

# The liberty deficit:

## long-term detention & bail decision-making

A study of immigration bail hearings  
in the First Tier Tribunal

NOVEMBER 2012

**BiD** Bail for  
Immigration  
Detainees



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**Bail for Immigration Detainees** is a small national charity established in 1999 to improve access to bail for those held under Immigration powers. BID provides legal advice, information, training, and legal representation in relation to immigration bail across the UK detention estate and in prisons. We do this through telephone advice lines, a self-help book for detainees called 'How to Get out of Detention' available in five languages, bail workshops in a number of detention centres, and through the preparation and presentation of bail applications in court. BID also engages in policy, research, and parliamentary work, and in strategic litigation. In the year to August 2012 we assisted 2510 detainees to make their own bail applications and we prepared 246 cases for representation in the Tribunal. BID often lodges more bail applications each month at the Tribunal than even the largest provider of publicly-funded immigration legal advice in removal centres<sup>1</sup>. Many of our clients are referred on to public law firms for unlawful detention challenges.

Over the years the courts have granted BID permission to intervene in a number of cases raising important issues on immigration detention, including: *Mustafa Abdi v United Kingdom* (European Court of Human Rights, Application 2770/08, on-going)<sup>2</sup>; *Razai & Others v SSHD* [2010] EWHC 3151 (Admin)<sup>3</sup>; *SK (Zimbabwe) v SSHD* UKSC 2009/0022<sup>4</sup>; *Walumba Lumba (Congo) and Kadian Delroy Mighty (Jamaica)* [2011] UKSC 12<sup>5</sup>, and *BA and others* [2011] EWHC 1446 (QB).

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1 Bail for Immigration Detainees, (2012), 'Exclusive contractors & bail hearings: analysis of daily court listings between November 11th and December 20th 2011'.

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

3 In which the court considered evidence indicating systemic difficulties with the Secretary of State's policy of providing accommodation for immigration detainees who are considered to be high risk.

4 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.

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

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For background information on this research please visit the Resources page of the BID website at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

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## GLOSSARY

AJTC	Administrative Justice and Tribunals Council
BID	Bail for Immigration Detainees
CCD	Criminal Casework Division
FTT	First Tier Tribunal
HOPO	Home Office Presenting Officer
IAC	Immigration & Asylum Chamber
IJ	Immigration Judge
ILPA	Immigration Law Practitioners' Association
IRC	Immigration Removal Centre
JACO	Judicial Appointments & Conduct Ombudsman
LSC	Legal Services Commission
NOMS	National Offender Management Service
OASys	Offender Assessment System
OGRS	Offender Group Reconviction Scale
OJC	Office for Judicial Complaints
OM	Offender Management
PBR	Payment by Results
SSHD	Secretary of State for the Home Department
UKBA	UK Border Agency



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# HOPE AND DESPAIR

Those that work with detainees as legal advisors and visitors in detention know only too well the difficulty in encouraging detainees to exercise their right to apply for release on bail. This is especially the case when someone has been detained for a long time during which they have made multiple applications for release, often months apart, which have been refused one after the other. On the one hand the need to make an application for release is as great as ever, arguably at its greatest the longer detention continues, since the length of detention of itself is ample evidence that the UK Border Agency is not able to remove the individual from the UK. But on the other hand, as those who work closely and on a daily basis with detainees know, people may be unable to bear the thought of yet another refusal by the Tribunal, despite offers of advice and support or even legal representation. Indeed, BID has been advised by the welfare team at one removal centre that staff keep a watch on bail applicants for 24 hours after bail hearings when a detainee has been refused release, because levels of distress following such a refusal are often very high<sup>6</sup>.

We are grateful to the Gatwick Detainee Welfare Group which has carried out a series of interviews<sup>7</sup> with their volunteers who visit detainees held in Brook House immigration removal centre. Many of them have supported a detainee over very long periods of administrative detention. Visitors spoke about their perceptions of the effect of immigration detention on the mental health of detainees. One issue that arose repeatedly was the damaging effect on long-term detainees of making one unsuccessful bail application after another over months and years, first allowing themselves to contemplate their freedom, but then being refused release again.

*I've watched him go for and be refused bail, and there's that carousel effect that however much you try to protect yourself against it hopes rise, and are then dashed, and the detainee becomes very unhappy as you'd expect, but also angry, frustrated, very critical and rightly so of the court process. I've been to other detainees' bail hearings and I understand the feeling that detainees have that you might as well flip a coin... It's a form of mental torture I'd say.... You've got this perpetual build up and crash, build up and crash, and it's not good for you.*

*X's response was, he was a very capable man but he wouldn't go for bail. He said "the last time I went [for bail] which was a year ago, I didn't eat for three days after I was refused"... He couldn't live with being refused repeatedly. He took a lot of pushing into applying for bail. He said to me "it's OK, because I'm stronger I can take being in here"; but it was a shock to all of us that he was still there because he'd been detained for over three and a half years at that point.*

*He did his own bail and put up his own money. He'd been in by this time for nearly four years. I went to court but he didn't want me there, he wanted to do it for himself. He was refused. Then he sort of cut himself off... Then we went back again and everyone was terrified. I think courts are frightening places, and the detainees aren't even there but I don't think that makes it any less frightening. It makes it more frightening because they may not be allowed to speak, they can't hear all of the little asides being said around the courtroom, they're sort of cut off, and I think they're really intimidating even to quite strong people.*

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6 Personal communication with BID.

7 Gatwick Detainee Welfare Group, (2012), 'A Prison in the Mind: the mental health implications of detention in Brook House Immigration Removal Centre'. GDWG, Crawley. Available at <http://www.gdwg.org.uk/resources.php>

*"The indefiniteness must be so awful. With M he couldn't go for bail because it would be too awful to be refused. You don't want to ask because you then contemplate being free, and I think it's awful to go to court and be told 'no'. I think that really hurts people. People just go to bed for a few days, and are down sometimes. I don't think we always know what goes on mentally because when they're down they won't come out"*

*"Part of the preparation for bail is that if the court asks you what you're going to do when you're out, you've got to have some sort of plan. And your options are limited because you'll have no money, and you'll have to stay where you're put, but in D's case he needs to demonstrate that he's not going back to his former associates, and that he's going to do something positive. It's like a job application. You've obviously got to think very positively, which inevitably builds up your hopes, then if you don't get bail it puts all those plans in the bin when they're perfectly good and rational and you'll have to get them out again ...and dust them off for the next one. It's really tough"*

*"One of the worst things is not knowing how long you're there for, and each time you think you might be getting somewhere with your case you find that for whatever reason it's not getting anywhere, or you go for bail and it's failed".*

*"He is also very good at compartmentalising. He'll talk to me about his asylum appeal and ask me to contact his solicitor, and quite a lot of talk around bible readings. But he does his bail appeals through BID and doesn't always tell me when they're coming up. Last time he didn't get bail because he was still waiting for leave to appeal to the Upper Tribunal. So it wasn't a good time. He doesn't talk a great deal about being disappointed, but it's in his whole body and posture. When he comes into the visits hall I can see from his demeanour, his colour, if it's bad news he's grey and physically downtrodden. If it's good news there's a bit of the old bounce there."*

*"If they keep going for bail and judges keep refusing them, it's so demoralising and they don't know what to do next. So they lose, it's more and more difficult for them to get good feelings. It's all bad and it's really difficult to rally them around"*

There is an all too visible human cost to those detainees who exercise their right to apply for release repeatedly over long periods of detention. We know that these feelings of despair are exacerbated where bail applicants don't feel they have had a fair hearing or had adequate opportunity to speak, or who see unfairness in the reasons given for their bail refusal even when it has been explained to them. Detainees' expectations of the Tribunal are perhaps different to those they have of the UK Border Agency, which they expect to refuse their applications for temporary release. As time passes it gets harder for detainees to discern any independence in the decision making. While the answer to this roller coaster of despair should not be for long-term detainees to cease making bail applications, for detainees with no access to legal representation this is the choice that many appear to be making for themselves.

These powerful descriptions offered by detention centre visitors offer evidence of the emotional impact of the immigration bail system and provide essential background to the more technical report which follows.

# INTRODUCTION

'Automatic' deportation provisions were rushed in by the last government in the wake of the foreign national prisoner scandal with the UK Borders Act 2007 which came into effect in 2008. These provisions have the effect of removing the discretion of the Secretary of State over whether or not to take deportation action against a non-EEA national<sup>8</sup> receiving a criminal sentence of 12 months or more. Such individuals can be detained at the end of their sentence for a reasonable period in order to deport them, and deportation has the effect of revoking any existing leave to remain.

It is essential that appropriate safeguards are in place when people are deprived of their liberty for months or even years at a time. The absence of such safeguards is exposed by the grinding, mundane, damaging existence of extended immigration detention imposed by the Secretary of State without any form of routine external oversight.

The lack of such safeguards is obvious when considering the inadequate efforts of the UKBA to obtain travel documents required for removal from the UK, the failure (recognised by the courts) by UKBA to detect and properly manage serious mental illness in line with the Secretary of State's positive duty of care towards those she has ordered to be deprived of their liberty, and the inadequate efforts on the part of UKBA to act in the best interests of separated children or observe its statutory duty under Section 55. This list of shortcomings operates in concert with poor decisions on the part of UKBA to maintain detention, decisions that appear not to acknowledge that over months or years little or nothing has been achieved by detention, little or no progress has been made towards removal, and lasting damage is being done both to those who have lost their liberty and to their families.

Those that work closely with detainees on a daily basis, like BID's legal caseworkers, are familiar with the reasons offered by UKBA and the Tribunal for long detention periods. These reasons typically revolve around a failure on the part of the detainee to cooperate with their own removal, either sufficiently or quickly enough. Unsubstantiated assertions are made that the individual poses a sufficiently high risk of absconding or reoffending on release so as to justify continued detention.

Of course the majority of immigration detainees spend no more than six months in detention, but that still leaves a sizeable minority who remain in detention for periods up to and now over five years<sup>9</sup>. For these people who the UK Border Agency have not been able to remove in anything resembling a 'reasonable period' nor, in retrospect, whose removal has ever been imminent during the months or years of detention, the quickest and simplest way for them to seek release from administrative detention is to apply for bail from the First Tier Tribunal of the Immigration & Asylum Chamber.

<sup>8</sup> Different criteria apply for EEA nationals who have committed offences in the UK, and are not addressed in this report.

<sup>9</sup> Home Office statistics show that in Quarter 2 2012, 3.7% of people leaving detention had been in detention for over 6 months, including seven people who had been held for over 48 months by the time they were released. Of course these figures do not show the number of people still in detention, only those released. (Source: Home Office, (2012), Detention data tables Immigration Statistics April - June 2012, 'Table dt.05: People leaving detention by reason, sex and length of detention'. Available at <http://bit.ly/RhFFCm>)

But the immigration bail system has also been found wanting: it was not designed to deal with very long periods of detention and the assessment of criminal risk. In BID's experience, criminal risk and removability are usually foregrounded in bail hearings, but, as this research has found, often without disclosure of adequate supporting evidence of the sort we should expect would be relied upon by the Tribunal to make decisions about release.

## 1.1 THE LOTTERY OF BAIL APPLICATIONS

There is a view that legal representatives play the immigration bail system like a lottery, withdrawing applications when they come before certain judges. This view holds that such behaviour adds to the number of repeat bail applications, which outnumber first time applications. Indeed, the title of BID's earlier report 'A nice judge on a good day: immigration bail and the right to liberty' (2010), reflected the lottery-like experience of making a bail application from a detainee's perspective, while the report itself showed many legal representatives' views to be similar.

But it is worth digging deeper to ask why the bail system continues to be experienced as a lottery by detainees and legal representatives. It is surely important not to let the apparent personalisation of this issue mask underlying concerns about tribunal decision making. After all, legal representatives do not withdraw cases lightly, especially when sureties (often at great personal hardship) have travelled at their own expense and used up leave to appear at court, or when it might take a further six months before a new bail application can be lodged if the applicant must obtain a new grant of Section 4 (1)(c) dispersal bail accommodation. And for those detainees who must make their own bail applications without the benefit of legal advice or representation, withdrawal based on reputation is anyway not an option, as they are entirely unaware of the record of judicial office holders. Instead, as our research shows, these applicants are often withdrawing on advice from the judge, typically when the lack of preparation of their cases becomes apparent.

A more interesting question therefore might be why 34% of bail applications were withdrawn in the second half of 2011<sup>10</sup>. This report offers some insight into why this is done and what purpose is served by withdrawal. The reasons include legal aid funding, the volume of unrepresented applicants with poorly prepared cases, and matters of legal strategy (for example where disclosure problems mean that a decision might be made, against Tribunal procedure rules, on the basis of information not made available to all parties), and finally the practice of reliance on unsafe bail refusals by UKBA and the higher courts.

It is of little surprise to BID that the volume of repeat bail applications currently outnumbers first bail applications, and we believe that this too warrants further examination, including by the Tribunal. Our casework experience, supported by this research, suggests that the most straightforward reason for the high volume of repeat bail applications lies in the number of longer term detainees who, if they have not been removed after a reasonable period will naturally wish to apply for release. Many long-term detainees represented by BID must make multiple bail applications over months or years before achieving release. This research supports BID's work in removal centres which suggests that unrepresented long-term detainees make multiple bail applications. These may be poorly prepared or poorly timed, but this is as much as anything a function of the lack of availability of legal advice continuously throughout their detention on the fact of their detention and on bail<sup>11</sup>.

## 1.2 WHY BID CARRIED OUT THIS RESEARCH INTO BAIL DECISION MAKING

BID's first extensive research into decision making at bail hearings, 'A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty', was published in 2010. The purpose of that research was to

10 See Annex A. 'Bail outcomes by hearing centre July to December 2011'. Response from HM Courts & Tribunals Service 23<sup>rd</sup> May 2012 to a request for disclosure under the Freedom of Information Act 2000 by Bail for Immigration Detainees, reference: FOI/76088. [Note: half-year figures only].

11 For more information on detainees' experiences of immigration legal advice while in detention refer to BID's 6-monthly surveys carried out across the detention estate available on the BID website at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

explore the hypothesis that the immigration bail process was not subject to adequate safeguards and that this had the potential to allow unfair decision making to go unchecked at bail hearings. We used Tribunal and Home Office guidance in force at the time of the research as benchmarks to build up and analyse a picture of practice in a number of bail hearings. We were able to demonstrate the extent to which that guidance was being followed in those bail hearings we observed, and concluded that the bail guidance in use at that time allowed for unacceptable disparities of practice.

The 2010 study examined the immigration bail process from end to end. This was essential in order to uncover barriers to applying for bail experienced by detainees making bail applications, including a lack of knowledge about the bail process, difficulties accessing legal advice, and problems acquiring a Section 4 (1)(c) bail address. Barriers to fairness in the bail process itself were found to arise from the treatment of applicants and interpreters, the service and content of Home Office documents, the actions of immigration judges at hearings, and from the bail decision-making process itself.

Perhaps most importantly, that study revealed that many of BID's concerns about the bail process are mutually reinforcing, leading in turn to a circle of inaction, most markedly between the Home Office and the Tribunal, which results in failure to prompt any advance or resolution of immigration issues, such as obtaining travel documents, from one bail hearing to the next. Failings were found in Home Office case management which amounted to a lack of joined up thinking between UKBA caseowners who write bail summaries, and Home Office presenting officers whose lack of authority to change their arguments renders them unable to respond sensibly to new evidence presented at a hearing or to demonstrable inaccuracies in a bail summary. The connection was made in the report between the failure to adequately review decision-making around detention during bail hearings and increasing numbers of detainees, especially those with a criminal record, who are detained for increasingly long periods of time.

In the 2010 report we touched on the inability of the bail system to respond adequately to the needs of foreign national ex-prisoners. In this current study we are more explicit about this. We describe a mutually reinforcing process involving failures on the part of both the UK Border Agency and the Tribunal in respect of the long term detention of ex-offenders. As a matter of course UKBA fails to substantiate assertions of high levels of criminal risk or absconding with offender management information provided by the National Offender Management Service (NOMS) to UKBA, despite an obligation to do so under a service level agreement with NOMS to serve this on the tribunal and the bail applicant. There is an apparent failure on the part of the Tribunal to require such assertions to be substantiated and to only make decisions based on evidence or information that is available to all parties.

In the 'A nice judge on a good day' report (2010) BID highlighted the stasis within the bail system and the failure of the bail system to deal with long-term detention within a remit that precludes the consideration of the lawfulness of detention. Our report made a number of recommendations to the Tribunals Service, to the UK Border Agency, and to the Ministry of Justice. We were pleased to see that a number of these were reflected in revised President's guidance on bail (first the 2011 and then the 2012 versions).

Table 1: A brief history of bail guidance

## A brief history of bail guidance

In May 2003 'Bail Guidance Notes for Adjudicators from the Chief Adjudicator' were produced by the former President of the Asylum & Immigration Tribunal (AIT), the then Chief Adjudicator, Henry Hodge OBE. The guidance was removed from the AIT website in 2007 and was then under revision for a number of years. Despite removal from the website, the Guidance Notes remained current practice until February 2010 by virtue of a statement in the then-AIT's Practice Directions that until the Tribunal formulated its own guidelines the Guidance Notes should continue to be followed.

In February 2010, the AIT transferred into the Unified Tribunal established by the Tribunals, Courts and Enforcement Act 2007, and since then bail hearings have been heard by the First Tier Tribunal of the Immigration and Asylum Chamber (FTT IAC). This statement was not replicated in the 'Consolidated Asylum and Immigration (Procedure) Rules 2005' for the First Tier Tribunal and there were no Bail Guidance Notes on the website of the new FTIAC in the section 'Guidance notes for the former AIT that are now relevant to FTIAC'. A revised set of bail guidance notes released on July 7th 2011, in the form of Presidential Guidance Note No 1 of 2011, filled that gap.

In late 2011, interested parties were invited by the President of the First Tier Tribunal to comment on the new bail guidance. A detailed joint ILPA and BID response<sup>12</sup> was submitted, among those of other stakeholders. A further iteration of the bail guidance, taking into account the results of the consultation exercise but with only relatively minor changes, was then published in June 2012 by HM Courts & Tribunals Service as 'Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings'<sup>13</sup>, referred to in this report as 'bail guidance'.

Data collection for this study was carried out while the July 2011 bail guidance was in use. References to the bail guidance in this report are to the current version (June 2012) unless otherwise stated.

In this second report on tribunal decision-making we consider the application of a new set of bail guidance from the perspective of longer term detainees, following the first major revisions to this guidance for some years. Bail has arguably always been seen by legal representatives and the tribunal as ancillary to the main immigration case. However, in our view once someone has been detained for one month or more without removal there is an ever greater need for the immigration bail system to operate as a proper check on the use of detention, and for this to be reflected in structures and safeguards that ensure fairness in bail outcomes.

Our argument here is that these safeguards are still failing. Despite clear and some would say stronger guidance to First Tier judges on the use of bail in principle and the use of directions to parties, these elements do not appear to have become incorporated into tribunal practice in the bail courts since the revised bail guidance was introduced in July 2011 and the current version was published in June 2012. In our view the Tribunal is not using its available powers sufficiently to ensure that detention does not become unnecessarily prolonged.

Nowhere does this become more apparent than in hearings for bail applications lodged by or on behalf of longer-term detainees. Take for example the case of Mr E, who made four bail applications within as many

12 'Consultation on the 2011 Bail Guidance: Joint submission from the Immigration Law Practitioners' Association and Bail for Immigration Detainees' available at <http://bit.ly/O4pJRH>

13 President of the First Tier Tribunal Immigration and Asylum Chamber, (2012), 'Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings'. HM Courts and Tribunals Service. Available via HM Courts & Tribunals Service website at <http://www.justice.gov.uk/tribunals/immigration-asylum/rules-and-legislation>



months having been detained for over two years at the time of his first bail application with BID. He was refused release on the first application, the second application was withdrawn when the conduct of the hearing raised concerns about fairness, the third application was refused as a result of a lack of knowledge on the part of the judge where bail in principle could have been used to provide time to check facilities at UKBA's Barry House Section 4 accommodation, and he was finally released on his fourth application.

### 1.3 IMMIGRATION DETENTION IN THE UK: CHANGES SINCE OUR LAST REPORT

This research is particularly concerned with the application of the revised bail guidance and the fairness of the bail system from the perspective of long term detainees. All thirty eight of the represented cases whose bail hearings formed part of this study were long-term detainees and also ex-offenders, and had been convicted of a range of low level and higher level offences. Media noise about foreign national offenders continues to get louder. It is impossible in our view to separate the long periods of time spent in detention by these detainees from their status as ex-offenders. A combination of hardening public and political attitudes to foreign national offenders and whether or not they might have a strong case to remain in the UK, the hurried introduction<sup>14</sup> of the 'automatic' deportation provision in the absence of any improvement in the quality of UKBA casework, and the inability of the Tribunal system to factor issues of criminal risk into considerations of release on bail, have all combined to make it more difficult for applicants to get released on bail and produced detention periods of five years and over at the extremes.

Publicly funded immigration advice is provided in removal centres by the Legal Services Commission under an exclusive contracting arrangement with a small number of provider firms. BID's regular surveys of detainees' experiences of legal advice across the estate show unacceptable delays, sometimes of two or three weeks, in gaining access to these legal surgeries, alongside increasing levels of dissatisfaction and confusion about the scope of that advice on the part of detainees. Long term detainees may be left without legal representation and without assistance in applying for release on bail for months at a time<sup>15</sup>. In addition we find consistently low numbers of bail applications being lodged on behalf of detainees who have the benefit of legal representation<sup>16</sup>.

For the five hundred or so immigration detainees held in prisons post-sentence at any one time there is not even the minimal safeguard of legal surgeries for immigration advice, and current legal aid fee structures provide a disincentive to firms to travel to potential clients. Yet these are some of the most complex and long-term immigration cases in the detained population.<sup>17</sup> From April 2013 deportation and general immigration matters will be taken out of scope of legal aid under the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The Home Affairs Select Committee has recently criticised the UK Border Agency for releasing too many foreign national ex-offenders from immigration detention. The Committee appears to be suggesting that ex-offenders should remain in detention simply because they **should** be deported, even where in individual cases it may be the case that they **cannot** be deported.

14 The UK Borders Act 2007 removed the discretion of the SSHD over whether or not to take deportation action against certain foreign national offenders. This has had the effect of widening the power to detain to those cases where the SSHD is still deciding whether or not to take deportation action.

15 The current fee structure for legal aid does not allow providers to stage bill when a Legal Help file is open, creating a financial disincentive for providers to keep a Legal Help file open for extended periods for when temporary admission and representations to UKBA for updates on a case are needed. The work being done currently under Legal Help includes case planning, advice letters to clients, and receiving calls from clients. Legal aid payments do not cover the often extensive work required to chase and secure Section 4 (1)(c) bail accommodation, meaning that firms who do this work must do it pro bono.

16 BID's regular survey of detainees' experiences of legal advice in detention has found that across four surveys to date, between 56% and 68% of those detainees interviewed who had a legal advisor at the time of interview had had no bail application made for them by their advisor. (Source: Bail for Immigration Detainees, (2012) *Summary of Surveys 1-4 of the level of legal representation for immigration detainees across the UK detention estate (November 2011 – May 2012)*. Available at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

17 On Monday 8 October 2012, there were 557 immigration detainees held in prisons post-sentence in England & Wales (Source: Hansard, HL Deb, 19 October 2012, c492W, available at <http://bit.ly/Un1Kms>). Full statistics available via the Association of Visitors in Immigration Detention (AVID) website at <http://bit.ly/WEGLNB>

*"We are concerned about the number of offenders who are released on bail by the courts when the Agency has advised they should remain in detention prior to deportation. As these arrangements fall within the remit of the Ministry of Justice we will draw this to the attention of the Secretary of State for Justice and the Justice Select Committee. . . . We are concerned at the large number of foreign offenders who remain in the community when they should have been deported"<sup>18</sup>*

This sounds remarkably like a blanket policy of detention for all foreign nationals leaving prison, and is in our view a significant misreading of the implied judicial limitations on the power to detain.

However, messages are mixed on detention of foreign national ex-offenders. In 2011 the Independent Chief Inspector of the UK Border Agency criticised UKBA for not releasing people from detention when the Agency's own guidance suggests it should be doing so under certain circumstances, for example at the point at which it becomes apparent that removal within a reasonable time will not be possible<sup>19</sup> compared to the number of people released from detention on application to the Tribunal. John Vine's report notes:

*"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" (ICIUKBA, 2011: 4)<sup>20</sup>*

These recent developments have had the effect of sweeping away the carpet from under the feet of foreign nationals. BID already encounters people in detention who have been prosecuted for the use of false documents by the UKBA despite the existence of a statutory defence to the use of false documents when entering the UK to seek protection, and victims of trafficking who instead have been treated as offenders. No doubt they will soon be joined by foreign national ex-offenders who cannot get legal advice to appeal their deportation despite having a strong case to remain in the UK, or who have fallen foul of new sentencing initiatives targeted at foreign nationals, including the introduction of new conditional cautions for foreign nationals directed towards their removal from the United Kingdom<sup>21</sup>.

## 1.4 RESEARCH METHOD

Applications for release on immigration bail to the First Tier Tribunal of the Immigration & Asylum Chamber are made by immigration detainees both with and without legal representation. Indeed, it is a principle of foundation of the tribunal system in the UK it should be accessible and fair to parties without legal representation. As in BID's earlier study of bail hearings (2010), this study was also concerned to observe the operation of the bail process in cases where applicants had legal representation in court and also where they did not, in order to assess fairness and accessibility in the First Tier Tribunal for both types of applicant. For this research BID examined eighty bail applications. Thirty-eight of these were prepared by BID and represented at the Tribunal by a pro bono barrister. In forty-two of the cases the applicants were representing themselves, and the hearings were selected at random on the basis of when observers were able to attend hearing centres. The observations began in November 2011 and finished at the end of April 2012, a period of five months.

18 House of Commons, (2012) 'The work of the UK Border Agency (December 2011-March 2012) - Home Affairs Committee'. Available at <http://bit.ly/RBmOTI>

19 UKBA, Enforcement Instructions & Guidance, Chapter 55 'Detention and Temporary Release,' 55.3.2.4. In all cases, caseworkers should consider on an individual basis whether removal is imminent. If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks. Cases where removal is not imminent due to delays in the travel documentation process in the country concerned may also be considered for release on restrictions. Available at <http://bit.ly/L6Lhwm>

20 Independent Chief Inspector of the UK Border Agency, (2011), 'A thematic inspection of how the UK Border Agency manages foreign national prisoners, February – May 2011'. Available at <http://bit.ly/rT6UuL>

21 See BID's submission to the Ministry of Justice consultation on the draft code of practice on adult conditional cautions, November 2012. Available at <http://bit.ly/ysVHBO>



### Unrepresented cases in this study

A total of 42 hearings for bail applications lodged by unrepresented applicants were observed for this study. The cases were selected at random from the daily court listings at the two main London hearing centres, Taylor House and York House. Court listings are published online on the HM Courts & Tribunals Service (HMCTS) website during the afternoon of the preceding working day. Unrepresented bail cases in this study consisted of those who we assume had prepared and lodged their bail application themselves (no legal representative appeared on the court listing against their name), and who were not represented during the hearing by a legal representative.

Unrepresented bail applicants must also take responsibility for making arrangements for any sureties to present themselves to the tribunal adequately briefed and documented, assuming that these applicants were aware of the role of sureties in immigration bail. Some of this group had clearly made bail applications before, and some may have had bail applications prepared for them by a solicitor in the past. No case documents were available to either the observers or to BID for these unrepresented hearings. Among the detainees whose cases comprised the unrepresented case group the amount of time spent in detention ranged from one week to 28 months (mean 6.5 months)<sup>22</sup>.

Only one of the 42 unrepresented bail applicants in the sample was known to BID. Among the unrepresented cases there were no repeat applications, although one applicant [U8] was known to BID<sup>23</sup> and was represented by BID later on during the research period. This applicant was one of the two applicants who BID brought to the Tribunal twice during the data collection period [B06, B14].

### Represented cases in this study

A total of 38 cases formed the sample of represented bail hearings, and were drawn from BID's priority caseload during the data collection period. During this period the barrister in every case prepared and lodged by BID was instructed to complete the observation pro-forma after the bail hearing. For various reasons barristers were not able to do this in all cases and so barristers were instructed until the required number of observations was reached. There was no cherry picking of cases for observation; we simply continued the exercise until sufficient numbers were reached.

These 38 individual bail hearings were lodged on behalf of 32 detainees. BID made two bail applications each for three detainees<sup>24</sup> during the research period and brought three bail applications on behalf of another detainee during this period<sup>25</sup>.

In these 38 hearings BID had the benefit of the sight of all case papers to inform analysis for this study. In addition to the observation pro-forma provided by pro bono counsel in each case, we were able to examine the B1 bail application form, grounds for bail and any witness statement, other documents in the brief to counsel provided by BID, and the bail summary served on the Tribunal and the applicant by UKBA. After the bail hearing had taken place we then had sight of the written notice of grant of bail with conditions, or the written Refusal of Bail notice. In a number of cases we sought records of proceedings where this was felt to be necessary as part of the legal casework.

Among the detainees whose cases comprised the represented case group the amount of time spent in detention ranged from 2 months to 4 years (mean 19.5 months). This longer average period of time spent in detention in this cohort of bail applicants reflects the fact that longer-term detention makes it more likely that BID will prioritise a detainee for full representation and provision of counsel. The represented group of applicants in this study had been detained, on average, almost three times as long as the unrepresented group.

22 The length of detention was logged by observers in only 26 of the 42 hearings where applicants were unrepresented. It was not always easy for observers at these hearings to work out the length of detention without access to case papers, unlike barristers who completed observation pro-formas. Indeed, in cases where the length of detention was not specifically mentioned during the hearing it would have been impossible to discern the length of detention. For unrepresented cases the mean length of detention is calculated only from those 26 cases out of the total of 42.

23 The names of unrepresented bail appellants in the sample were checked against BID's database of clients.

24 B03, B31, B06, B14, B18, B37

25 B01, B16, B35, B38

## Observations of bail hearings

Observations for this study were carried out in HM Courts & Tribunals Service (HMCTS) hearing centres between November 2011 and April 2012. The bail guidance to judges that was in force during the data collection period is the version published by the President of the First Tier Tribunal in July 2011<sup>26</sup>. However, references to the bail guidance in this report are to the current 2012 version unless otherwise stated.

It is assumed that the reader is broadly familiar with the current immigration detention system in the UK including powers to detain and the bail application process. The essentials of the immigration bail process have not changed since BID's first report on bail decision making was published in 2010. The reader is referred to Section 1.3 (p11-17) of the 2010 report '*A nice judge on a good day: immigration bail and the right to liberty*', which is available in its entirety on the BID website<sup>27</sup> as well as these background sections which are now available as a separate briefing.

We used two separate pro-formas to record observations, one for represented cases and the other for unrepresented cases. The pro-formas used in this study were almost identical to the ones used by BID in our 2009-10 exercise, revised where necessary to reflect the new President's bail guidance published in July 2011. A question in the pro forma relating to whether or not the judge considered the effect of detention on family was left in even though this suggestion had been removed from the July 2011 version of bail guidance to judges (it has since been reinstated in the 2012 version). A new question was added asking for narrative comments by the observer on the treatment by the First Tier judge - at any stage of the bail hearing - of issues related to criminal risk. This was intended to elicit details of judges' responses to assertions by the SSHD (evidenced or not) of risk of re-offending or risk of harm to the public on release, comments by the SSHD on the seriousness of actions for which convictions received, perceived absconding risk and so on.

The pro-forma is a structured attendance note designed primarily to serve the needs of counsel in represented cases. This document was then adapted for use with observers in the unrepresented cases to reflect the fact that in unrepresented cases the researchers had no access to case documents and would therefore be unable to answer a number of the questions adequately.

The pro-forma document was designed to be used quickly, offering yes/no and tick-box answers wherever possible for ease of use for both counsel and researchers. The document also leaves room for narrative responses, and both barristers and researchers were encouraged to provide additional information on hearings where they wished to make additional points or raise specific concerns, either on the pro-forma or at a later point following reflection on the hearing.

Observation reports on the 38 represented cases used in this study were produced by counsel instructed by BID for each particular case. In all but two of the bail hearings, barristers drawn from BID's rota of pro bono counsel across the UK represented the applicants. In two of the hearings the applicants were represented by BID casework volunteers accredited at OISC Level 3, one of whom is a qualified solicitor. Unrepresented cases were observed by a team of post-graduate law students from The City Law School at City University. These researchers received training in advance and support throughout the data collection period. A number of these student observers had previous experience as legal advisers or advocates, and of court monitoring, outside the UK.

## Consent

Barristers who took part in this study were provided with written information about the research in advance of their participation. For each hearing they reported on, counsel were given the option of being acknowledged at the start of the final report or remaining anonymous. The observers from The City Law School were given written information about the project, and signed an undertaking to keep their findings confidential and anonymous.

26 For supporting documents for this research please refer to the BID website's 'Resources' section at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

27 Available via the BID website 'Resources' section under research reports at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

Signed consent forms were obtained from each of the 33 detainees who were BID clients and whose 38 bail hearings between them were reported on by counsel. These consent forms confirm that the bail applicants understood the purpose of the research as it was explained to them in writing and that they had agreed to allow BID to use documents in their case for the purpose of this study. In the 42 cases observed where the bail applicants had no legal representation but were representing themselves no consent was sought from the bail applicant. The observers entered the court and took notes as a member of the public.

All material from both sets of observations is presented anonymously, and care has been taken not to identify the applicant or the observer.

### Hearing centres

Represented cases in this study were reported on by the instructed barrister. Data from these cases therefore comes from a range of hearing centres throughout England, depending on the IRC where each represented applicant was detained, and which cases were ready for listing during the sample period. The represented cases were heard at Birmingham, Stoke, and London. For reasons of cost, the unrepresented cases were only observed at Taylor House and York House hearing centres in London.

*Table 2: location of the bail hearings examined in this study*

Hearing centre	Cases prepared by BID	Unrepresented cases
Birmingham	5	0
Hatton Cross (York House)	8	11
Taylor House	19	31
Stoke	2	0
	38	42

## 1.5 OTHER ISSUES

A small number of unrepresented bail hearings were observed twice in error. Where duplicates were noted, the observation pro-forma containing the least amount of information of the two was discounted during analysis.

In a number of the observations of hearings in unrepresented cases, BID was later informed that the judge had become aware of the observer's presence. Some judges and one Home Office Presenting Officer (HOPO) had engaged the observer in conversation during or after the hearing. These observations were later discounted in the analysis because, as far as possible the presence of lay observers was not intended to result in interaction with judges. In a couple of such cases, on realising that an observer was present the judges made specific remarks that acknowledged the presence of an observer, or made a general comment expressing goodwill to them in their studies. In one case the Home Office presenting officer approached the observer after the hearing to volunteer an explanation in relation to points made during the hearing.

The known presence of observers in a courtroom as part of a court monitoring exercise can be harnessed to particular effect such as increased judicial self-awareness and reflexivity, or as an indication or reminder to the court and those present of the importance to the public of a specific case or type of case. Court observation exercises in the United States involving systematic observation and publication of observations by members of the public have a long history, and are held to promote accountability. One organisation describes the effect of their presence on judicial office holders, suggesting that it appears to encourage them to be

*“more likely to maintain appropriate behaviour and to be courteous and respectful”.. “to take more time to explain delays, continuances, rulings and decisions when monitors are present.” The presence of court monitors led to “a decrease in casual and inappropriate conversations in the courtroom” and “makes the courtroom environment more professional”, though it also has the potential to make judges “more guarded, irritated, defensive and nervous” (WATCH, 2008: 9-10)<sup>28</sup>*

However alteration to the courtroom environment as a result of a known observer presence was not a desired outcome of this particular research project. In total seven of the unrepresented bail hearings were discounted for the purpose of the final analysis for reasons of duplication or discovery of the observer.

In the body of this report we use the preferred term ‘First Tier judge’ rather than the term ‘immigration judge’ or ‘IJ’, though where the latter terms are used in comments by observing counsel these are reproduced verbatim.

We also chose to use the term ‘unrepresented’ rather than adopt the term ‘self-represented’, as now increasingly used by the Ministry of Justice. In BID’s view, bail applicants who have not had the benefit of legal advice or representation are lodging bail applications and appearing at bail hearings, but what they are *not* doing is representing themselves in any meaningful or informed sense<sup>29</sup>. To use terms that suggest otherwise is, we believe, to mask the reality of the way legal aid advice is now delivered in England and Wales. Simply changing the language will not alter the experience of legal advice for immigration detainees or any other client group reliant on publicly funded legal advice. Recent Ministry of Justice pronouncements suggesting that immigration matters do not in fact always require legal advice have not had the effect of simplifying overnight the complex tangle of immigration rules, statute, and case law that a person making an appeal or bringing a case must negotiate unaided. In this study, those bail applications where applicants were represented had a 31% grant rate while unrepresented applicants were granted bail in only 11% of cases. This is also despite the fact that many of the BID represented cases, unlike the unrepresented cases in this study, will have had more complex immigration issues to address given the longer periods of their detention. Professional legal representation makes a difference, not only in terms of case outcome but also to the review and progression of a case in the round, and the management of client expectations.

## 1.6 OUTLINE OF THIS REPORT

This report seeks to examine whether the immigration bail system serves the needs of the long term detainees who form the majority of BID’s clients. We take ‘long-term’ in this report to mean continuous administrative detention of a period of 6 months or more, as, in our view, a period of six months in detention without removal having been achieved is unacceptable. The six-month period is in line with the guidance to First Tier judges (2012) which states:

*“The senior courts have been reluctant to specify a period of time after which the length of detention will be deemed excessive and as a result that bail should be granted. Each case turns on its own facts and must be decided in light of its particular circumstances. However, it is generally accepted that detention for 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” (HMCTS, 2012: para 19)*

As in our earlier study of the immigration bail system we are primarily interested in the actions of the Tribunal and the Home Office. The work of other state actors such as the National Offender Management Service (NOMS) and the National Health Service (NHS) are implicated in bail hearings, if only at one remove. The role of legal representatives, whether as a result of their presence or their absence, is clearly of significance to the management and outcome of a bail application and bail hearing, but was not the focus of this study.

28 WATCH, (2008), ‘Impact of Court Monitoring on Hennepin County, Minnesota’. A survey of criminal justice personnel carried out by WATCH, ‘bringing a public eye to justice’. Available at <http://www.watchmn.org/>

29 BID’s experience is that unrepresented applicants often have little idea of how to frame grounds for release (often mixing up the purpose of bail applications with evidence used in relation to their claim for protection); the tone of their application is often wrong and may contain personal or emotional appeals to the judge; they are often unable to marshal suitable sureties with supporting evidence to appear on the day; and they have little or no idea of what evidence is available, could usefully be submitted, or how to obtain it. All of this is assuming that they can read and speak adequate English, and feel sufficiently confident to navigate the tribunal system.

In Chapter 2 we revisit the founding principles of the Tribunal system. Chapter 3 addresses the practical barriers to justice that are still being experienced by detained bail applicants, and the balance of argument and discussion by Home Office Presenting Officers and the Tribunal in the hearings we observed. Chapter 4 examines the evidential basis on which bail decisions should be made and are being made, and highlights the poor record of disclosure - to both the Tribunal and the bail applicant - of the UK Border Agency. We question how fair bail decisions can be without proper disclosure of evidence, and the role of the Tribunal in ensuring this. Chapter 5 revisits the 'circle of inaction' first described in BID's report *'A nice judge on a good day: immigration bail and the right to liberty'* (2010), and finds that little has changed in the Tribunal despite the publication of new bail guidance for judges. This overwhelming sense of stasis from one bail hearing to the next leaves long term detainees, especially those with a criminal conviction, unable to rely on bail as a fair and accessible means of challenging their detention. We find that the bail process in fact contributes to long-term detention, and indirectly to the lodging of repeated bail applications by long-term detainees. Chapter 6 examines the remedies that are available to bail applicants who believe they have not had a fair hearing in the absence of a right to appeal, particularly the handling by the Tribunal of complaints about the conduct of judicial office holders, and finds the Tribunal wanting. Chapter 7 concludes with a summary of key findings and recommendations for the Tribunal and other agencies.

# FAST AND FAIR? TRIBUNAL DECISION MAKING & BAIL

*"It should never be forgotten that tribunals exist for users, not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases" (The Leggatt Review, 2001: paragraph 6)<sup>30</sup>*

## 2.1 INTRODUCTION

BID's first report on the bail system, 'A Nice Judge on a Good Day' (2010), took the unique nature and purpose of the tribunal system as a given, and the link between immigration bail and the host institution went largely unexamined. For this report however, and now that what was the Asylum and Immigration Tribunal (AIT) has been reorganised and merged into HM Courts & Tribunals Service, we decided to go back to first principles and address the intended character and purpose of tribunals<sup>31</sup> – that is all types of tribunal, not simply the Immigration and Asylum Chambers – and hold up the findings of this research into decision making at immigration bail hearings against the stated purpose of the tribunal system.

In deciding on release from discretionary detention, the First Tier Tribunal of the IAC is increasingly required to investigate, weigh up, and make decisions in relation to elements of the criminal justice process. For bail applicants who have been detained for long or extremely long periods this will almost always be the case.

For this research we reviewed studies of decision making in criminal bail hearings in UK magistrates' courts, where, just like many immigration tribunals, decisions about criminal risk and risk of absconding must be made in individual cases. Although made in different judgment domains, decision makers at both magistrates' criminal bail and immigration bail hearings may nowadays be required to consider surprisingly similar material. Both types of decision maker are required to make decisions about loss of liberty, albeit for different purposes. Studies of legal and other professional decision making models show that in real-world situations people develop decision making strategies to enable them to adapt their decision making to local conditions and requirements. The literature suggests that in order to deliver decisions quickly, decision makers are forced to grapple with the 'effort vs. accuracy' equation, resulting in mechanisms for decision making which act to simplify the complexity of judgments at the expense of what is generally considered to be due process.

30 'Tribunals for Users - One System One Service: Report of the Review of Tribunals by Sir Andrew Leggatt' (March 2001), Lord Chancellor's Department. Available at the National Archives' web archive at <http://bit.ly/O4s2nN>

31 The author is grateful to Edward Jacobs, (2011, 2<sup>nd</sup> edition), 'Tribunal Practice and Procedure: Tribunals under the Tribunals, Courts and Enforcement Act 2007', published by Legal Action Group, from which much of the background information on the tribunal system used in this chapter is drawn. The author had access to the book in Kindle format only, so paragraph numbers are referenced here rather than page numbers.

## 2.2 ACCESSIBILITY, FAIRNESS AND EFFICIENCY: UNDERLYING OBJECTIVES OF THE TRIBUNAL SYSTEM

Since tribunals first appeared in limited form in the early twentieth century, their procedures and overall nature, including their relationship with ordinary courts of law and government departments, and their degree of specialisation, have evolved in large part in response to the three public enquiries that have considered tribunals over the years. Jacobs (2011) describes a recent trend towards independence for tribunals from controlling government departments, more training for decision makers, greater numbers of salaried judges, and more case management. He notes that from around 2000 “there was, anecdotally, a more legalistic approach in some tribunals.”<sup>32</sup>

Going back as far as 1957, the Franks Committee made recommendations to the government on the judicial nature of tribunals, and tribunal standards and supervision in relation to three principles: openness, fairness, and impartiality:

*“In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables the parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject-matter of their decisions”<sup>33</sup>*

More recently the Leggatt review of tribunals<sup>34</sup>, which published its findings in 2001, carried out a review of the delivery of justice through tribunals with a focus on efficiency and effectiveness. By this point it appears that the constitutional position of tribunals was accepted, and the key recommendation of this enquiry was a single coherent structure with uniform powers for tribunals, away from the influence of sponsoring departments (Jacobs, 2011:1.8). The White Paper ‘Transforming Public Services: Complaints Redress and Tribunals’ followed in 2004, and the Tribunals, Courts and Enforcement Act (TCEA 2007) established the First Tier Tribunal and Upper Tribunal.

## 2.3 THE OVERRIDING OBJECTIVE AND THE DUTY TO COOPERATE

Fifty or so years on from the Franks Committee the language of accessibility, fairness and efficiency is still being used in relation to the tribunal system, marking out the manner and the degree to which the nature and procedures of various tribunals are intended to be different from the courts, as well as delineating the advantages that tribunals are intended to have over courts.

Section 2.3 of TCEA 2007 imposes a duty on the Senior President of a tribunal to “have regard to particular features in carrying out the functions of that office”, namely that tribunals should be accessible, fair, efficient, expert, and innovative (Jacobs, 2011: 1.24), features that are also reflected in the objectives for rules of procedure<sup>35</sup>. Jacobs further notes:

*“Procedural fairness is an essential attribute of the judicial function. It is guaranteed by the common law principles of natural justice, article 6 and the overriding objective” (2011: 3.150).*

Something known as the ‘overriding objective’ acts as the guiding principle of procedure rules across the civil division of the judiciary. In the tribunal system, the overriding objective<sup>36</sup> concerns “the attitude to the proceedings and the parties, both individually and systemically” (Jacobs, 2011: 3.23). The Council on Tribunals’ ‘Guidance on Drafting Procedure Rules’ (2003) notes in relation to the application of the overriding

<sup>32</sup> *ibid*: 1.95

<sup>33</sup> The Report of the Committee on Administrative Tribunals and Enquiries, 218 (1957), para 42, cited in Jacobs, 2011: 1.6.

<sup>34</sup> ‘Tribunals for Users - One System One Service: Report of the Review of Tribunals by Sir Andrew Leggatt’ (March 2001), para 6. Lord Chancellor’s Department available at the National Archives’ web archive at <http://bit.ly/O4s2nN>

<sup>35</sup> TCEA 2007 s. 22(4) available at <http://bit.ly/10enNeC>

<sup>36</sup> “The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest” (The Asylum & Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No. 230 (L.I.)), Rule 4), available at <http://bit.ly/S2NLfK>



objective that:

*“These Rules are a new procedural code with the overriding objective of enabling the Tribunal with the assistance of the parties to deal with cases fairly and justly<sup>37</sup>... the tribunal must seek to give effect to the overriding objective when it i) exercises any power under these Rules; or ii) interprets any rule... in particular the Tribunal must manage cases actively in accordance with the overriding objective<sup>38</sup> (emphasis added)*

The duty of parties to cooperate with the enabling function of the Tribunal stems from the overriding objective rather than specific procedure rules or guidance, but Jacobs argues that this requirement to cooperate is indeed “a duty not a feature of procedure or an exhortation” (ibid: 3.123). Of course each party will take its own position on the substantive issues at stake, but they are required to routinely exercise procedural cooperation, as well as when specifically directed to do so by the Tribunal. The duty of parties to cooperate with the Tribunal and with each other is a central feature of procedural justice.

It is sometimes stated that Tribunal judges must be able to act independently, in the sense of having ‘judicial independence’. However, it is our understanding that individual judicial office holders are not independent of the rules and guidance that relate to their position, simply that they are independent of control or influence by the state, a status with particular significance for the tribunal system given its history of controlling government departments. Perhaps it is more appropriate to say that the tribunal must be independent on the *facts*, but judicial office holders cannot be independent in relation to *procedure*. Indeed, in the view of Jacobs

*“TCEA 2007 creates one potential interference with individual judicial independence”. Section 23 (1) gives the Senior President power to issue practice directions” and section 23 (6) envisages that they may include guidance on the application or interpretation of the law” (2011:1.105).*

With reference to Tribunal bail, while it sometimes noted anecdotally that Tribunal judges must be ‘free on the day’ to make decisions, how free are they in practice, given the overriding objective and the need to deal with cases justly and fairly? Chapters 5 and 6 of this report address in more detail the relationship between judicial office holders and the President’s bail guidance for judges in the context of making complaints about procedural justice in bail hearings, and the notion of judicial independence in relation to records of proceedings and directions to parties.

## 2.4 ASPECTS OF ACCESSIBILITY: THE ENABLING ROLE OF TRIBUNALS

Tribunals are required to be accessible and fair to all parties, including those who have no legal representation. The enabling role of the Tribunal is a key aspect of this accessibility. The Leggatt Review of the tribunal system<sup>39</sup> (2001) stressed the importance of the enabling approach, stating “we are convinced that the tribunal approach must be an enabling one” (ibid: para 7.5), and highlighting the special care needed in cases where public law entitlement is involved and where government departments represented at tribunal have the benefit of familiarity with both the law and the tribunal system (ibid: para 7.4).

Immigration bail hearings, which routinely feature unrepresented applicants appearing via video link, often with the help of an interpreter, are quite a severe test for the Tribunal in the application of the enabling approach required to gain the fullest possible participation of inexperienced and unrepresented parties. Using case studies from this research, Chapter 6 examines in greater detail the relationship between the enabling role of the Tribunal, specifically the point at which a failure in this role 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.

<sup>37</sup> Broadly, fairness is related to the interests of the parties, while justice has wider implications.

<sup>38</sup> Draft Rule 2 (page 10) and Draft Rule 3 (page 12)

<sup>39</sup> Ibid: paras 7.4-7.5.



Accessibility of the tribunal system further “requires a tribunal to be actively involved in identifying the issues *and obtaining relevant evidence at the hearing*” (Jacobs, 2011: 1.59) (emphasis added), an approach that Jacobs notes is not unique to tribunals. The tribunal’s duty to ensure accessibility is further addressed in Chapter 4, where issues of evidence and disclosure in relation to bail hearings are examined.

## 2.5 WHAT LEGAL DECISION-MAKING MODELS CAN TELL US ABOUT IMMIGRATION BAIL HEARINGS

Theoretical decision making models depict professionals as behaving in an ideal way, an approach that “assumes large attentional, memory, and processing abilities” (Dhami, 2003: 175)<sup>40</sup> and ignores the need to deliver decisions in real-world environments. The “mythology of legal decision making” (Dhami & Ayton, 2001: 163)<sup>41</sup> similarly relies on idealised notions of behaviour:

*“We expect decision makers to use all of the relevant information, and weight and combine it appropriately. Moreover, we expect them to behave like this when their decisions have significant consequences” (Koneci & Ebbesen, 1994)<sup>42</sup>*

The overriding objective makes it clear that any case before the tribunal must be dealt with fairly and justly. But how are judicial office holders likely to go about fulfilling that duty in the real-life working environment of the First Tier Tribunal?

Decisions made by the Tribunal in immigration bail hearings are of the type described in the psychological and behavioural science literature as ‘expeditious hearings’. This literature seems to converge around the view that under conditions of time pressure, professional decision makers turn to simple decision-making strategies which enable them to cope with the demands of their working environment. Dhami & Ayton note

*“The due process model would require that magistrates...carefully search through all the available information and appropriately weight and then integrate the relevant information...However, we have already mentioned that human cognitive limitations and certain task characteristics may prevent individuals from using such judgment strategies” (2001: 161)*

Magistrates making criminal bail decisions are required to consider the history of offending behaviour including the seriousness of past offences as well as those currently being faced, the defendant’s bail record, and character and community ties, among other things. They are required to release a defendant on bail (with or without conditions), or whether to remand them in custody. The decision is directed towards ensuring that the defendant appears at a future date to answer the charge against him. The parallels with immigration bail decision-making, particularly but not exclusively in those hearings where the applicant has a criminal conviction, are quite apparent.

While rational models of decision making would be expected to consider all available information; studies have shown that by contrast the mechanisms used by magistrates rely on only limited information to make decisions at the earliest point in a hearing, and as soon as a decision was made no further information presented to the decision maker would alter that decision. These mechanisms enable decision makers to perform in their particular real-world environment<sup>43</sup>.

Applications for release on immigration bail are nearly always listed by the Tribunals Service within its target time of three days, a factor of some importance to those held in administrative detention, especially if they have been required to wait for months for UKBA to provide them with a Section 4 (1) (c) bail address before

40 Dhami, M., (2003), ‘Psychological models of professional decision making’. *Psychological Science* 14 (2): 175-180

41 Dhami, M. K., & Ayton, P. (2001). Bailing and jailing the fast and frugal way. *Journal of Behavioral Decision Making*, 14, 141-168.

42 Cited in Dhami, M., (2003), ‘Psychological models of professional decision making’. *Psychological Science* 14 (2): 175-180

43 “In real world situations with sufficient complexity, the knowledge, time, and computation necessary to realise the classical ideal of unbounded rationality can be prohibitive” (Todd, & ABC Research Group, 1999, ‘Simple Heuristics that make us smart’. OUP, New York. Page 2).

they can make their application for release. First Tier judges are then required to hear six bail applications<sup>44</sup> per video link session<sup>45</sup>. Allowing for the withdrawal of two of those six cases in line with the national withdrawal figures<sup>46</sup>, some during the hearing itself, the Tribunal will be left with four cases to be prepared and heard per video link session.

The average (mean) length of bail hearings in this study where the applicant is represented is 59 minutes; where they are unrepresented the average length of hearing is 29 minutes. As we show in greater detail in Chapter 3, there is considerable pressure on the Tribunal in terms of the time available overall for bail hearings. An insufficient amount of time for representatives to take instruction from clients, and conduct of bail hearings that often results in less than comprehensive interpretation for the benefit of applicants who need this service, are symptomatic of this pressure. In Chapter 4 we address our findings on the type and volume of evidence that may be submitted to the Tribunal in cases where the applicant has been detained very long-term, and the apparent difficulty faced by the Tribunal in addressing this volume of evidence in the time available to them.

It is impossible to escape two conclusions in respect of those cases where a bail applicant has been detained for a long period. Firstly, that what is known about legal decision making models suggests that in order to cope with the demands of their working environment, judicial office holders may turn to decision-making mechanisms that allow them to consider only a proportion of the evidence put before them in order to reach a decision. Secondly that the Tribunal is currently being asked to deliver fair and safe decisions on release with less time available overall than is needed in order to observe due process where the applicant has a long immigration and detention history.

44 Comment from Clements J, President, First Tier Tribunal IAC, at the Immigration & Asylum stakeholder meeting of 23rd January 2012, Field House, London. Item 7.2 'Time and caseload allocation for First Tier Tribunal Judges in bail hearings'. In January 2012 BID submitted a query to the tribunal prior to the stakeholder meeting noting that the new bail guidance of July 2012 stated that each party to a case should now be adducing evidence, particularly where issues may be in dispute, and asking whether there had been a subsequent increase in preparation time for First Tier Tribunal judges hearing bail cases and/or an increase in the number of judges or sittings for such cases

45 Bail applicants applying from immigration removal centres typically appear at the hearing by videolink, unless they or their legal representative has requested an in-person hearing for exceptional reasons. Immigration detainees held in prison may appear by videolink, or be produced in person if there is no such facility or they have made a request on exceptional grounds.

46 See Annex A for bail outcomes by hearing centre, including withdrawal, figures, provided by HM Tribunals Service.

# ACCESSING FAIR BAIL DECISIONS: PRACTICAL BARRIERS & SELECTIVE ARGUMENTS

## 3.1 INTRODUCTION

A number of practical barriers to accessing bail were found in BID's earlier research into bail decision making. Since that research was published in 2010, a number of improvements have been made but many practical barriers in the bail process still exist, including a number that unfairly disadvantage unrepresented applicants. This sense of unfairness is at its most acute in relation to the bail applications of those people who have spent the longest in detention, whether or not they have the benefit of representation. These practical barriers often create a powerful impression of unfairness or injustice to the detained applicants themselves, to their sureties, and to their families and supporters. We believe there is a need for the Tribunals Service and UKBA to make some urgent practical changes in order to reduce these barriers.

However, a sense of fairness is not created simply by removing practical barriers to accessing justice and enabling full participation of all parties in bail hearings. We also examine here what this detailed study has told us about the balance of oral arguments run by the Secretary of State<sup>47</sup> (SSHD) in opposing release before the Tribunal, and the criteria considered by the Tribunal at the hearing when deciding on release. We find that the great majority of argument and discussion on the part of Home Office Presenting Officers and the Tribunal relates to unsubstantiated assertions of the likelihood of re-offending or absconding on release.

Consideration of the length of time spent in detention to date, or likely future duration of detention, only featured in around half of the hearings in this study. Detail of any consideration by the SSHD of the use of alternatives to detention was offered by the HOPO in only 6% of the hearings. We found that neither the Tribunal nor the SSHD are deploying the Home Office's own definition of 'imminent removal' as being within four weeks. The balance of discussion is disturbing, since length of detention and imminence of removal relate to the lawfulness of detention, and the implied limitations of the power to detain (as set out in the so-called 'Hardial Singh principles') relate directly to these factors.

The chapter begins by looking at grant rates at bail and rates of withdrawal of bail applications. We then consider the use of videolinks, the inadequacy of the ten-minute slot for counsel to take instructions from their client, especially where there is a lengthy detention history, and highlight a current problem with access to a sufficiently long enough video link connection for applicants in some prisons. Data on the length of bail hearings has enabled us to show that interpreter time is squeezed where hearings are longer and the issues are more complex. Finally we examine the role of sureties in bail applications, and highlight the particular challenges faced by them when assisting the Tribunal in the case of a long-term detainee, and the unfairness we believe this creates for longer-term detainees.

<sup>47</sup> The Home Secretary, currently Rt Hon Theresa May MP.

### 3.2 GRANTED, REFUSED, WITHDRAWN: THE REPRESENTATION PREMIUM

There is a clear advantage to having a bail application prepared by an accredited legal advisor and being represented at a bail hearing. In this study 31% of those applicants whose bail case was prepared by BID and who were then represented by a pro bono barrister were granted bail, while only 11% of unrepresented applicants secured their own release. Put another way, 89% of unrepresented applicants whose cases were not withdrawn during the hearing were refused bail, while 69% of those with a barrister were refused bail. In this study the overall grant rate in those cases heard (not withdrawn or abandoned), considering both represented and unrepresented applicants together, was 20%, and the refusal rate was 80%. The success rate across all hearing centres for hearings completed is 31% (see Table 3). The Ministry of Justice statistics do not differentiate between represented and unrepresented applicants.

Table 3: Outcomes of bail hearings in this study

Heard 2011–2012	Number of bail hearings	Withdrawn during hearing	Completed hearings	Granted (after completed hearings)	Refused (after completed hearings)
Represented applicants	N=38	N=6	N=32	N=10	N=22
		16%		31%	69%
Unrepresented applicants	N=42	N=4	N=38	N=4	N=34
		9%		11%	89%
All applicants	N=80	N=10	N=70	N=14	N=56
		12.5%		20%	80%

Typically, many of the represented applicants in this study had been unable to get legal aid for a bail application. They may or may not have been represented in their main immigration case, but if represented they had either not been recently considered for bail or had failed the merits test for bail if it had been considered<sup>48</sup>.

We understand that bail withdrawal rates nationally are of concern to the First Tier Tribunal IAC. The current national rate for withdrawal of bail applications for the most recent 6-month period is 34% (see Table 4 below). The Ministry of Justice statistics do not differentiate between represented and unrepresented applicants. The national rates show the number of cases withdrawn both before and during the hearing, unlike the data from this study, which makes comparison of withdrawal rates impossible<sup>49</sup>. In this study by BID only those cases that began to be heard but were then withdrawn during the hearing were considered<sup>50</sup>.

Withdrawal rates in this study were higher when a barrister ran the bail case. In total 12.5% of all the applications observed were withdrawn during the hearing. However, a higher rate of 16% (n=6) were withdrawn where the applicant had the benefit of counsel, while 9% (n=4) of unrepresented applicants withdrew their case during the hearing. While the overall numbers in this study are relatively small, close examination of the observation data suggest that withdrawal in represented cases and unrepresented cases

48 For further information see *Bail for Immigration Detainees, (2012) Summary of Surveys 1-4 of the level of legal representation for immigration detainees across the UK detention estate (November 2011 – May 2012)*. Available at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

49 And somewhat meaningless given the huge disparity in size of the two datasets.

50 BID does withdraw a proportion of bail applications prior to the hearing date, but data has only just started to be collected on this. Counsel briefed by BID will sometimes but not always obtain a short adjournment to call the briefing legal manager at BID and to confer with the client to discuss withdrawal of the bail application.

appears to be prompted by different sets of reasons. Unrepresented applicants who withdrew in this study did so on the suggestion of the Tribunal, generally for reasons to do with the preparation of their case (see Chapter 5 for more information on withdrawals during bail hearings).

Table 4: Bail outcomes by hearing centre

For the half-year July to December 2011				
Bail applications (new & repeat) total all centres	Withdrawals (of total applications)	Heard (of total applications)	Granted (of those cases heard)	Refused (of those cases heard)
5925	2008	3917	1223	2607
	34%	66%	31%	67%
For the full year 1 July 2010 to 30 June 2011				
Bail applications (new & repeat) total all centres	Withdrawals (of total applications)	Heard (of total applications)	Granted (of those cases heard)	Refused (of those cases heard)
11004	3800	7204	2194	5010
	35%	65%	30%	70%

(Source: Ministry of Justice, 2011 and 2012)<sup>51</sup>

### 3.3 VIDEO LINK BAIL HEARINGS: DIFFICULT TO PARTICIPATE FULLY IN PROCEEDINGS

Of the 80 bail hearings observed, seventy three (91%) were heard by video link. Using this system the applicant is not produced in court but remains in the removal centre where she or he is detained, and communicates with the judge and her or his legal representative at the Tribunal hearing centre via video link. The pre-hearing consultation between the applicant and her legal representative (if she has one) take place via the video link. Interpreters and any sureties put forward in an application are all present at the hearing centre. There are video link facilities in a number of prisons that may be used for immigration bail hearings, but where this is not available the detainee must be produced at the hearing centre.

The use of video link bail hearings is now standard throughout the detention estate. A bail applicant must make a special case to a hearing centre in order to be produced at the hearing centre to be heard in person<sup>52</sup>. At the time of writing, video links are also routinely used throughout the criminal justice system, although as we understand it for pleading only and not for criminal trials. The First Tier Tribunal of the Asylum and Immigration Chamber is unique within the Tribunals Service in requiring video link facilities, since only in immigration bail cases will one of the parties be held in custody<sup>53</sup>.

Detainees tell us that there are some advantages to a video link hearing, not least that they need not give up their room at their removal centre and travel in great discomfort in an escort lorry, handcuffed at certain points, and without proper toilet breaks (for periods of up to five hours each way), to and from the hearing

51 See Annex A for complete figures for this six month period by hearing centre, the most up to date available in a response to BID's FOIA request at the time of writing. See also bail outcomes by hearing centre for July 2008-June2009, July 2009-June 2010, and July 2010 - June 2011 disclosed by the Ministry of Justice in response to an FOIA request by BID in 2011.

52 See President of the First Tier Tribunal Immigration and Asylum Chamber, (2012), 'Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings', Annex 6 'Revised guidance note to judiciary about video link bail hearings, s7 'Request for "In-Person" Bail Hearing'. Available via HM Courts & Tribunals Service website at <http://www.justice.gov.uk/tribunals/immigration-asylum/rules-and-legislation>

53 Hearings of the Mental Health Review Tribunal take place at the hospital where a patient is detained under the Mental Health Act 2003 (or where they were previously held), or in a nearby community venue (Source: Ministry of Justice website <http://www.justice.gov.uk/tribunals/mental-health>)

centre. Given that the odds are against obtaining release on bail, even with a barrister, the discomfort and upheaval may seem to a detainee to be a high price to pay.

However, under certain circumstances it can be invaluable to have the applicant present in the courtroom. As one barrister in the study put it:

*"I believe the applicant's presence in person was a significant factor in his obtaining bail. His presence allowed me to take sufficient instructions, and gave his evidence greater weight and allowed the judge to assess his demeanour" (B38).*

This applicant had made four previous bail applications within the six months prior to release, and had been detained for almost three years by the time he was finally released on bail. A request had been submitted for the applicant to be produced in person at the fourth and final bail hearing.

First Tier Tribunal judges are required to check that the video link is working, and that the applicant can hear and see everything in the courtroom, before the hearing starts. This was done by judges in 81% of cases in this study.

*"I had already checked the video link though the judge did not" (B05)*

*"The judge did not check anything at all. When she initially addressed the applicant she asked him if he had any sureties. The applicant later mentioned that he didn't hear a question clearly" (U6)*

*"The judge was actually very good with explaining the procedures to the client and ensuring that he understood" (B27)*

There were technical problems with the video link facilities in 15% of the cases heard this way. These problems were not sufficient to stop the hearings going ahead, but sound level and sound quality were affected, and this would have compromised the ease of conduct of the hearing and the experience of the hearing for all parties to some degree. Judges - where they acknowledged these problems - attempted to solve them by asking parties to speak up, repeat themselves, and move closer to microphones.

*"There is almost always a distracting echo which the JJs just seem to ignore. This was the case in today's hearing" (B37)*

*"Echo as usual. The judge did nothing. I suggested that the volume be turned down a bit" (B08)*

*"There was a lot of echo caused by the video link. The surety found it very difficult to ignore and continue giving her evidence" (B31)*

*"The judge told the applicant to speak slowly and to pull to pull the microphone closer to him or to move closer" (U36).*

*"The judge repeated what he had said" (U5)*

*"The judge asked the applicant to speak up as the line had echo" (U13)*

*"The sound quality was a bit muffled. The judge spoke louder and repeated his statements when necessary" (U26)*

No one really knows how detainees experience the courtroom while they sit in the video suite in their removal centre, or whether the experience could be improved on a technical level. However, poor sound and limited vision are unlikely to make the experience of a bail hearing any easier for an applicant who is already at a disadvantage given the distancing effect of a video link. Where an interpreter is used this can only add to the communication problems where the quality of the video link is poor. The Tribunal does however have an enabling duty, and there is a requirement to ensure full participation of all parties

in tribunal proceedings (Jacobs, 2011: 1.48). BID therefore recommends that when funds allow, the specification of videolink technology be raised and infrastructure upgraded in the HMCTS hearing centres and immigration removal centres in order to improve the videolink experience and achieve fullest possible participation of all parties. We also recommend that HMCTS hearing centres be linked to each other via videolink to allow sureties to appear in the hearing centre nearest them regardless of where the bail hearing is being heard. It is unfair to penalise bail applicants and their sureties when the geography of detention and Section 4 (1) (c) bail accommodation is completely out of their hands.

### 3.4 TAKING INSTRUCTIONS FROM CLIENTS BY VIDEO LINK: TEN MINUTES IS ALWAYS INSUFFICIENT

The fact that representative and client are limited to only 10 minutes pre-hearing instruction when a case is heard by video link is perhaps the aspect of video link hearings that has the greatest potential for adversely affecting the outcome of a hearing. Barristers in this study were of one mind that although in all but one of the 42 represented hearings they were given their ten minutes to take instructions from their client, the ten minutes was simply insufficient. In the one case an earlier power cut at the hearing centre meant that all hearings were rushed through in order to get through the list.

*"I had 10 minutes to consult with the applicant before the case was listed. I do not believe that this can ever be enough time to take full instructions except in the simplest of cases" (B03)*

*"They kept me to the 10 minutes – insufficient to go through a 14-page bail summary served shortly before" (B04)*

*"You are given ten minutes as standard and this simply is not long enough to take all the instructions necessary in what are often complex immigration histories" (B37).*

*"Ten minutes is never enough to take detailed instructions, especially from clients who have mental health problems. It takes a while to build trust with someone before they will speak to you about very private and personal health problems. Ten minutes, especially over a video link is not enough" (B08)*

*"Only by fighting [did I get enough time to take instructions]. Tribunal allocated ten minutes to take instructions on a 31-month bail summary, which would not be adequate. Applicant produced late by the detention centre" (B16).*

*"Ten minutes is never enough time to go through the accuracy of UKBA's bail summary" (B21)*

Counsel in these cases had the benefit of a detailed bundle from BID, and, in many cases either a short phone call with the instructing legal manager or at least an email before they took instruction from their client, and to some extent this may help reduce the time required for a consultation. However, we recommend that the Tribunal should consider doubling the time available for consultation to 20 minutes or longer where an interpreter is required. The revised bail guidance (2011 version) laid great emphasis on the fact that each party to a case should now be adducing evidence, particularly where issues may be in dispute. BID asked the IAC at a stakeholder meeting in January 2012 whether there had been a subsequent increase in preparation time for those hearing bail cases, or an increase in the number of First Tier judges to hear bail cases. The IAC replied that it had decided to reduce the number of bail cases listed per video link session from seven to six<sup>54</sup>. We recommend that consideration should again be given to reducing this number still further to allow, among other things, for adequate consultation time where a bail applicant has representation at the hearing. In BID's view, allowing more time for judges to read case papers might have the benefit of allowing bail hearings to progress more quickly.

<sup>54</sup> Immigration & Asylum Chamber stakeholder meeting, 23rd January 2012.



At present, when adult family members make joint applications for release on bail, counsel is limited to ten minutes despite there being two or even three times as much material to cover. In such circumstances, which are relatively rare, we recommend that counsel be allowed ten minutes for consultation with each of the joint applicants, to run consecutively.

We recommend the Tribunal consider the possibility of separate videoconference booths for the use of barristers and their detained clients of the sort found at magistrates' courts, which could then be booked for longer periods outside the timings of court listings<sup>55</sup>. Commercial contractors operating immigration removal centres may need to make infrastructural and staffing alterations to their videolink suites to accommodate such changes.

### 3.5 LENGTH OF HEARINGS: REPRESENTED CASES TAKE MUCH LONGER

The average length of the 38 bail hearings in this study where the applicant was represented was 52 minutes long, excluding the consultation with the client (range: 5 minutes to 120 minutes). Where applicants were unrepresented, hearings were almost half this length at 29 minutes on average (range: 5 minutes to 75 minutes).

Table 5: Length of hearings for represented and unrepresented cases

	Average (mean) length of hearing	Range of hearing times
Represented cases (N=38)	52 minutes	5 - 120 minutes
Unrepresented cases (N=42)	29 minutes	5 - 75 minutes

Those 32 detainees in the study who were represented at bail had an average (mean) length of detention of 19.5 months (range 2 months to 4 years), while those bail applicants with no representation had a significantly shorter average length of detention of 6.5 months (range 1 week to 2 years).

The mean length of hearings with and without legal representations, combined with the obvious representation premium in this study together point to the fact that legal representation for bail is not only helpful, but essential to ensure procedural fairness.

BID has found that immigration detainees held in prisons are at risk of having their participation in bail hearings curtailed by an arbitrary time limit operated by HM Prison Service on videolink connections between HMCTS hearing centres and prisons. At any one time there are around 500 detainees held post-sentence in prisons, and around 3000 detainees held in immigration removal centres<sup>56</sup>, so this is not an insignificant problem. In this study three of the bail applicants were detained in prison, but all three were produced in person for the bail hearing. An unknown number of prisons have videolink facilities.

55 Videoconferencing booths were first suggested by a barrister who took part in the research for BID's 2010 research into immigration bail hearings.

56 See footnote 17 above on the number of immigration detainees held in prisons. At the end of Quarter 2 2012, 2,993 people were being held in immigration removal centres detention. (Source: Home Office Statistics, Detention. Available at <http://bit.ly/OB9Kwh>)



## Case study Mr P

A BID client held in prison had his bail hearing heard via videolink from his prison on the south coast of England. After twenty minutes of the videolink connection had elapsed (10 minutes for the barrister to take instructions, then another 5-10 minutes for everyone to get into position) the judge told the applicant that because the videolink facility would be available for sixty minutes in total, there would come a point if the hearing continued past sixty minutes where the applicant would no longer be able to connect with the hearing centre, although the hearing would continue, and he would be informed of the result later on.

This was clearly an unsatisfactory situation for the applicant and counsel for the applicant, who raised objections. It may be generally felt in the criminal justice system (including HM Prison Service) where videolink is used in prisons for entering pleas, and where bail hearings in magistrates' courts are often very short, that sixty minutes is sufficient for an immigration bail hearing. But this study shows that the range of hearing length is wide, and hearings may take up to two hours for both represented and unrepresented applicants. For represented applicants the mean hearing time is 52 minutes (not including the 10 minute legal consultation prior to the hearing).

The problem in this case and the findings of this study in relation to average (mean) and range of duration of bail hearings were brought to the attention of the Immigration & Asylum Chamber at a stakeholder meeting in July 2012.

Of course it is not possible to know in advance which bail hearings are likely to take more than sixty minutes, but in BID's view it should be possible to make representations via the First Tier Tribunal (IAC) for some flexibility on a case by case basis. It is not clear at present whether there is an agreement with HM Prison Service (nationally or locally) that foreign national immigration bail applicants will appear by videolink where the technology exists, or whether this is determined on a case by case basis, notwithstanding specific requests to the Tribunal for the applicant to appear in person. BID is now pursuing these issues. We believe that no-one held in immigration detention, whether in a removal centre or a prison, should find themselves in the position of being unable to participate in their own application for release from administrative detention.

BID therefore recommends that there is no upper time limit to the length of videolink hearings from prisons for the purpose of immigration bail hearings. If that is genuinely not practical as a result of typical prison regimes then videolink hearings from prisons to HMCTS hearing centres should be capped at 120 minutes rather than 60 minutes.

### 3.6 USE OF INTERPRETERS: COMPREHENSIVE INTERPRETATION SQUEEZED WHERE MORE EVIDENCE AND ARGUMENT

Table 6: Use of interpreters

	Interpreter used	Judge checked mutual understanding before case heard	Apparent full translation of proceedings	
Represented cases (n=38)	N=8	N=7	N=4	
	21%	88%	50%	
Unrepresented cases (n=42)	N=18	N=16	N=16	
	43%	89%	11%	
Total (n=80)	N=26	N=25	N=20	
	33%	96%	77%	

Tribunal interpreters were used in 19% of the represented cases in this study, and in 43% of the unrepresented cases. In represented cases where interpreters were used, judges checked prior to the start of a hearing that the applicant and the interpreter could understand each other in 7 out of 8 cases, with a similar rate for unrepresented cases of 16 of 18 (89%).

*“Before the hearing started the IJ asked the interpreter merely to ask the applicant’s age and whether he had eaten today, although it was apparent from this that the applicant could understand the interpreter” (U46)*

*“The judge made sure the language spoken between the interpreter and the applicant was understood and confirmed that the language is Arabic” (U44)*

However, when it came to translation of the full content of the hearing, the barristers in the study judged that in only 50% of the hearings where an interpreter was used were the interpreters translating everything that was said in the courtroom, including discussions and asides. In the remaining 50% of hearings the interpreter only translated direct questions to and answers involving the applicant when the interpreter should be speaking throughout the hearing. In BID’s 2010 study, it was similarly found that in only 50% of hearings was there near-enough complete translation of the proceedings. One barrister in this study told us that:

*“Everything was interpreted in so far as the speed of the hearing would allow. Neither the IJ nor the HOPO paused to allow time for interpreting. He approached the hearing as though the applicant was not there, and did not allow time for the interpreter to translate everything that was being said. Worse, he grew impatient when I paused to let the interpreter speak” (B25)*

Somewhat shockingly, a barrister reported that in one hearing (B38) the interpreter requested by the applicant was sent away by the judge, on the grounds that the applicant *“has been here long enough”*. During the same hearing the judge would not allow evidence to be produced, and gave written reasons for refusal of bail that clearly related to the facts in the previous case heard that morning, another BID case in which the same barrister had acted<sup>57</sup>.

<sup>57</sup> In this case (B38) the barrister advised a further bail application without delay.

More encouragingly, in the cases where applicants were appearing unrepresented, there was a higher proportion of instances in which comprehensive interpretation was achieved - or allowed - during the hearing (77%) than in the unrepresented case hearings (where the rate was 50% of an admittedly small set of 4 cases). One observer explained the approach taken by the judge in an unrepresented case:

*“The judge asked both the HOPO and the applicant to slow down to make sure interpretation could be carried out effectively” (U34)*

The absolute numbers of cases where interpreters were used was fairly low in this study, so caution must be exercised, but it is possible to speculate on why comprehensive interpretation seemed to be compromised in cases where an applicant was represented at a hearing. Where detainees have representation at bail the amount of material before the Tribunal tends to be significantly greater and systematically presented than where an applicant has prepared his or her own application and appears unrepresented. Advocates will also want to put their arguments to the Tribunal in such a way and at a length that most unrepresented detainees will not be able to achieve. The finding in this research that the average hearing length in represented bail cases was double that of cases without representation would seem to support this (see Table 5 above).

One mechanism for managing a list of bail cases may be for decision makers to delegate the burden of responsibility for the communication of the entirety of arguments and decisions to the advocate, in the expectation that they will have an opportunity to explain to their client after the hearing. It may be that judicial decision makers in such circumstances, knowing that the Tribunal's role as enabler is reduced where an applicant has representation, take the view (however unconsciously) that this extends to interpretation and communication. Under pressure of time, and in complex cases with long detention histories, something has to give, and comprehensive interpretation may be a tempting target.

Regardless of the explanation for this shortfall in comprehensive interpretation, such as the tentative suggestions made above, we maintain that full interpretation of proceedings must be facilitated by the Tribunal, even - and especially - in those bail applications where applicants have long detention histories, complex immigration cases, and where the volume of evidence and argument before the Tribunal is likely to be highest. Otherwise, the Tribunal is failing in relation to its enabling role, including fullest possible participation by all parties, and hence to its overriding objective to deal with cases fairly and justly. The Tribunal should never dismiss an interpreter where one has been requested by an applicant, no matter how long the applicant has lived in the UK.

These findings of significantly less than 100% rates of comprehensive interpretation (worse at only 50% for represented applicants, both in this study and our 2010 research), suggest that pressure of time in the face of greater volumes of evidence and argument where counsel is instructed may be leading the Tribunal to squeeze the time available to interpreters. There is less evidence from this study that interpretation is being squeezed where bail applicants are unrepresented, but of course the amount of evidence and argument that such applicants are typically able to marshal for the Tribunal is extremely small by comparison, and they do not pose the same time management problems for the Tribunal as a result.

Regardless of whether or not a bail applicant is represented, the evidence discussed and arguments made must be interpreted in full for applicants. These findings suggest that long-term detainees, typically with long detention and immigration casework histories, and issues of criminal risk and supporting evidence to consider, are likely to be the people most disadvantaged by less than complete interpretation at bail hearings. The greater volume of evidence and argument generated by legal representatives must be comprehensively interpreted for applicants, yet it is just such cases where this seems to be most difficult for the Tribunal to achieve.

### 3.7 ADEQUATE OPPORTUNITIES TO SPEAK FOR COUNSEL AND APPLICANT

Barristers told us that they felt judges had given them adequate opportunity to speak in 87% of the represented cases in the study. One barrister told us *"I was invited to make submissions first, and then when I asked was permitted time to respond to Home Office submissions too"* (B05). However, in those 5 cases (13%) where it was felt insufficient opportunity was given to counsel to speak, the experiences which barristers describe are troubling.

*"I was continuously interrupted by sneering comments about the plausibility of my instructions"* (B25)

*"IJ [X] did not give me an opportunity to make submissions after the HOPO had made her submissions"* (B03)

*"IJ not inclined to give opportunity for me to reply, making decision immediately after HO representations"* (B16)

In 89% of the represented cases barrister observers judged that either their clients were given adequate opportunity to speak by the judge or counsel was otherwise satisfied that there was no need for their client to speak or to speak at any length.

*"The client asked to speak at some point when submissions were being made on bail in principle and the IJ gave him the opportunity to do so"* (B27)

*"Applicant wanted to address the IJ when the reps were addressing the current situation with the Embassy, IJ did allow applicant to comment at the end"* (B13)

In 11% (n=4) of the represented cases, barristers noted that applicants were refused the opportunity to speak despite the fact that either they or the barrister requested this, or counsel was obliged to argue very forcefully that it was necessary for their client to speak, or counsel was otherwise not satisfied with the opportunity given to their client to participate adequately in the hearing.

*"The IJ refused to take evidence either from the applicant himself, or from his wife, who had very valuable evidence to give about the circumstances of the index offence. She, in particular, was very upset by this as it had clearly 'psyched her up' to give evidence about issues that would no doubt be painful for her to talk about"* (B25)

*"IJ declined to hear evidence [from the applicant], and said I could give my client's account on the basis of instructions"* (B14)

*"IJ [X] said that he did not want to hear from the applicant but would hear submissions from me alone"* (B03)

Observers in the unrepresented cases were generally more satisfied that the bail applicants, who were appearing without legal support, were given adequate opportunity to speak by the judge. In 95% (n=40) of the unrepresented cases, observers felt applicants were given adequate time to speak.

*"Every time the judge spoke he subsequently asked the applicant if he wished to make any comments. The judge gave the applicant considerable opportunity to speak and ensured that the applicant did not want to say anything else before speaking again"* (U1)

*"After the judge confirmed that the applicant's removal was imminent she asked him if he would like to say anything. She also asked him if he understood that he would be removed"* (U4)

*"The judge never asked the applicant to stop speaking and always asked if he had anything to add after the applicant had finished speaking"* (U46)

*"The applicant challenged several points in the bail summary. The judge interrupted the applicant by telling him only to state why he should be granted bail instead of going through all his history"* (U51)

*"The judge gave the applicant ample time to speak and sometimes interjected to help clarify information. He even retorted that so many folks want to go to St Lucia and here he is fighting a removal order" (U42)*

The impression is created of a significant majority of First Tier judges who deal courteously and sometimes thoughtfully<sup>58</sup> with unrepresented applicants in their interactions, who make efforts to ensure that these applicants understand the procedure, and appear to give sufficient time to these applicants to speak. Only in a minority of cases in this study were either counsel or bail applicants not given what was felt to be an adequate opportunity to speak at a bail hearing, but it is notable that this sense of being silenced unfairly appears almost more disturbing to barristers, to trained observers, and - we know from our legal casework - to bail applicants themselves, than other types of failure on the part of the First Tier Tribunal. Indeed, discourtesy to applicants and counsel, and the impression given of the Tribunal sometimes silencing those who wish to speak, are the traits of the Tribunal most frequently commented on whenever those who support detainees discuss bail and bail hearings. One observer noted that:

*"The applicant challenged several points in the bail summary. The judge interrupted the applicant by telling him only to state why he should be granted bail instead of going through all his history" (U51)*

However, this is not the entire story, particularly where unrepresented applicants are concerned. In BID's view, the manner in which a hearing is conducted, even when this is done courteously, cannot make up the deficit in those cases where the Tribunal might be said to have failed in other aspects of its enabling approach, such as obtaining the necessary evidence in order to make a safe decision. Jacobs notes that the accessibility of the Tribunal system relies to an extent on an inquisitorial approach, which also relates in part to the right of claimants to be heard. Where claimants at a tribunal are unrepresented, especially against the state, he argues that the approach of the tribunal should encompass both an active investigative aspect with regard to necessary evidence, as well as the identification of relevant issues (Jacobs, 2011: 1.48). This, Jacobs argues, involves the

*"Appropriate application of the tribunal's powers under its rules of procedure, [as well as] the explanations given to the parties, the manner in which the hearing is conducted, and the atmosphere that is created" (2011: 1.45)*

In order for the Tribunal bail system to function correctly it must offer sufficient safeguards to allow unrepresented claimants to participate on an equal footing with represented or more expert parties. This study suggests that while First Tier judges generally take care to make unrepresented applicants feel at ease, other duties of the Tribunal in relation to evidence are neglected, and this impacts more on applicants with no advocate. We turn to the issue of evidence, the raw material of decision-making, and the role of the Tribunal in relation to evidence, in greater detail in Chapter 4.

### 3.8 THE TREATMENT OF SURETIES

BID's earlier report on immigration bail (2010)<sup>59</sup> described how many detainees, especially those who have never lived in the UK, have problems in finding sureties to support an application for release on bail. The report also highlighted the financial and other practical difficulties that many committed people face in appearing repeatedly before the Tribunal, including the geographical contradictions that may place a bail applicant in Section 4 (1)(c) bail accommodation tens or hundreds of miles from a potential surety. All of these problems still exist today for bail applicants and their sureties. What has changed since BID's previous research on bail hearings in 2009-10 is that prolonged detention is increasing, and the contractual arrangements for the no-choice Section 4 (1)(c) bail accommodation provided by the UKBA will now disperse bailed detainees across the UK. This has changed the context in which applications to the Tribunal for release on bail are now made, and added new barriers for sureties.

58 One observer reported that "the applicant's mother [who was appearing as a surety but was not called because the case was withdrawn] was invited in and spoke with the judge about how she sent for her son who was 15 years old at the time along with 5 other children in 1988. The judge gave the family 15 minutes of private family time with the applicant following the withdrawal" (U42).

59 Bail for Immigration Detainees, (2010), 'A nice judge on a good day: immigration bail and the right to liberty'. See especially pages 24-26. Available at <http://bitly.com/mmGMiG>

It is possible to achieve release on bail without sureties where they are not available. BID successfully runs bail applications without sureties in cases where counsel is instructed. However, our experience and research suggests that this option is not recognised by all the legal practitioners that provide publicly-funded advice in removal centres, despite the bail guidance to First Tier judges being very clear that a surety should not be an automatic requirement and acknowledging the practical problems faced by certain types of bail applicant.<sup>60</sup> Organising and preparing sureties can be time consuming, and not necessarily a financially attractive element of bail work where an application is funded by legal aid.

However, being able to offer sureties, so long as they are appropriate and properly prepared, is an extra tool in the armoury of any bail application. BID is perhaps unusual among those who give immigration advice in coming into contact with and taking on the detention cases of long-term and very long-term detainees who have not been able to obtain or maintain publicly funded legal representation throughout their detention, often because they are considered to fail the merits test for bail. Our funding arrangements mean that BID is not required to operate a merits test in relation to bail work, and so within the limits of our capacity we can make a series of bail applications for those cases we take on until we get them released or have successfully referred them for an unlawful detention claim.

Where there are people prepared to stand as a surety for long term detainees, through regular contact with these individuals BID is able to gain useful insights into the role and concerns of these sureties, especially where the person they support has been detained for a very long period, say three or four years.

Practical hurdles related to bail sureties affect long-term detainees disproportionately. It is not unusual for male detainees to be transferred around the country from one removal centre to another, disrupting visitor relationships and relationships with their family and friends over the months or years they are detained. Over long periods of a person's detention, their sureties may have exhausted leave entitlements that they otherwise need for school holidays or caring responsibilities, or may not be able to afford the cost of peak rail travel from London to Birmingham or Newport for a hearing at 10 o'clock in the morning. Potential sureties may be unwilling or unable to overcome these financial and practical difficulties where they have appeared for a hearing for which the bail application has been poorly prepared by an unrepresented applicant, and felt their time has been wasted, no matter how much they understand about bail in principle or wish to assist the court. Many of BID's clients may have made ten or more bail applications while they have been detained over a number of years, and it is the potential sureties for these detainees subjected to extreme detention periods without removal that are deterred from standing repeatedly, especially where they are living on low or fixed incomes<sup>61</sup>. We were told by one barrister:

*"I asked the judge to examine the surety since he had attended on several occasions and it was difficult for him to attend on every occasion because of work and that she could mark the file as to his suitability. IJ refused to do this but commented that no doubt the surety was suitable in terms of character but questions would need to be asked as to what influence he could have over the applicant (B01)"*

### Developing the concept of the 'continuous surety' for immigration bail

BID understands that in criminal law the concept exists of something called a 'continuous surety, and this is in use in the magistrates' courts, the Crown Courts, Divisional Courts and the Court of Appeal<sup>62</sup>. Under this provision, surety details are given at a police station following which checks are made for criminal convictions or problems with the address given. Where a surety is proposed at court, the same thing is done by the prosecution. When a case is heard in a magistrate's court, the surety can attend and be checked, and then remain in place throughout proceedings without having to attend court again. In

60 "A First-tier Tribunal Judge may require an applicant for bail to produce sureties. This should not be an automatic requirement and the Judge must have due regard to the fact that people recently arrived in the country may have nobody to whom they could expect to stand surety for them" (Source: President of the First Tier Tribunal Immigration and Asylum Chamber, (2012), 'Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings', paragraph 63. Available via HM Courts & Tribunals Service website at <http://www.justice.gov.uk/tribunals/immigration-asylum/rules-and-legislation>)

61 This point was made in 'Consultation on the 2011 Bail Guidance, Joint submission from the Immigration Law Practitioners' Association and Bail for Immigration Detainees'. ILPA & BID, (2010), paragraph 41.

62 We are grateful to Rajeev Thacker for this point.



the magistrates courts a surety can be made continuous to the transfer hearing, and the surety agrees to forfeit the recognizance if the accused fails to attend any of the required hearings. We understand that it is theoretically possible, though rare in practice, for a criminal defendant on being refused bail to ask the judge to state that the surety need not attend again in person in case of a further bail application.

*“To avoid the inconvenience to the sureties of their having to enter into recognizances every time the defendant’s case is adjourned, the magistrates may make the sureties continuous. This means that on the occasion when bail is first granted the surety undertakes to pay the specified sum if the defendant fails to appear on any of the occasions to which is case is adjourned ... Similar provisions to those described above apply when the Crown Court, Divisional Court or Court of Appeal grants bail subject to sureties.” (Sprack, 2012: 114)<sup>63</sup>*

In the case of immigration bail, the personal details of sureties offered by the applicant are passed to the Tribunals Service when the application is lodged, and subsequently passed to the UK Border Agency who carry out checks on those individuals (the precise details of which are not known). The starting point for a mechanism similar to the continuous surety in the criminal justice system is therefore in place, and experience of this system in the criminal courts would be available to inform its use in the Tribunal. A version of the ‘continuous surety’ as used in criminal courts - adapted for Tribunal purposes - would not only be fairer to longer-term detainees, but would also allow for sureties to continue to stand regardless of the geography of detention and Section 4 accommodation, which otherwise have the potential to defeat the purpose of offering sureties. We believe the continuous surety concept has the potential to reduce the number of repeat bail applications and court time, because without this barrier to offering a surety, applicants will be able to put forward their best possible case for release.

Table 7: Rate of offering sureties, number of sureties offered, and rate of examination of sureties

	Sureties were offered	Sureties were examined	1 surety offered	2 sureties offered	3 sureties offered
Represented cases (N=38)	N=16	N=10	N=8	N=7	N=1
	42%	63%	50%	44%	6%
Unrepresented cases (N=42)	N=15	N=7	N=8	N=7	N=0
	36%	47%	53%	47%	0%

Sureties were offered in 42% of the represented cases (8 applicants offered one surety, 7 offered two sureties, and 1 offered three sureties). The judge went on to examine sureties in 63% of cases where they were offered (10 out of 16). Barristers offered the following notes on how judges dealt with sureties where they appeared:

*“The IJ spent the most part of an hour taking evidence from both sureties, which were the applicant’s parents. As mentioned above, the IJ was not that bothered about the money they were offering but was keen to find out how they would be able to exert a positive influence on him, given they had not been able to in the past” (B10)*

*“The IJ stated that he was impressed by the surety, and found her honest and trustworthy, but given the client’s extensive criminal history that this was not sufficient to ensure that he would not abscond” (B31)*

*“I asked the IJ to examine the surety since he had attended on several occasions and it was difficult for him to attend on every occasion because of work and that she could mark the file as to his suitability. IJ commented that no doubt the surety was suitable in terms of character but questions would need to be asked as to what influence he could have over the applicant” (B01)*

63 John Sprack, (2012)(4th ed.) ‘A Practical Approach to Criminal Procedure’. Oxford University Press.

*“Evidence demonstrated that surety unable to exercise requisite control over applicant said IJ” (B02)*

It is interesting to note here that where criminal bail is being sought, a surety is obliged to ensure only that the accused attends Court when required, at risk of forfeiture of the recognizance if the person who has been bailed does not do so. The surety is not expected to prevent the commission of further offences or interference with witnesses. The bail guidance for judges hearing immigration bail cases is clear on this point:

*“A surety’s principal obligation is to ensure that the applicant attends when required to do so. If the applicant fails to attend the surety risks losing all or some of the recognisance pledged to ensure that duty. A surety has no other obligations in law under the bail conditions. A surety need not reside at the same address as the applicant, and the degree of supervision that the surety may seek to exercise to ensure that the applicant attends when required is a matter for the surety in the light of the risk of the loss of the recognisance” (HMCTS, 2012: 40).*

Yet the expectation of the Tribunal towards a number of sureties in this study was seen to be creeping in direction of finding some sureties unsuitable on the basis that they appeared likely to be unable to prevent offending. Such an expectation strays beyond the requirement for the surety to be of good character themselves, to monitor the activities of the applicant, and to notify the Tribunal or the police if the applicant were to abscond at any point after release. It is not clear why this appears to be required of sureties by the Tribunal in some immigration bail hearings, given that if the applicant is a former offender they have finished serving their sentence. Where a bailed detainee is still under the terms of a Release Licence then they will receive supervision from their Probation Officer, so it is not clear why the Tribunal should require anyone, least of all the surety, to prevent the commission of further offences<sup>64</sup>.

In the unrepresented cases sureties were offered in fewer cases, only 36% (8 applicants offered one surety, and 7 offered two sureties). Sureties were examined in a lower proportion of the cases where applicants were unrepresented, namely 47% (7 of 15 cases).

This study suggests that where bail applicants are unrepresented and have both completed and lodged their application themselves, sureties that do appear are not always well prepared in relation to production of relevant documents, address checks, and their demeanour before the Tribunal. This is of course one of the roles of the legal representative<sup>65</sup>. Applicants themselves do not always understand the role of the surety. They may invite sureties to stand who are unsuitable by virtue of a criminal record, and they may not fully grasp that sureties must appear in person.

*“The applicant claimed to have many sureties (parent, brothers, partner), in the country, but none could come to the hearing. His partner was in hospital. Judge advised him to withdraw the application as he would not be granted bail without proof of where he would live and sureties to account for him” (U13)*

*“The applicant mentioned that his partner attended the previous hearings, but the judge said that none of the previous bail applications specified his partner as a surety” (U1)*

*“The one surety was not present in the court (had not turned up)” (U51)*

*“The judge asked [the applicant] to give her some reassurances if his aunt told him he could not go out on a Friday as she considered his application. The applicants response was that his aunt was putting up her money and it was up to her to enforce any restrictions, and if he did not listen to her it was her money that was going to be lost” (U41)*

<sup>64</sup> In a speech on bail in June 2010 the President of the Upper Tribunal (IAC) Mr Justice Blake noted in passing, while discussing the common law presumption of liberty in relation to immigration bail: “...subject to being satisfied of suitable recognisance and sureties if any. **Suitability in that context must relate back to the need to be satisfied as to the need to appear**” (emphasis added). Mr Justice Blake, transcript of presentation given at immigration judges’ conference 2010, ‘Immigration bail: problems and practice’.

<sup>65</sup> The need for preparation of sureties is also well understood by support organisations whose members act as sureties for detainees.



*"No sureties were offered. However, the applicant had intended to offer sureties, a name was mentioned but she was not present during the hearing. Without a confirmed address and surety present the judge wasn't willing to grant bail" (U6)*

In BID's view the amount of any financial guarantee offered by sureties should not be viewed in absolute terms but rather in relation to the means of the surety, although this has never been subject of bail guidance for judges. During this research barristers reported:

*"The IJ thought £200 insufficient due to deception re identity in applicant's past. IJ suggested that £5000 necessary without any evidence of surety's means (B16).*

*"The judge indicated that a surety of £2500 would be necessary for bail. Surety present at court with a sum of £500, declined to enter into a higher sum. I pointed out that such a requirement would mean the applicant stayed in detention indefinitely. Judge replied "he's brought it on himself"" (B24).*

The surety in the first of these two cases, an Anglican cleric on a very low income, had indicated to BID that he was prepared to continue to appear repeatedly as surety for this long-term detainee, yet a £200 sum was the very limit of what he could afford to offer as recognizance.

In another hearing the Tribunal took a rather Victorian approach to the details of the accommodation offered by a surety, in a manner that the President of the Upper Tier (IAC) Mr Justice Blake himself has noted has no place in a bail hearing<sup>66</sup>:

*"The judge asked about the job of the other surety, his marital status, whether he has any children, whether he owns the house, and how many bedrooms this house has" (U2).*

Such additional and unnecessary practical requirements made of sureties have the effect of raising the barrier to release for the applicant, and indeed coming as they do after bail has presumably been agreed in principle such requests may appear at the hearing to be the decisive factor in refusal. Where additional or unreasonable burdens are placed on sureties, which contribute to refusal of bail, then a further bail application will likely need to be made, and may be made without a surety if they or the applicant are discouraged from taking on this responsibility. Where detainees have a legal advisor who insists on a surety for Tribunal bail then it may be difficult to persuade the advisor to run bail again when a discouraged potential surety has withdrawn.

The new COMPASS accommodation contracts for asylum support accommodation in operation from 2012<sup>67</sup>, which cover the supply of Section 4 (1)(c) bail accommodation, allow for bail addresses to be provided across the UK, no longer just in London. We recommend that where possible First Tier judges take this into account when assessing sureties, and the role of geographical proximity to the bailee in the ability of a surety to exert a positive influence over them, since this may be impossible for a significant number of bail applicants under the COMPASS contract now in force. Later in this report in Chapter 5 we explain why BID recommends greater use of the power to grant bail in principle (under paragraph 48 of the bail guidance 2012) in hearings where, for example, a surety is acceptable but must submit a document to the court, and where release is otherwise indicated.

<sup>66</sup> "As to what a suitable address may be, it seems to me that this is primarily one that is available to the applicant for the duration of the intended grant of bail. I do not see that the quality of the accommodation or its furnishings; the identity of the person supplying it whether friend, philanthropist, or a statutory agency has a material impact on the question will the applicant stay there, receive communications there and meet his terms of bail from there?" (Mr Justice Blake (President, Upper Tribunal Immigration & Asylum Chamber), transcript of presentation given at immigration judges' conference 2010, *'Immigration bail: problems and practice'*. Paragraph 23).

<sup>67</sup> UKBA is operating the Commercial and Operational Managers Procuring Asylum Support Services (COMPASS) project for the purpose of providing contracts for the provision of asylum support services, including initial and dispersed accommodation and associated services for asylum applicants (which includes Section 4 (1)(c) bail accommodation); and transport for asylum applicants. Further details available on the UKBA website at <http://bit.ly/sXSFvu>

### 3.9 ARGUMENTS AGAINST RELEASE ON BAIL RUN BY PRESENTING OFFICERS

The role of advocacy before the First Tier Tribunal, either by Home Office Presenting Officers or by representing counsel, is not examined in any detail in this report beyond the relationship between the presence of counsel and rates of release from detention on bail. However, the study did examine which points were made in argument by HOPOs and how prevalent these were, and which factors were considered during the hearing by the Tribunal.

The tick-box Tribunals Service 'Refusal of Bail' notice (below), with a further page for outlining the reasons for believing that the applicant would abscond if released, clearly shapes the arguments made by the SSHD to oppose release on bail in the bail summary, as well as the arguments run by HOPOs during the bail hearing.

HM Courts & Tribunals Service		FIRST-TIER TRIBUNAL THE IMMIGRATION ACTS	
<b>Refusal of Bail</b>			
<b>Particulars of Applicant</b>			
Application No:		Appeal No:	
Last Name:		Forenames:	
Place of Detention: <b>HARMONDSWORTH</b>		Date of Detention:	
<b>Reasons For Refusal</b>			
<p>Having considered the evidence and the arguments for and against the grant of bail, <b>BAIL IS REFUSED</b> for the following reasons:</p> <p>I find that the applicant comes within one or more of the restrictions on the grant of bail contained in paragraph 30(2) of the Second Schedule to the Immigration Act 1971, namely:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> there has been a previous failure to comply with conditions of a recognizance</li> <li><input type="checkbox"/> the applicant is likely to commit an offence unless retained in detention</li> <li><input type="checkbox"/> the release of the applicant is likely to cause danger to public health</li> <li><input type="checkbox"/> the applicant is suffering from mental disorder and continued detention is needed in his interests or for the protection of others</li> <li><input type="checkbox"/> the applicant is under the age of 17, that arrangements ought to be made for his care in the event of release, and no satisfactory arrangements for that purpose have been made</li> </ul> <p>(tick applicable box)</p> <p>and it is not appropriate to grant bail for that reason.</p> <p><b>OR</b></p> <p>I am satisfied there are substantial grounds for believing that if granted bail the applicant will abscond for the reasons set out overleaf.</p>			
Signed:		Date:	
Immigration Judge			

Tribunals Service 'Refusal of Bail' notice

The restrictions on the grant of bail related to the applicant causing a danger to public health, or to the applicant being under the age of 17, are likely to apply only to a tiny minority of bail applicants, and have never been seen in use by BID to date. The restriction on release in relation to the mental health of the applicant is used from time to time, though BID believes provision of treatment for mental health should play no part in immigration bail decisions and this ground should be repealed<sup>68</sup>.

By disregarding these three statutory grounds for refusal on bail we see that those grounds remaining are i) previous failure to comply with the conditions of a recognizance; ii) likelihood of committing an offence unless retained in detention, and iii) likelihood of absconding if granted bail.

This concentration on the perceived level of risk of re-offending and absconding becomes clear when the arguments made by HOPOs in the hearings in this study are examined.

Table 8: HOPO points of argument

Total 80 cases	Consideration given to alternatives to detention	Removal imminent	Detention proportionate to purpose, Home Office diligent in progressing case	Absconding risk	Danger to public or risk of re-offending on release	Other issues
Represented cases N=38	N=2	N=14	N=20	N=33	N=31	N=21
	5%	37%	53%	87%	82%	55%
	N=3	N=16	N=20	N=32	N=18	N=39
	7%	38%	48%	76%	43%	93%
All cases Total= 80	N=5	N=30	N=40	N=65	N=49	N=60
	6%	38%	50%	82%	62%	

A sufficiently high risk of absconding to make release unjustified was argued by the HOPO in 87% of represented cases, and 76% of unrepresented cases. In other words in the view of the SSHD the likelihood is that the majority of bail applicants are likely to abscond if released from detention.

### 3.10 IS THE SECRETARY OF STATE OVERSTATING THE RISK OF ABSCONDING?

A high likelihood of absconding was argued by the HOPO as a reason to refuse release in 82% (n=65) of all cases in this study, yet even some of the Home Office’s own statistics show that the vast majority of people required to report regularly do so, as we will show. Loss of contact with the Home Office once released from detention could be seen as defeating one of the stated purposes of detention, which is removal from the UK. It is therefore understandable that the UKBA would want to ensure that absconding following release on bail or temporary admission be kept to a minimum<sup>69</sup>.

In 2010 BID and The Children’s Society carried out detailed research into the cases of eighty two families (including 143 children) who were held in immigration detention during 2009, using data from all eighty two clients’ case files, interviews with thirty family members and twenty seven legal representatives, and complete Home Office files we had obtained for ten of the families<sup>70</sup>. That research found that the UKBA has

68 For further information see Chapter 5 of this report.

69 Chapter 55 of UKBA’s ‘Enforcement Instructions and Guidance’ sets out the criteria that immigration officers must consider when making a decision about whether to detain (UKBA 2011, 55.3.1), including a number of factors deemed to increase or mitigate the risk of absconding. The guidance states that people are more likely to abscond on release from detention if they have a history of non-compliance, if they have no close personal ties in the UK, and if they have no outstanding legal applications.

70 Bail for Immigration Detainees, (2011), ‘Last resort or first resort? Immigration detention of children in the UK’. Available at <http://bit.ly/LjWGrw>

not historically been able to effectively assess absconding risk for asylum seekers and migrants.

Between October 2004 and February 2005, the Home Office piloted the use of electronic monitoring with 111 applicants who were selected on the basis that they were perceived to have a low risk of absconding. Of these 111 applicants, 92% maintained contact. Electronic tagging was used in cases where the Home Office assessed the individual as having a high risk of absconding. However, the compliance rate of this group was the same as that of 'low-risk' applicants, at "around 90%"<sup>71</sup>. The internal evaluation of the Home Office pilot study found that it would not have been possible for the department to predict that the applicants who absconded were at risk of doing so:

*'Having reviewed the details of each case, there are no factors which would have indicated in advance that [the eight participants who absconded] were more likely to abscond than any of the other cases released.'* (Home Office, 2009, Response to Freedom of Information Act request). (BID, 2011: 39)

In correspondence with BID as part of our research on detained families, the Home Office was not able to cite any criteria used by staff to define an applicant as an absconder. Their response simply stated that an absconder is defined as someone who breaches one or more of the conditions imposed on them by the Home Office, such as reporting. BID's request specifically asked whether a missed reporting event would count as an incident of absconding, even where the applicant had offered evidence to the Home Office of their reasons for missing the event. The Home Office did not respond to this question, and have not provided an explanation for the omission (Home Office, 2010, Response to Freedom of Information Act request).

BID's detailed examination of the Home Office files for ten families in that study showed that in most cases inadequate reasoning and evidence were recorded to support assessments of the risk of families absconding. In most of the cases where reasons and evidence were given, the information contained inaccuracies and the reasoning was flawed. One detained family was viewed as being at risk of absconding simply because they were subject to deportation action. In other cases the fact that the family could not be removed was deemed to make a absconding more likely. In yet another case, the fact that it would be possible for the family to abscond from their flat was used as evidence that they were more likely to abscond. Several families were wrongly recorded as having absconded. Factors which might make it less likely that the family would abscond, such as a history of reporting regularly, were often not considered when risk was assessed. In some cases, details of the Home Office's reasoning and evidence for deeming a family to be at risk of absconding were only recorded on the file after the family had been detained for some time, for example, in response to a bail application. This suggests that reasons may have been produced to justify the decision to detain *after* the decision had been taken.

The evidence suggests that the UKBA has a rather mixed record on the accurate assessment of absconding risk, yet appears to be routinely making assertions of high absconding risk in a variety of detention-related contexts in a manner that is of great concern to BID. Significant risk of absconding on release was argued by the UKBA in 82% (n=65) of bail hearings in this study, despite the Home Office's own research which shows that absconding rates even among those they believe to pose a higher risk of so doing are only around 10% (Home Office, 2005). It is surely therefore more reasonable to assume that most bail applicants will not abscond unless there is substantial evidence to the contrary in individual cases. There are no published statistics on rates of absconding by bailed detainees. This misreading by UKBA of the Home Office's own findings on absconding rates is not credible, and we therefore recommend that assertions of absconding risk should be substantiated before the Tribunal.

The Tribunal is empowered to refuse release where "there are substantial grounds for believing that if granted bail the applicant will abscond for the reasons set out overleaf"<sup>72</sup>. In this study sufficiently high risk of absconding was offered as a reason for refusing release by the Tribunal in 75% (n=60) of cases. However, in order for such decisions to be both defensible and seen to be so, we believe they should be based on adequate evidence of risk of absconding in the face of Home Office findings of absconding rates of only around 10%, and the arguments of both parties in relation to absconding risk should be set out in any written decision.

71 Home Office, 2009, in response to a request for disclosure under the Freedom of Information Act from BID.

72 As noted on the template document 'Refusal of Bail notice', Tribunals Service.

### 3.11 THE STATUTORY RESTRICTION ON THE GRANT OF BAIL RELATED TO LIKELIHOOD OF RE-OFFENDING

A sufficiently high risk of harm to the public on release, or of re-offending on release to make release unjustified was argued by the HOPO in 82% of the represented cases (all of whom had a criminal conviction), and 43% of unrepresented cases (who may or may not have had a conviction). In the represented cases in this study, all of whom are BID clients, the SSHD was making the case that they were overwhelmingly likely to reoffend or posed a serious danger to the public if released.

The HOPOs ran a number of additional arguments in these 80 bail applications. The most popular of these types of arguments, which are noted in Table 9 below, can be seen as arguments almost entirely related to the character of the applicant (describing him or her as 'disruptive', 'a liar', 'uncooperative', 'frustrating UKBA processes', 'deviant', 'deceptive', or noting their poor immigration history).

Table 9: Additional arguments run by HOPOs in opposing release on bail

Argument	Details	No. of events
Characterised as criminal or deviant, or magnifying offence. Some of these applicants had no criminal convictions.	Includes characterisation of bail applicant as "dishonest"; having "lied continuously"; previous use of false documents; guilty of "serious offending" when applicant had one 4 month sentence.	2
Disruptive/general obstruction	Includes references to not cooperating with deportation questionnaire; making an application for JR; making an application for JR immediately after a previous bail hearing in order to deliberately frustrate removal; making a late asylum claim to deliberately frustrate removal; applicant had previously suggested he would return voluntarily then having gone through FRS process refused to comply; applicant has "brought it upon himself".	8
No travel document	Including one case of an Iranian national during the period in which the Iranian Embassy in London was closed.	16
Frustrating re-documentation process.	Includes references to lying about identity; refusing to give fingerprints; applicant has produced no evidence of identity or false information; not showing up for embassy interview.	18
Poor immigration history	Includes reference to illegal working; unlawful presence in the UK; applicant never had a genuine right to live in the UK as partner had no job and therefore not exercising Treaty rights.	7
Mental health	Arguing deterioration in mental health not causally connected to detention despite an independent medical report saying just that; applicant is a suicide risk or on suicide watch in detention (without also stating what steps had been taken by UKBA to explore care on release); applicant is just as likely to attempt suicide if released as in detention (despite medical report saying self-harming directly related to frustration at 4 years in detention)	4
Attributing blame for delaying removal to applicant when next step in is the hands of UKBA	Refusing to cooperate with removal (while in fact waiting for UKBA to decide whether to revoke refugee status); arguing that progress of JR in the hands of the applicant when the judge pointed out that in fact UKBA must expedite the JR paperwork.	2

Refused bail on previous occasions		1
Family reasons or sexual orientation	Applicant has one child in the UK and is expecting another [provided by the HOPO as a reason to oppose release]; the applicant is a “supposedly self-proclaimed bisexual”.	2
Prejudging outcome of forthcoming hearings or decisions	There is a JR hearing forthcoming and after that UKBA will be removing the applicant swiftly; assertion that applicant’s asylum claim has been decided and a decision is imminent (on probing by judge claimed refusal but no supporting evidence).	2
Sureties	No sureties; surety lives too far away to exercise any control.	3
Bail address	Only Section 4 (1)(c) offered; bail address was not where the applicant had lived previously.	3

At paragraph 20, the bail guidance for judges notes that:

*“When considering the length of immigration detention, a First-tier Tribunal Judge will take into consideration any periods where a person has obstructed the reasonable inquiries of the immigration authorities or during an appeal or other legal proceedings which have the effect of preventing further investigation or the intended removal. ....” (HMCTS, 2012: para 20)*

This may explain this type of additional argument run by HOPOs, which paint a picture of obstruction on the part of the applicant. In relation to allegations of non-cooperation with the travel document process, it should be noted that for the year 2010 only 8 prosecutions were brought against individuals for offences under s35 (1), (3), and (4) Asylum & Immigration (Treatment of Claimants) Act 2004<sup>73</sup>. Other additional arguments made by HOPOs included an attribution of blame for delaying removal to the applicant (when the next step in a particular legal process was in fact in the hands of UKBA), prejudging the outcome of a judicial review (assuming it would be refused), as well as an argument that refusal of bail in the current application is appropriate since bail was refused on the previous application, and even comments about the sexual orientation of the bail applicant.

The Tribunal is required to consider the potential for danger to the public on release and the risk of re-offending on release. The Tribunal can refuse release on bail where it considers that *“the applicant is likely to commit an offence unless retained in detention”* in line with the statutory restriction on the grant of bail available to it in the Immigration Act 1971<sup>74</sup>. The UKBA relies on offender management (OM) information provided to it by the National Offender Management Service (NOMS), including HM Prison Service and Probation Trusts nationwide, at various points in the management of foreign national offenders both immediately prior to and following their transfer from criminal custody to immigration detention<sup>75</sup>, and also in considering suitability for certain types of Section 4 (1)(c) bail accommodation by means of direct consultation with NOMS.

Yet rather oddly, in opposing release on bail the UKBA does not use the same criteria as those used in the criminal justice system or indeed any published risk assessment tool to measure the risk of re-offending for foreign nationals. The first thing to note is that rates of re-offending cannot be known with any certainty<sup>76</sup>. The Ministry of Justice instead generally refers to re-conviction rates, and widely uses the following definition in its reporting on re-offending statistics (used to report on, assesses, and manage offenders),

73 Source: Justice Statistics Analytical Services, Ministry of Justice, obtained through a request by BID for disclosure under FOIA 2000, December 2011. Ref 701-11 FOI 73711

74 See paragraph 30 (2), Second Schedule to the Immigration Act 1971. HM Courts & Tribunal Service ‘Refusal of Bail’ notice.

75 For example in deciding whether to transfer the individual from a prison to an immigration removal centre at the end of the custodial element of a prison sentence (factors related to security and control, as well as the nature of the index offence are considered).

76 For example, because an offender may re-offend but not be apprehended or convicted.



and in the Payment by Results contracts it is currently introducing in pilot form in an attempt to reduce re-offending rates<sup>77</sup>.

*“The definition of a re-offender is “an offender who has committed a recordable offence within a one year follow-up period and who has the offence ‘proved’ ... either by the offender accepting a caution, warning or reprimand, or by being found guilty in a court of law” (Ministry of Justice, 2009: 2)<sup>78</sup>*

Assessments of risk of re-offending or re-conviction carried out by NOMS officials always include the probability of certain events taking place within a particular time scale (which may vary depending on the risk assessment tool used), required in order for such an assessment to be meaningful. This sense of time is entirely absent from UKBA assessments of risk of re-offending.

For the purpose of opposing bail the UK Border Agency does not operate any published criteria to predict the risk of re-offending. Nor does the UKBA substantiate arguments in relation to risk of re-offending before the Tribunal with evidence in relation to risk of re-offending or re-conviction provided to them by NOMS, as opposed to simply providing the facts of any earlier offence.

More worrying still for the purpose of this report is the fact that the Tribunal does not typically appear to seek supporting evidence in order to refuse release on the ground of a sufficient risk of re-offending, despite its own requirement for such information in the bail guidance<sup>79</sup>. We examine the question of evidence in relation to assessment of criminal risk in more detail in the following chapter. It is for this reason, among others, that we believe the Tribunal bail system is not currently equipped to deal with considerations of criminal risk, including risk of re-offending.

BID continues to hold the view expressed in our earlier report on bail decision-making (2010: 59)<sup>80</sup>, that “the restriction of bail to prevent future offending is inappropriate”. We recommend that the First Tier Tribunal IAC should be provided at the earliest opportunity with expert training for judicial office holders on the assessment and management of criminal risk.

We would also urge careful scrutiny by the Tribunal of arguments made against release on bail which involve assertions of the applicant posing a danger to the public on release, or a risk of serious harm to the public on release. The UKBA operates its own system of ranking the degree of ‘harm’ posed by an individual using a scoring system called the Harm Matrix<sup>81</sup>, which is used by the Agency to prioritise cases for removal. A form of shorthand has evolved where particular individuals are described by the Agency as “high harm”. While accepting that UKBA is entitled to operate its own system for determining how resources are used to carry out its removal function, we believe care should be taken when evaluations from a system designed to prioritise removals are introduced as evidence of risk of re-offending in hearings for release on bail and used as reasons to continue to hold in detention or by the Tribunal to refuse release from detention. The SSHD is not entitled to argue against release on bail on the basis of the applicant being a “high harm” individual, no matter how much she wishes to remove that person, if removal has not been achieved within a reasonable period and if she is not clearly acting to ensure removal within a reasonable time.

The Crown Prosecution Service (CPS) notes the legislative definition of “serious harm” to mean “death or

77 See for example, Puddicombe, B et al, (2012), ‘Payment by results’, *Criminal Justice Matters*, 89 (1): 46-48.

78 Ministry of Justice, Offender Management & Sentencing Analytical Services, (2009), *OGRS3: the revised Offender Group Reconviction Scale. Research Summary 7/09*. Expected re-offending rates can be calculated using OASys scores for individuals that will provide a static/dynamic prediction, or the static prediction provided by OGRS3, with actual re-offending rates after one-year based on data from the Police National Computer (PNC).

79 President of the First Tier Tribunal Immigration and Asylum Chamber, (2012), ‘Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings’, Annex 3 ‘Foreign national prisoners (FNPs)’. Available via HM Courts & Tribunals Service website at <http://www.justice.gov.uk/tribunals/immigration-asylum/rules-and-legislation>

80 Bail for Immigration Detainees & The Children’s Society, (2011), *Last resort or first resort? Immigration detention of children in the UK*. Available at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

81 “The matrix is used to score an applicant according to the severity of their offence. The assessment score is used to prioritise removal from the UK. Offences are categorised based on their perceived level of seriousness... Each case is determined on its own merits and following an adverse decision the harm assessment will be used to prioritise deportation/removal. Sentencing only plays a part in determining harm if the specific offence is not listed in the categories published” (Home Office letter to NASF stakeholders, 2<sup>nd</sup> November 2010). The Home Office operates this scoring system using the Harm Matrix Scoring Matrix.

*serious personal injury, whether physical or psychological*<sup>82</sup>. Where a bail summary or oral argument describes the bail applicant as posing a risk of serious harm to the public on release (or similar), we believe that the Tribunal should seek clarification of which type of assessment – removal prioritisation by UKBA or ‘serious harm’ in the criminal justice sense – is being referred to by the HOPO, and seek supporting evidence. Does the type of offence of which the applicant has been convicted fall into the category of a serious or dangerous offence as understood by the Criminal Justice Act? We make additional arguments in relation to the shelf-life of assessments of criminal risk in relation to longer term detainees in the following chapter.

### 3.12 THE TRIBUNAL’S RESPONSE TO ARGUMENTS AGAINST RELEASE

The bail guidance for judges at paragraph 4 notes that

*“In essence, a First-tier Tribunal Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control. A First-tier Tribunal Judge will focus in particular on the following five criteria (which are in no particular order) when deciding whether to grant immigration bail.*

- a. *The reason or reasons why the person has been detained.*
- b. *The length of the detention to date and its likely future duration.*
- c. *The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable.*
- d. *The effect of detention upon the person and his/her family (see para 20 below).*
- e. *The likelihood of the person complying with conditions of bail.*

*In practice it is often not possible to separate one issue from the others and First-tier Tribunal Judges will need to look at all the information in the round” (HMCTS, 2012: paragraph 4).*

Analysis of the eighty bail hearings in this study contributes to the impression that Home Office Presenting Officers and the Tribunal concentrate most of their discussion on the perceived risk of absconding, and of risk of re-offending or harm to the public on release. We have seen above how reliance in the decision making process on assertions of risk of re-offending and of absconding may not be safe without substantial evidence to support such arguments.

There were fewer occasions during these eighty hearings in which the length of detention to date, and likely future length of detention, the question of whether detention continued to be the proportionate response, and the use of alternatives to detention were raised and discussed. The bail guidance notes at paragraph 17 that:

*“Although a First-tier Tribunal Judge does not have the power to decide whether the length of detention in a particular case is excessive (and therefore unlawful), the judge must take into account the length of immigration detention because the period will be informative about why the person remains detained and whether they should continue to be” (HMCTS, 2012).*

82 In reference to s224 (3) Criminal Justice Act 2003. For more detail see ‘Sentencing Dangerous Offenders’ on the CPS website, available at [http://www.cps.gov.uk/legal/s\\_to\\_u/sentencing\\_and\\_dangerous\\_offenders/](http://www.cps.gov.uk/legal/s_to_u/sentencing_and_dangerous_offenders/). The CPS advises that the following offences are considered to involve serious harm and will trigger a risk of serious harm assessment (ROSH). CJA 2003 has a dangerousness provision, lists specified sexual and violent offences that will trigger a ROSH assessment (see Schedule 15 of the CJA 2003): murder, abduction/kidnapping, manslaughter, serious sexual or violent offences against adults or children, serious/repeat driving offences, arson/criminal damage endangering life, GBH with intent to endanger life, unlawful imprisonment, malicious wounding, use of weapons, threats to kill (including attempts, conspiracy, aid/abet).



The relevance of the length of detention to date was considered in 48% of hearings overall, though in a lower proportion where applicants were unrepresented (40%, n=17) than in cases where counsel was instructed (55%, n=21). The likely future duration of detention was considered in 50% of cases overall, though more often in unrepresented cases (57%, n=24) than in represented cases (42%, n=16). We would expect that the question of length of detention would feature in Tribunal responses in more than around 50% of cases.

In fourteen of the hearings where the HOPO argued that removal was imminent (meaning continued detention was proportionate) they also argued that the applicant was not cooperating with the re-documentation process (with the implication that the applicant would not cooperate with bail conditions). In other words in 18% of all bail hearings in this study the SSHD simultaneously argued that removal was both imminent and not possible in the absence of a travel document<sup>83</sup>.

Table 10: Factors considered by the Tribunal during the hearing

	Relevance of length of detention to date YES	Likely future duration of detention YES	Likelihood of compliance with bail conditions YES	Impact of detention on applicant, children, family members <sup>83</sup> YES
Represented cases N=38	N=21	N=16	N=32	N=7
	55%	42%	84%	18%
Unrepresented cases N=42	N=17	N=24	N=28	N=7
	40%	57%	67%	17%
All cases Total=80	N=38	N=40	N=60	N=14
	48%	50%	75%	18%

It may be that once arguments have been heard from the SSHD about presumed risk of re-offending or risk of absconding, and efforts have been made to paint a picture of an applicant who is or has the potential to obstruct ongoing investigations in relation to removal, that the need for ongoing detention appears to the Tribunal to be proportionate, as noted in the bail guidance at paragraph 20:

*“These factors may help explain why in many cases immigration detention remains connected to the issues of investigation and removal, but a First-tier Tribunal Judge must continue to consider what alternatives there are to detention, that will not interfere unreasonably with the functions of the immigration authorities, in order to reach a proportionate decision regarding bail” (HMCTS, 2012: paragraph).*

83 HOPOs and tribunal judges both appear to be using the term “imminent removal” in a different sense, and implying both looser and longer timescales than those stated in UKBA’s Enforcement Instructions and Guidance (EIG). EIG Chapter 55 notes at 55.3.2.4 “Removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks”.

84 The revised version of the President’s bail guidance for judges (2011) no longer contained the requirement in the previous version (2003) to consider the impact of continuing detention on the applicant, on children, and on family members. However, we decided to continue to monitor this as part of the research, and made a recommendation (among others) jointly with ILPA that the requirement be reinserted into the guidance. The current version of the bail guidance (July 2012) has this requirement at paragraph 4 (d).

It has not been possible for this study to identify the point at which the Tribunal considered alternatives to detention in each case. Often this issue is related to the availability and suitability of sureties, and amount of recognizance. There is no obvious linear pathway in bail decision making along which it could be said that specific factors will be considered in a particular order and given a particular weight<sup>85</sup>. For example, is consideration of the value of an individual surety most useful once a decision has been made on bail in principle, or earlier on in the decision making process? It is however possible to determine how often the SSHD raises the question of alternatives to detention (or release with conditions as we might refer to it). An acknowledgement during the hearing that the SSHD had considered alternatives to detention was made in only 6% of the cases in this study.

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85 Dhami (2005: 369) makes this point for decision making in criminal bail in the UK. "There is no guidance as to how factors should be weighted, the direction in which they should be used, and how they should be integrated to form a bail risk judgment. There is also no guidance as to how risk judgments should be converted into decisions. Importantly, such discretion is not structured by the training provided to judges". Dhami, M. K. (2005), 'From discretion to disagreement: Explaining disparities in judges' pre-trial decisions'. *Behavioural Sciences and the Law*, 23: 367-386.

# THE JUSTICE GAP: EVIDENCE AND DISCLOSURE

*“A hearing cannot be fair if the parties are not shown the evidence before the tribunal and have a right to comment on it. It is the duty of the tribunal to ensure that all potentially relevant material is put to the parties. The same documents should be before all the parties and the tribunal (Lloyds Bank plc v Cassidy (2005) Times 11 January). This is subject to provisions to the contrary” (Jacobs, 2011: 3.123)<sup>86</sup>*

## 4.1 INTRODUCTION

In this chapter we illustrate BID’s concerns about the justice gap that has emerged where the Secretary of State’s routine unwillingness or inability to provide evidence to substantiate assertions made in opposition to release on bail, meets the apparent unwillingness of the Tribunal to demand evidence for these assertions. This justice gap is especially concerning in light of the fundamentally cross-tribunal principle contained in the Asylum and Immigration Tribunal (Procedure) Rules (2005) that:

*“Subject to section 108 of the 2002 Act, the Tribunal must not take account of any evidence that has not been made available to all the parties” (Section 51 (7))<sup>87</sup>.*

Chapter 2 of this report outlined the duty of all parties to cooperate with each other and with the tribunal, a central element of procedural justice. Jacobs puts this succinctly:

*“If a tribunal is required to take account of all the circumstances of a case relevant to an issue, the parties are under a duty to provide the tribunal with the information that is required” (2011: 1.93).*

As a result of the automatic deportation provisions introduced in August 2008<sup>88</sup>, and increasing numbers of foreign national ex-offenders held for extremely long periods in immigration detention, the role of assessments of criminal risk in the immigration system has come now under greater scrutiny. Before the automatic deportation provisions came into force, foreign national offenders would generally be released at the end of the custodial element of their sentence under License and managed in the community in the same way as UK citizens, unless court-recommended for deportation. But 97%<sup>89</sup> of foreign national ex-offenders are now detained under immigration powers at the end of the custodial element of their sentence pending removal or deportation from the UK, including while the SSHD makes her decision on whether or not to deport them.

<sup>86</sup> Jacobs, E. (2011, 2<sup>nd</sup> edition), *Tribunal Practice and Procedure: Tribunals under the Tribunals, Courts and Enforcement Act 2007*, Legal Action Group. Jacobs describes here those additional rights that have the effect of protecting ECHR Article 6 [the right to a fair trial], including the right to access, to equality of arms, and to material before the tribunal (ibid: 3.199).

<sup>87</sup> Available at <http://bit.ly/S2NLfL>

<sup>88</sup> UK Borders Act 2007.

<sup>89</sup> “The Agency’s policy presumes the release of foreign national prisoners at the end of their sentence subject to an assessment of the risk they pose to the public and the risk of absconding. However, foreign national prisoners had remained in detention in 94 out of 97 cases sampled (97 per cent), where they had completed their sentence and where deportation was being pursued” (Source: Independent Chief Inspector of the UK Border Agency, (2011), *A thematic inspection of how the UK Border Agency manages foreign national prisoners, February – May 2011*. Available at <http://bit.ly/rT6UuL>)

In the case of bail applicants who the UKBA has not removed from the UK, despite long periods spent in detention, the expectations placed on bail decision-making have shifted, and where applicants are ex-offenders the role of the Tribunal in relation to criminal risk is now substantially different. Increasingly the Tribunal is required to address issues of criminal risk across the total spectrum of listed offences. It is not in our view equipped to do this, and this is most obvious in applications made by longer-term detainees. This is despite the duty of all parties (including the detaining party) to cooperate in the provision of information to the Tribunal, which appears not to be enforced by the Tribunal, and the requirement that the Tribunal must not take account of evidence not provided to all parties. This research found the degree of interrogation of the arguments and evidence in relation to the assessment and management of criminal risk to be minimal.

This new terrain of longer-term detention of ex-offenders also casts doubt on the ability of unrepresented bail applicants to be able to marshal sufficient evidence in relation to their offending behaviour, and to be able to rely on the enabling role of the Tribunal, in order to get a fair hearing in relation to their release. The National Offender Management Service (NOMS), including local Probation Trusts, are being increasingly drawn into the immigration bail process regardless of whether or not they are funded for this work, which appears to be contributing additional periods of delay to the bail application process. BID understands from UKBA that an increased involvement by NOMS is being sought even in those cases where a detainee's License period has since expired<sup>90</sup>.

## 4.2 DISCLOSURE OF EVIDENCE

Using information provided by counsel and by trained observers, this chapter addresses the disclosure of evidence at bail hearings in relation to two issues of particular relevance to longer-term detainees applying for release on bail.

We look first at the assessments of various types of risk in the event of release from immigration detention, specifically evidence relating to risk of re-offending, risk of harm to the public on release, and the risk of absconding (or failure to report). Unlike the agencies of the Ministry of Justice, the UKBA does not operate any validated risk assessment instruments. Where the UKBA seeks relevant information from NOMS we have found that it fails overwhelmingly to provide this information to the Tribunal or disclose it to the bail applicant, despite guidance that it should do so. Subject Access Requests reveal that offender management information from NOMS provided to UKBA on request may go on to be directly contradicted by UKBA in assertions before the Tribunal in relation to risk of re-offending or harm to the public on release on release.

Second, we examine the question of treatment options on release in light of the statutory ground for refusal of bail where, in the view of the Tribunal, "the applicant is suffering from mental disorder and continued detention is needed in his interests or for the protection of others"<sup>91</sup>. In practice this type of decision revolves around available treatment options in the community in addition to the other factors that the Tribunal is required to consider. However in BID's experience there is a almost complete absence of evidence submitted by the Secretary of State in such cases, despite the positive duty of care on the part of the Secretary of State to those she holds in administrative detention. Bail applicants receiving treatment for severe mental illness and using their health as a ground for release form a relatively small but often extremely vulnerable proportion of those seeking release on bail.

<sup>90</sup> Personal communication with UKBA Section 4 bail team, August 2012.

<sup>91</sup> UKBA's Enforcement Instructions and Guidance Chapter 57.4 notes in relation to statutory restrictions on the grant of bail: "The Tribunal's power to release a person on bail in accordance with paragraph 29 (3) of Schedule 2 of the Immigration and Asylum Act 1971 is subject to the provisions of paragraph 30(2) of Schedule 2 to the 1971 Act. Under paragraph 30(2), an immigration judge or the Tribunal is not obliged to release an appellant... where it appears to the immigration judge or the Tribunal that... the appellant is suffering from mental disorder and should be detained in his own interests or for the protection of any other person". Available on UKBA website at <http://bit.ly/uRubkQ>

This chapter asks

- What evidence is typically provided to the Tribunal by the SSHD in bail applications? Is it sufficient, reliable and up to date?
- What information should the Tribunal be actively seeking from parties during the hearing, or directing parties to provide it if not immediately available, in order to substantiate arguments and inform decision-making? What information does the Tribunal actually seek? Finally, does the Tribunal fulfil its duty to ensure that information relied upon in decision-making is available to and therefore challengeable by both parties?
- How is evidence from parties used by the Tribunal to inform decisions about release on bail? How does the limited time available for bail hearings appear to affect the degree to which the Tribunal can engage with evidence?

This study has found that the bail process in the First Tier Tribunal currently fails applicants on all three counts. As matters stand, it is simply impossible to ensure that all bail decisions are safe, given the weight of evidence that the Tribunal now needs to consider in some bail applications, the difficulties in getting adequate information before the Tribunal, and the lack of training for the Tribunal for the types of decisions on criminal risk that may be required.

### 4.3 HOW THE TRIBUNAL APPROACHES EVIDENCE AND DISCLOSURE AT HEARINGS

Formal rules of disclosure<sup>92</sup> do not apply in the First Tier Tribunal, nor is the duty of candour that is required of public bodies in relation to judicial review invoked in relation to the First Tier Tribunal. First Tier judges can only direct parties to produce evidence. In other Tribunals, applications may go unopposed by the Home Office because the burden of proof is on the applicant. However, in immigration bail hearings where the applicant's liberty is at stake, the burden of proof is on the Secretary of State (the defendant) to show why detention should continue. On Tribunal practice and procedure Jacobs notes:

*"The level of procedural protection under article 6 [the right to a fair hearing] varies according to what is at stake in the proceedings... but as an irreducible minimum every party has the right to sufficient information about the other party's evidential case to give effective instructions and, so far as possible, to refute that case" (2011: 3.198)<sup>93</sup> (emphasis added).*

The tribunal system was founded on the principles of accessibility, fairness and efficiency. It would be possible to argue that the benefit of a speedy listing for a bail hearing outweighs the benefit of lengthy disclosure and evidence gathering procedures, while keeping costs per hearing as low as possible. One might want to add that greater use by the Tribunal of adjournments, directions to parties, and bail in principle pending resolution of practical barriers to release, would go some way towards compensating for the routine failure to substantiate arguments against release on the day of a bail hearing.

Despite the presence of routine factual inaccuracies in bail summaries, and the 'risk inflation' exercised by UKBA in relation to criminal risk by comparisons with risk assessments carried out by criminal justice professionals in the National Offender Management Service (NOMS), it is not always straightforward for the applicant to challenge, or ask that the Tribunal challenge, the SSHD's grounds opposing release on bail, even when the applicant has the benefit of counsel. Barristers describe how at a number of bail hearings the Tribunal accepted assertions made by a Presenting Officer without supporting evidence. Where a barrister challenged an assertion as being factually inaccurate, a request for such assertions to be substantiated was rejected. Yet the Tribunal would still demand substantive evidence for arguments made on behalf of the applicant.

<sup>92</sup> In addition, judicial review can test legality with disclosure of all relevant documents, while additionally in private law cases witnesses may be called for cross-examination.

<sup>93</sup> Jacobs, E. (2011, 2<sup>nd</sup> edition), *Tribunal Practice and Procedure: Tribunals under the Tribunals, Courts and Enforcement Act 2007*, Legal Action Group.

*“The HOPO expressed “astonishment” that the applicant expected to see any evidence from the UKBA. The judge seemed satisfied that there was no evidence to substantiate the UKBA’s assertions, and stated **“I accept what the Presenting Officer says as I have never known the Secretary of State to make an assertion that was not true”** (B37) (emphasis added)*

*“The HOPO spoke to point 14 of reasons for opposing bail on [the] bail summary and stated “evidence we have suggests...”. I interrupted and stated that if she was going to rely on evidence in support of a contention she was required to produce that evidence (e.g. §27 Bail Guidance). The IJ stated words to the effect that everyone knows that in bail applications we don’t need evidence, people make assertions all the time, it is a matter for the judge as to the weight to be attached... On the other hand, in respect of my submissions in relation to the applicant’s scarring, depression, and suicide attempts, he repeatedly asked for evidence. The applicant also showed the scarring and stated over the video link that the scarring was everywhere. The IJ told the applicant not to speak. The IJ...gave no indication ...of accepting the status of the applicant’s mental health, largely because of the need for more evidence” (B35)*

*“The UKBA had made a number of assertions in the bail summary that could/should have been substantiated with documentary evidence, particularly in relation to the UKBA’s conduct related to obtaining a travel document. No evidence was provided for any assertions. Both the HOPO and the IJ continued to mention the applicant’s adverse immigration history throughout the proceedings. When I sought to address these issues by discussing the immigration history and applicant’s past conduct, the IJ deemed it irrelevant stating that his job was not to make a “retrospective decision” but to make a decision “looking forward”” (B37)*

This research has found that the Tribunal is not always willing to consider extensive evidence from applicants, even when the evidence is of direct relevance to the factors the Tribunal is required to consider such as likely future duration of detention or the likely risk of the applicant offending. Bail summaries may now be 15-20 pages long in cases where the applicants has a long immigration history as a result of residence in the UK for many years, or has been detained for a long period. BID has not monitored bail summaries systematically, but our legal managers report that three or four years ago, at a time when it was unusual to encounter someone in detention who had been held for more than one year, bail summaries were never more than 3-4 pages long.

## Case study Mr A and Mr B

Mr A and Mr B were both clients of BID whose bail hearings were heard consecutively by the same First Tier judge in 2011. Both men had partners and children in the UK who were not detained.

In both cases the judge indicated to counsel that he had not read the applicant’s bundle prior to the hearing. In one case this evidence included detailed and relevant information in relation to the welfare and best interests of children in the family, the risk of re-offending, the risk of absconding, and the imminence of removal, all of which were at issue in the application for release on bail.

In both cases the Tribunal refused release on bail. There is no way of knowing what difference the evidence served by the applicants could have made to each decision had it been read and considered by the Tribunal.

Given the existence now of some extremely long-term detention periods<sup>94</sup>, it is unavoidable that both bail summaries and applicants' bundles are getting longer. There is simply more evidence to present on immigration history if nothing else, as a result of the passage of time in detention. The Tribunal has recently reduced the number of bail hearings per video link from seven down to six. The evidence from this study suggests that this may need to be reviewed again.

If the Tribunal finds itself on occasion unable to read and consider all evidence as a result of bigger bundles and longer bail summaries, then we recommend that the number of bail applications listed for each session should be reviewed again, to allow decision makers sufficient preparation time. There may be value in identifying those bail applicants who have been held in detention for more than 6 months without being removed from the UK, and listing them for hearing during sessions where fewer than six bail cases are to be heard. This would allow for their longer detention history, and what will inevitably be more complex issues in relation to their removal, to be given sufficient time, and for bail decisions to be noted in detail.

For detainees who remain in detention long term (say over 6 months, with the upper limit in IRCs currently standing at over five years<sup>95</sup>) the trend appears to be for upper detention periods to be increasing year on year. We suggest that this might be the correct time for the Tribunal to consider how applications for release on bail made by people who are clearly unremovable, and whose detention may have become unlawful, should be managed.

#### 4.4 THE BURDEN OF PROOF IS NOT ENFORCED BY THE TRIBUNAL

Prior to a bail hearing, the UKBA prepares and presents its case on an application for release on bail in the form of a bail summary. The UKBA is required to serve the bail summary on both the Tribunal and the applicant's legal representative (or the applicant him or herself if unrepresented) by 2pm on the day preceding the hearing<sup>96</sup>. However, the often inaccurate and routinely unsubstantiated content of bail summaries, alongside the apparent unwillingness of the Tribunal to press for evidence, is of great concern to BID<sup>97</sup>.

The content of the bail summary, alongside the B1 bail application form from the applicant and any supporting evidence submitted by or on behalf of the applicant, such as copies of embassy correspondence, together constitute the evidence before the Tribunal on which the Tribunal is then required to make a decision on release from detention on bail, as well as the nature of any conditions which should apply to that release.

For the applicant, the B1 bail application form contains personal details, the proposed bail address, details of sureties, and the grounds for release on bail. The B1 form may be supplemented by additional documents containing evidence in support of these grounds or arguments. Where BID represents a detainee, additional evidence in the form of a bundle is served on the Tribunal and UKBA generally no later than the day prior to the bail hearing.

Based on BID's long experience of bail hearings, and the case papers from the thirty eight represented bail applications prepared by BID in this study, the type of information that is routinely submitted to the Tribunal by the applicant and the SSHD in a bail application is listed below in Table 11.

94 See footnote 3 above.

95 BID has now encountered detainees held in prisons and removal centres for up to and over periods of five years.

96 UKBA, 'Guidance – immigration judge bail – version 4.0, valid from 12 July 2012', available at <http://bit.ly/PZFpu0>

97 Issues of evidence are also an advocacy issue of course, but advocacy is only a factor in those cases where bail applicants have an advocate. Advocacy before the tribunal is not dealt with in this research, but BID is addressing this issue elsewhere.



Table 11: Typical information submitted to the Tribunal by parties in bail applications

Documents served by SSHD	Documents served by bail applicant
<b>MUST INCLUDE</b>	<b>MUST INCLUDE</b>
Bail summary, which contains criteria for detaining, reasons for opposing release on bail, immigration history and chronology, details of any sureties proposed, and conditions of bail sought by the SSHD if the applicant is released.	B1 bail application form containing grounds (arguments) for release on bail, details of the bail address, details of any sureties proposed and amount of recognisance
<b>IN PRACTICE MAY ALSO INCLUDE SUPPORTING EVIDENCE SUCH AS</b>	
NOMS 1 form continuing offender management information, supplied to UKBA by NOMS on request in the case of bail applications made by foreign national ex-offenders <sup>98</sup> .  <i>(In practice the NOMS1 form is not provided by UKBA for the Tribunal or the applicant. At the time of writing UKBA have failed to respond to BID's requests for disclosure in specific cases and as a general policy matter for the last ten months to date.)</i>	Extracts from OASys <sup>99</sup> reports Pre-sentence reports Drug or alcohol treatment reports from community-based treatment programmes Police reports Certificates of offence and behaviour related courses completed in prison, for training and education in IRCs PNC printouts Details of ancillary orders (e.g. restraining orders, Sexual Offences Prevention Orders)
	Copies of correspondence with embassies or High Commissions, and evidence of other enquiries in relation to establishing nationality and obtaining travel documents to facilitate removal.
	Copies of ongoing court applications or cases, e.g. family court hearing, asylum appeal, judicial review. Any letters from applicant to UKBA caseowner inquiring about their immigration case.
	Medical report or extract from medical records Details of likely care or treatment available on release (e.g. where the applicant has a diagnosis of mental illness)
	Evidence of family life relevant to whether the best interests of child are being taken into account in the ongoing detention of the applicant, including: Birth certificates Witness statements from partner Letters/pictures from child Letters from school if issues of disruptive child Letters from hospital if there are relevant medical issues with child separated from their parent by detention (e.g. bed wetting, lack of concentration). Photographs of applicant and child either in or before detention.
	Reporting records (where non-reporting is alleged by UKBA). Hospital or GP records (where a hospital appointment was a reason for non-reporting).
	Evidence related to duty of due diligence on the part of UKBA including monthly progress reports, SAR file extracts.
	Letter from landlord/owner of proposed bail address Letter from probation confirming suitability of bail address (where applicant still within licence period)

98 In a Service Level Agreement between the Ministry of Justice and the Home Office, UKBA undertook to serve this document automatically on both the tribunal and the bail applicant (or their representative) at the bail hearing. (Source: Ministry of Justice & Home Office, (2009), 'Service Level Agreement to support the effective management and speedy removal of Foreign National Prisoners')

99 The probation and prison services across the UK use the Offender Assessment System (OASys) for assessing the risks and needs of an offender. OASys can be used to re-assess offenders at various points during their sentence and to measure how they have changed.



Unrepresented bail applicants who have had advice from BID will have been advised to fax through evidence to the hearing centre, but those without such advice may not have thought to do so, assuming that they have even prepared any evidence in response to the bail summary or otherwise. Unrepresented applicants are highly unlikely to be aware that evidence in relation to their case, of the type listed in Table 11 above, could be submitted in advance, let alone be able to obtain such evidence. In this study, when unrepresented applicants came to the video link suite at the removal centre with evidence they were of course unable to hand it up to the judge or otherwise present it to the Tribunal. They were often reduced to waving documents at the screen or simply referring to the existence of evidence without being able to share the content adequately.

What is immediately striking about this table is that while - at least in theory - the burden of proof is on the Secretary of State who must justify the need for ongoing detention, in practice the evidence in support of arguments put before the Tribunal is provided almost exclusively by only one party to the proceedings, namely the detained bail applicant. In BID's experience, the SSHD's case for arguing against bail is contained in its entirety in the bail summary and Home Office Presenting Officers will only hand up supporting documents if required to by the Tribunal and only if they have them to hand.

#### 4.5 BAIL SUMMARIES: INACCURATE, UNEVIDENCED, BUT NO LONGER SERVED LATE

For a number of years, there was persistent and widespread failure on the part of the Home Office to serve bail summaries either in advance or the hearing, or even on the day of the hearing, leaving applicants unable to prepare their case. In 2008, BID together with the Refugee Council undertook research into video link bail hearings, which found that in around one third of cases bail summaries were not served. The UKBA's own research found that in 40% of bail applications they monitored in 2009 a bail summary was not served. These concerns were shared by HM Chief Inspector of Prisons<sup>100</sup>. BID and the Refugee Council wrote to the Home Office between 2009 and 2010 to ask for a review of the timescale allowed for the production of bail summaries, and this current study shows that timing of the service of bail summaries by UKBA has improved significantly since then.

An earlier version of the Bail Guidance Notes (2003) noted at 2.7.2

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

BID's earlier research on bail decision making in 2010<sup>101</sup> found that despite the absence of a bail summary in a number of the hearings examined, and therefore in the absence of arguments from the Home Office opposing bail, judges in those hearings were not minded to grant release on bail.

It is therefore important to see that there appears to be a significant improvement in the prompt service of Home Office documents, which in practice consist solely of the bail summary, just at the point at which the bail guidance to judges has been revised to remove the direction to release in the absence of a bail summary.

In 95% of the eighty bail hearings in this study, the Home Office served a bail summary within the required timescale, namely by 2pm on the day prior to the hearing<sup>102</sup>. In two of the thirty eight represented cases, there were pages missing from the bail summaries. In the unrepresented cases, a bail summary had not been served by the time of the hearing in two cases out of a total of forty two. In one of these two

100 HM Chief Inspector of Prisons, (2010), 'Report on an unannounced full follow-up inspection of Yarl's Wood Immigration Removal Centre 9 – 13 November 2009'. See section 3.22. Available via HMIP website at <http://bit.ly/Txlgr1>

101 Bail for Immigration Detainees, (2010), 'A nice judge on a good day: immigration bail and the right to liberty'. Available via the BID website at <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

102 UKBA, 'Guidance – immigration judge bail – version 4.0, valid from 12 July 2012', page 9. Available at <http://bit.ly/PZFpu0>. See also UKBA, 'Enforcement Instructions & Guidance, Chapter 57 'Bail''. Available at <http://bit.ly/LOVY6A>

unrepresented cases the judge adjourned the hearing to get the bail summary sent through to the court and resumed the hearing in the afternoon. In the other case the failure to serve a bail summary led the judge to advise withdrawal of the bail application.

The UKBA continues however to serve bail summaries without any supporting evidence of assertions made in them in relation to imminence of removal, steps taken towards obtaining travel documents, risk of harm to the public on release, risk of absconding, or risk of re-offending on release. There would seem to be no reason why the UKBA should not be expected to disclose all the evidence upon which it is relying to argue against bail and in favour of detention. Yet in BID's experience factual errors in bail summaries that would be dispelled by the availability of evidence are not uncommon. These errors may relate to dates in immigration chronology, family history, reporting record, criminal record, nationality, attempts to redocument the applicant, and details of adverse behaviour in detention. It is hard to imagine an unrepresented applicant being able to manage the correction of serious errors in the bail summary from one bail application to the next. We recommend that UKBA disclose all evidence upon which it relies to oppose bail, and that the Tribunal use directions to request disclosure where it is not forthcoming.

One of the most worrying types of error in bail summaries is the discrepancy often seen between the level of the risk of re-offending or risk of harm on release in relation to an individual as made by NOMS and that offered by the UKBA to the Tribunal in relation to a bail application. Where UKBA routinely use bail summaries to argue high risk of re-offending, high risk of harm to the public on release and high risk of absconding, offender management information obtained by means of a Data Protection Act request by BID directly from a Probation Trust may, to the contrary, show these elements to have been assessed (by means of a professional risk assessment system such as OASys), as low risk for the individual applicant concerned. This information has presumably been made available to UKBA at their request, yet they have chosen to override it, and not to bring it before the Tribunal. The SSHD is of course entitled to make her own assessment of risk of re-offending for her own purposes, but it is entirely reasonable that such discrepancies should be substantiated before the Tribunal.

#### 4.6 THE STRANGE CASE OF THE MISSING OFFENDER MANAGEMENT INFORMATION & THE NOMS1 FORM

Where a detainee with a criminal conviction applies for Tribunal bail, a case owner from the UKBA's Criminal Casework Directorate (CCD) prepares the bail summary<sup>103</sup>. UKBA's 'Guidance – Immigration Judge Bail – version 1.0' (January 2010) contains no instruction to caseowners to provide supporting evidence to accompany the bail summary as it is passed on to the Presenting Officers Unit. This leaves HOPOs without any evidence to support assertions contained in the bail summary, and therefore unable to argue in any detail - if required to - the grounds submitted by the SSHD to oppose release on bail in CCD cases.

On receiving the bail summary from the case owner, the UKBA guidance states that the Presenting Officers' Unit administrative team must then serve it on the Tribunals Service Immigration & Asylum Chamber (IAC) and the applicant's representative. With only the bail summary as indicative of the SSHD's position, neither the Tribunal nor the applicant's representative is in possession of any evidence – as opposed to mere assertions – to support the stated risk of re-offending or absconding, or risk of harm to the public on release, or progress to date towards obtaining travel documents for removal. It bears repeating again here that the Tribunal Procedure Rules currently state at Section 51 (7) that “subject to section 108 of the 2002 Act, the Tribunal must not take account of any evidence that has not been made available to all the parties”<sup>104</sup>.

Since 2009, in cases where an immigration detainee has served a prison sentence immediately prior to consideration of their transfer to the detention estate, a Service Level Agreement (SLA) between the Ministry of Justice and the Home Office has provided for what is known as 'offender management information' to be

<sup>103</sup> Otherwise, “if the applicant does not have a criminal conviction a port, enforcement unit, asylum team or local immigration team will be responsible for preparing the bail summary” (UKBA, (2010), 'Guidance – Immigration Judge Bail – version 1.0', page 7).

<sup>104</sup> *The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No.230 (L.1))* as in force from 19 December 2011. Available at <http://bit.ly/S2NLfL>

given to UKBA by the National Offender Management Service (NOMS)<sup>105</sup>. Offender management information is intended to inform UKBA's assessment of the risks involved in releasing an individual from detention, including the risk of re-offending and the risk of harm that would be posed to the public on release, as well as the suitability of different types of Section 4 (1) (c) bail accommodation if this is required.<sup>106</sup> Offender management information is provided to UKBA by NOMS via a pro-forma document known as the NOMS1. The document contains details of NOMS' assessment of the level of risk posed by a foreign national ex-offender were they to be supervised on licence in the community<sup>107</sup>.

The Service Level Agreement establishes that the NOMS 1 report is to be made available by UKBA to the applicant's solicitors and to the immigration judge at a bail hearing on behalf of NOMS, and this is to be done via the Home Office Presenting Officers<sup>108</sup>. The opening paragraph of the latest version of the NOMS1 form states:

*"This document is to provide information to the UKBA Criminal Casework Directorate, Immigration Judges at Asylum & Immigration Chambers and Appellant's Legal Representatives. UKBA Presenting Officers will provide copies to the Chambers and Appellant's Legal Representatives at hearings on behalf of NOMS Offender Managers. The subject of this form will have access to it"*

The bail guidance to immigration judges (2012) confirms this arrangement, noting that:

*"Since 1 November 2006 it has not been a requirement for Probation Areas to provide separate information to the appellant's representative. The appellant's solicitors, and appellants if representing themselves, will be provided with the pro-forma at the AIT."*<sup>109</sup>

BID prepares and presents as many bail applications as the largest legal aid provider working in detention<sup>110</sup>. In our extensive experience and since this agreement came into force in 2009 we have not seen HOPOs volunteer the NOMS 1 report to immigration judges or legal representatives at bail hearings. Neither do they currently volunteer to produce NOMS 1 reports to unrepresented bail applicants, who with very few exceptions appear via video link, a situation that anyway presents a practical barrier to serving documents during a hearing.

In March 2012 BID wrote to UKBA to request that HOPOs engage with the terms and the spirit of the 2009 agreement made between NOMS and UKBA, namely to make information relied on by UKBA available to bail applicants on behalf of NOMS. BID suggested that the simplest method would be to serve the NOMS1 forms on both the Tribunal and the representative alongside the bail summary on the day preceding the bail hearing. Where a bail applicant is unrepresented, the NOMS1 form could be provided directly to the applicant in the removal centre by fax along with the bail summary<sup>111</sup>.

<sup>105</sup> The National Offender Management Service (NOMS) includes HM Prison Service and local Probation Trusts around the country.

<sup>106</sup> Enforcement Instructions & Guidance, Chapter 55 (final page, no page numbers) notes that "NOMS will only be able to provide a risk assessment where the subject has received a sentence of one year or more, or where there has been a pre-sentence report or where the subject has previously been sentenced to a community order and has had contact with an Offender Manager through that. In other cases, CCD will produce an assessment based on offence type, sentence length, previous history (where known) and behaviour in prison and Immigration Removal Centre". In other words this is not done by a trained criminal justice professional.

<sup>107</sup> The type of information provided via the NOMS1 form includes the licence date, the release date, whether or not an OASys assessment has been completed, the 'risk of serious harm level' (summarise the risk factors, who is at risk, of what, and when?); 'if not OASys is available what information can be provided regarding Risk of Serious Harm?'; whether the individual when released is to be managed locally in the community under the Multi Agency Public Protection Arrangements (MAPPA), any additional non-standard licence conditions, and issues relating to the bail address, comment on suitability of Section 4 bail accommodation if relevant, and history of compliance with national standards, licence requirements, and bail.

<sup>108</sup> See submission by NOMS to First Tier Tribunal (IAC) consultation on 2011 bail guidance, 2012.

<sup>109</sup> Probation Circular 32/2007: Management of Foreign National Prisoners: Licenses, Bail Hearings, Releases from Immigration Detention and Deportation, cited in President of the First Tier Tribunal Immigration and Asylum Chamber, (2012), 'Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings', p: 17. Available via HM Courts & Tribunals Service website at <http://www.justice.gov.uk/tribunals/immigration-asylum/rules-and-legislation>

<sup>110</sup> Bail for Immigration Detainees, (2012), 'Exclusive contractors & bail hearings: analysis of daily court listings between November 11<sup>th</sup> and December 20<sup>th</sup> 2011'.

<sup>111</sup> We understand from NOMS (personal communication) that the NOMS 1 must often be completed on the basis of relatively little information in the case of foreign national ex-offenders, but is completed as best as possible. If the form is not completed, it is because there is no available information on which to rely on. If the form is not completed then we believe UKBA should note this to the Tribunal.

We do not see that this should present cost issues or practical problems, since where a NOMS 1 report has been prepared for UKBA by an offender manager, and is relied on for the purpose of producing a bail summary, this document will be readily available. It also overcomes the difficulty inherent in passing a document to an unrepresented bail applicant appearing before the court via video link at the start of or during the hearing slot. At the time of publication BID has not received a commitment from UKBA to ensure the NOMS1 form is produced in all bail applications where it is required.

Some of the information in a completed NOMS1 form, or similar information, can be obtained by a detainee's representative via an informal direct request to the relevant Probation Trust, or by means of a request for disclosure under the Data Protection Act. But these requests can take many months to fulfil, and it may be necessary for a representative to proceed to lodge an application without the benefit of this information, for example in the all too common circumstance of a bail applicant having waited several *months* to be granted a Section 4 (1)(c) bail address by UKBA which then expires 14 days after issue.

Where this happens, the applicant and his or her representative are not in possession of offender management information and are therefore not able to adequately challenge UKBA's own risk assessments, but just as importantly neither is the Tribunal in possession of this information. UKBA is failing to provide the NOMS1 form to either the bail applicant or the Tribunal, despite both the Strategic Level Agreement and the clear instruction in the President's bail guidance, and this leaves both the Tribunal and applicant at a disadvantage.

It is a principle of natural justice that parties must have sight of the arguments being made against them in order to respond effectively, and be able to challenge factual errors. In any event, the Tribunal Procedure Rules make it clear that subject to exceptions "the Tribunal must not take account of any evidence that has not been made available to all the parties"<sup>112</sup>. It is not clear to BID why the Tribunal is not currently enforcing the requirement contained in the bail guidance for the SSHD to produce the NOMS1 form.

Presumably at some point in the recent past the Tribunal felt it would be of benefit to have sight of the NOMS1 form containing information provided to UKBA by criminal justice professionals, and subsequently introduced a requirement for this in the recent iterations of the bail guidance (both 2011 and current 2012 versions).

The Independent Chief Inspector of UKBA, in his report on the management of foreign national prisoners by UKBA<sup>113</sup>, remarked on the need for the Agency to properly evaluate and to substantiate assertions of risk of re-offending, and offered some insight into the apparent reluctance of the UKBA to do this.

*"Although more foreign national prisoners were deported before the end of their sentence, I found the overwhelming majority of those who had yet to be deported were detained at the end of their sentence under immigration powers. Where decisions to detain are based, in part, on the risk to the public, I expect the Agency to set out the evidence of whether a person is likely to re-offend and to ensure that detention is not the default position in all cases" (ICIUKBA, 2011: 2)*

*"There was genuine fear and reluctance to release [by UKBA], 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**" (ICIUKBA, 2011: 4) (emphasis added)*

It is absolutely essential in BID's view that offender management information produced by NOMS, where it is sufficiently 'fresh' to be considered reliable, is placed before the Tribunal, as this provides an evidential base for Tribunal decisions, and allows the Tribunal to place the arguments against release made by the SSHD into context. If the SSHD wishes to disagree with the NOMS position on the level of risk posed by the bail applicant then this can be clearly stated and substantiated (for example with evidence of subsequent or recent disruptive behaviour in detention<sup>114</sup>).

<sup>112</sup> *The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I.2005 No.230 (L.1)) as in force from 19 December 2011*. Available at <http://bit.ly/S2NLfL>

<sup>113</sup> Independent Chief Inspector of the UK Border Agency, (2011), 'A thematic inspection of how the UK Border Agency manages foreign national prisoners, February – May 2011'. Available at <http://bit.ly/rT6UuL>

<sup>114</sup> Notwithstanding the current difficulties with the accuracy of such information provided to UKBA by detention centre contractors, which then forms the basis for bail summaries for the Tribunal.

Such divergence by the SSHD from risk assessments provided by criminal justice professionals at NOMS, the lack of any published details of an alternative tool used by UKBA for assessing criminal risk, and the failure of UKBA to provide the Tribunal and applicant with the NOMS1 form containing offender management information which the agency has itself sought, point to an urgent need for the Tribunal to change its approach. The Tribunal needs to carefully interrogate such arguments when deployed to oppose release, issue directions to order the disclosure of evidence where appropriate, and no longer rely on unsubstantiated assertions.

#### 4.7 HOW THE TRIBUNAL ENGAGES WITH ISSUES OF CRIMINAL RISK: THE NEED FOR DEFENSIBLE BAIL DECISIONS

The most recent version of the NOMS/HM Prison Service 'Public Protection Manual'<sup>115</sup> advises staff that in the context of risk assessment and risk management in the criminal justice system, risk cannot be totally eliminated. The manual notes that the consequences of a risk assessment:

*"...may involve limitations on the person's freedoms and rights. It is therefore very important that a risk assessment is fair ... carried out by assessors who are alert to their own possible sources of bias, carried out in an organisational context that supports fair and accurate risk assessment"*<sup>116</sup>

The manual continues:

*"A decision is defensible if, in spite of a negative outcome, it can be demonstrated that all reasonable steps had been taken in its assessment and management".*

NOMS advise their staff in the criminal justice system to ensure that decisions are grounded in evidence, and made on the basis of reliable risk assessment tools. The manual continues:

*"This is particularly important for those agencies that carry out risk assessment in the public eye, and where risk assessment and management failures can be very costly for victims, and to organisational credibility" (2009: 13).*

Given the increasing prominence of the assessment and management of criminal risk in immigration bail decision making, most obviously where the applicant is a long term detainee with a criminal conviction, then the Tribunal must be able to demonstrate that full consideration has been given to substantiated arguments against release on the ground of criminal risk, and that the Tribunal's decision (which is effectively the plan to manage the level of risk that it judges to exist) is both reasonable and proportionate.

Experience-based devices for decision making used by the Tribunal are anyway not evidence based. The First Tier Tribunal, like magistrates' courts and the police, does not receive feedback on the predictive validity of their decisions to release on bail.<sup>117</sup> It is not possible for the Tribunal to look back at historical information to see whether predicted behaviour actually took place since no independent data on outcomes for those who are released from detention is fed back to decision makers<sup>118</sup>. In cases where an individual is refused release on bail and must remain in custody, the predictive validity of the Tribunal decision is never put to the test, since for those who continue to be detained there is no opportunity to abscond and vastly reduced opportunity to offend.

However, refusal to release on bail 'just in case' can never be an adequate response, and when it becomes apparent to the Tribunal that removal within a reasonable time is not possible then risks must be managed by means of reporting and electronic monitoring. Detailed bail decisions and straightforward disclosure of records of proceedings and judges' notes of evidence will support these steps. Release on license offers

115 Prison Service Public Protection Manual, Ministry of Justice (NOMS) & HM Prison Service, Version 4.0, January 2009. Available at <http://www.justice.gov.uk/offenders/public-protection-manual>

116 *ibid*: Chapter 9, page 7

117 Morgan, P.M. & Henderson, P.F., (1998), *Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project*. Home Office, London.

118 In BID's experience, information on offending presented by UKBA in bail summaries can be inaccurate, and anyway cannot be considered as independent evidence since the SSHD is a party to the case.



some safeguards against reoffending, but failure to release can never be justified once a license has expired on the basis that there are no longer such safeguards in place.

Release on Tribunal bail does not mean that the function of UKBA in removing foreign nationals is automatically thwarted, nor does it mean that released former offenders will automatically re-offend at any greater rate than recidivism rates for the population as a whole. But decisions not to release in the absence of evidence to support assertions look increasingly unsatisfactory. As the Hon Mr Justice Blake put it in a speech to an immigration judges' conference in June 2010:

*"We are no part of any UKBA mission to deter applications by offering prolonged detention as the normal price to be paid for making them. We are here to do right to all manner of persons according to the laws and usages of this realm"<sup>119</sup>*

Barristers who took part in this study were asked to comment, where relevant, on how the Tribunal addressed the issue of criminal risk during the bail hearing, specifically re-offending on release.

*"I argued that, if the applicant had been a British national, his risk would be deemed manageable in the community by way of licence conditions, and that there was no good reason to suppose that a foreign national's risk could not be managed in the same way, if combined with bail conditions to address the risk of absconding. The IJ did not engage with this argument at all - he made no reference to it when giving his reasons for refusing bail. The applicant's index offence concerned a domestic incident between him and his wife. His wife had written a long letter to the Tribunal, explaining that she had fabricated the allegation, and that she withdrew her complaint. The IJ refused to hear evidence on this. Instead he commented at length about the implications of perjury" (B25)*

*"Bail refused. It was felt re-offending was obvious although the low risk of re-offending on the [NOMS] OASys report was highlighted for the judge" (B05)*

*"Home Office allegations not supported. In any future application Home Office should sort out bail summary and provide evidence in support" (B07)*

*"The IJ did not engage at all with my submissions that the risk of absconding could be managed by the imposition of conditions" (B25)*

*"The applicant had a conviction for assisting unlawful immigration - he had provided food and accommodation to fellow asylum seekers [from his own country]. The IJ completely ignored the context in which the offence had occurred, and concluded that the applicant could only have acted for personal financial gain (although I pointed out to him that he had been charged under s25 not s25A of the IA 1971). The IJ then went on to conclude (in the absence of any evidence of the same) that the applicant must have been supplementing his income in this way for some time before he had been caught. Accordingly, he refused bail on the basis that as the applicant had no recourse to public funds he would be tempted to return to "this sideline to his earnings". That his wife ran a profitable shop was completely overlooked" (B26)*

*"The applicant was MAPPA, category 2. The HOPO relied on risk of harm to the public on release in the argument for opposing bail. The barrister put forward a strong argument regarding the fact that Probation had assessed him as being able to be released on licence, they would also be monitoring him on a regular basis and that he had served his time. He stressed that if the professionals believed the applicant should be eligible for release and that regular monitoring by the offender manager was in place, then if was not for the immigration courts to counter this position" [bail was refused] (B10 –observation by BID legal manager)*

*"The IJ referred to the history of offending by the applicant, and noted that the Home Office were entitled to infer that he would re-offend" (B30)*

<sup>119</sup> Mr Justice Blake (President, Upper Tribunal Immigration & Asylum Chamber), transcript of presentation given at immigration judges' conference 2010, 'Immigration bail: problems and practice', paragraph 8.

*"I submitted that given the client's history of torture by security services, it was unsurprising that he had reacted violently when detained in a dramatic fashion. The IJ stated that the client's account of torture had been rejected by the Tribunal on appeal. He therefore considered the conviction for assault on police to be evidence of risk to the public" (B32)*

*"The IJ inferred that mental health condition and drug use may lead to risk [on release]. Not mentioned in any of the SSHD's bail summaries [i.e. new evidence introduced by the judge] but the judge took it upon herself to attach great importance to the applicant's medical history and previous drug dependence. The applicant gave evidence to her that the doctor who had seen him in detention had now taken him off his prescription medicine for schizophrenia and he had not taken any drugs for years. The IJ however indicated that she would be refusing bail on the basis of the lack of evidence from the applicant that he had been SUCCESSFULLY treated for his schizophrenia and had ever been successfully treated for, or had himself overcome, his dependence on drugs. Although it is hardly surprising that there was a lack of 'evidence' given that it was raised for the first time at the hearing by the judge, the judge indicated (although not particularly clearly) that her concerns were to do with risk of re-offending, public safety, and his own welfare, given that he would not be supervised at Barry House [Section 4 initial bail accommodation]" (B17)(original emphasis)*

Other barristers simply noted that despite the opposition to release on the part of the SSHD on the grounds of previous offending and risk of harm to the public, the "IJ did not make any remarks on this issue", "no real discussion of risk", "not raised", or "this was not addressed by the judge"<sup>120</sup>.

In most of the hearings for unrepresented applicants, observers noted that there was little or no discussion of issues of risk, and in the absence of counsel this is perhaps not surprising. Instead, in these cases, the essence of comments made by judges in relation to criminal risk and absconding was that the applicant had offended previously therefore he was likely to offend again or fail to comply with bail conditions, or that he had absconded previously and was therefore likely to abscond again.

This is about as far away from an evidence-based discussion about dynamic risk assessment and the management of that risk as it is possible to get. By this logic no one would ever leave prison once convicted. Unrepresented bail applicants realistically have no hope of understanding how offender management information may help support their grounds for release, let alone obtaining it, or inviting the judge to interrogate the bail summary.

For the Tribunal, this wholesale failure by UKBA to provide the NOMS1, as well as their failure to adequately respond to requests to explain this situation, must raise concerns about how decisions about criminal risk on release are being made when expert evidence prepared by NOMS in the NOMS1 form and intended for the Tribunal is not made available. Without disclosure of this detailed supporting evidence, despite an agreement by UKBA to do so, the evidence cannot be examined by the applicant or his or her representative, though it is apparently being relied on by the Tribunal to make decisions on release. Where a legal representative has instead been able to obtain offender management information from NOMS by means of a Data Protection request<sup>121</sup>, then an odd situation prevails where it is only the Tribunal (the decision maker) which is out of the loop and without the benefit of this offender management information to refer to (see Table 12).

<sup>120</sup> B11, B04, B14, B36.

<sup>121</sup> It should be noted that the Data Protection Act adds to the SSHD's duty of disclosure, it does not exempt her from disclosing where otherwise required to do so. The same is also true for the Tribunal.

Table 12: Access by parties to offender management information

PARTY	POSITION	QUANTITY OF OM EVIDENCE
SSHD	Opposes release on bail	Has NOMS1 document containing fullest possible OM information, provided to them by NOMS.
Bail applicant (with legal representative)	Seeking release from discretionary detention	May have OM information if legal representative has been able to obtain under DPA or through subject access request.  Otherwise will have no OM information.
Bail applicant (unrepresented)	Seeking release from discretionary detention	Highly unlikely to have any OM information.
Tribunal	Decision maker	Has no detailed OM information from NOMS, despite an obligation on the SSHD to provide this.

The style and format of bail summaries is shaped to a great extent by the Tribunal Service's 'Refusal of bail notice'. The cut and paste approach of UKBA to bail summaries results in what both looks and feels like a sterile recitation of standard UKBA arguments on risk of re-offending and risk of absconding on release. In BID's view, Tribunal decisions on release from detention must be made, and be seen to be made, on the basis of evidence provided in support of arguments made about risk on release, not simply unsubstantiated arguments.

#### 4.8 LONG TERM DETAINEES & THE SHELF LIFE OF RISK ASSESSMENTS AND OFFENDER MANAGEMENT INFORMATION

It is of great concern to BID that aspects of offender management information relied on by the SSHD may become out of date and unreliable – at least in part - from the perspective of professionals involved in assessment and management of risk in the criminal justice system<sup>122</sup>. The NOMS1 document is provided only once by NOMS on request from UKBA in response to a bail application, and is completed on the basis of information held by NOMS at the point at which the foreign national left their custody. The NOMS1 therefore contains a snapshot of risk-related information, which may subsequently be updated informally by means of e-mail or telephone call between UKBA and NOMS staff where required<sup>123</sup>, but only in the event that there has been further contact between the offender manager and the Licensee and the License has not expired.

By the time someone has been in detention for two, three, four or even five years they are an awfully long way away from the point at which any professional risk assessment within the criminal justice system has taken place. For example, a person may have spent a total of nine months in prison followed by three years in immigration detention. Yet the only structured, dynamic risk assessment that was done with this individual is now three years old. A senior manager with NOMS has told BID<sup>124</sup> that risk information contained in an OASys report or the NOMS1 form for UKBA is generally most reliable at the point of preparation, and that it becomes

<sup>122</sup> Personal communication, meeting between BID and NOMS, March 2012

<sup>123</sup> Personal communication from a NOMS senior manager, June 2012.

<sup>124</sup> Personal communication from a NOMS senior manager, June 2012.



*“Possibly unreliable the further away it is used from when it was prepared and written. It is difficult to establish a time beyond which an assessment becomes ‘out of date’...it depends on the circumstance of the offender... The NOMS approach is generally that any key decisions (e.g. parole) require a new assessment to be completed, to ensure that such decisions are based on up to date risk information”.*

It must therefore be a concern that UKBA, and by extension the Tribunal, may continue to rely on offender management and risk management information in the NOMS1 for the purpose of opposing bail and writing bail summaries even when such information is no longer safe to rely on<sup>125</sup>. The level of risk in relation to various events posed at the point at which the assessment was made may well be different by the time the offender management information comes to be relied on, for example at a bail hearing. Indeed, once an immigration detainee has been held in detention past his or her licence expiry date, which is the case with most of the represented cases in this study, NOMS has no further interest in the individual concerned. This means that NOMS can no longer be involved in checking the suitability of bail addresses, nor are they in a position to provide any updates to UKBA on risk issues<sup>126</sup>. We understand from UKBA’s Section 4 bail team<sup>127</sup> that despite this, the Criminal Casework Directorate of UKBA are keen to have greater involvement of NOMS even after release licenses have expired.

Not only does UKBA continue to make assertions to the Tribunal about risk of reoffending on release that are based as often as not on out of date offender management information, but this study has shown that the Tribunal does not interrogate such assertions to any significant degree. Neither this research nor BID’s wider experience in the bail courts suggest that the Tribunal is concerned to know how current or safe the offender management information relied on by the SSHD is, nor the basis on which UKBA arrives at its own evaluation of criminal risk.

BID therefore recommends that where a detained ex-offender is no longer under licence then UKBA should no longer be able to rely on offender management information provided to them by NOMS, via the NOMS1 form or otherwise, for the purpose of opposing release on bail. Given that NOMS is the agency with the expertise in dynamic risk assessment, we recommend that the Tribunal and NOMS jointly determine how offender management information should best be provided to the Tribunal once a licence has expired.

Secondly, we recommend that NOMS provide or advise on training for the Tribunal on risk assessment and risk management. Both of these steps would go some way towards ensuring that Tribunal decision-making on bail is as safe as it can be, and that longer-term detainees are neither disadvantaged by reliance on risk assessments that were once but may no longer be reliable, nor by the manner in which such information is presented to, considered, and given the appropriate weight by the Tribunal.

We further recommend that consideration be given to the need for a fresh risk assessment by a criminal justice expert (i.e. not by UKBA caseowners) after a detainee has spent a certain period of time in detention and after the point at which no fresh risk information will be available from NOMS. Such a requirement, as well as contributing to the safety of any subsequent decision on release on bail, will serve the purpose of focusing the mind of UKBA on the length and legality of detention to date given that removal has not been achieved. Such discussions will need to account for the fact that with a few exceptions NOMS has no statutory role with former offenders, including immigration detainees, once their licence period has expired<sup>128</sup>.

125 The information in the NOMS1 form, however out of date, is also used to inform monthly progress reports for detainees, and for determining eligibility for Section 4 (1)(c) bail accommodation.

126 Where the individual is being monitored under MAPPA arrangements then even if the license period has expired, NOMS and other agencies may need to be involved post-release from an IRC if the level of management required in the community dictates this. The number of such cases is small. MAPPA stands for Multi Agency Public Protection Arrangements, a set of arrangements for supervising offenders in the community. These arrangements are principally a structure by which the various agencies an offender comes into contact with can share information and monitor risk factors after the person is released from prison. The ‘responsible authorities’ of the MAPPA include the National Probation Service, HM Prison Service and England and Wales Police Forces. MAPPA is coordinated and supported nationally by the Public Protection Unit within the National Offender Management Service.

127 Personal communication, August 2012.

128 The great majority of BID’s fully represented clients who have a conviction have passed their licence expiry date, meaning that NOMS has no further interest in their case and no further responsibility for their management in the community.

### Reliance by the Tribunal on UKBA reports of adverse behaviour in detention

Once a release licence has expired, and assuming that a bail applicant has been in continuous detention ever since, the only major factor that may change that might need to be considered in relation to risk of re-offending or risk of harm to the public on release is the behaviour of the applicant in detention. Indeed, UKBA will often make assertions in a bail summary about behaviour in detention in opposing release. Assertions of adverse behaviour while in detention may be offered by the SSHD as a reason for an assessment of level of risk on release at odds with the one produced by NOMS, especially where the bail applicant has been held in detention since leaving prison.

However, in BID's view the Tribunal should not place any reliance on such assertions without proper exploration - directly with the applicant - of the events referred to by the SSHD, and disclosure of supporting management records from the removal centre concerned. BID has found that the manner in which IRC contractors and the UKBA log and retain information about behaviour in detention is deeply flawed. This has been brought to the attention of UKBA in some detail by BID in 2011 and again in 2012. UKBA has accepted our concerns in the main and has undertaken to address the issue, but this has not been achieved to date.

BID has been informed by the management team of one removal centre that the current format of wing reports passed by IRC contractors to UKBA does not allow for a distinction to be made between aggressor and victim in the incident reports produced as a result of a fight or bullying. After any incident those detainees involved may be put into segregation briefly while responsibility is identified, yet both victims and aggressors are recorded equally as having been in segregation. All such information is passed to UKBA and entered on UKBA's central database (CID), yet UKBA have accepted that there is no protocol for entering the raw data supplied by IRC contractors and all names are logged indiscriminately. UKBA does not collect positive information about detainees' behaviour, such as their participation in a Buddy scheme, nor are mitigating factors (such as mental illness or distress about judgments in their case) taken into account when logging behaviour.

When caseowners prepare bail summaries they are therefore doing so on the basis of entirely unfiltered information. Where for example an entry against the bail applicant's name suggests they have been in segregation it is as likely to be as a result of them having been an innocent victim as the perpetrator of the incident. There is simply no way for the caseowner to know. The Tribunal must therefore always require such assertions to be substantiated by written evidence also made available to the applicant prior to the hearing.

### A wide range of levels of criminal risk

It may be that the time currently available to the Tribunal to assess criminal risk in bail cases, especially where the applicant has been detained for a long time, is not adequate. It may also be that the need for fresh risk assessments will complicate the process of applying for bail. However, we believe that the option for the Tribunal of doing nothing to address the safety of bail decisions in relation to risk assessments and offender management information cannot be acceptable, given the increasing burden on the Tribunal in this area, and in the face of the extremely long detention periods now being seen.

We believe that greater scrutiny needs to be given to the assessment of criminal risk by UKBA and its role in decisions to detain and to maintain detention. The Tribunal as an independent reviewer of decisions to detain must be seen as beyond reproach in this area. Indeed, the overall failure of the bail process (and those agencies involved) to provide fair decisions for longer-term detainees, which has the effect of 'returning detainees to detention' could be said to contribute to extended detention periods, periods during which detention may become unlawful where removal has clearly not been achieved by UKBA within a reasonable time.

A minority of detainees, around 500 at any one time, are held in prison post-sentence for reasons of national security, criminality, control, behaviour in custody, and on-going medical treatment<sup>129</sup>. These may sometimes be people for whom NOMS and other agencies would agree that certain safeguards must be

<sup>129</sup> UKBA, *Enforcement Instructions and Guidance, Chapter 55 'Detention and Temporary Release'*. See section 55.10.1. Criteria for detention in prison. Available via UKBA website at <http://bit.ly/uRubkQ>

put into place before they can be released into the community. The inability to provide such safeguards within the detention estate is, at least in part, typically what requires them to be removed from the UK direct from prison rather than from an IRC<sup>130</sup>. By contrast, the majority of detainees (3000 or so in the detention estate at any one time) have been determined by both NOMS and UKBA to be sufficiently low risk to be held in an IRC.

It bears repeating that people held under immigration act powers at the end of the custodial element of their sentence have served their sentence. Shockingly, a significant minority of those that are transferred to the detention estate are deprived of their liberty for as long as – or sometimes far longer than - the custodial element of their sentence. It is a basic tenet of risk assessment and risk management practice, regardless of sphere of practice, that the risk of adverse or unwanted events cannot be removed entirely but can be managed and reduced. But this is not a reality that is currently addressed by UKBA, nor one that is handled well by the Tribunal.

When the automatic deportation provisions were introduced, and public and political opinion towards foreign national offenders hardened, it may not have been possible to predict that increasing numbers of ex-offenders would be held in removal centres unable to be removed. However, it seems clear that new, more nuanced responses now need to be developed towards consideration of release on immigration bail for those long term detainees who have been in prison. BID believes that in addition, all agencies must be prepared to work together to put safeguards in place where the genuinely highest risk individuals cannot be removed from the UK within a reasonable time and *must* therefore be released. Such individuals cannot be held indefinitely.

This study has not sought the views of individual decision makers, yet BID believes it is entirely possible that they would welcome further training at the earliest opportunity from criminal justice professionals on the assessment and management of criminal risk (in particular the risk of re-offending). BID recommends that such training take place.

#### 4.9 EVIDENCE IN RELATION TO MENTAL HEALTH TREATMENT AT BAIL HEARINGS

At present a statutory restriction on the grant of bail may be applied to certain 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”<sup>131</sup>. This statutory restriction on the grant of bail implicitly relies on the assumption that the Tribunal will be provided by UKBA with case-specific evidence on treatment options for a mentally ill detainee both in detention and outside detention. It also has the effect of encouraging the immigration Tribunal to make what is in effect a quasi-clinical decision.

UKBA always opposes applications for release on bail, and it is not uncommon for UKBA to oppose release for detainees who have a diagnosed mental disorder for which they are receiving treatment from the GP at their removal centre on the ground that “*it is not clear what medical treatment will be available for them on release*”, or words to that effect. The Tribunal is usually susceptible to this line of argument and will refuse release, as indeed it is entitled to do purely on this ground while the statutory restriction exists. Clearly it would be open to UKBA to find out what treatment options are available in each case (in fact it would be expected given the positive duty of care of the Secretary of State). Indeed BID has now done this in respect of those detainees who are bailed to initial accommodation in south east London, by means of a couple of emails and phone calls, followed by a meeting with the local GP whose practice and health visitors serves this accommodation. On the strength of this information, counsel instructed by BID and other barristers are now able, if they wish, to supply at least generic evidence of available treatment on release for mentally ill detainees in some circumstances.

UKBA has failed to engage with this issue in relation to release on bail, and therefore any assertion made in a bail summary in relation to treatment for mental illness is almost certainly made without specific

<sup>130</sup> Though even these individuals cannot be detained indefinitely under immigration act powers if they cannot be removed.

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

investigations in the individual case. If specific investigations have been made then evidence of this should be supplied to the Tribunal. In one hearing in this study, the HOPO argued against release on the grounds that both i) the applicant's [mental health] condition "could lead to difficulties for him and the public" and now that he is being treated in detention it is "the best place for him", and then subsequently in response to the applicant's argument for release on the ground of his health ii) "there is no suggestion that he has serious mental health difficulties". (B09)

This casual approach by UKBA leaves often extremely vulnerable people trapped in detention who might otherwise be released on bail. Mentally ill detainees without the benefit of legal advice are extremely ill equipped to manage their immigration case or seek their release. BID's legal caseworkers, immigration lawyers, and all visitors groups are familiar with these disturbing cases.

In a written bail decision in this study in relation to the bail application of a BID client who has a mental disorder and is on antipsychotic medication, the Tribunal noted

*"I cannot direct his transfer to a psychiatric hospital; he has not been sectioned. No release address has been proposed, other than a Section 4 address at Barry House. In the circumstances, he has better access to control, observation and care at Harmondsworth than would be available at Barry House"* (B09)

It is not clear on what basis the Tribunal made such an evaluation, but had the decision maker been in possession of fuller – or indeed any – information about treatment and support options for severely mentally disordered residents released to Barry House he might have found it harder to reach this conclusion. The comment about sectioning suggests a lack of understanding of transfers under the Mental Health Act, in which the Immigration & Asylum Chamber has never had any role<sup>132</sup>.

In another case in this study, the Tribunal had been provided by the applicant with an expert medical report on his mental state prepared by a professor of psychiatry at the request of a specialist NGO. In the written bail judgment, the Tribunal notes:

*"I have considered the report. I find it to be no more than a report of initial observation of the applicant and in it [the psychiatrist] recommends assessment. [The psychiatrist] believes there may be a physical illness underlying his conditions and he recommended HIV testing and a CT or MRI scan. He noted that the applicant has, whilst at Harmondsworth, been prescribed Olanzapine (an antipsychotic drug). There is nothing in this initial report that satisfies me that the applicant cannot continue to be treated satisfactorily short-term in detention"* (B17)

The danger of this kind of decision is that no evidence on the applicant's mental health or adequacy of treatment in Harmondsworth IRC was provided to the Tribunal by UKBA in this case. It would be essential for the Tribunal to explain how it has assessed the evidence and reached its conclusions.

UKBA may be in possession of information about the level of treatment required by a detainee on release, or they may not have sought such information or instructed healthcare contractors to make arrangements, or they may have done either or both of those things but chosen not to share details with the Tribunal. Whatever course of action is taken by UKBA in relation to disclosure of information in relation to treatment for mentally ill bail applicants, this demonstrates the problems inherent in the current approach to disclosure and sharing of evidence, and subsequent Tribunal decision-making in relation to detention and release.

The approach of the Tribunal seems on the one hand to be quite incurious about the provision of necessary healthcare and support on release, or on the other hand to make quasi-clinical decisions in the absence of any evidence on the part of UKBA in relation to individuals to whom they have a positive duty of care. At present, UKBA need take no steps towards ensuring continuity of care on release for mentally ill detainees and can simply state that the healthcare needs of a detainee would be better served by remaining in

<sup>132</sup> For further information on mental health in IRCs refer to McGinley, A. & A. Trude, (2012), 'Positive duty of care? The mental health crisis in immigration detention: A briefing paper by the Mental Health in Immigration Detention Project', Association of Visitors in Immigration Detention D & Bail for Immigration Detainees; and Immigration Law Practitioners' Association (pending, 2012), *The legal basis of immigration detention and release, and its articulation with the Mental Health Act*.

detention without, it would seem, being challenged by the Tribunal. At the very least the Tribunal should give consideration to issuing directions for the Border Agency to provide a medical report before a further bail hearing on the suitability and impact of continued detention upon a detainee's health.

We believe that the issue of a detainee's mental health should be 'neutral' in relation to decisions in relation to release on bail. The last twelve months have seen the first four cases<sup>133</sup> in the UK in which the treatment by the Home Office of severely mentally ill men in detention was found to have been unlawful and to have breached their Article 3 rights (inhuman and degrading treatment). While the statutory bar to release on bail for reasons of mental health remains, we believe that the Tribunal is surely 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 might now be safer for the Tribunal to assume that a detainee who is mentally ill would get better treatment if released<sup>134</sup>.

We believe that from now on the Tribunal should neither allow arguments by the UKBA that they have no information on treatment and support on release, nor should the Tribunal attempt to make quasi-clinical decisions in relation to mental health without medical evidence upon which it can reasonably rely.

When considering release on bail, the fact of a detainee's mental health should not be allowed to trump the immigration-related issues the Tribunal is required by statute and guidance to consider, namely the length of detention to date, the likely future length of detention, the risk of offending, and the risk of absconding, all of which touch on the lawfulness of continuing detention. First and foremost, the Secretary of State as the detainer 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 fulfill that duty in any individual case in the forward looking manner required of her<sup>135</sup>, 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. Neither should release be granted without ensuring that some level of support is in place<sup>136</sup>. BID recommends that the statutory restriction on the grant of bail on mental health grounds should be repealed.

However, while this statutory restriction remains in place, and where the Tribunal is otherwise minded to release, then using the powers available to the Tribunal, including bail in principle, adjournment, and directions to parties, the Secretary of State (who still has a positive duty of care towards the detainee at this point) should be directed by the Tribunal to make arrangements for continuity of care on release for detainees receiving treatment for mental illness. If this is not an option that the Tribunal feels able to consider then we recommend that a wider review is required, since what may seem to be the easiest path - in effect to return the individual to detention **only** because they are mentally ill - cannot be considered acceptable.

#### 4.10 DECISIONS ABOUT HOW TO RELEASE ON BAIL: COMPLEX RELEASES

In addition to the question of whether to release, the Tribunal should consider how to release, since safeguards may need to be put in place in the community in order for release to be possible or responsible. This is where current offender management information provided by NOMS, or proper plans for continuity of care for those with mental illness, need to be provided to the Tribunal by the SSHD. It cannot be considered adequate for the Tribunal to avoid this responsibility by denying bail where the option exists for

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).

134 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.

135 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 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.

136 Cf. the current UKBA practice of sudden release on temporary admission of extremely ill detainees, who may be left destitute with no accommodation, no financial support, as well as no immediate healthcare.

the use of directions to parties, bail in principle, and adjournment<sup>137</sup>.

In relation to magistrates' bail in the criminal justice system, a much-cited report commissioned by the Home Office in 1997<sup>138</sup> notes that

*“Defendants for whom no condition or combination of conditions can **reasonably assure** safety or appearance [before court] are held without the possibility of release” (emphasis added).*

BID believes that there will be ways of *reasonably assuring* the safety of release for the majority of immigration detainees, including those with a criminal conviction. After all, until 2006 foreign national offenders, even those recommended for deportation, were released from prison and managed in the community by the probation service (alongside UK citizen offenders) until the end of their license period. We believe the Tribunal should use its powers to direct parties to provide information, and its powers to grant bail in principle or to adjourn a hearing to allow for practical barriers to be dealt with.

The cohort of immigration detainees kept in prison post-sentence, generally those considered jointly by NOMS and UKBA to be unsuitable for the detention estate, are entitled to apply for release from prison on immigration bail. One might expect that discussions about a genuinely serious risk of re-offending or serious harm to the public on release would be carried out in relation only to these bail applicants. Instead, in bail hearing after bail hearing, both in this study and in BID's wider experience, we see assertions of a high risk of re-offending, or of high risk of serious harm to the public on release, rehearsed by the Home Office in relation to the majority of bail applicants who are held in removal centres. These are detainees who have been assessed by NOMS and UKBA as being sufficiently low risk to be transferred to the detention estate, and most of these bail applicants have committed what the Crown Prosecution Service would refer to as low level offences.

Tribunal decisions about the level of criminal risk made at bail hearings have real-life consequences, most importantly for the continuing detention of the bail applicant. In this, the First Tier Tribunal of the IAC is unlike any other branch of the Tribunals Service<sup>139</sup>. It really matters that such decisions are made on the basis of risk assessments provided by trained NOMS staff where available, that this information is not cherry picked by UKBA, and that offender management information that UKBA has undertaken to share with all parties can be examined in advance by the bail applicant and the Tribunal. If that were to start happening then not only could the Tribunal claim to carry out transparent and defensible risk assessments in relation to release on bail, but also to set in play more meaningful management of criminal risk on release. Bail decision-making, which is increasingly required to take criminal risk into account, would then become considerably more defensible and be increasingly in line with current guidance on public protection in the criminal justice system.

<sup>137</sup> These powers are explored in detail in Chapter 5.

<sup>138</sup> Morgan, P. & P. Henderson, (1998), *Remand decisions and offending on bail: evaluation of the Bail Process Project*. Home Office Research Study 184. Home Office Research & Statistics Directorate.

<sup>139</sup> With the exception of some cases heard by the Mental Health Tribunal.



# MOVING THINGS FORWARD: THE POWERS OF THE TRIBUNAL

## 5.1 INTRODUCTION

There are a number of powers available to First Tier judges when deciding applications for release on bail. These powers allow for greater administrative control over bail applications and have the potential to increase the efficiency of the Tribunal and reduce the need for arguments to be run afresh at each new bail hearing. Greater use of these powers may also ensure that bail decisions are both defensible and seen to be fair and just, because they are demonstrably based on the facts. This is essential now that the Tribunal is required to address complex issues at bail in relation to criminality, often-lengthy detention and immigration histories, and matters that touch on lawfulness of detention. Underlying these powers is the need for urgent and careful attention to each case of immigration detention because such detention is discretionary. The powers in question are

- The use of bail in principle to extend the space of the bail hearing for a short period, allowing for outstanding minor administrative matters that stand in the way of release to be dealt with<sup>140</sup>.
- The use of directions to either party to obtain supporting evidence for the purpose of substantiating assertions,
- The use of adjournments combined with directions to parties.
- Full disclosure of records of proceedings and judges' notes of evidence.

Reluctance to use these powers may, in our view, may be seen as contributing to longer and unnecessary periods in detention, as well as a correlative increase in the number of multiple bail applications by individuals who may have remained in detention where a simple administrative check would otherwise have led to their release. This study has shown that these outcomes are already a reality for a number of detainees. Repeated and often seemingly pointless rehashing of arguments at bail, with no resolution achieved over long periods of detention, is unlikely to enhance levels of respect for the bail process.

## 5.2 IMMIGRATION & DETENTION CASES AS A SERIES OF STEPS

An immigration legal case, whether or not it involves a claim for protection, will typically consist of a series of interlinked steps and processes required of both the individual and the Home Office. These may include written applications, interviews with the UK Border Agency, witness statements, correspondence, establishing identity or nationality, a requirement to report on a regular basis, decisions on the part of UKBA officials, the Tribunal or a higher court, a grant of leave or refugee status, or a refusal of leave or protection and some form of appeal. Other actions, including appeals against deportation, and the need to obtain travel documents to enable removal, may also need to be taken.

Anyone subject to immigration control, including those who make a claim for protection, may be detained

<sup>140</sup> See paragraphs 46 and 48, bail guidance for judges (2012).



while these steps are carried out. Where a person has no leave to remain in the UK, or is facing deportation action, they may also be held in detention for the specific purpose of their removal from the UK. Third parties also become involved in the trajectories of immigration cases. Cooperation may be needed from embassies and High Commissions where nationality and re-documentation issues are to be resolved, and from local probation trusts where a person detained while still under licence makes an application for release on bail, and the proposed address must be checked by the trust, to name but two examples.

For a person to be held in immigration detention pending completion of these steps and processes, the wait in custody can be distressing in itself. Timeliness on the part of the UK Border Agency is of great importance under such circumstances, but is not always seen, and is rarely evidenced at bail hearings. The most egregious examples of such failures are the extreme waits of weeks or months for certain types of UKBA Section 4 (1)(c) bail accommodation experienced by some detainees before they can lodge an application for release on Tribunal bail, and the lack of urgency which characterises UKBA's approach to obtaining travel documents for the purpose of removal. A number of BID clients have waited longer for a grant of a UKBA Section 4 (1)(c) bail address than the custodial element of their prison sentence. More than that however, where administrative detention is concerned, there is a positive duty on the SSHD to release at the point at which it becomes apparent that removal cannot be achieved within a reasonable period. Yet it is the default position of the SSHD to oppose release on bail, often with little or no evidence for cut-and-paste opinions offered on risk of absconding or risk of re-offending.

### 5.3 ADMINISTRATIVE JUSTICE AND THE ARGUMENT FOR A 'RIGHT FIRST TIME' APPROACH TO BAIL DECISION MAKING

In BID's view the Tribunal has a key role to play in using to the full those mechanisms available to it so as to act as an independent check on the power to detain, without having to directly address the lawfulness or otherwise of a person's detention<sup>141</sup>. Our view is grounded in the requirement for administrative justice, and the arguments for a 'right first time' approach to provision of services on the part of public bodies such as UKBA, and which must by extension encompass HM Courts & Tribunals Service and therefore bail decision-making in the First Tier Tribunal.

Helpfully, in its recent report 'Right First Time' (2011)<sup>142</sup>, the Administrative Justice and Tribunals Council (AJTC) offers a set of practical steps for public bodies which it believes will save money, and improve both the experience of service users and increase public trust and confidence in public services<sup>143</sup>. The AJTC argues that public bodies that make original decisions must take the lead in improving the quality of the service they offer. The report notes:

*"There is little evidence that the financial costs of not getting it right first time are fully understood and qualified by public bodies, partly because many of the costs can be off-loaded to tribunals and ombudsmen"* (AJTC, 2011: 3).

The Tribunals Service, in executing its role through the various chambers, has the benefit of close examination of original decision-making and processes on the part of public sector bodies, including the UK Border Agency. It is able to monitor both the volume of appeals against public bodies and rates of success at appeal, giving a proxy measurement of the quality or otherwise of decision-making on the part of these public bodies.

Immigration bail hearings in the First Tier Tribunal take the form of an independent review of the SSHD's decision to maintain detention, against statutory restrictions on the grant of bail related to the likelihood of re-offending (if relevant), likelihood of absconding (or more accurately failing to report), continued detention where it is in the best interest of a detainee who is mentally ill, and "previous failure to comply

<sup>141</sup> The tribunal is of course free to grant bail even where detention appears to be unlawful.

<sup>142</sup> Available at <http://bit.ly/TJQHn9>

<sup>143</sup> See also Parliamentary & Health Service Ombudsman (PHSO), (December 2008). 'Improving Public Service: a matter of principle', in which the Ombudsman urges "getting it right" as one of six principles of public service. Available at <http://bit.ly/TJQUXx>

with conditions of a recognisance<sup>144</sup>. These statutory grounds shape the arguments presented by the SSHD in bail summaries. As this study has shown, while the burden of proof is on the SSHD this is not enforced as a matter of routine by the Tribunal.

We believe there is a significant number of bail hearings where the use of bail in principle, or an adjournment with directions, could be used and, if so, would have the effect of requiring UKBA to take steps and make decisions which would contribute to a resolution of outstanding immigration matters. Our research shows that at present it is too easy for agencies to pass responsibility to another public body or to the First Tier judge in subsequent bail applications. This is especially so where the detained individuals whose cases lie at the heart of these immigration bail decisions are often without the benefit of legal representation, may understand little or no English, and have negligible public and media sympathy.

#### 5.4 A 'WITHDRAW OR DISMISS' CULTURE VS. USE OF DIRECTIONS TO PARTIES

One of the simplest steps open to the Tribunal is the use of directions to either party in a bail hearing. The bail guidance is essentially silent on the utility or otherwise of directions to parties. However, the Procedure Rules<sup>145</sup> for the Immigration & Asylum Chamber, which govern practice and procedure in applications and appeals, lay out the options for First Tier judges in relation to giving such directions at section 45.

### 45. Directions

- (1) The tribunal may give directions to the parties relating to the conduct of any appeal or application.
- (2) The power to give directions is to be exercised subject to any specific provision of these rules.
- (3) Directions must be given orally or in writing to every party.
- (4) directions of the tribunal may, in particular—
  - (a) relate to any matter concerning the preparation for a hearing;
  - (b) specify the length of time allowed for anything to be done;**
  - (c) vary any time limit in these rules or in directions previously given by the tribunal for anything to be done by a party [(including, where the tribunal considers that there are exceptional reasons for doing so, extending a time limit which has expired)];**
  - d) provide for—
    - (i) a particular matter to be dealt with as a preliminary issue;**
    - (ii) a case management review hearing to be held;
    - (iii) a party to provide further details of his case, or any other information which appears to be necessary for the determination of the appeal;**
    - (iv) the witnesses, if any, to be heard;
    - (v) the manner in which any evidence is to be given (for example, by directing that witness statements are to stand as evidence in chief);
- ...
- (5) The Tribunal must not direct an unrepresented party to do something unless it is satisfied that he is able to comply with the direction.

Of particular interest to BID is the option at 45.4.(d)(iii) "*Directions of the tribunal may, in particular, provide for a party to provide further details of his case, or any other information which appears to be necessary for the determination of the appeal [or application]*". The following is an example of the use of a direction by the Tribunal in a bail application prepared and presented by BID. The case of Mr A shows clearly how the use of a direction can enable the Tribunal to make a decision on release on the basis of evidence rather than mere

<sup>144</sup> HM Courts & Tribunal Service 'Refusal of Bail' notice.

<sup>145</sup> The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No.230 (L.1)), as in force from 19 December 2011 Part 5: General Provisions. Available at <http://bit.ly/S2NLfK>.

assertion, and has the potential to change the course of an applicant's detention history. In the case below the applicant was released.

## Case study Mr A

BID's client Mr A had already been in detention for 28 months at the time of this particular bail application, and was subject to a deportation order. At his bail hearing the bail summary stated that:

*"[A] was disruptive in prison [Dover IRC] by barricading himself in his cell. He was placed onto the segregation unit".*

The First Tier judge in that case refused bail but issued directions to the Respondent to present evidence that related to assertions made by the Respondent and denied by the Applicant, one of which was the allegation of misconduct in detention noted above. This evidence was to be produced within 5 working days

The Respondent replied by letter to the Immigration and Asylum Chamber on the record of Mr A barricading himself in his cell at Dover IRC as follows:

*"Mr A's computer record states that this had indeed happened. However, on checking with Dover Immigration Removal Centre, where Mr A was detained on this date, they can provide no evidence of this incident. I can only assume that this entry was attributed to Mr A's record in error. I apologise unreservedly and confirm that this record has been removed from Mr A's record and will of course not appear on any future bail summary".*

Mr A was granted bail at his next application<sup>146</sup>.

However, in this study there was only one use of a direction to one or other party by the Tribunal. Among the thirty-eight represented cases in this study there were no instances in which a direction was given to the Home Office. Although it is not possible to be specific, this should not be taken to reflect an absence of requests for a direction on the part of counsel<sup>147</sup>. In one case (B15) bail was granted and the judge asked for a letter of conformation from the landlord of the bail address to be submitted to the Tribunal. In the unrepresented cases there was only one use of a direction, in this case to the Home Office requiring them to fax through some supporting documents to the Tribunal.

While not going so far as giving directions to UKBA, this study found that Tribunal judges none the less gave helpful advice to unrepresented applicants in a number of cases, for the purpose of enabling them to prepare a more robust bail application in the future, to help applicants join up the various aspects of their legal case, or to ensure that healthcare needs or a desire to return to their home country were addressed.

*"The judge advised the applicant to allow reasonable time between his bail applications to, to provide correct information about his address in China, and to offer sureties and recognisance. The judge also advised the*

<sup>146</sup> It is of extreme concern to BID that such serious misrepresentations about conduct in detention are occurring in bail summaries. Our concerns about information management in relation to behaviour in detention by centre management contractors and Detention Services have been brought to the attention of UKBA. Unrepresented detainees and detainees unable to speak or read English will not be in a position to challenge any inaccuracies relating to their conduct in detention contained in bail summaries. Under these conditions such inaccuracies can perpetuate through multiple bail applications which may add months or years to periods in detention before eventual release and an increased risk of high court action. The requirement for evidence in support of assertions must be considered as essential.

<sup>147</sup> The use of directions to parties is, it must be acknowledged, in part an advocacy matter. BID is now attempting to address this in the bail applications that we prepare and present with the help of pro bono counsel. But the Tribunal system was designed with the intention of being both accessible and fair to unrepresented applicants to any chamber. The onus therefore lies, in BID's view, on the Tribunal to initiate the use of directions to parties.

*Home Office to provide clear evidence showing that the applicant gave incorrect information.” (U42)*

*“The judge said that both of the sureties needed to be present during the hearing, and that the tenancy agreement and a letter from the landlord of the surety at whose house the applicant will stay were required. The judge advised the applicant to make a third application.” (U34)*

*“No directions but the judge advised applicant to make a record of times and dates of when he had conversations with the people at the Moroccan embassy to have as evidence that he was contacting them for his next bail hearing, if he reapplied.” (U27)*

*“Applicant should contact police station if he wishes to give evidence (I presume he was a witness in legal proceedings) and then to tell them that they should submit to the Home office to delay his departure [from the UK].” (U29)*

*“No directions for either party but IJ did ask prison staff (A was produced in court) to ensure his medical needs were taken care of.” (U31)*

*“The A wanted to be deported back to his home country of Somalia. The judge asked the HOPO to speak to the Home Office as appropriate to speed up the process.” (U35)*

Without talking to First Tier judges it is not known what lies behind the apparent reluctance on the part of the Tribunal to give directions to parties (or indeed on the part of representatives to request them). It may simply be that the culture of ‘withdraw or dismiss’ has become established over many years, and may be viewed as having the benefit of keeping proceedings simple.

One of the benefits of greater use by the Tribunal of directions to parties would be to highlight the role of timely and effective action on the part of the detaining power, the SSHD, and focus parties on the purpose of administrative detention. The 2003 bail guidance to judges (at 2.6.2) included a number of factors that it was considered might be useful for the Tribunal to consider as relevant to decisions to detain, including:

*“2.6.2.c The speed and effectiveness of any steps taken by the SSHD to surmount such obstacles [to removal]...”*

However this clause was removed from the updated guidance published in July 2011. In their joint submission to the consultation by the President of the First Tier Tribunal on the revised bail guidance in late 2011<sup>148</sup>, BID and ILPA made a recommendation that this paragraph be reinstated. Our submission also noted that

*“In our experience, the UK Border Agency routinely asserts in bail summaries that removal is imminent in cases where there is no specified date for removal, but where steps towards removing a person are taking place. All too often, the evidence reveals that after a lengthy period of apparent inactivity, a tentative “step” has been taken on the eve of the bail hearing. In such circumstances a person may go on to remain in detention for a significant period. The sentence “However, imminence of removal on its own should not be the sole reason for refusing release on bail, and **may require evidence of removal date or steps taken**” should be inserted at the end of paragraph 24.” (ILPA & BID, 2011: para 29) [emphasis added]*

While the most recent version of the bail guidance to judges no longer refers to the need to consider timeliness and effectiveness on the part of the SSHD, we believe that the use of directions to parties, as well as the granting of bail in principle pending disclosure of documents or resolution of outstanding practical obstacles to release, could be an effective substitute for this requirement if used and used appropriately. In BID’s view it can never be appropriate to fail to consider the timeliness and effectiveness of the actions of the detaining party, with a requirement for evidence for this, when a person has lost their liberty for administrative purposes. Time is always of the essence where administrative detention is concerned.

<sup>148</sup> ILPA & BID, (December 2011), ‘Consultation on the 2011 Bail Guidance. Joint submission from the Immigration Law Practitioners’ Association and Bail for Immigration Detainees’. Para 8. It was noted that the speed and effectiveness of steps taken by the SSHD is a highly relevant contributory factor to the three main criteria listed as those on which immigration judges should focus.

In chapter 4 above we described the apparent inability of the UKBA to provide supporting evidence in relation to assessments of the level of different types of risk on release, particularly the NOMS1 form containing offender management information. Such a failure appears to be a breach of the bail guidance at paragraph 12, which states:

***“The immigration authorities must substantiate (in the bail summary or elsewhere) any allegation that a person poses a risk of harm to the public or a risk of reoffending. In the case of foreign national prisoners an Annex A/NOMS 1 report should be made available by UKBA (see Annex 3). It is for the immigration authorities to justify the need for detention.”***(HMCTS, 2012) (emphasis added)

## 5.5 BAIL GRANTED IN PRINCIPLE PENDING RESOLUTION OF ISSUES OR DISCLOSURE OF DOCUMENTS

The use of directions to parties can assist in fairer decision-making by the Tribunal, but will necessitate a further application for release on bail in order for that decision to be made. The July 2011 revised bail guidance for judges, continued in the June 2012 guidance, placed a new emphasis on the use by the Tribunal of bail in principle pending resolution of issues relating to conditions to be imposed (in line with para 46 of the guidance) or pending disclosure of documents within 48 hours (in line with para 48 of the guidance). At para 46 the bail guidance refers to the desirability of granting bail in principle - rather than refusing bail or prompting a repeat bail application in cases where

*“Release cannot be immediate because information is missing to complete the conditions to be imposed.... In appropriate cases therefore bail can be granted in principle and the applicant detained until such time as the information is provided to the Judge’s satisfaction when release can be effected”*(HMCTS, 2012) (emphasis added)

In our view this postponement of release could be deployed pending the confirmation of a positive address check by the Probation Service where a delay was being experienced. Since the assessment of relevant risk would have been concluded by the Tribunal by this point, the use of bail in principle would provide some welcome flexibility to allow all agencies to complete their obligations.

The bail guidance at para 48 refers to the grant of bail in principle pending the disclosure of documents to the Tribunal that are not available at the time of the hearing.

*“Where a First-tier Tribunal judge would grant bail and order release but for the fact that a relevant document is not available, the judge may grant bail in principle and order that release should be delayed for 48 hours for the document to be produced”* (HMCTS, para 48)<sup>149</sup>

It should be noted here that the period of 48 hours is not set out in statute, but is a matter of guidance, and we believe that this period could be increased by the Tribunal where appropriate in line with the unspecified timescale for the provision of further information in order to complete conditions noted in para 46. In a recent bail hearing that did not form part of this study such a step was suggested by the Tribunal, which allowed release of BID’s client some three weeks after the bail hearing by means of an imaginative solution - where release was otherwise indicated - suggested by the First Tier judge himself.

In the 38 represented cases in this study, bail in principle - in the sense of first carrying out the assessment of risk before examining any sureties - was clearly seen to be considered by the Tribunal in a number of cases, either prior to or parallel with consideration of sureties. However, the option to grant bail in principle pending the resolution of issues, or disclosure of documents, was not seen to be in use, despite the emphasis on this case management tool in the revised bail guidance (2011), and the fact that in our view, bail in principle could have been deployed in a number of these hearings.

<sup>149</sup> The guidance at paragraph 48 continues: “if the document is produced to the Tribunal within the set period, and is satisfactory, the order for release can be completed without any further hearing”

*“The judge asked how the surety knew the applicant in quite some detail and asked questions about how she could influence the applicant. The main issue raised by the HOPO was that the bank account was in three names and that she had not got permission from the other two account holders. The IJ pursued this and was concerned about the other two people not having given their permission. The IJ withdrew so that counsel could discuss this with the surety. I asked for bail in principle in order for the surety to have time to get the permission. The IJ did not accept this argument. I then suggested that bail in principle could be granted and the other account holders could then submit evidence within 24 hours and if the IJ was satisfied with the evidence then the applicant could be released. I reminded the judge of the new guidance on this. The judge did not comment on this and wanted to continue with the hearing, but at this stage I said that if the judge was not minded to consider this then I would consider withdrawing the bail application. The judge became annoyed at this point, and started saying “well what sort of evidence are you talking about submitting?” I suggested taking witness statements from the two account holders. The judge dismissed this immediately, intimating that witness statements are not worth the paper they are written on. At this stage I decided to withdraw” (B11)*

*“The IJ gave me a strong indication that he could not make a positive finding on bail in principle due to the issues described [probation address check outstanding and sureties’ inadequate information. The IJ heard from the two sureties who had attended. They had not brought with them adequate evidence of their bank statements. I took this opportunity to withdraw the bail application, so as to avoid the applicant receiving a refusal of bail”. (B34).*

The situation in case B34 above would in our view be a ideal instance in which to grant bail in principle for the two outstanding practical issues to be resolved. The Tribunal however saw these obstacles as a barrier to granting bail in principle. In our view, greater openness to the use of a grant of bail in principle, pending the provision of further information to the Tribunal in either of these two cases would remove the need for a further bail hearing. This would obviate the need to make a further bail application, which it is understood is a matter of concern to the Tribunal at present. Greater use of bail in principle would also contribute to greater fairness for unrepresented applicants. The examples of advice given by judges to unrepresented applications on the preparation of future bail applications noted above demonstrate that such applicants are not best placed to prepare sureties adequately for their role in assisting the Tribunal, regardless of how willing the sureties are to do so, nor to prepare documents in their possession for the Tribunal.

In one case in this study, a man who had been detained for 33 months at this point, was without travel documents (and therefore unremovable until this was resolved), and who has a significant history of self-harm and suicide attempts in detention was refused bail because the First Tier judge did not know that Barry House initial accommodation in south east London, supplied by UKBA, had the facility to monitor electronic tags where they were fitted as a condition of bail. The Tribunal was encouraged in this view by the HOPO. Counsel for the applicant had stated that monitoring was possible (Barry House is 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.

*“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 J 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". (B01)*

This particular First Tier judge deciding bail applications was not familiar with the facilities at the most commonly used bail address, but this lacuna could have been resolved through the use of bail in principle. Instead, reliance was placed on information provided by the HOPO (which was not accurate), rather than on the comments from counsel for the applicant who was providing the correct information.

We believe that the use of bail in principle pending resolution of issues relating to conditions to be imposed (in line with para 46) or pending disclosure of documents within 48 hours (in line with para 48), should be used by the Tribunal wherever possible regardless of the length of detention of the applicant. However, it would seem especially appropriate to deploy bail in principle in the face of easily resolved practical obstacles in those cases where the applicant has been detained for a long period, and where there are pure lawfulness points to consider in the case before the Tribunal, as was the case in B01 immediately above.

## 5.6 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. Take the case study of Mr A earlier in this chapter, which concerned an unsubstantiated and disputed assertion made in a bail summary. Under the new bail guidance (2012) there are a number of options open to the Tribunal and the applicant during the hearing in this situation. 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. The current bail guidance (2012) notes helpfully on length of detention at paragraph 19 that:

*"...it is generally accepted that detention for 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"<sup>150</sup>*

<sup>150</sup> See also paragraph 21 of the bail guidance (2012) where it is stated that "a period of weeks might be disproportionate where one of the effects of detention is to keep a parent apart from young children", with reference to the case of MXL and others [2010] EWHC 2397 (Admin), para.45ff.



Table 13: Options available to the Tribunal to curtail the need for further bail applications on the same issues<sup>151</sup>

OPTIONS AVAILABLE TO THE TRIBUNAL	Requires subsequent bail hearing	Requires 2 <sup>nd</sup> subsequent bail hearing	Requires 3 <sup>rd</sup> subsequent bail hearing
<b>Dismiss the application</b>	yes, because lack of evidence not dealt with	yes, because lack of evidence not dealt with	yes, because lack of evidence not dealt with
<b>Withdraw the application</b>	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 the 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:§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:§48) (NB: unfair to applicant if evidence required of SSHD who then fails to comply)	Only if evidence not produced, bail then treated as refused (bail guidance:§50).		
Adjourn the hearing on the 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.	Maybe, 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, as described above in Chapter 4 (see Table 11).

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.

<sup>151</sup> 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.

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 the 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<sup>152</sup>. 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 on 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”<sup>153</sup>. If the IAC were to disallow withdrawal of a bail application without the consent of the Tribunal, 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.

## 5.7 RECORDS OF PROCEEDINGS & JUDGES’ NOTES OF EVIDENCE

Each of these options available to the Tribunal, in our view, require that the steps to be taken in respect of production of documents or disclosure of evidence are noted clearly and fully in a format made easily available to all parties. Disclosure should not be at issue; in addition to the general fairness point full disclosure of records of proceedings **and** judges’ notes of evidence will enable unrepresented bail applicants to participate as fully as possible in proceedings.

At present, when a detainee makes a repeat bail application, the information the applicant and the Tribunal has before them about the previous application is contained in the ‘reasons for refusal’ and ‘reasons for decision’ sections of the Refusal of Bail notice. The ‘Reasons for refusal’ section allows the First Tier judge to tick any one of the statutory restrictions on the grant of bail<sup>154</sup>, or the declaration “I am satisfied there are substantial grounds for believing that if granted bail the applicant will abscond for the reasons set out overleaf” [in the ‘reasons for decision’ section of the notice].

152 The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No.230 (L.1)), as in force from 19 December 2011 Part 5: General Provisions. Available at <http://bit.ly/S2NLfk>. We understand that the Procedure Rules are currently under revision.

153 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).

154 These restrictions are i) there has been a previous failure to comply with conditions of a recognizance, ii) the applicant is likely to commit an offence unless retained in detention, iii) the release of the applicant is likely to cause danger to public health, iv) the applicant is suffering from a mental disorder and continued detention is needed in his interests or for the protection of others, and v) the applicant is under the age of 17, that arrangements ought to be made for his care in the event of release, and no satisfactory arrangements for that purpose have been made. See para 30 (2), Schedule II, Immigration Act 1971.

What the Refusal of Bail notice does not usually contain is a record of evidence submitted by parties, or details that may be favourable to the applicant's application for release. On occasion, the written decision in the Refusal of Bail notice may differ in content from reasons for refusal given at the end of the hearing. First Tier judges generally avoid making findings in fact or law in written bail decisions. Whether bail is refused or granted, judges do not make statements such as "I find that the applicant is compliant with reporting requirements" or "I find that the applicant poses a low risk of harm to the public". As a result these points need to be both proved and decided all over again at subsequent bail hearings.

BID understands from correspondence with one Resident Senior Judge at the FTT IAC that details of any previous bail hearings, including directions to parties, are not before the Tribunal at subsequent bail hearings. The RSJ noted "*the issues that any Immigration Judge will consider at a future bail hearing will be those that are put before him or her on the day*"<sup>155</sup>. This would suggest that the Tribunal operates in something of a vacuum and deals with bail applications outside of their historical context.

Indeed, from discussion with hearing centre staff<sup>156</sup> it appears that each application is dealt with independently without reference to previous applications. If an applicant wants the Tribunal to consider material from previous applications this material should be included in the application. BID has also been given to believe that at a hearing the judge will have access to a complete file containing the history of previous applications, and were the applicant to want to refer to issues not contained in a refusal decision, it would be possible for a judge, if minded to do so, to look at notes made during the relevant hearing.

The file of material could be assumed to contain records of proceedings and judges' notes of evidence from any previous hearing (or hearings). In BID's experience a record of proceedings may – and indeed should – contain details of any assurances given by the UK Border Agency in submissions, for example in relation to the time needed to obtain travel documents, the length of time before removal can be effected, or the length of time before a deportation appeal is concluded. Although it might be expected that these details would be mentioned in a Refusal of Bail notice, this is not done as a matter of routine. Where the record of proceedings is not disclosed to the applicant, the applicant has no official record of assertions or commitment made by the SSHD in court. It may be that the First Tier judge made comments favourable to the applicant, but these will not be available to the applicant without the record of proceedings.

If records of proceedings and notes of evidence were to be routinely disclosed to bail applicants, either with the Refusal of Bail notice or on request, then subsequent decisions on release would benefit from a more accurate evidential base in relation to progress towards removal, including those details favourable to the applicant, and the Tribunal could conduct the hearing accordingly. The alternative to routine disclosure is to start afresh with the same arguments at each subsequent bail hearing. Such circumstances do little to help reduce the number of repeat bail applications by people held in detention.

Without a copy of Records of Proceedings bail applicants may be at a disadvantage in any future bail hearings if the Home Office Presenting Officer makes identical arguments against release, despite the passage of time, and simply fails to mention or report back on assurances given earlier before the Tribunal. We have seen in the previous chapter that there are shortcomings in the degree of evidential support provided by the SSHD for her arguments against release on bail.

An extract from a typed record of proceedings that was provided on request is shown below, and provides an example of how a record of proceedings could help an applicant to address issues of concern to the court in future bail applications. The four-page record from 2011 details the arguments made by parties, the examination of two sureties, and clear and helpful details of how the Tribunal arrived at its decision to refuse release.

*"Removal is not imminent - there is likely to be considerable passage of time before any action could be taken to remove because an asylum claim has not even been properly investigated and decided yet. I would therefore generally think it right to give bail if I could have confidence in conditions of bail and in sureties. In this case I have only one surety effectively, if a surety offers no guarantee other than his word there is no*

<sup>155</sup> Correspondence dated 6<sup>th</sup> October 2011.

<sup>156</sup> Via telephone, October 2012.

*sanction against that surety. I have been seriously troubled by [the] discrepancy that has come up between the two sureties on the point of the applicant's place of birth - if I am to rely on the support of the sureties then I want to be able to have confidence in them - I cannot have confidence that the one surety who offers money is being frank with me. So one surety offers no money - the other offers an explanation that is not supported by his cousin. This does not give me confidence that either or both of them will do all that they promise to ensure that the applicant abides by bail conditions. So I refuse bail<sup>157</sup>.*

The level of detail provided in this record of proceedings can be appreciated from the two one-page extracts below.

A Start time: 10.30  
Finish time: 11.20

B Mr [redacted]  
The application is straight forward -- on [redacted] the appellant was served with liability to automatic deportation -- on [redacted] he has been screened -- he is now awaiting a substantive asylum interview -- covering letter -- monthly progress report -- observation is that we are some way away from the end of finalising the appeal -- first simply awaiting travel document -- removal is far from imminent -- therefore no justification for detention -- if were released -- would be in touch with probation -- good incentive to stay in touch with authorities -- wants to progress claim -- can impose sanctions -- asked for electronic monitoring -- two sureties -- with appropriate conditions no reason why should stay in detention for such a long time

C Ms [redacted]  
Rely on bail summary -- immigration history is bad -- false documentation -- decision is still pending but risk of absconding exists -- has an offender manager in contact

D Mr [redacted]  
The applicant has been punished for offence -- in process of asylum and deportation appeal -- will either have to travel or file can be assigned to office in London -- the appellant knows that if he doesn't attend meetings he will be in detention

E States [redacted]  
Do you have a document to prove your identity  
I have my passport  
How do you know the applicant  
He is my cousin

F What is the exact relationship  
His mom and my mom are sisters  
You are prepared to stand surety for 1800 -- if he doesn't attend where he is supposed to attend you will probably lose that money -- do you understand  
Yes  
Have you documents to show you have that money  
Yes -- I have a bank statement -- I do online banking -- I printed this -- I have more money in my other account

G Cross-examination  
When did you know the applicant had arrived in the United Kingdom  
I can't keep track -- I know it was about a year or two now  
When did you first contact  
We have been in contact for quite some time  
When was the first  
I can't keep track -- it has been quite some time now  
How can you ensure that he will stick with bail conditions  
He definitely will -- he is somebody I know I will keep track with him  
What do you do for a living

A I am self-employed as [redacted]  
What hours do you work  
From 7 to 4 or 5  
The applicant will be living with you  
Yes

B Are you aware of history in the United Kingdom  
Yes  
What do you know  
I am very much aware he is [redacted]  
What will you do if he absconds  
I doubt that he will -- if I sense something like that I will let the authorities know

C Court:  
What sort home do you live in  
Council flat  
How many rooms  
Two bedrooms  
Who else lives there  
My wife and my two children  
Where would he stay  
The rooms are quite big -- as for sleeping -- in the living room  
Who is [redacted]  
My cousin -- our cousin -- his mom is before my mom and then [redacted] mom  
You have said that you are very much aware that your cousin is [redacted] mom  
Actually -- back in the 80s our parents came to Europe to study -- my parents came here and had me here -- his parents were in [redacted] was born I think between 83 and 84

D Where  
Abroad -- I am not too sure if it is [redacted] -- but it was outside [redacted]  
He was convicted for using a false [redacted] identity document  
Yes

E That scarcely gives one confidence that he is entitled to [redacted] nationality  
I was shocked when I heard that and tried to get in touch with relatives to find out what happened  
Where had he travelled from when he entered the United Kingdom  
I am not too sure  
Your bank statement shows that you have been in overdraft since the beginning of the month  
On and off -- I have overdraft -- I have another account also -- if I request statements it takes five to seven working days -- I have monies in other accounts  
What other accounts  
[redacted]

F What other funds  
About £800  
What is your income  
Between £2500 to £3000 per month  
Do you have proof of income  
I don't have any of my recent invoices with me here  
Who is [redacted]  
My son

As a result of having sight of the record of proceedings the applicant, who was not removable at the point of application for release due to a pending asylum decision, knew that he would need to find better sureties in order to satisfy the Tribunal and secure his release from detention. Routine disclosure of records of proceedings by the Tribunal would allow applicants to prepare further applications in a manner which assists the court by addressing each of the issues that formed the basis of the decision at the previous hearing, not simply those noted on the Refusal of Bail notice. This could include provision of further evidence for the Tribunal in relation to attempts over time to obtain travel documents, or on the applicant's record of behaviour while in detention.

However the disclosure of records of proceedings on the part of the Tribunal is by no means automatic. During the course of this research BID made a number of requests for the disclosure of records of proceedings in individual cases that were subsequently refused.

<sup>157</sup> This extract is taken from a typed record of proceedings, provided on request, in relation to a bail hearing conducted at Hatton Cross hearing centre during 2011.

- In 2011, BID requested the records of proceedings for bail hearings for Mr B and Mr T, each heard before a separate judge. The President of the First Tier Tribunal of the IAC refused both requests, replying in October 2011

*"I do not consider that it is appropriate to provide you with a copy of the record of proceedings"*

The President went on to note in both refusal letters, that in his view it was only appropriate to provide such a record if the issue at stake was what occurred at the hearing and in the event of a direction to produce to a superior court.

- In January 2012 BID wrote to Taylor House hearing centre to ask for the record of proceedings for a bail hearing brought on behalf of Mr S immediately before the Christmas holiday. The bail clerk replied that it was *"not possible to pass copies of the record of proceedings to legal representatives"*. When told that the record was needed for consideration of a possible application for judicial review of the bail hearing the Designated Immigration Judge then gave consent to provide BID, as legal representative, with a copy.
- In May 2012 BID wrote to York House hearing centre asking for a copy of the record of proceedings for two separate bail applications heard a week apart earlier in that month. The bail clerk replied identically in both cases:

*"I have taken your request for the record of proceedings . . . to the Designated Immigration Judge for instruction and he has stated as follows: - "It is not the practice of The Tribunal to disclose copies of the Judge's R.O.P""*

BID wrote by return to ask again, this time in more detail, for copies of both records of proceedings, and received the following reply to both requests:

*"I have taken your request for the record of proceedings. . . to the Resident Senior Judge for instruction and he has stated as follows: - "Application refused. The Applicant was present at the hearing and his representative will have been able to make a full note of the hearing". "*

There is of course a distinction between the need to keep a record of proceedings and the disclosure of such a record. The Bail Guidance for First Tier Tribunal Judges (2012) notes at para 68 that "immigration judges will keep a clear record of proceedings". The guidance is however silent on the need to disclose records of proceedings.

BID believes that greater use of directions to parties is essential. However, if directions to parties are given verbally but not noted in the Refusal of Bail note, note of evidence, or record of proceedings, then there is very little chance of follow up in a subsequent bail hearing, even where a bail applicant has the benefit of legal representation.

We assume it would be a matter of judicial supervision if a First Tier judge fails to keep a record of proceedings for a bail hearing. Failure to keep an adequate record might imply a material error of law or at the very least procedural unfairness. Beyond that, it is difficult to understand any reluctance in the First Tier Tribunal of the IAC to disclose records of proceedings since it is assumed that such records contain details only of evidence supplied to the Tribunal, directions to parties, and arguments raised during the hearing itself. It is not entirely clear how the FTT can operate the 28-day rule on further bail applications if records of proceedings are not seen as relevant and are not routinely disclosed to parties. Paragraph 67 of the bail guidance (2012) notes in relation to restrictions on length of hearings that such restrictions may be imposed in cases where



*“immigration bail has previously been refused by a 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**” [emphasis added]*

By contrast a practice statement for the Social Entitlement Chamber notes on records of proceedings that:

*“2. A record of the proceedings at a hearing must be made by the presiding member, or in the case of a Tribunal composed of only one member, by that member.*

*3. The record must be sufficient to indicate any evidence taken and submissions made and any procedural applications, and may be in such medium as the member may determine. . .*

*. . .*

***6. Any party to the proceedings may within the time specified in paragraph 5 [six months] apply in writing for a copy of the record of proceedings and a copy must be supplied to him”** [emphasis added]*

Source: Practice statement ‘Record of proceedings in Social Security and Child Support cases in the Social Entitlement Chamber on or after 3 November 2008’, Lord Justice Carnwath (30 October 2008).

This appears to offer a fair and straightforward approach to records of proceedings and their disclosure. Clarity in the matter of disclosure of records of proceedings would also greatly assist unrepresented bail applicants. BID suggests that the IAC Procedure Rules should contain a requirement for all jurisdictions that there must be a record of proceedings, and that on application all parties should be provided with a copy of the record of proceedings and judge’s note of evidence. Disclosure is anyway required of HM Court and Tribunals Service under paragraph 7 of the Data Protection Act.

The disclosure of records of proceedings was raised by BID at the Immigration & Asylum Chamber stakeholder meeting of July 2012. The IAC Presidents noted that in their view the record of proceedings was merely a record of the time and place, and those present in the hearing room, in relation to a particular bail hearing, and that any additional material noted in the record of proceedings is a matter of choice on the part of the individual judge<sup>158</sup>.

They continued that there is a distinction to be made between records of proceedings and judges’ notes of evidence, the latter being less easy to disclose they suggested, as they believed that there may be issues of confidentiality. BID noted that the bail guidance makes it very clear what records of proceedings should contain. Paragraph 68 of the guidance (2012) states:

*“First-tier Tribunal Judges will keep a clear record of proceedings. Where bail is granted, it is good practice to identify the key reasons for that decision in the record of proceedings. Where bail is refused in addition to the record of proceedings, the reasons for refusal of bail should be set out in writing and with sufficient detail so that the applicant knows why they have not been granted bail”.*

The bail guidance seems to suggest that records of proceedings go beyond mere housekeeping details in any one bail hearing to include “key reasons for that decision”, in fact to take the approach seen in the example of a record of proceedings noted above at page 76 and by the Social Entitlement Chamber that requires a record of “any evidence taken and submissions made and any procedural applications”<sup>159</sup>

However, BID is now beginning to see that the format of records of proceedings seems to have been

<sup>158</sup> BID also asked the IAC whether examination of records of proceedings form part of the Tribunal’s quality assurance processes for bail compared to substantive proceedings. Does the Tribunal sample a certain percentage of records of proceedings in bail cases? The IAC replied that this is not done at present. We do not know whether judges’ notes of evidence are sampled for quality.

<sup>159</sup> Practice statement ‘Record of proceedings in Social Security and Child Support cases in the Social Entitlement Chamber on or after 3 November 2008’, Lord Justice Carnwath (30 October 2008), paragraph 3.

transformed into a one page document, below, on a new standard document format<sup>160</sup>, with one short paragraph allowing for details of the case (see below) This is a very different type of record of proceedings from the detailed four page record shown above.

*New shorter format Record of Proceedings in First Tier Tribunal (IAC)*

<b>FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)</b>		
		Appeal No.:
		Heard at: <b>Taylor House</b>
		Date: <b>10 October 2012</b>
Before:		
_____		
_____		
		APPELLANT(S)
<b>Secretary of State</b>		
		RESPONDENT
REPRESENTATIVE: For Appellant:	<b>No Representative</b>	Name
		Capacity
For Respondent:		Name
	<b>HOME OFFICE PRESENTING OFFICER</b>	Capacity
Interpreter:		
Language:		
<b>RECORD OF PROCEEDINGS</b>		
Start Time:		
Finish Time:		

If the FTT IAC has decided to make records of proceedings in bail hearings a note of housekeeping details only, then whatever vehicle is used for noting details of evidence presented, arguments made, directions given to parties, and detailed reasons for the decision, must be made available to bail applicants. The requirement to keep such records and to disclose such records should be reflected in Procedure Rules and Practice Directions. Where there is a substantial concern about the release of information about an individual to that individual (for example on grounds of national security) then that could be noted, but we can conceive of no other reason for refusing disclosure on the grounds of confidentiality.

This is a pressing issue. The alternative is for the First Tier Tribunal to ensure that bail refusal decisions provide a full account of the arguments presented by the SSHD and the applicant, and the reasons for the decision. Absent this, and so that progress is made with an applicant’s detention matter, that bail is not treated in isolation, and in the interests of justice, applicants need to be allowed to have sight of the records of proceedings or notes containing details of the evidence relied upon by the Tribunal when deciding to refuse then release on bail.

<sup>160</sup> First Tier Tribunal (Immigration & Asylum Chamber) document LIST07A\_A



## 5.8 CONCLUSION

Decisions in relation to release on bail by the Tribunal do not exist in isolation. Any release on Temporary Admission of a detained former offender by UKBA must be signed off by the Chief Executive of UKBA<sup>161</sup>. Under such circumstances UKBA caseowners are required to submit details of any Refusal of Bail notice to the Chief Executive. In this way, the Home Office is seen to be influenced to a degree by decisions on release made by the Tribunal, using a refusal at bail as evidence to support a refusal of Temporary Admission.

Greater use of bail in principle (as outlined in paragraphs 46 and 48 of the 2011 and current 2012 bail guidance) would also assist in those cases where an applicant is represented at bail under legal aid, but is unlikely to get more than a couple of funded bail applications<sup>162</sup>. A bail refusal, where the use of bail in principle pending resolution of practical obstacles might in fact have resulted in release, may have a negative effect on future applications of the merits test for bail.

Where it appears to a legal representative that unsupported assertions by the SSHD are being considered uncritically by the Tribunal during a hearing, or there is a simple practical barrier to release that under current conditions in the Tribunal is likely to result in a refusal, then for all the reasons listed immediately above this may prompt a withdrawal of the application during the hearing<sup>163</sup>. Unrepresented bail applicants facing even simple clerical errors in bail summaries, but without the skills and knowledge to challenge via videolink, but knowing that something is not fair, simply apply for bail repeatedly.

The revised bail guidance (2011 and 2012) offers the option of two new and slightly different options for bail in principle, yet this study has shown that these options are not used even where there appears to be a good case for doing so, and are even actively resisted by the Tribunal.

Directions to parties are similarly underused by the Tribunal in bail decision-making, despite being allowed for in the Procedure Rules. Only one direction was given in this study. Unless and until the requirement for the Tribunal to consider the timeliness and effectiveness of the actions of the SSHD is reintroduced to the bail guidance, the use of bail in principle can, in our view, reintroduce an appropriate element of urgency into consideration of release on bail. Failure to use directions to parties means that the same arguments over the evidential basis of assertions made before the Tribunal or in bail summaries can go on indefinitely over successive bail applications.

<sup>161</sup> UKBA *Enforcement Instructions and Guidance, Chapter 55 'Detention and Temporary Admission', Section 55.3.2.2. Available at <http://bitly.com/uRubkQ>*

<sup>162</sup> Personal communication, Legal Services Commission August 2012.

<sup>163</sup> As we have seen above, this study has found that withdrawals recommended by First Tier Tribunal judges to unrepresented applicants usually reflect the poor preparation of the case by the applicant.

# EASIER TO APPLY AGAIN: COMPLAINING ABOUT BAIL HEARINGS

## 6.1 INTRODUCTION

Each year around 11,000 immigration bail applications are heard at Tribunal hearing centres across the UK.<sup>164</sup> In any such process, judicial or otherwise, there will be applicants who, disappointed with the result of a decision, will seek to blame or complain about the decision maker. But this research suggests that the high proportion of repeat bail applications and high rate of withdrawal<sup>165</sup> seen at the Tribunal is in part related to the fact that the complaints process for bail hearings is, in effect, something of a dead end. When faced with apparent unfairness, the easiest and quickest route by far is simply to make a further bail application.

As a result of this, the opportunity for any learning and improvement on the part of the Tribunal is lost. For immigration detainees, especially those detained for over six months who have not yet been removed, the bail process offers only the same ‘circle of inaction’ between the Tribunal and UKBA. BID has suggested some remedies for this in the previous chapter that we believe have the potential to reduce the number of repeat bail applications and withdrawn applications. Bail applications, especially under the revised bail guidance of 2011, have the potential to be used as a means of progressing issues in an immigration case through greater use of adjournments, directions to parties, and bail in principle pending resolution of minor practical matters. As such bail hearings also have the potential to make a contribution toward ensuring – indirectly – that detention remains lawful.

Instead, as this research has shown, the tendency toward stasis in the system persists. Chapter 4 described the regular failure on the part of the Tribunal to follow its own guidance in relation to reliance on evidence made available to both parties. This research shows that the lack of progress between bail applications where facts are contested has the potential to contribute to extended detention periods, multiple bail applications, and a degree of loss of confidence in bail decisions. All of this at a time when some solicitors report that the administrative courts, currently under huge pressure, are increasingly expecting such issues to be ventilated in bail hearings.

This chapter will outline problems in the current system for complaining about Tribunal decision making on immigration bail. Bail decisions are not subject to appeal, but we examine the difficulties inherent in complaining about personal conduct in the Tribunal, or circumstances where the Tribunal appears to fail to follow its own rules. We will show how the opportunity for feedback and improvement in Tribunal decision making is lost as a result of these difficulties. We ask what can be done by those who wish to

<sup>164</sup> See Annex A of this report for statistics on the number of immigration bail applications lodged by hearing centre for 2008 – 2011.

<sup>165</sup> See Annex A of this report. The most recent statistics on withdrawal of bail applications show a rate of 34% for July to December 2011.

work constructively with the Tribunals Service to understand why it might be that judicial office holders do not appear to be engaging with the spirit of the revised President's bail guidance, or adhere to procedural rules, and the role of complaints and feedback to the Tribunal in this dynamic.

In the context of judicial concerns about the volume of repeat bail applications, this chapter also addresses 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.

Finally, we show that poor decision making or unacceptable conduct does not come without a significant cost to the detained applicant in one particular respect. Delays in provision of Section of Section 4 (1)(c) support, and particularly for dispersal accommodation, are currently running at several months for some applicants. Where a detainee is reliant on UKBA for a bail address they will simply be unable to lodge a further application for bail, possibly for several months. In this way, poor decision-making by the Tribunal that results in a failure to release may be contributing to significant extensions of time spent in detention, detention which may become unlawful.

## 6.2 WHO TO COMPLAIN TO?

At first glance it appears that for individuals who wish to complain about a decision made in any Tribunal, either with or without the benefit of legal advice, the choice of appropriate step to be taken is fairly clear. The Office for Judicial Complaints (OJC)<sup>166</sup> explains that where there is a material error of law the complainant may be able to appeal the decision.

*"The OJC cannot help you if you disagree with a [Judicial Officer Holder's] JOH's decision or if you think a JOH has made a legal error. If you are unhappy for this type of reason you may be able to appeal through the court system" (OJC, 2011: 2)<sup>167</sup> (emphasis added).*

However, appeal is not an option in relation to immigration bail decisions. First Tier Tribunal bail decisions are not appealable because decisions under the bail paragraphs of the Immigration Act 1971 are listed as excluded decisions in the Excluded Decisions Order. This leaves judicial review of the bail decision or a further bail application as the only remedies.

Where the issue at stake is the conduct of the judicial office holder this does fall within the remit of the Office for Judicial Complaints. The OJC explains that a complaint should first be made to the President of the relevant body if there is one, or otherwise be directed straight to the OJC. The tribunal president will refer the complaint upwards to the OJC and hence to the Lord Chancellor and the Lord Chief Justice if it appears that there may be a case for formal disciplinary action. Dissatisfaction by the complainant about the handling of the complaint, either by the tribunal president or the OJC, can be referred to the Judicial Appointments & Complaints Ombudsman (JACO). JACO can comment only on whether a complaint procedure was correctly followed, not on whether or not the decision to dismiss a complaint was correct<sup>168</sup>.

We have seen above in Chapter 3 how unpleasant or hostile conduct of the Tribunal towards applicants is taken very seriously by applicants, and often felt strongly both by applicants and others to be a form of unfairness. Unpleasant behaviour that may be the result of a tough day for a decision maker should be recognised for what it is, not simply a throwaway comment but an action with the potential for serious consequences for a person held in administrative detention. It is not for no reason that bail applicants are watched carefully on the day of a bail hearing in a couple of removal centres. Furthermore, the current severe delays in provision by UKBA of one type of Section 4 (1)(c) bail accommodation, may jeopardise the ability to re-lodge a bail application for several months with particularly severe consequences for ex-offenders (see Table 14 below).

<sup>166</sup> Office for Judicial Complaints, 'The Judicial Complaints (Tribunals)(No 2) Rules 2008', available at <http://bit.ly/Zc9lhp>. See also Office for Judicial Complaints, 'The Judicial Complaints (Tribunals) Rules 2008, Roles and Responsibilities', available at <http://bit.ly/Uqy1t8>

<sup>167</sup> *Ibid*

<sup>168</sup> 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>

### 6.3 ACTING JUDICIALLY: THE ATTITUDE OF THE TRIBUNAL TO THE PROCEEDINGS AND TO THE PARTIES

The two complementary approaches of any tribunal, the enabling approach and the inquisitorial approach, referred to by Jacobs (2011) are in his view a matter of duty not a matter of choice. The attitude of the office holder both to the proceedings and to the parties is part of the enabling approach, what Jacobs refers to “the manner in which the hearing is conducted and the atmosphere that is created” (Jacobs, 2011:1.45-1.47).

Jacobs goes on to point out that the Leggett review<sup>169</sup> of the tribunal system in 2001 noted that the enabling approach was especially important where public law entitlement was involved (in other words a case between citizen and state). We assume this stance to be no less firm where the applicant cohort is comprised not of citizens but of foreign nationals.

Jacobs notes, in relation to all types of tribunal, that the tribunal must act judicially and that there are two aspects to this obligation. The first is the basis on which the tribunal makes its decision, “*the appropriate recourse is by way of appeal*” (2011: 3.141). The second aspect

*“refers to the personal manner and behaviour of the members and their interpersonal skills. In this sense it refers to matters that do not affect the outcome of the proceedings”* (2011: 3.141).

However he almost immediately contradicts the latter sentence by noting that the two areas may overlap, noting “*a racist comment is the proper subject of a complaint, and may show that one of the parties did not have a fair hearing*” (2011: 3.142)

*“Discourtesy by a tribunal to a representative or a party may render a hearing unfair by creating the impression that the representative or party is not being allowed effectively to put a case to the tribunal”* (R v Hare (2004) Times 16 December 2004) cited in Jacobs, 2011: 10.95.

*“Aggression and hostility are not appropriate for a judge. The impression they create is not consistent with impartiality”* (2011: 10.95).

Inappropriate personal conduct, in creating an impression of partiality on the part of the tribunal, jeopardises procedural fairness in tribunal decision making<sup>170</sup> (a process rather than a right in itself). Though less likely, misconduct in the form of apparent partiality might take the form of humour towards one party as much as the use of racist language or other forms of discriminatory behaviour, or sarcastic or discourteous remarks. Bell (2009: 636-637)<sup>171</sup> describes eye rolling, smirking, frowning, shaking the head, yawning and exaggerated sighing as examples of judicial misconduct.

One barrister explained to BID how the manner of a First Tier judge may affect perceptions of the approach of the tribunal at a particular sitting:

*“I have also found the judge to be unnecessarily obstructive and confrontational which is not very pleasant. Not that being pleasant necessarily matters in a hearing (there are plenty of unpleasant but good judges) but it is an indication, in my view, of how negatively this particular judge views immigration cases generally. A couple of colleagues in chambers also mentioned succeeding in appeals against [this judge] on the basis of ‘perceived bias’”* (B28)

While the trend in recent years has been towards the independence of tribunals from sponsoring (indeed controlling) government departments, and this was a key recommendation of the Leggett inquiry (2001), it is not hard to see how certain types of conduct or personal approach on the part of the Tribunal may give rise to a perception in certain cases that the Tribunal is not independent of the Home Office or the UK Border Agency where immigration matters are under consideration, even where such conduct may not go so far as descending into the arena.

<sup>169</sup> See ‘Tribunals for Users – One System, One Service (2001: paras 7.4-7.5) cited in Jacobs (2011: 1.47).

<sup>170</sup> Where, broadly speaking, fairness is related to the interests of the parties, and justice has a wider remit.

<sup>171</sup> Bell, E., (2009), ‘Judicial misconduct’. *Commonwealth Law Bulletin* 35 (4): 619-647.

As part of this research, BID followed the progress of three complaints made by BID to the Tribunal. These 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.

## COMPLAINT 1

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.

*“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 which had prompted counsel to withdraw the application in the belief that Mr P was not receiving a fair hearing. In response to BID’s letter to the Tribunal, the judge in question responded via the Office of the Resident Judge. The judge began:

*“Thank you for showing me the documentation from BID. I have read it all, and to say that I feel highly insulted is an understatement.”*

The response from the judge did not address the specific concern raised by BID about comments made in relation to the success or otherwise of previous suicide attempts. Nor did it address the issue of apparently discrepant requirements for evidence made by the judge to the SSHD and the applicant, other than to note that this was a “gross distortion as to what happened”. The response ended with a lengthy paragraph detailing the judge’s views on the character of Mr P, including comments on his history of offending behaviour, truthfulness, lack of cooperation, level of reliability and responsibility.

When BID wrote again in response asking for the specific complaints to be addressed, we were told

*“[The judge] does not accept that he made an inappropriate comments or demonstrated any lack of adherence to bail guidance during the hearing” ... “It is not accepted by [the judge] that he made that comment, but even supposing that he did, put at its highest I find this was inappropriate and insensitive but does not demonstrate that he exceed the limits of appropriate behaviour or gave the appearance of being biased or prejudiced”... “It seems to me just as likely that counsel sought to withdraw the application because she came to the view that bail would otherwise be refused, such refusal or grant being the main options open to the Judge” (letter dated 18 April 2012 to BID from a Resident Senior Judge)*

The Office for Judicial Complaints (OJC) is responsible for the “maintenance and provision of the 2008 Rules”<sup>172</sup>. These Rules state at para 7 (1)

<sup>172</sup> See footnote 168 for details of these Rules.

*“The investigating judicial officer must reject a complaint, or part of a complaint, if – (b) it is about a judicial decision or judicial case management, and raises no question of misconduct”.*

*(3) Where an account of facts given by a complainant differs from an account given by the judicial office holder about whom the complaint is made, the investigating judicial office holder should consult any independent evidence which exists which may verify the facts in dispute before dismissing the complaint, unless to do so would be disproportionate in all the circumstances”*

We believe the example of Complaint 1 demonstrates the difficulty inherent in making a complaint about the personal conduct of judicial office holders. In effect, resolution rests on individual memory and records of events as they unfolded in the hearing room. In this case the contemporaneous record of counsel was not helpful. It is not clear what might constitute evidence sufficiently independent to be acceptable to the investigating judicial officer. Possibly a statement from a visitor to the court during the hearing, assuming they are traceable? Where counsel is not instructed for a bail hearing, it is difficult to imagine an unrepresented bail applicant mounting a successful complaint about the personal conduct of a judge<sup>173</sup>.

## COMPLAINT 2

Mr A and Mr B were both clients of BID. At the time of the bail hearing in question Mr A had been detained for 2 months and Mr B for three, both had partners and children who were not detained. Their bail applications were lodged at a hearing centre outside London and heard consecutively by the same judge towards the end of 2011. In both cases the judge indicated to the barrister that he had not read the bundle prior to the hearing. In one case in particular this evidence included detailed and relevant information in relation to the welfare of children of the family, the risk of re-offending, the risk of absconding, and the imminence of removal, all of which were at issue in the application for release. Release was refused by the judge in both cases, after an admitted refusal to consider the evidence in either bundle that had been prepared by BID.

A letter of complaint by BID to the Resident Senior Immigration Judge at the hearing centre received no reply. An e-mail sent by BID in early March 2012 was acknowledged by the hearing centre, but there was no further response. This was followed up by a further e-mail from BID at the end of March seeking a response.

At the end of March 2012 the Resident Senior Immigration Judge wrote to BID to say that the original letter had been referred to the President’s office. At the start of April 2012 the IAC Customer Service Centre in Loughborough replied to BID to say that as BID was a third party to the two cases they were unable to provide further details in line with their legal obligation under the Human Rights Act, DPA and treatment of private information. They would need authorisation from the legal representative (this was in fact BID) in both cases. The Customer Service Centre also erroneously noted in this letter that one of the bail applications had been withdrawn. BID replied pointing out the errors in this response and asking for a response to the original complaint made almost three months earlier. Six months after the bail hearings in question, no substantial response to BID’s concerns expressed on behalf of our clients has been received.

<sup>173</sup> It is nonetheless possible to work out features that should be present in a complaint about conduct of a judicial office holder for it to gain any purchase with an investigating JOH. Jacobs notes in relation to the duty of fairness of the tribunal and possible complaints that “by silence or delay in raising the issue, the party affected may be treated as having waived the right to fairness in that particular respect or the right to object on that ground” (Jacobs, 2011: 3.263). From the judgment in *Azia (proof of misconduct by judge)[2012] UKUT 00096 (IAC)* we learn that allegations of misconduct must be substantiated or proved. The affected party must act promptly to prepare and disclose evidence. Failure to do so is unfair to the other party, and not in the interests of justice.

## COMPLAINT 3

Mr K made an application for bail and the application was heard in late 2010. The Tribunal noted in the written decision that

*“15 months is well within the accepted guideline of 20-24 months”.*

This decision came to light shortly afterwards in early 2011 when, by this time, BID had begun to represent the applicant. It was noted that the bail summary prepared by UKBA now cited this element of the written bail decision word for word as a ground for refusal of bail in a subsequent bail application made in February 2011. BID then spoke by phone with the judge in question, who did not wish to discuss this point, after which BID wrote a letter to the judge asking what reference in either guidance or law had been relied on for the phrase “accepted guideline of 20-24 months” in relation to detention. The judge replied in writing

*“I am not prepared to enter into further discussion... I have made my decision and if the applicant is unhappy with it he must decide whether to renew his application or seek some other remedy” (letter 4.5.11 from the First Tier judge in question).*

In this letter the judge is suggesting that a further bail application is a suitable remedy for dissatisfaction with a Tribunal decision. This left unaddressed the fact that once in circulation embedded in a bail summary, the damage of this comment in any future bail decision making process, to a great extent, had been done. BID did not, at that point, seek to comment on the decision to refuse release made by a judicial office holder who appeared to hold the view that administrative detention for two years regardless of the facts of the case is acceptable, and who was not prepared to state the basis on which this statement was made.

On receipt of this letter BID then wrote to the President of the First Tier Tribunal IAC in mid-2011 seeking clarification. No response has been received to date.

### 6.4 NO FEEDBACK, NO IMPROVEMENT

Faced with the limited resources that are available for not-for-profit and publicly funded legal representatives to make and follow up on complaints, and only limited engagement with complaints when we make them, it is almost always simpler and quicker to lodge a further bail application for our clients. Indeed, in the case of Complaint 3 above, the judge in question suggested this as a remedy.

Assuming the resources to make a complaint, a complaint about the personal conduct of a judicial office holder in relation to a decision about release from detention can never, even if upheld by the Tribunal or the OJC, or if refused but later set aside on appeal to the Judicial Appointments & Complaints Ombudsman (JACO), result in anything more than a recommendation by JACO for a review of an investigation or determination by a Review Body (JACO, undated: 9)<sup>174</sup>. Even on receipt of such a finding by the Judicial Appointments & Complaints Ombudsman, the quickest route to release for a detainee will almost certainly be a further application for Tribunal bail or an urgent application for judicial review of the decision to refuse bail. Most represented bail applicants will have given up on the complaint long before this point, with the end result that the opportunity for recommendations to Tribunal President is lost.

It goes without saying that the obstacles to understanding the complaints process, let alone mounting and following through successfully with a complaint, are almost insurmountable for unrepresented bail applicants in detention, often with poor or non-existent written or spoken English, and generally highly restricted internet access within removal centres. And as we saw in the example of Complaint 1, if the complainant has a criminal record, whether for a low-level offence or a serious violent or sexual offence, this may be deployed against them during the complaint process as if this were relevant in some way.

<sup>174</sup> Office for Judicial Complaints, ‘The Judicial Complaints (Tribunals)(No 2) Rules 2008’, available at <http://bit.ly/Zc9lhp>



For someone who has already been detained for six months or more and has still not been removed, priority will understandably be given to efforts to obtain release by the quickest means possible, while redress for possibly unacceptable conduct by the Tribunal during earlier efforts to obtain release on bail becomes a matter for later consideration, if at all. Table 14 below shows the options available to a detainee when faced with conduct likely to amount to a material error of law during a bail hearing.

Table 14: Options when faced with conduct likely to amount to a material error of law during a bail hearing

When	Remedy	Complications
<b>During the hearing</b>	Short adjournment to take instructions on whether to withdraw the application. Withdraw the application and re-apply <i>within 28 days</i> .	<ul style="list-style-type: none"> <li>• Subject to availability of Section 4 (1)(c) bail accommodation.</li> <li>• Grant of dispersal accommodation valid only for 14 days, so must re-lodge immediately, given current delays of several weeks or months for grants of dispersal accommodation, or wait months for a further grant.</li> <li>• Lodging again within 28 days may affect the time given to the case by the Tribunal<sup>175</sup>.</li> <li>• Sureties may not be able to attend court again this quickly, for financial or employment reasons.</li> </ul>
	Short adjournment to take instructions on whether to withdraw the application. Withdraw the application and reapply <i>after 28 days</i> .	<ul style="list-style-type: none"> <li>• Will need to make a further application for Section 4 (1)(c) bail accommodation. There are delays of several weeks or months for grants of dispersal accommodation at present, which will stop applicants reliant on Section 4 support from applying for release during that time.</li> <li>• It may be that a further four weeks in detention is the only significant change in the facts.</li> </ul>
<b>After the hearing</b>	Make an urgent application for judicial review of the refusal of bail, with bail as interim relief.	<ul style="list-style-type: none"> <li>• There may be problems getting accommodation and support if the applicant was reliant on a grant of Section 4 (1)(c) for a bail address.</li> </ul>
	Apply to the President of the First Tier Tribunal IAC to set aside the decision <sup>176</sup> .	<ul style="list-style-type: none"> <li>• The application must be filed within 10 days of service of the relevant notice of decision, and there must be consultation with all parties.</li> <li>• There is no right of appeal against the decision to refuse to set aside.</li> </ul>

However, the problem with simply making a repeat bail application, aside from the waste of resources in the Tribunal system and ongoing loss of liberty of the individual concerned when they may have been released at an earlier date, is that the opportunity for the Tribunal to learn lessons and to improve bail

<sup>175</sup> See paragraph 67, Presidents bail guidance, which states "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 a 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".

<sup>176</sup> The Tribunal (Procedure) (Amendment) (No. 2) Rules 2011 give the President power to set aside any order, notice of decision or determination on the ground that it was wrongly made as a result of an administrative error on the part of the Tribunal or its staff. A decision to set aside can only be made following consultation with all parties to the appeal. An application to set aside must be filed within 10 days of service of the relevant notice of decision or determination where the party is in the UK and 28 days where the party is outside the UK. There is no right of appeal against the decision to refuse to set aside. Available at <http://www.legislation.gov.uk/ukxi/2011/2840/made>

decision making in this new world of longer term detention is lost. One aspect of the work of the JACO is “through recommendations and constructive feedback, to improve standards and practices in the authorities or departments concerned” (JACO website)<sup>177</sup>

The evidence in this study suggests that little has changed since the BID report ‘A nice judge on a good day’ of 2010 in terms of the “cycle of inaction”. Guidance is one thing, but for any system to improve there must be feedback. As things stand, the complaint process for immigration bail does not appear to allow for this. We believe this state of affairs may lead to increased disillusionment and a loss of confidence in Tribunal decision making.

By anyone’s account the odds are stacked quite highly against applicants for immigration bail. They are often unrepresented (the tribunal system has been designed to allow for this), may speak or read no English, they appear at bail hearings via a videolink often through an interpreter, they may come from a country where it is unwise to challenge the authorities, and, to cap it all, they are held as a matter of administrative convenience. BID believes that no efforts should be spared in ensuring that Tribunal decision making is as good as it could be for such applicants. Complaints to the Tribunal about the conduct of bail hearings will not provide speedy redress for the individual as we have seen, but constructive responses to complaints can demonstrate accountability on the part of the Tribunal, and contribute to improvements to the system where necessary<sup>178</sup>.

The revised bail guidance for judges was a helpful if overdue response to the new regime of ‘automatic’ deportation and the wider detention powers now available to the SSHD. However, we believe that there is also an opportunity for the First Tier Tribunal IAC to examine its handling of complaints about the conduct of office holders during bail hearings. Instead of its current somewhat defensive approach to complaints, and instead of taking the view that repeat bail applications are the result of applicants and their legal representatives playing the ‘lottery’ of judges, waiting for a more sympathetic judge at a subsequent hearing, we believe the Tribunal should look at the role of its own decision making and systems for feedback and complaint for some of the reasons why it is necessary for so many repeat applications to be made. If nothing changes, then the simplest and quickest remedy for dissatisfaction with the conduct of a bail hearing will remain a further application for release.

However, this still leaves significant areas of potential dissatisfaction where the tribunal appears to have

- 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.
- Done something very different to what is suggested in the bail guidance.
- Failed to deploy options outlined more clearly and more strongly in the recently revised bail guidance, such as the use of bail in principle
- Been lacking in judicial knowledge of local/specialist type<sup>179</sup>, for example the existence or not of arrangements for electronic monitoring at Barry House (so-called Section 4 (1)(c) bail accommodation provided by UKBA and used by a large proportion of bailed detainees), as described in Chapter 5, to the degree that it could be seen to jeopardise the fairness of a decision.

It is not always a simple matter to distinguish inappropriate conduct from a legal decision, or the point at which personal conduct amounts to a material error of law. Where does failure to follow the bail guidance or the Procedure Rules lie? There appears to be a grey area of Tribunal actions in relation to the conduct of bail hearings and bail decision making which falls outside the remit of the OJC in relation to personal conduct<sup>180</sup> but which are not clearly failures in law, and which as bail decisions are in any event unappealable.

<sup>177</sup> Ministry of Justice, Judicial Appointments and Conduct Ombudsman homepage, available at [www.justice.ov.uk/about/jaco](http://www.justice.ov.uk/about/jaco)

<sup>178</sup> We understand that the Office for Judicial Complaints has recently carried out a review of the rules and regulations governing judicial discipline.

<sup>179</sup> Jacobs (2011) refers to the different forms of the tribunals own knowledge, namely general, local, specific, or specialist knowledge. On local knowledge “if the tribunal is a local one, it may be entitled to rely on its members’ knowledge of local conditions” (2011: 10.26); on specialist knowledge “the member’s knowledge may be used to help the tribunal in assessing the evidence” (2011: 10.30)

<sup>180</sup> The OJC notes “the group is therefore of the view that it would be helpful for the name to reflect more closely the remit of the office” (para 8, ‘A Review of the Rules & Regulations Governing Judicial Discipline’) page 13. 29 Feb 2012.

# BAIL DECISIONS IN THE TRIBUNAL: FAST BUT NOT FAIR

## 7.1 BAIL AND UNLAWFUL DETENTION

The current bail guidance states:

*“A First-tier Tribunal Judge’s power is simply to grant bail, which is itself a restriction of liberty. The judge has no power to declare the detention unlawful and give any relief if it is considered to be; such matters need to be decided in the Administrative Court or in a claim for damages. Given the wide ranging powers of the immigration authorities in relation to the detention of non-nationals, First-tier Tribunal Judges should normally assume that a person applying for immigration bail has been detained in accordance with the immigration laws. **However, it will be a good reason to grant bail if for one reason or another continued detention might well be successfully challenged elsewhere**” (HMCTS, 2012: paragraph 5) (emphasis added)<sup>181</sup>*

The bail guidance appears to be saying that the Tribunal can take legality of detention into account, indeed that it is increasingly required to take into account the likelihood that detention might be unlawful when making a decision about whether to grant bail. The guidance itself contains many points coming out of the jurisprudence on the legality of detention. Bail decisions are not necessarily but can be determinative of the lawfulness of detention.

We have seen in Chapter 3 of this report that a number of the criteria that First Tier judges are required to consider when deciding whether or not to grant bail are pure lawfulness points. For example, the length of detention to date and the likely future duration of detention<sup>182</sup>, and the need for the reasons given by the SSHD for the continued detention of the applicant to be specific to and demonstrate consideration of the applicant’s circumstances, not merely make a statement of general policy. In this new era of extremely long-term detention, where a bail applicant has the benefit of legal representation and has been detained for a significant period, much of the evidence submitted to the Tribunal as part of their application for release on bail may be of a similar nature and quantity to that used for unlawful detention cases in the High Court, as we have shown above in Chapter 4.

Given these similarities, the current burden on the Administrative Court (that part of the High Court that deals with claims for unlawful detention, often following a claim for judicial review), and the lengthy delays experienced by detainees wishing to challenge the lawfulness of their detention, it is perhaps understandable that consideration is being given in some quarters to the notion of determinations of unlawful detention being moved to the First Tier Tribunal. Indeed, the perception is that the specialist

<sup>181</sup> President of the First Tier Tribunal Immigration and Asylum Chamber, (2012), ‘Presidential Guidance Note No 1 of 2012: Bail guidance for judges presiding over immigration and asylum hearings’. Available via HM Courts & Tribunals Service website at <http://www.justice.gov.uk/tribunals/immigration-asylum/rules-and-legislation>

<sup>182</sup> *Ibid*, paragraphs 16 through 20.

tribunals are expert in their field of the law and due deference should be given in view of this<sup>183</sup>. However, the lawfulness of detention is not an issue that First Tier judges in the Immigration and Asylum Chamber are particularly specialist in. While unlawful detention is not legally complicated it can be complex on factual grounds. This research has highlighted serious concerns about the reliance by the Tribunal on arguments that have not been substantiated before applicants, and BID would argue that in relation to issues of criminal risk it cannot be said at present that the First Tier Tribunal provides specialist expertise in relation to the factual content of such cases.

Bail decisions produced by the Tribunal are not full written determinations, and they do not make findings or lay out the factual evidence of both parties. We have seen above in Chapter 3 that the content of written decisions is largely shaped by the format of Refusal of Bail notices. Bail decisions fail to provide the full account necessary for assessing the development of a case that is required when deciding whether continued detention is lawful. This must mean that bail decisions are to be treated with great care by any party considering evidence as to whether or not detention has become unlawful.

Nevertheless, the Tribunal provides all parties to a case with an opportunity for independent assessment of the issues relating to a person's application for bail and for release from detention. If the recommendations made by BID as a result of this research were to be implemented, meaning among other things that evidence were to be properly accounted for in fully determined decisions, and if directions were issued by the Tribunal for steps to be taken by both parties to a case, the resulting bail decisions could make a contribution to an eventual assessment of the lawfulness of continued detention in a particular case.

This research has also shown that as things stand, the First Tier Tribunal (IAC) environment is characterised by constraints on the time available for bail hearings dictated by case management needs, including the need to list bail hearings within a short amount of time, and complicated by the practicalities of video links and the necessity to use interpreters. This report has also shown that insufficient time may be available for consideration of the often sizeable bundles submitted by long-term detainees in support of their application for release. If the Tribunal were to strictly enforce paragraph 51 (7) of the Tribunal Procedure Rules, and if the UKBA were to begin to substantiate assertions made in bail summaries, the pressure on available time in bail hearings would only increase. The Tribunal is currently able to list bail applications and deliver decisions quickly, but it appears to do so in the absence of substantiated arguments on the part of the SSHD in too many cases, most notably where issues of level of criminal risk on release must be considered.

While immigration detention of only one day may be held to be unlawful, it is those people who have been held for several months or years without removal where the need to consider lawfulness is most urgent. However, in BID's view the First Tier Tribunal of the Immigration and Asylum Chamber is not the appropriate place for this to be done. Bail decision-making as currently delivered in the First Tier Tribunal, including in relation to those issues touching on lawfulness of detention, is certainly fast and efficient, but it is not, in BID's view, necessarily accurate or fair. In addition, there is a serious risk that if the tribunal system is allowed to determine unlawful detention, then this can create an issue estoppel in the future (when perhaps new evidence has emerged), therefore preventing a detainee from making a claim for damages for unlawful detention. BID believes that in the absence of substantiated arguments, full written determinations, disclosure of records of proceedings or judges' notes of evidence, and a First Tier judiciary trained in assessing criminal risk, it must be impossible for the First Tier Tribunal IAC to have a role in determining the continued lawfulness of detention.

183 For example SSHD v. AH (Sudan) and others [2007] UKHL 49, Lady Hale at paragraph 30. Available at <http://bit.ly/SbCmtV>

# BID'S RECOMMENDATIONS

BID makes a number of recommendations arising out of this research. These have been arranged firstly by issue, and secondly by the agency to which they apply.

## RECOMMENDATIONS BY ISSUE

### Barriers arising from the use of videolink bail hearings

1. When funds allow, the specification of videolink technology should be raised and infrastructure upgraded in Tribunal hearing centres and immigration removal centres, so as to improve the video link experience and enable the full participation of all parties.
2. The Tribunal should double the time available for representatives to consult with their client from 10 minutes to 20 minutes, or longer where an interpreter is required.
3. Where a joint bail application is made by an adult family, we recommend that counsel be allowed twenty minutes for consultation with each of the joint applicants, to run consecutively.
4. Tribunal hearing centres should be linked to each other via videolink to allow sureties to appear in the hearing centre nearest them regardless of where the bail hearing is being heard.
5. The tribunal should consider the possibility of separate videoconference booths for the use of barristers and their detained clients (of the sort found at magistrates' courts), which could then be booked for longer periods outside the timings of court listings.
6. There should be no upper time limit to the length of videolink hearings from prisons for the purpose of immigration bail hearings. If that is genuinely not practical as a result of typical prison regimes then videolink hearings from prisons to Tribunal hearing centres should be capped at 120 minutes rather than 60 minutes.

### Interpretation

7. The Tribunal must facilitate complete, comprehensive interpretation of bail proceedings in their entirety, including evidence discussed and arguments, even - and especially - in those bail applications where applicants have long detention histories, complex immigration cases, and where the volume of evidence and argument before the tribunal is likely to be highest.

## Sureties

8. When assessing sureties the Tribunal should no longer require geographical proximity to the bail address where an applicant is reliant on Section 4 (1)(c) bail accommodation, since under the new COMPASS accommodation contracts this may be impossible for a significant number of bail applicants from now on.
9. As in the criminal justice system, immigration bail sureties should not be expected by the Tribunal to exercise any control over the commission of further offences by the bail applicant.
10. The Tribunal should not create additional and unnecessary conditions for sureties.
11. The Tribunal should consider the use of continuous sureties in immigration bail applications.

## Case management and length of listings

12. The First Tier Tribunal should again review the number of bail applications listed for each video link session, so as to ensure adequate time for legal representatives to take instructions, comprehensive interpretation of hearings in their entirety, and for consideration of greater volumes of evidence especially where the applicant has been detained long term. The number of bail hearings on a list may need to be reduced.
13. The number of bail hearings listed for each session should also be reviewed to ensure that decision makers have sufficient preparation time. There may be value in identifying those bail applicants who have been held in detention for more than 6 months, and listing them for hearing during sessions where fewer than six bail cases are to be heard.

## Disclosure of evidence

14. The Tribunal should scrupulously observe Rule 51 (7) of the Tribunal Procedure Rules (“subject to s108 of the 2002 Act, the Tribunal must not take account of any evidence that has not been made available to all the parties”).
15. As a general principle the UKBA must fulfil its duty to assist the Tribunal and must therefore disclose all evidence upon which it relies to oppose release on bail. The Tribunal must use adjournments and directions to order disclosure where it is not forthcoming.
16. UKBA should append evidence for arguments made in a bail summary with the bail summary at the point at which it is served on the tribunal and the applicant, so as to allow proper consideration and response.
17. The tribunal should use its existing powers to direct both parties to provide evidence and information, and its powers to grant bail in principle or to adjourn a hearing to allow for practical barriers to be dealt with. It can no longer be considered acceptable for the tribunal to avoid this responsibility by in effect ‘returning’ a person to detention where the option exists for the use of adjournment, directions to parties, and bail in principle.

## Specific types of evidence

18. The Tribunal must provide written reasons for reliance on the SSHD’s opinion on risk of reoffending above any such assessment generated in the criminal justice system by NOMS.
19. The statutory restriction on the grant of bail to prevent future offending is inappropriate and should be repealed.

20. Where high risk of harm to the public on release is argued, the Tribunal should always seek clarification of which type of structured risk assessment and management system is being relied upon by the SSHD (the UKBA Harm Matrix removal prioritisation scoring system, or 'serious harm' in the criminal justice sense measured using OASys or similar), and require supporting evidence.
21. The Tribunal should not rely on unsubstantiated arguments in relation to adverse behaviour in detention on the part of the applicant so long as the information systems in use by IRC contractors and UKBA fail to distinguish between victim and aggressor in regular reporting, or consider mitigating factors such as mental illness.
22. Imminence of removal on its own should never be the sole reason for refusing release on bail. In order for removal to be considered imminent the Tribunal should always require evidence of a flight booking and written confirmation from an embassy or High Commission that they will issue a travel document within a specified time. Both the Tribunal and the SSHD should consider imminent removal only those removals that can take place within four weeks, in line with the UKBA's own guidance.
23. Assertions of high absconding risk should be substantiated before the Tribunal in the face of the Home Office's own findings (2005) of absconding rates of only around 10%, and the arguments of both parties in relation to absconding risk should be set out by the Tribunal in any written decision.
24. Once a detainee's licence period has expired, unless they are MAPPA nominals or there is a restraining order, Sexual Offences Protection Order or other ancillary order in place, their presumed level of risk of re-offending and risk of harm to the public on release should no longer be part of bail decision making without a fresh assessment using a recognised structured risk assessment process such as OASys.
25. Judicial decision makers in the First Tier Tribunal (IAC) should be provided at the earliest opportunity with expert training on the assessment and management of criminal risk, provided by NOMS, to include advice on the weight to give to aspects of risk assessment and which order in which to consider them, to ensure adequate risk management on release.
26. The Tribunal and NOMS should jointly determine how offender management information could best be provided to the tribunal once a Licence has expired.
27. All agencies must be prepared to work together to put safeguards in place where the genuinely highest risk individuals cannot be removed from the UK within a reasonable time and *must* therefore be released, since such individuals cannot be held indefinitely.
28. The UKBA must immediately comply with both the bail guidance and its own agreement with the National Offender Management Service in relation to disclosure of the NOMS1 form containing offender management information.
29. The NOMS1 form should be served by the UKBA on both the Tribunal and the representative alongside the bail summary on the day preceding the bail hearing. Where a bail applicant is unrepresented, the NOMS1 form should be provided directly to the applicant in the removal centre by fax along with the bail summary.

### **Moving detention cases towards resolution**

30. The Tribunal Procedure Rules should contain a requirement that there must be a record of proceedings noting details of evidence presented, arguments made, directions given to parties, and detailed reasons for the decision to refuse release.



31. The Tribunal Procedure Rules should contain a requirement for all jurisdictions that, on application, all parties must be provided with a copy of the record of proceedings and judge's note of evidence, as would anyway be required if the decision in question was to be subject to judicial review.
32. The Tribunal should take full advantage of its own complaints system to improve bail decision making, in consultation with stakeholders.
33. Written bail decisions should outline what further steps might need to be taken by either party in the case before a subsequent bail hearing or within a set time scale (for example, steps to be taken by either party in relation to a travel document application).
34. Written bail decisions should detail arguments presented by the UKBA and the applicant as well as the reasons for refusing bail.
35. The Refusal of Bail notice should be redesigned. At present the notice is structured to prompt inclusion only of negative information about the applicant that has prompted the refusal of bail, yet the Refusal of Bail notice may be relied on by UKBA or the higher courts without sight of findings during the bail hearing that are advantageous to the applicant.
36. The Tribunal should make greater use of its power to grant bail in principle pending the provision of further information to the Tribunal within 48 hours, especially where this concerns surety paperwork that can easily be provided, and where bail would otherwise be refused.
37. The Tribunal should make greater use of its power to adjourn bail hearings.
38. The Tribunal should make greater use of its power to give directions to parties. Directions should be noted in the Refusal of Bail notice and the judge's record of proceedings.

## Other

39. The Legal Service Commission should ensure that there is no financial disincentive in the legal aid fee structure for providers of immigration advice to adequately explore issues relating to criminal risk and delays in the provision of UKBA Section 4 (1)(c) bail accommodation.
40. The statutory restriction on the grant of bail that relates to the mental health of the bail applicant should be removed. Immigration detention should never be used for the purpose of medical treatment.
41. The issue of a detainee's mental health should be 'neutral' in relation to decisions in relation to release on bail.

## RECOMMENDATIONS BY AGENCY

### First Tier Tribunal (IAC) & HM Courts & Tribunals Service

1. The Tribunal should scrupulously observe Rule 51 (7) of the Tribunal Procedure Rules (“subject to s108 of the 2002 Act, the Tribunal must not take account of any evidence that has not been made available to all the parties”).
2. The tribunal should use its existing powers to direct both parties to provide evidence and information, and its powers to grant bail in principle or to adjourn a hearing to allow for practical barriers to be dealt with. It can no longer be considered acceptable for the tribunal to avoid this responsibility by in effect ‘returning’ a person to detention where the option exists for the use of adjournment, directions to parties, and bail in principle.
3. As a general principle the UKBA must fulfil its duty to assist the Tribunal and must therefore disclose all evidence upon which it relies to oppose release on bail. The Tribunal must use adjournments and directions to order disclosure where it is not forthcoming.
4. The Tribunal must provide written reasons for reliance on the SSHD’s opinion on risk of reoffending above any such assessment generated in the criminal justice system by NOMS.
5. Where high risk of harm to the public on release is argued, the Tribunal should always seek clarification of which type of structured risk assessment and management system is being relied upon by the SSHD (the UKBA Harm Matrix removal prioritisation scoring system, or ‘serious harm’ in the criminal justice sense measured using OASys or similar), and require supporting evidence.
6. The Tribunal should not rely on unsubstantiated arguments in relation to adverse behaviour in detention on the part of the applicant so long as the information systems in use by IRC contractors and UKBA fail to distinguish between victim and aggressor in regular reporting, or consider mitigating factors such as mental illness.
7. Imminence of removal on its own should never be the sole reason for refusing release on bail. In order for removal to be considered imminent the Tribunal should always require evidence of a flight booking and written confirmation from an embassy or High Commission that they will issue a travel document within a specified time. Both the Tribunal and the SSHD should consider as imminent removal only those removals that can take place within four weeks, in line with the UKBA’s own guidance.
8. Assertions of high absconding risk should be substantiated before the Tribunal in the face of Home Office findings of absconding rates of only around 10%, and the arguments of both parties in relation to absconding risk should be set out by the Tribunal in any written decision.
9. Once a detainee’s licence period has expired, unless they are MAPPA nominals or there is a restraining order, Sexual Offences Protection Order or other ancillary order in place, their presumed level of risk of re-offending and risk of harm to the public on release should no longer be part of bail decision making without a fresh assessment using a recognised structured risk assessment process such as OASys.
10. Judicial decision makers in the First Tier Tribunal (IAC) should be provided at the earliest opportunity with expert training on the assessment and management of criminal risk, provided by NOMS, to include advice on the weight to give to aspects of risk assessment and which order in which to consider them, to ensure adequate risk management on release.
11. The Tribunal and NOMS should jointly determine how offender management information could best be provided to the tribunal once a Licence has expired.

12. All agencies must be prepared to work together to put safeguards in place where the genuinely highest risk individuals cannot be removed from the UK within a reasonable time and *must* therefore be released, since such individuals cannot be held indefinitely.
13. All agencies must be prepared to work together to put safeguards in place where the genuinely highest risk individuals cannot be removed from the UK within a reasonable time and *must* therefore be released, since such individuals cannot be held indefinitely.
14. The Tribunal and NOMS should jointly determine how offender management information could best be provided to the tribunal once a Licence has expired.
15. The Tribunal Procedure Rules should contain a requirement that there must be a record of proceedings noting details of evidence presented, arguments made, directions given to parties, and detailed reasons for the decision to refuse release.
16. The Tribunal Procedure Rules should contain a requirement for all jurisdictions that, on application, all parties must be provided with a copy of the record of proceedings and judge's note of evidence, as would anyway be required if the decision in question was to be subject to judicial review.
17. The Tribunal should take full advantage of its own complaints system to improve bail decision making, in consultation with stakeholders.
18. Written bail decisions should outline what further steps might need to be taken by either party in the case before a subsequent bail hearing or within a set time scale (for example, steps to be taken by either party in relation to a travel document application).
19. Written bail decisions should detail arguments presented by the UKBA and the applicant as well as the reasons for refusing bail.
20. The Refusal of Bail notice should be redesigned. At present the notice is structured to prompt inclusion only of negative information about the applicant that has prompted the refusal of bail, yet the Refusal of Bail notice may be relied on by UKBA or the higher courts without sight of findings during the bail hearing that are advantageous to the applicant.
21. The Tribunal should make greater use of its power to grant bail in principle pending the provision of further information to the Tribunal within 48 hours, especially where this concerns surety paperwork that can easily be provided, and where bail would otherwise be refused.
22. The Tribunal should make greater use of its power to adjourn bail hearings.
23. The Tribunal should make greater use of its power to give directions to parties. Directions should be noted in the Refusal of Bail notice and the judge's record of proceedings.
24. When assessing sureties the Tribunal should no longer require geographical proximity to the bail address where an applicant is reliant on Section 4 (1)(c) bail accommodation, since under the new COMPASS accommodation contracts this may be impossible for a significant number of bail applicants from now on.
25. As in the criminal justice system, immigration bail sureties should not be expected by the Tribunal to exercise any control over the commission of further offences by the bail applicant.
26. The Tribunal must not create additional and unnecessary conditions for sureties.
27. The Tribunal should consider the use of continuous sureties in immigration bail applications.
28. The issue of a detainee's mental health should be 'neutral' in relation to decisions in relation to release on bail.

29. When funds allow, the specification of video link technology should be raised and infrastructure upgraded in Tribunal hearing centres and immigration removal centres, so as to improve the video link experience and enable the full participation of all parties.
30. The Tribunal should double the time available for representatives to consult with their client from 10 minutes to 20 minutes, or longer where an interpreter is required.
31. Where a joint bail application is made by an adult family, we recommend that counsel be allowed twenty minutes for consultation with each of the joint applicants, to run consecutively.
32. Tribunal hearing centres should be linked to each other via video link to allow sureties to appear in the hearing centre nearest them regardless of where the bail hearing is being heard.
33. The tribunal should consider the possibility of separate videoconference booths for the use of barristers and their detained clients (of the sort found at magistrates' courts), which could then be booked for longer periods outside the timings of court listings.
34. The Tribunal must facilitate complete, comprehensive interpretation of bail proceedings in their entirety, including evidence discussed and arguments, even - and especially - in those bail applications where applicants have long detention histories, complex immigration cases, and where the volume of evidence and argument before the tribunal is likely to be highest.
35. The First Tier Tribunal should again review the number of bail applications listed for each video link session, so as to ensure adequate time for legal representatives to take instructions, comprehensive interpretation of hearings in their entirety, and for consideration of greater volumes of evidence especially where the applicant has been detained long term. The number of bail hearings on a list may need to be reduced.
36. The number of bail hearings listed for each session should also be reviewed to ensure that decision makers have sufficient preparation time. There may be value in identifying those bail applicants who have been held in detention for more than 6 months, and listing them for hearing during sessions where fewer than six bail cases are to be heard.

### UK Border Agency

1. As a general principle the UKBA must fulfil its duty to assist the Tribunal and must therefore disclose all evidence upon which it relies to oppose release on bail. The Tribunal must use adjournments and directions to order disclosure where it is not forthcoming.
2. UKBA should append evidence for arguments made in a bail summary with the bail summary at the point at which it is served on the tribunal and the applicant, so as to allow proper consideration and response.
3. Assertions of high absconding risk should be substantiated before the Tribunal in the face of the Home Office's own findings (2005) of absconding rates of only around 10%.
4. The UKBA must immediately comply with both the bail guidance and its own agreement with the National Offender Management Service in relation to disclosure of the NOMS1 form containing offender management information.
5. The NOMS1 form should be served by the UKBA on both the Tribunal and the representative alongside the bail summary on the day preceding the bail hearing. Where a bail applicant is unrepresented, the NOMS1 form should be provided directly to the applicant in the removal centre by fax along with the bail summary.

6. All agencies must be prepared to work together to put safeguards in place where the genuinely highest risk individuals cannot be removed from the UK within a reasonable time and *must* therefore be released, since such individuals cannot be held indefinitely.
7. The issue of a detainee's mental health should be 'neutral' in relation to decisions in relation to release on bail.
8. When funds allow, the specification of video link technology should be raised and infrastructure upgraded in Tribunal hearing centres and immigration removal centres, so as to improve the video link experience and enable the full participation of all parties.

## **NOMS**

1. All agencies must be prepared to work together to put safeguards in place where the genuinely highest risk individuals cannot be removed from the UK within a reasonable time and *must* therefore be released, since such individuals cannot be held indefinitely.
2. The Tribunal and NOMS should jointly determine how offender management information could best be provided to the tribunal once a Licence has expired.

## **HM Prison Service**

1. There should be no upper time limit to the length of video link hearings from prisons for the purpose of immigration bail hearings. If that is genuinely not practical as a result of typical prison regimes then video link hearings from prisons to Tribunal hearing centres should be capped at 120 minutes rather than 60 minutes.

## **Home Office**

1. The statutory restriction on the grant of bail to prevent future offending is inappropriate and should be repealed.
2. The statutory restriction on the grant of bail that relates to the mental health of the bail applicant should be removed. Immigration detention should never be used for the purpose of medical treatment.

## **Legal Services Commission**

1. The Legal Service Commission should ensure that there is no financial disincentive in the legal aid fee structure for providers of immigration advice to adequately explore issues relating to criminal risk and delays in the provision of UKBA Section 4 (1)(c) bail accommodation.

# Annex A

## Bail outcomes by hearing centre

1. Response from HM Courts & Tribunal Service 23<sup>rd</sup> May 2012 to a request for disclosure under the FOIA by Bail for Immigration Detainees, reference: FOI/76088. [Note: half-year figures only]

July to December 2011

Hearing Centre	Bail Application Outcomes			
	New/Repeat Applications	Granted	Refused	Withdrawn/ Abandoned
Belfast	29	8	12	9
Birmingham	640	160	180	290
Bradford	140	31	73	38
Field House (London)	6	1	0	5
Glasgow	370	84	160	130
Harmondsworth	81	9	47	27
Hatton Cross / Sutton	1,700	310	810	560
Manchester	110	30	52	24
Newport	340	85	160	78
North Shields	11	6	3	2
Nottingham	78	12	37	27
Stoke	440	80	220	130
Taylor House (London)	1,900	400	810	660
Yarl's Wood	73	7	36	26
Other	7	0	7	2

2. Response from HM Courts & Tribunals Service 5<sup>th</sup> November 2011 to a request for disclosure under the FOIA by Bail for Immigration Detainees, reference: FOI/72543

1st July 2010 - 30th June 2011

Hearing Centre	Bail Application Outcomes			
	New/Repeat Applications	Granted	Refused	Withdrawn/ Abandoned
Belfast	36	14	11	11
Birmingham	1041	224	396	418
Bradford	385	89	176	115
Field House (London)	8	2	2	5
Glasgow	930	149	505	272
Harmondsworth	172	10	92	65
Hatton Cross / Sutton	3011	480	1,441	1,059
Manchester	311	71	170	66
Newport	681	136	326	214
North Shields	32	8	14	9
Nottingham	145	32	72	43
Stoke	106	22	42	35
Taylor House (London)	3943	930	1,654	1,367
Yarl's Wood	187	24	105	60
Other	16	3	4	7



3. Response from HM Courts & Tribunals Service 5<sup>th</sup> November 2011 to a request for disclosure under the FOIA by Bail for Immigration Detainees, reference: FOI/72543

**1st July 2009 - 30th June 2010**

Hearing Centre	Bail Application Outcomes			
	New/Repeat Applications	Granted	Refused	Withdrawn/ Abandoned
Belfast	69	10	30	29
Birmingham	1070	249	393	433
Bradford	435	81	249	107
Field House (London)	11	0	1	8
Glasgow	1087	144	643	282
Harmondsworth	180	14	104	66
Hatton Cross / Sutton	2912	365	1,575	1,014
Manchester	281	65	149	65
Newport	836	116	445	275
North Shields	33	5	20	8
Nottingham	156	21	88	39
Stoke	101	25	44	26
Taylor House (London)	3896	935	1,498	1,457
Yarl's Wood	205	13	100	90
Other	2	0	0	2

4. Response from HM Courts & Tribunals Service 5<sup>th</sup> November 2011 to a request for disclosure under the FOIA by Bail for Immigration Detainees, reference: FOI/72543

**1st July 2008 - 30th June 2009**

Hearing Centre	Bail Application Outcomes			
	New/Repeat Applications	Granted	Refused	Withdrawn/ Abandoned
Belfast	168	20	38	109
Birmingham	1151	277	429	443
Bradford	488	108	253	122
Field House (London)	10	4	3	3
Glasgow	750	86	495	181
Harmondsworth	101	8	59	33
Hatton Cross / Sutton	3027	315	1,706	984
Manchester	202	62	89	50
Newport	862	105	432	322
North Shields	62	8	45	9
Nottingham	86	12	53	20
Stoke	157	30	80	42
Taylor House (London)	3332	846	1,236	1,229
Yarl's Wood	175	14	97	65
Other	1	0	0	1





**BiD** Bail for  
Immigration  
Detainees