, they should be able to apply for s95 accommodation from within detention in order to make a successful bail application.
- Detention is being used for the sole purpose of accommodation and this is unlawful.

2. HN

HN was detained under immigration powers in April 2017. His asylum application was refused in October 2017. Since this date the Home Office has been trying to remove him, and he has actively tried to accelerate his own removal. So far, it hasn't been possible to get a travel document.

After a lengthy process, HN had managed to secure a section 4 address in December 2017, under the old accommodation regime. However, he was refused bail in early January 2018. The address then expired on 15 January 2018, the exact date that the new regime came into force, and so he was unable to re-apply for a new section 4 address.

In a bail hearing in February 2018, one of the Home Office's reasons for opposing bail was the lack of release address.

HN applied for FTT bail again in April 2018. Just days before his bail hearing, his caseowner told him over the phone that they were planning to release him and that they were waiting for the probation service to approve an address provided to him under schedule 10. When BID spoke with the caseowner to confirm that this was in fact the case and ask for this to be reflected in his bail summary, they initially refused and then acquiesced and amended the bail summary to add the following:

"04/04/18. Release Referral drafted and submitted for consideration. S 10 accommodation recommended as no release address is available and probation has shown concerns for release to no fix abode."

However, despite this, the Home Office still opposed bail. Among the reasons for opposing bail were the lack of release address, and the fact that he had no access to public funds, and no right to work.

At the hearing, the judge was sympathetic to HN's case, but did not want to grant bail without accommodation that had been approved by probation. He didn't want to give a conditional bail



order because the FTT has no power to order the Home Office to find accommodation within a set amount of time. The judgment stated that the best thing to do would be to work with the Home Office and probation to try to find accommodation, independently of the tribunal.

The next day, he was released by the Home Office, to the streets. We can only assume that the consideration for schedule 10 accommodations was unsuccessful. This decision went against the concerns expressed by the probation service, the Tribunal and the Home Office at the bail hearing the day prior. It must also be remembered that HN had no right to work and no access to public funds.

Issues

- The SSHD is taking contradictory approaches toward accommodation in respect of FTT bail and SSHD bail.
- There should be an application process for schedule 10 bail accommodation.
- The SSHD is releasing detainees to the streets in violation of Article 3.
- Schedule 10 bail accommodation should be available to detainees who would be released into destitution but for SSHD support, such as HN.

3. XV

XV is an EEA national, who came to the UK in 2014. She was convicted of 5 petty offences for which she was sentenced to two days in prison (both of which were served prior to being sentenced) and fines totalling less than £250. As a consequence of these sentences, the Home Office found that XV poses a 'genuine, present and sufficiently serious threat to the interests of public policy' and made a deportation order against XV. As an EEA national, XV is not entitled to legal aid to assist with a deportation appeal. BID has taken on her deport appeal case as well as representing her for bail. XV has been in immigration detention since late September 2017 (6 months). This can be contrasted with her longest custodial sentence which was two days. XV has a 13-year-old daughter who currently resides in Manchester with XV's brother.

XV's past crimes all relate to a controlling and coercive relationship with an ex-partner who was involved in drugs and alcohol. XV's ex-partner had forced her into prostitution in order to fund his own addictions. XV was referred to the National Referral Mechanism as it was considered that XV may have been trafficked by her ex-partner. XV was kept in detention whilst a reasonable grounds determination was made by the Home Office.

XV is an adult at risk and suffers from a number of health problems, both physical and mental. She hears voices and sometimes hallucinates and finds her ongoing indefinite detention to be deeply distressing.

BID has applied for bail for XV on three occasions. Two were refused, and one had to be withdrawn, all for reasons that relate to her accommodation.

XV has told the Tribunal that she is willing to comply with such bail conditions that it deems fit, including electronic monitoring and a curfew. XV is waiting for her FTT appeal; no travel document



exists; there are no removal directions in place; and her removal cannot be effected in four weeks. As XV cannot be removed, she should not be in detention.

Being unable to apply for section 4 accommodation, XV proposed to live with her partner's aunt who attended both of her bail hearings in her support. In the first bail hearing, the tribunal judge would not grant bail because of a concern that the proposed accommodation arrangements might put XV at risk of re-trafficking, despite XV no longer in contact with her ex-partner having formed a new relationship. Although the judge accepted XV was vulnerable, and that she ought to be released, they were concerned about her safety outside detention.

At the second bail hearing the HOPO conceded there was no prospect of removal at the moment due to XV's ongoing appeal and her referral to the NRM, and the Tribunal made a finding to this effect. The Tribunal also found that the Home Office had not provided justification for XV's ongoing detention. The tribunal judge stated: "Nevertheless, I must impose at least one condition to grant immigration bail. In this case, given the issues arising and the mental health concerns raised by the applicant, I would only grant bail subject to a residence condition and a reporting condition. I see both as being necessary to monitor and control the applicant". Although the Tribunal was no longer concerned about XV's safety at the proposed accommodation, it was not satisfied that the landlord had consented to XV living at the accommodation. The Tribunal judge stated: "I mention that I considered whether bail in principle might be an option under para 3(8) of schedule 10 to the Immigration Act 2016 (conditional grant) but because it is unclear whether the SSHD is required to provide the applicant with accommodation, such a grant would be inappropriate."

At the third bail hearing, XV applied for release without a residence condition, and requested that if the judge found this to be inappropriate, they should grant conditional bail and ask the Home Office to provide a schedule 10 address. In the bail summary, the Home Office argued that the lack of a release address was a reason for opposing bail. The application was withdrawn on the day of the hearing as it was clear that the FTT judge would not release XV without accommodation and a residence condition.

Issues

- This demonstrates the same issues as present in case study 1. Detention is being used for the sole purpose of accommodation and this is unlawful.
- Our concerns about XV's ongoing detention are compounded by the fact that she is an adult at risk and her ongoing detention is having a significant impact on her health. This demonstrates how the problems with the detention system intersect.

