# A Comparison of the Differing Approaches to Bail Hearings Observed in Scotland, England and Wales

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## Contents

# Introduction

The UK continues to be the only European nation that detains immigrants without release dates. The decision to detain these foreign nationals, often in a vulnerable state, has been heavily criticised over the past decades by charities, academics, and politicians alike (Liberty, 2021). Though the original decision to detain is made solely by the Home Office with no judicial authorisation, UK immigration law does provide that any individual held in immigration detention can apply to the First-Tier Tribunal (Immigration and Asylum Chamber) for immigration bail. The outcome of these applications are decided by a First-Tier Tribunal Judge, and are routinely last-ditch efforts to appeal against deportation decisions made by the Home Office. There is both a distinct lack of public knowledge as to how this procedure functions in practice, as well as limited awareness of the human rights abuses which continue to occur. In the previous two decades, successive governments have enacted legislation and policies aimed at restricting the availability of immigration detainee's right to appeal, most notably the UK Borders Act 2007, which allows for the automatic deportation of foreign national offenders sentenced to at least twelve months, unless ample evidence is produced to highlight that deportation will infringe upon their human rights. As a result of these successive UK policies, those non-British citizens who have committed crimes (foreign national offenders), are increasingly 'doubly dammed modern British folk devils' (Griffiths, 2016).

The Bail Observation Project is a spin-off organisation of the campaign group Oxford Against Immigration Detention(formerly Campaign to Close Campsfield). Its original report, published in 2011, aimed to move past anecdotal stories of mistreatment, towards a publicised and concrete understanding of how the UK immigration legal system infringes applicants' human rights, making further proposals for the precise practices and processes that were in need of reform.

The project's reports have focused largely upon bail applications made within English First-Tier tribunals, most notably London's Taylor House, Middlesex's Hatton Cross and Newport's Columbus House. In contrast, this current project has aimed to highlight regional disparities within the UK immigration legal system by evaluating applications made throughout the country, in Scotland (Glasgow), Wales (Newport) and England (Bradford). The team of observers, comprised of three City Law School and 3 BPP University students, convened last year, to

determine whether the Bail Observation Project's original recommendations had been heeded, whether regional disparities indeed existed, and crucially, whether the system continued to deny justice to detainees in many instances.

Following guidance from Bill MacKeith, a co-founder of the organisation, the team began its investigations. As will be detailed in the methodology below, our aim was to analyse how precisely immigration judges in each location followed the criteria contained within the *Guidance on Immigration Bail for Judges of the First-Tier Tribunal*, so as to achieve objectivity and justice.

Most notable was the context in which the current project occurred; that of a system struggling under the burgeoning weight of a worldwide pandemic. As with the UK criminal justice system more generally, Covid-19 continues to have a major impact upon the UK immigration legal system, worsening delays, digitalising hearings, and increasing backlogs. However, regardless of whether an applicant's hearing is delayed for Covid-9 related reasons, case delays and lengthened detention in and of themselves remain an egregious violation of detainee's human rights.

This project found that while generally, immigration judges throughout the three locations were cognisant of Covid-19's negative impact upon applicants' mental and physical health, for example, and infused such considerations into their reasoning, Home Office representatives often appeared with limited evidence and poor organisation, employing the pandemic as a justification. While immigration detention indeed hit record low levels at the height of the pandemic, at the time of this report's publication, instances of detention have returned to their original levels. Notably, as of 2021, the number of deportations related to foreign national prisoners in particular, continues to increase (Sheikh, 2021). As such, though this report indeed details isolated examples of good practice and justice, there remains a need for an "effective and consistent approach" to the management of UK immigration detainees, particularly foreign national offenders, if we are to achieve a system which ensures that each UK prison and tribunal has in place the processes and resources necessary to sustain progress in this oft-neglected area of law (HM Inspectorate of Prisons, 2006).

## Methodology

6 BOP volunteers observed a number of bail hearings between December 2021 and April 2022. The volunteers were assigned a tribunal to monitor - Bradford, Glasgow or Newport. Volunteers contacted the hearing centres by email and requested access to the online hearings listed for that day. When observing the hearings, a

questionnaire (Appendix A) devised by the team leader was used by each volunteer to collect qualitative and quantitative data to analyse the bail hearings. The bail hearings are cited by date in the format (00/00).

Section 1 of the questionnaire follows the five criteria intended to aid a judge's decision as to whether to grant bail, as set out in *Bail Guidance for Judges Presiding over Immigration and Asylum Hearings* (2018). The criteria are as follows:

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.
e) The likelihood of the person complying with conditions of bail.

Section 2 of the questionnaire concentrates on the decision itself:

f) How well either side was able to provide evidence to support their case.
g) Granting/not granting bail.

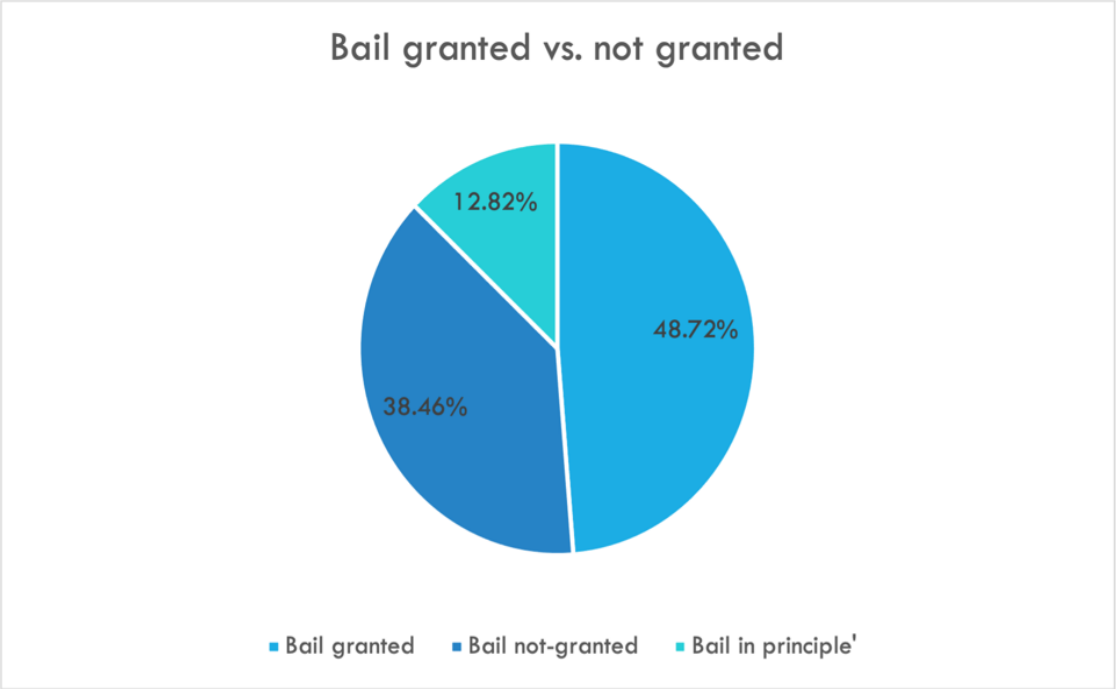
The reports for each tribunal follow the structure of the questionnaire, examining how each criterion was engaged with by the judge to produce the final outcome. Each subsection of the final report contains a case study/studies, statistics and interpretative analysis and conclusions.

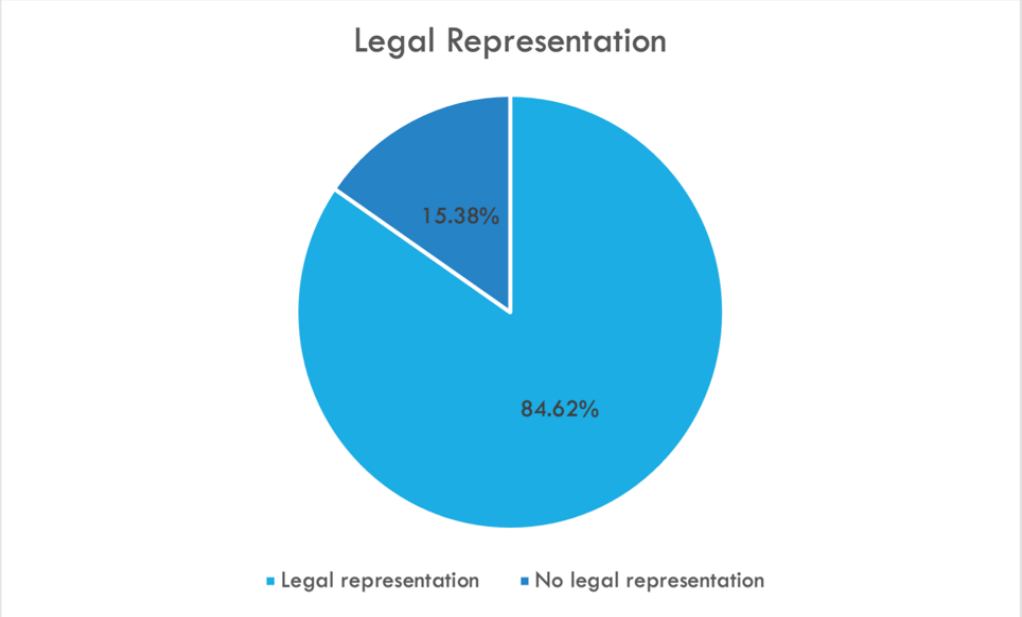
Limitations

Clearly our report only deals with one tribunal from each country, therefore the relevance of our findings across the entire UK immigration system is limited. However, our data set is wide enough to form a representative image of the system's current state. The volunteers were unable to speak to the parties involved in the hearings and could not examine any documentation used in the hearing. Furthermore, since we were divided into pairs, there will be some slight differences in emphasis and style of writing for each centre's report.

**Aggregate Statistics**

We observed a total of 47 hearings out of which 8 were adjourned and will not be discussed in this report or form part of the following statistics.



## Glasgow Tribunal Hearing Centre

*Observed by Appin Mackay-Champion and Emily Jarron*

We observed 25 bail hearings in total. 17 of these resulted in a decision of bail being granted or detention being continued. 8 hearings were adjourned to a later date for a range of issues including Home Office failures to liaise with local authorities and a lack of information being available, in particular, copies of license conditions. In short, adjournments were continually caused by administrative errors and failings. These adjourned cases do serve to highlight the issue of human error and potentially, a lackadaisical approach by the Home Office to communication and gathering evidence. They serve to elongate detention, however short, and increasingly infringe upon the applicant's right to a fair hearing (Bosworth 2011). The 17 hearings in which a decision was reached will be considered below.

All applicants during the hearings were being held in Dungavel Immigration Removal Centre (IRC), located in South Lanarkshire. Frequent criticisms have been levied against Dungavel from organizations such as the Scottish Refugee Council and Detention Action, for its breaches of human rights (O'Hare 2018, 1) with its purported tendency to detain vulnerable migrants in contravention of both domestic immigration and international law. Chief amongst critics' concerns has been that migrants are detained in Dungavel for "unreasonably long periods" without the *opportunity* to apply for bail or because of the refusal of their bail application on grounds relating to the severity of their alleged crimes, which in some cases they are later found innocent of (Leask, 2015). Locating discernible reasoning behind each applicant's detention is therefore an essential task when observing bail hearings to determine whether Glasgow's arm of

the First-Tier Tribunal deals with applications in a just and objective manner, or whether criticisms are indeed well founded.

## Section 1: *Bail Guidance* Criteria

### A: The reason or reasons why the person has been detained

In all the bail applications, the reasoning behind detention was present in the bail summary – this was solicited at the beginning of each hearing by the judge, then either party – the Home Office and the detainee's legal representative – were called to produce evidence to support or contend statements made in summary. Judges must consider whether 'in totality the reasons given are proportionate to the need to continue to detain' (*Guidance*: 7). The most consistent reason given for detention was that the applicant posed a threat to the public on account of their criminal history – this constituted 53% of applicants. Examples of offences include s.38 and s.39 Criminal Justice Act (1988) offences (24/02), possession of Class B drugs (08/03), a '*depressing litany*' of criminal convictions including breach of bail, drug abuses and violence (15/03) and a total of 5 convictions for 8 different violent offences (22/03). Notably, several detentions concerned serious sexual offences, occasionally against minors. In one such instance (12/04), the presiding judge highlighted the '*most serious*' nature of the applicant's sexual crimes against a minor alongside a number of outstanding sexual offences. In these cases the judge must 'assess the risk of that person re-offending and the consequences of such re-offending if there is such a risk' (*Guidance*: 11) The severity of each offence, its context and the applicant's tendency to re-offend were continually taken into account by the presiding judges in a manner characterized by objectivity and fairness. In the example above (12/04), the severity of the applicant's criminal history did not deter the judge outright from considering bail. The bail was later withdrawn on grounds primarily relating to the financial incapacity of the individual's Financial Conditions Officer (FCO).

It must be noted that bail summaries were never questioned on grounds of any objective inaccuracies or false statements. However, in 7 of the hearings, the judge deemed the Home Office's evidence to be insufficient. The Home Office's statement, for example, that an applicant was a *'continuing danger'* was deemed inadequate by the presiding judge because of a lack of '*concrete'* evidentiary support detailing precisely how the applicant remained so in the specific circumstances (30/03) Often the Home Office was deemed to give too much weight to what was described by one judge as seemingly *'negligible reasons'* for continued detention (30/03) The Home Office's continually improvident and arguably lackadaisical arguments in many cases can indeed be explained. As Tomlinson and Karemba (2019) highlight, their decision-making process is highly time sensitive, and as such bears no similarity to a court process in which supporting evidence and details are 'thrashed out fully' to achieve justice. Though this may provide an explanation, backlogs should not serve as a justification for half-hearted attempts to seek the true picture and achieve justice for those being detained.

**B: The length of detention to date and its likely future duration**

One of the main criticisms levelled against the UK immigration system is that detention is indefinite. Though judges do not possess the power to decide whether the detention period itself has been excessive (which would mean also, unlawful), judges in several of the cases did grant bail partially on the ground that the applicant had '*more than satisfied*' their detention length (24/03). It is therefore the task of the FTT Judge to consider whether it would be justified to further detain the applicant, though 'it is generally accepted that detention for three months would be considered a substantial period of time and six months a long period' (*Guidance*: 19).

The presiding Glasgow judges all commented on the length and proportionality of each detention. Overall, 12 applicants had been held in detention for less than a month, 3 for a period of 2 months and 2 for a period of 6 months. The authorities 'must demonstrate that 'the reasons for detention remain connected to the pending investigation and/or removal' (*Guidance*: 18). The largest

proportion of those who had been detained for less than a month were those applicants with a criminal history and whose risk to the public remained high – they had been detained with *'a view to removal.'* Where applicants been detained for 2 months, this was the consequence of Home Office administrative delays on two accounts, as one detainee's legal defence quipped regarding a delayed deportation decision – *'I have more chance of winning the lottery than the HO issuing this in the 10 days'* (24/02). The presiding judges were critical of 'long' detention periods when they were considered in conjunction with relatively minor crimes: in one hearing in which an applicant had been detained for 6 months, the judge challenged whether there were indeed any '*imperative considerations of public safety'* to justify this lengthy period. Though the applicant had previously been imprisoned for assault, the judge decided that he was *'bound to take the length of detention as being an important factor'* and that, in this case, *'imperative grounds of public safety cannot outweigh that time he has spent in detention'*, thus granting him bail with accompanying conditions (01/03).

Several judges were quick to note the negative impact that the Covid-19 pandemic had upon detention periods, unnecessarily lengthening detention in several cases due to re-scheduling of bail hearings. Judges also highlighted that for more minor crimes, the pandemic's significance related also to the crime's context. Covid's significance was particularly pertinent during a hearing in which the applicant had been detained for spitting on a police officer, having been charged with an Assault on an Emergency Worker (24/03). The applicant's counsel highlighted that the Crown Office had introduced a blanket policy to '*fiercely prosecute Covid offences'* such as spitting on police officers. As such, the applicant served a custodial sentence, which had subsequently been lengthened by Covid delays, for an assault that would not have incurred any custodial sentence prior to the pandemic. In the context of detention lengths, the judge explicitly highlighted that the applicant had served more time than was just for the offence, and bail was granted.

**C: The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable**

As per the *Guidance*, there should be a presumption in favour of liberty – 'First-Tier Tribunal Judges should grant bail where a less intrusive alternative to immigration detention is sufficient to protect the relevant public interest' (Guidance: 22) In every hearing the judges explicitly considered alternatives to detention (ATDs) such as a bond or home visit, evaluating their applicability to the individual. The *Guidance* details that judges should consider applicants' 'personal circumstances' including perhaps incentives to abide by their bail conditions and keep in contact with immigration officials. In general, the Glasgow judges looked favorably upon these less-intrusive alternatives, continually deeming them proportionate and sufficient to protect public interest.

The two main reasons for refusal to grant bail even with conditions was the detainee's risk to the public and previous non-compliance with bail conditions and hence detention remained both '*necessary and proportionate'* (14/03) However, bail should not be considered a punishment itself but rather as facilitating further administrative decisions, as argued by the solicitor in one hearing: '*he has been imprisoned only once and the criminal justice system is rehabilitative. It is respectfully submitted that he has already been adequately punished. There are alternatives in this case. This applicant could be managed by way of bail conditions.'* (15/03). Furthermore, where deportation could be achieved within '*a reasonable time-scale'* (22/03) the judge was more likely to refuse bail. In one hearing the Somalia returns process had been temporarily stopped until post-elections; it was therefore decided that *'since removal is not imminent and the purpose of detention is for removal, this applicant could be managed instead by way of bail conditions*.' (15/03)

Positive factors levelled against detention included previous compliance, proof of credible Financial Conditions Officers (FCOs) to financially secure their release, approved

accommodation, willingness to refrain from detrimental behaviour e.g. excessive alcohol consumption, and a genuine desire to find work and integrate into UK communities e.g. by attending local social integration programmes such as the Caledonian Men's Programme. As pointed out in one hearing, unlike in England, electronic monitoring is not currently available in Scotland (08/03). However, the greatest proportion of each hearing focused on discussions of the personal finances of FCOs. The Home Office routinely provided in-depth analysis of individual FCO bank statements, often to aid their argument that FCOs did not have the funds to ensure bond payments. In 6 hearings, the Home Office stated that an FCO's receipt of state aid provided evidence that they had little incentive to keep up payments and limited ability to do so. In hearing (04/12) for example, the applicant's brother had elected not to attend the hearing, having offered only £500 to secure his brother's conditional release despite earning net profits of approximately £2,700 a month. Though the applicant's mother had appeared and promised £500 as security, the presiding judge highlighted that such limited financial incentive was indeed troubling. However, the judge did not deem the FCO's financial instability the most significant factor in their deliberations. The Home Office's forensic approach to FCO bank accounts served to highlight their somewhat lackadaisical approach to providing evidence in support of their assertion that the applicant was a continuing risk.

In every case in which bail was granted, the applicant was released on parole, backed by a FCO bond, and had to travel to their local police station for check-ins. Particularly striking were the lengths that to which the presiding judges and applicant's counsel went to ensure the applicant understood the requirements of their ATDs. In hearing (30/03) the requirements of the applicant were explained to him in full, including that he needed to '*attend weekly meetings as instructed, answer the phone when they (immigration authorities) call and continue to be complaint with any new rules.'* All hearings were thorough about requirements to ensure that any non-compliance would not be accidental.

**C: Effect of detention on the applicant's family**

The judge must consider the effect of detention upon the applicant and their family. As the Bail Observation Project's 2013 report highlights, detention of migrants in UK prisons is mentally torturous for many. This has only worsened as a result of Covid backlogs and resulting delays. Applicants commented that delays and their continued detention had caused them '*incredible stress*' (12/04) and increased the risk of previous mental health issues re-surfacing (24/03). However, concerningly, there was next to no focus on the applicant's own vulnerability, safety and health in the hearings. In only one hearing was the applicant's '*mental health and vulnerability'* considered and though it was noted that he was being monitored under the Adults at Risk Policy (01/03), this did not even form one of the reasons for which bail was granted here.

However, there was often consideration of the impact upon spouses and partners, particularly in cases wherein the applicant had previously been charged with domestic abuse. 16 out of the 17 applicants were male, out of which 11 were single and a concerningly high number – 6 – had a history of domestic abuse or had committed assault on their ex-partners. In the latter cases, this was successfully deployed every time as a primary reason not to grant bail. In one case the applicant's partner, whom he had previously attacked, had attended the hearing and served as an FCO. The presiding judge probed '*What comfort do I have that there is no pressure upon N to serve as a FCO and welcome the applicant back to their shared address?'*, asking the applicant's counsel whether he had "*taken instructions from her separately, outwith the presence of a third party.'* On this occasion, bail was granted nonetheless.

Only 6 applicants had partners, and in 2 hearings the applicant sought to rely on Article 8 ECHR – right to family life – to bolster their application. On both occasions bail was granted though this was not cited as the primary reason for granting bail, rather it was the fact that the family members could provide *financial* support. Only 3 applicants had a child/children. Detention must be compatible with the best interests of the child recognized by the UN Convention on the Rights of the Child (1990) and s. 55 of the Borders, Citizenship and Immigration Act (2009).

Disappointingly, there was little consideration of the effect their father's detention had upon the children. Whilst it was noted in one bail summary that the reason for the application was to return to his 3-year-old child, this was not once deliberated upon and bail was refused regardless (08/03). In another hearing, the applicant's child was only mentioned regarding his relation to the applicant's ex-partner – there was no further discussion of the child. One applicant submitted that his partner and her child from another father were willing to support him upon release. However, because they could offer no financial support and were not present at the hearing, this was deemed as not '*stacking up'*, i.e. it seemed the judge viewed the relationship as fabricated, even though the applicant's legal representative submitted that the applicant played a '*parental role with his partner for the upbringing of that child'* (24/02). This demonstrates the importance of substantiated evidence in the hearings, but also the strong emphasis the FTT judges place on the financial support offered by family members. However, as concerns the female applicant, the judge explicitly noted the applicant's two children, who had been without their mother for a considerably long period (24/03). This, in conjunction with the minor quality of her criminal offences, constituted the main reason for bail being granted here. Perhaps this demonstrates that little importance is placed on the father's role in a child's life as compared to the mother in the view of this tribunal, as informed by wider cultural norms.

**E: Likelihood of the applicant complying with conditions**

Collinson (2021) argues that the Conservative Government's 'New Plan for Immigration' was implemented to ensure that more 'Foreign National Offenders' are deported, and rights restricted (Collinson, 2021: 1). Human rights law does permit differential treatment of non-national and nationals, but any distinctions must be for 'weighty and objectively justifiable reasons' (Article 14, HRA). As such, any assertions by the Home Office that an applicant will re-offend must be accompanied by strong objective evidence. The *Guidance* notes that the judges are likely to 'give significant weight to a person's previously good record of complying with immigration control'

and ‘maintaining contact’ with authorities (*Guidance*: 24). Judges noted that an applicant’s compliance with immigration authorities (12/04), non-violence while in prison and ‘*engagement with social programmes’* (24/03) all served as evidence of this good behaviour.

A pattern that emerged was emphasis the judge placed on the applicant’s family’s ability to *influence* their compliance with bail conditions. For instance, the judge contended in one hearing that the applicant’s mother ‘*had very little influence over him in light of his criminal career’* and if bail was to be granted in the future he would ‘*need to know she has some influence or leverage over him’* (22/03). Likewise, in hearing (22/02) the judge noted that *‘the father had little control over the applicant in past so it is unclear how he will ensure the applicant’s compliance with the law now’* Likewise, one of the factors for refusal of bail in hearing (08/03) was that the applicant had ‘*provided no evidence for someone willing to stand as a financial condition supporter or anyone to influence his behaviour’* , and in the event of a future application ‘*the tribunal would be comforted that there might be someone to keep an eye out for him but currently nobody is prepared to support him’* (15/03).

In 9 of 17 hearings, previous criminal history was cited as strong evidence that the applicant would not comply with bail conditions. For example, in hearing (22/03) the applicant’s *‘failure to comply with criminal bail conditions’* was evidence that he was unlikely to comply with immigration bail conditions. In one peculiar hearing the applicant repeatedly denied the criminal offences for which he had served in prison. When addressing the applicant directly, saying *‘it appears you do not appreciate the situation you are in or that if released you will comply with bail conditions or that you will not offend’* (24/02). Evidently, acknowledgement or contrition is a significant factor in determining the risk of re-offending and an appellant’s unwillingness to engage honestly in the hearing ‘*diminishes the trust [the judge] can put in him’*, hence it was decided here that the applicant presented ‘*an unreasonably high risk of reoffending and absconding’* (24/02) and bail was refused.

As well as the impact of detention upon the applicant's own family, in cases concerning sexual offences on minors, judges discussed at length any risks of the applicant's *release* upon children living within the local area. Housing support for ex-offenders is a popular topic of political discussion. Ministry of Justice figures demonstrated that in 2020, there were approximately 200 sex offenders released from prisons in England and Wales without any fixed, and pertinently, traceable, address. The judges in the Glasgow hearings made stringent efforts to ensure that if the applicant's criminal record included sexual offences, their new address would provide no risk to local public safety. During hearing (30/03) the presiding judge was markedly dissatisfied that the Home Office had made no attempts to contact the local authority to ensure that there were no minors present, which had caused the hearing to be adjourned. Even in cases where re-offending could not be ruled out entirely, presiding judges often noted that this risk was countered by stringent ATDs (24/03).

## Section 2: The Decision

### F: How well was either side able to provide evidence to support their case?

<u>Procedure</u>

The clerks were always on time, setting up the video call before the parties arrived and ensuring that we, as volunteers, were connected in. However, it should be noted that *every* hearing started late, most often by about 15 minutes, though, and more frequently than appropriate, for periods of up to 30-45 minutes, largely due to delays in the applicant arriving from the immigration removal centre (IRC). Aside from this, the hearings were procedurally sound: the judges would always explain to the parties how the hearing was to proceed, check everyone had the same documentation, and require us to announce our presence and explain that we were observing for educational purposes. The judges effectively directed the hearings by eliciting cross-examination and allowing either party to present their final submission without interruption. In cases where a

party or necessary information was absent, this was addressed, dealt with or its absence considered in relation to the fair running of the hearing.

Interpreters

In every case, where English was not the applicant's first language (15 out of 17), an interpreter was employed. Notably, the online nature of hearings as a result of Covid-19 made communication between an interpreter, applicant and the tribunal less smooth than a typical in-person hearing would be. This is however, not an issue inherent to the First-Tier Tribunal itself, but rather a general concern witnessed throughout international court systems (Bannon and Adelstein, 2020). However, wherever technical issues did arise, all presiding judges and clerks made great efforts to clear up any confusion and slow the pace, allowing all necessary information to be relayed. In all cases the judge checked with the applicant that the interpreter and legal representation provided were adequate, and in every case, this was affirmed. Only on one occasion was there an issue where the interpreter left early for another appointment – the judge made clear this was detrimental to the efficiency of the hearing ('*you have placed us in significant difficulty'* (24/02). Overall, the applicants engaged effectively with the proceedings, and it was in their best interests to do so. However, on one occasion the applicant denied his proven criminal record repeatedly and did not answer the questions asked of him. The judge concluded that the applicant had been '*given ample opportunity to provide oral evidence'* and refused bail for his non-compliance with the hearing.

Home Office/ Legal representation

In 16 of 17 hearings the applicant had legal representation. In the one hearing in which there was no legal representation, it was clearly wanting. As the *Guidance* instructs: 'failure by one side or the other to provide relevant evidence that is reasonably available should result in a First-Tier Tribunal Judge giving less weight to that party's arguments' (*Guidance*: 28). The judge stated that there was no evidence of the proposed address, financial supporters, and the pledged £300 offered by the applicant himself. In light of this, the judge considered this a '*premature bail*

*application which requires the applicant to review evidence'* and encouraged him to seek legal representation (08/03). In the 16 other hearings, legal representation was adequate, with applicants' counsel consistently presenting a case supported by evidence and testimony and a final submission. Counsel had often constructed well thought-out arguments and line of questioning for the Home Office's representative. For example, in hearing (24/03), counsel argued that his own research had highlighted that the Home Office had never before referred to an applicant's prospect of removal as '*medium'*, as they had done in the hearing. Such a statement, he argued, was confusing and unprecedented. Crucially, though hearings were short, the Immigration Judges in 100% of cases allowed the applicant and their legal representation to challenge and question the Home Office. Such challenges were typically enunciated by the legal representation and were thorough. The hearings are a fast-paced affair and as the *Guidance* notes, they are a 'risk assessment'. As such, any attempts to 'apply a strict burden of proof' can be disingenuous and 'misleading' (*Guidance*: 28). Home Office attempts to deport without the necessary level of evidence required by the *Guidance* were met with fierce cross-examination by both the applicant's counsel and presiding judge. In one hearing for example, the counsel stated that the Home Office were *'ill-prepared*' for proceedings (30/03) and that their statements lacked '*strong evidentiary foundations'* (24/03).

**G: Granting/Not Granting Bail**

The *Guidance* states that if there is 'no sufficiently good reason to detain a person or lesser measures can provide adequate…means of control' then bail should be granted.

Bail granted:

Bail was granted in 9 of 17 hearings. The reason for granting of bail generally rested upon the applicant's good behaviour and the low risk they presented to the public. Though, in all of these, the conditions imposed were stringent. As aforementioned, these included ATDs such as bonds, parole and check-ins. The Judges ensured that applicants understood these conditions, probing

continually *'do you understand these conditions?'* (14/04), '*do you understand the consequences if these conditions are not met'* and *'do you understand the impact upon [your FCOs] if you choose to abscond?'* (14/04). In 3 hearings bail was granted 'in principle', pending the securing/approval of accommodation. For example, the Judge in (24/03) explained to the applicant that if social workers were able to provide *'a suitable release address*' within *'the next few days'* they were a *'suitable candidate for immigration bail'*. In all cases of bail in principle, the reasoning for this decision was made clear to all the parties involved, and this was never challenged by either the applicant themselves, the FCOs or the applicant's legal representative.

Bail not granted

Bail was not granted in 8 of 17 hearings. The reasons can be divided into two main categories. The first was due to lack of evidence provided on the applicant's part (3/8). For example, in (24/02), the judge was simply '*not satisfied with the explanation about the failure to report since 2018'* and '*the evidence of the applicant's current circumstances'*, concluding that '*detention at this stage is reasonable.'* Likewise, in the case in which the applicant had no legal representation, the judge offered some advice as to what '*documentary evidence'* the applicant might return with in the event of a future application. The second category was for reasons of public safety (5 of 8 hearings). Hearing (22/02) is a typical example: the judge viewed the applicant's '*concerning and violent criminal record and a blatant disregard for court orders'* as posing a *'risk of commission of future offences and threat to maintenance of public order'.* In one case bail was granted after the applicant had been detained for a period of 6 months. It was decided his previous conviction was *'not serious enough to define it as maintaining detention on imperative grounds of public safety'* and the Home Office had not thoroughly evidenced this argument, as the judge concluded, *'I don't see anything in the bail summary to assess that point'* (01/03).

## Bradford Tribunal Hearing Centre

*Observed by Rory Wilson, Ava Hedley-Miller, and Ashley Penty*

We observed a total of 12 bail hearings, of which 7 resulted in a decision of bail being granted. In the remaining 5 hearings, bail was refused. There were no instances of bail being postponed. The most common reason for the refusal of bail was the lack of an approved release address. This was often the result of administrative failings on the part of the Home Office or the Probation Service or the fact that the applicant could not themselves find accommodation. The Home Office representatives frequently exposed the lack of organisation within the Department with repeated incidents of bail summaries being presented at the last minute, family members who were supposed to attend the hearings being absent, alongside more rudimentary issues such as the failure to send meeting invites. 45% of applicants had interpreters, and 75% had legal representation.

The applicants were held in several local centres and a number were held in category B prisons, such as HMP Leeds and HMP Hull. These prisons primarily hold long term (10+ years) and high security prisoners. Notably, HMP Hull has attracted criticism for the duration that some of its immigrant detainees have been held, in contravention of the requirement that detainees are only 'held in prisons under exceptional circumstances and for as short a time as possible' ('My mental health is at a breaking point': BID Review HMIP Inspection Reports, 2022). Establishing why these detainees are held for so long is key to determining whether the applicants are in fact treated fairly, or whether there is a more deep-rooted problem in the administrative process that is leaving these applicants languishing in prisons for excessive periods of time.

## Section 1: *Bail Guidance* Criteria

### A: The reason or reasons why the person has been detained

All hearings observed were of the First-Tier Immigration Tribunal, and therefore ostensibly the defendant's detention was on the basis of their being subject to either a Priority Removal Notice (PRN) or a deportation order. The hearings observed included persons at every stage of the removal process. A young man who had been detained on criminal charges only for the Home Office to begin deportation proceedings (18/02); a woman who had already served 4.5 years within the prison system for illegal entry into the United Kingdom – and signed a disclaimer that she would return to her home country on release – detained once again (23/02); and finally, an older man granted 'bail in principle' dependent on accommodation guaranteed under s.4(2) of the Immigration and Asylum Act still detained because of a failure of the Home Office to deliver on their s.4 guarantees (14/12). Every single case observed was at some stage of the deportation process, but only one case (the 'bail in principle' case discussed above) was an asylum seeker, as s.4 support is only available to a person who exhausts their appeal rights while applying for asylum.

But while the reason for the applicants' presence at the hearings was obviously to secure bail, most had become detained in the course of criminal proceedings. Indeed, in a majority of hearings observed, the applicant had initially been detained by the police, and often in connection to drug production, on the main cannabis. Indeed, on three separate observations (04/02, 31/01, 23/03), applicants had been detained on the basis of cannabis plants, and yet in all these cases the court accepted that the detainees had been the subject of human trafficking. Indeed in 31/1, the applicant had been granted bail after detention in 2018, but had absconded after being re-abducted by his traffickers, and was, as the judge held, a '*victim of modern slavery*'. In (23/2) the applicant's testimony was corroborated by a diagnosis of post-traumatic stress disorder from a

third party – the diagnosing psychiatrist regretted not being able to do a scarring report – the product of her treatment at the hands of her traffickers. Moreover, in all of the cases in which the facts of 'slavery' or 'trafficking' were accepted by the court bail was refused because of the risk of abscondment and re-abduction, and were conducted entirely through interpreters; often the applicants seemed confused about the situation they were in. This gestures not only at the epidemic of modern slavery in the UK, lent added urgency by the recent tragic disclosures by decorated Olympian Sir Mo Farah, but the isolation it facilitates, often creating a vicious cycle of abscondment and detention. As in (23/02) discussed above, while the judge felt 'it was not his place to add further punishment', he was nonetheless unwilling to grant bail on the basis of the likelihood of further abscondment.

Finally, a smaller proportion of cases involved violent crime. For example, in (18/02) an applicant was detained after a '*spree*' of crime including driving under the influence and a violent assault. This man had been born in England, and spoke fluently with an English accent, yet the Home Office had begun deportation proceedings against him, extending his period of detention beyond the custodial sentence awarded to him for his criminal behaviour. The judge exhibited some frustration regarding the fact that the Home Office had conflated a criminal proceedings with an immigration charge and had then been unable to substantiate it; '*one would hope that the agency responsible for detaining this gentleman would prioritise processing the administration*' and argued that '*there has to be a certain obligation on the behalf of the authorities to work in a swift and decisive manner*' when concerning the deprivation of someone's liberty. This case offers an instructive counterpoint to the trafficking cases discussed above; the applicant was awarded bail despite being convicted of a violent crime, while none of the victims of trafficking were, on risk of abscondment.

**B: The length of the detention to date and its likely future duration**

A number of the judges expressed concern regarding the duration of the applicants' detention, prompting their decision to grant bail. In (25/03), it was noted that the applicant had been held in detention at HMP Leeds for 5 weeks since the 18th February. The judge noted allegations that the applicant had been a victim of trafficking and commented that he 'should not remain in detention for one minute longer than is necessary'. The hearing concluded within 14 minutes with the judge deciding to grant bail within the first 10. Similarly, in hearing (18/03) the applicant had been held in detention for a week and four months since 12 November 2021. The judge expressed his concern regarding the length of detention, which factored into his decision to grant bail 'in principle'. Another judge expressed the view that it was not his duty to extend the duration of an applicant's detention through refusing bail unless absolutely required by circumstance. In hearing (13/05) the applicant had been held in immigration detention for 9 months and bail had been refused on 4 previous occasions in March 2021, September 2021, December 2021, and February 2022 as a result of public safety concerns. The judge noted that '*imperative concerns of public safety can justify extending his sentence by 6 months*'. However, given that the applicant had already been held in detention for 9 months, the judge could not justify refusing bail on these grounds. He expressed the view that '*as regards further offending, that is a matter for the Home Office*', thereby acknowledging his limited competency regarding the extension of the applicant's detention period. This is consistent with the presumption in favour of release set out in Chapter 55 the UKBA Enforcement Instructions and *Guidance*.

The following observations illustrate how administrative issues with the verification of applicants' proposed release addresses or their inability to find accommodation can prolong the duration of their detention. In hearing (11/02) it was noted that the applicant had been held in detention at HMP Hull since 12 November 2021. The applicant had provided a release address but explained that he was unable to contact his friend who currently resided at the property to verify it because his phone had been taken by HMP Hull and he had no other means of contacting him. The judge refused to grant bail 'in principle' subject to the verification of the address. This applicant reapplied for bail and the next hearing was held on 18 March. The applicant had then

been held in detention for a week and four months in spite of the fact that his Deportation Order had only reached the first stage and his removal from the United Kingdom was not imminent. The applicant explained that he was still unable to contact his friend to provide verification of the address as a result of his inability to access his phone. However, this judge (who was different from the first) was willing to grant bail without a Condition of Residence subject to approval by the Probation Service. The first judge's unwillingness to grant bail without a Condition of Residence in hearing (11/02) had meant the applicant had spent an additional 5 weeks in immigration detention. However, it is doubtful whether granting bail 'in principle' necessarily results in applicants' earlier release from detention. In hearing (14//02) the applicant had been granted bail 'in principle' subject to the provision of a release address. The applicant had been unable to find accommodation independently and the Home Office were unable to provide him with a residence under Schedule 10 of the Immigration Act 2016. This resulted in the applicant being held in detention for 313 days, in spite of the fact that his original sentence was only 75 days in duration. This is illustrative of the fact that the duration of applicants' detention is frequently prolonged by administrative issues and failings on the part of the Home Office.

**C: The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable**

When bail was granted, a spectrum of measures were available to the immigration judges to secure compliance with deportation proceedings beyond continued detention, and a whole range were deployed. The measures appeared primarily decided on a nexus between the severity of the charges that had resulted in the detention (as discussed above in s.1, in a majority of hearings observed, the immigration proceedings had their basis in criminal proceedings) and the likelihood of further absconding. Subtending this however was the consistent judicial '*presumption of bail*' (23/02); markedly in almost all hearings judges registered an eagerness to get applicants out of detention, operating within the premise that '*detention is only viable if there is no other option*' (31/01). In this sense, alternative measures deployed in hearings observed ranged from no

conditions at all (04/02) to a whole battery of measures including electronic monitoring, financial conditions amounting to £5000, and enforced reporting to local Home Office officials (31/01). However, the deployment of these higher measures seemed uneven, or at least motivated by policy arguments that were not disclosed. For example, a man (18/2) originally detained for a '*spree of offences*' after release from detention including two instances of common assault o was released on bail only with reporting conditions and electronic monitoring equipment, while a victim of human trafficking forced to grow cannabis had the most stringent conditions imposed, including a £5000 financial condition (31/01). Risk of absconding and reoffending was also a consideration; in perhaps the most interesting hearing (13/05) regarding gang-related violence, the judge noted that his '*colleagues have made some heavy observations on the nature of the offence and the likelihood of reoffending*'. The applicant posed an '*immediate risk of recall*' and in light of this, the judge imposed bail conditions including electronic monitoring by the Home Office, reporting conditions to the probation service, transfer conditions to the immigration service and required two financial sureties to put up £1000 each, a comprehensive set of measures.

Financial conditions seemed to be the distinguishing factor; the more 'criminal' cases almost all had financial conditions attached, while in a majority of cases (e.g. 25/03, 18/03) the judges opted only for reporting conditions and an electronic monitoring requirement. A word on sureties (the individuals made liable for the payment of the financial conditions upon the absconding of the applicant): in a variety of hearings it was observed that there was confusion and a lack of understanding of what was expected of them in their role. Indeed in one such case the judge had to ask the surety three times to describe his role and each time he failed ('*I have been asked by my dad to do him a favour, so it is what it is*';/'*Despite being asked three times I am not convinced that Mr Dushku is aware of his role as surety*'). The judge then had to temporarily adjourn the hearing so that the counsel for the applicant could explain to the surety his function. In a variety of other hearings the sureties seemed either unaware of their liability if the applicant absconded, or not to know the applicant personally, which was then counted against the applicant in the judges' final determination. Perhaps this suggests a more stringent process of vetting and/or

preparation of potential sureties by the Courts or Home Office is required, or that the concept of vicarious financial liability for absconding is not an effective means of preventing reoffending.

**D: The effect of detention upon the person and his/her family**

The effects of detention were felt upon many of the applicant's families as well as the applicants themselves. In one observation, (18/3), the applicant was being detained for an excessive period (per the judge's comments) in an attempt to prevent reoffending. Not only was this detrimental to the applicant's wellbeing to be in for a long time past the date he was eligible, he was also struggling whilst in detention to make arrangements for living once he was outside of the centre. He said whilst in detention he was unable to make contact with anyone who could assist him with finding a place to live – however as one of the conditions of his release he would need approved accommodation. The detention itself had prolonged the duration as his licence conditions could not be met. It was a cyclical issue of continual administration problems that was having profound effects and preventing the applicant from moving on with his life. In another observation (18/02), the applicant had a child dependent solely upon him. As he was detained for an extensive period, his child was forced to live with the applicant's parents, which may have caused a substantial inconvenience (no matter how good the family relationship is). His parents also were the ones in the end who agreed to the applicant living with them after his release. There was a distinct lack of commentary overall at the hearings on the effect of detention on both the applicant and on the applicant's family. That in itself seems to be quite a subtle but important comment on the consideration of the effect on the applicants during the hearing process.

**E: The likelihood of the person complying with conditions of bail**

The judges were very careful in their consideration of the likelihood of someone complying with their bail conditions. Often this took a large portion of the hearing.

In hearing (31/02), it was noted that the applicant had a history of absconding. He had made an asylum claim in February 2018 and absconded in May 2018. The applicant had managed to live under the radar for two and a half years. However the applicant's history of absconding was a product of the trafficking situation in which the applicant found himself and the judge fairly commented that '*any adult who is a victim of modern slavery is at risk*'. This represented a fair view of the likelihood of this particular applicant complying with his conditions. In hearing (13/05) showed a more direct approach to using the applicant's history in determining their likely future actions. This applicant posed an '*immediate risk of recall*', having committed serious, '*gang-related violent offences*' whilst on bail. The comments on this applicant were concise and were, in this instance, a fair acknowledgement of the applicant's history. This did not appear to be an overtly biased judgement of character in this instance, rather a rational decision was made.

Another hearing had quite complex considerations of whether the applicant would comply with the conditions. In (23/03) the judge acknowledged the presumption of bail and placed considerable weight on this basis. He acknowledged the previous sentence and the confiscation resulting from this, noting there was no place for him to add further punishment. However, he was satisfied that, were bail to be granted, the applicant would disrupt the immigration process through absconding. The judge also noted the psychiatric report and the R35 report and scarring. In spite of this, he found that the R35 report found the applicant capable of internment: '*There is at the very least a difference of medical opinion*'. Consideration was given to the point that symptoms of PTSD must have continued throughout custodial sentence and that monies must have been available to the claimant because of the confiscation order. The applicant lived illegally in UK between 2012 and 2015, and signed a disclaimer in 2018 saying she wanted to leave the UK, though she subsequently retracted this. A claim for modern slavery was not brought up before these proceedings. The judge held that the applicant should make their mental situation known to the detention centre as soon as possible. The complex issues around modern slavery and this particular applicant's situation made this instance of complying with bail conditions not as straightforward as many, but the judge was willing to consider these in depth.

In hearing (18/02), the judge held that the rehabilitation courses undertaken in prison and a letter of support from prison guard regarding the applicant's behaviour as good evidence of a desire to comply with conditions established. The judge still established a rigorous schedule of bail conditions, and reminded the applicant of the consequences of not complying with bail.

## Section 2: The Decision

### F: How well was either side able to provide evidence to support their case?

The quality of evidence presented at the hearings varied substantially; some were well balanced with helpful judges and sufficiently organised administration practices that meant all documents were provided, legal representation was present and the applicant was fully aware of their situation. Some were very poorly organised with applicants even unsure as to why they were detained. On one occasion the judge did not receive the bail summary until moments before the hearing. Administrative issues seemed to be the largest cause of difficulty presenting evidence. Some of the most notable examples are below.

In hearing (04/02), the applicant was not accompanied by a legal representative. As such, the applicant was unable to present the case for his release very clearly and seemed to be confused by the whole proceedings. He was even unsure as to why he was being detained in the first place. Clearly this meant the entire hearing was imbalanced for the applicant.

A hearing on (23/02) was conducted in a much better manner that permitted both sides to present their evidence well. On the whole, the judge allowed both sides equal oportunity to pose their

case. He gave equal weight to both submissions (Dr Bingham's report and the R35 summary, Home Office Presenting Officer, and opposing counsel) but had to take a holistic view, taking into account the applicant's previous offences. He was patient and allowed a long time for interpreters to explain proceedings to the defendant. Another hearing (31/01) was conducted well and professionally. The judge was lenient and allowed the financial surety to have his role explained to him instead of using his ignorance as a point against the applicant's case. The judge was also receptive to modern slavery arguments amongst others. Another example of a good hearing was on 18/3: the judge was very fair in balancing the interests of the Home Office Presenting Officer and what the applicant was presenting. The judge clearly explained issues to the applicant if there were any misunderstandings. The Home Office Presenting Officer also seemed relatively fair towards the applicant and suggested to the judge if there was an alternative to detention this may be suitable. The judge did also point out that immigration detention was not to be used to prevent reoffending. Overall, it seemed like a balanced hearing and both sides had ample opportunity to present their arguments.

In hearing (18/02), there were a few issues faced in the hearing but there was a good judge who listened to either side, explained things clearly and expressed frustration regarding the inefficiency of the Home Office affecting the deprivation of someone's liberty. The applicant's solicitor was also unable to attend on that date for an unexplained reason and whilst the applicant was happy to continue and make his own case, the absence of legal representation when it was supposed to be organised could certainly have been detrimental to the overall outcome of the hearing.

It should be noted that the judges, when needed, were willing to criticise the Home Office for administrative failings or for unfairly made comments. An example was in (14/12), where the judge was very receptive to scathing assessments of the Home Office from defence counsel, even going so far as to append their own critical note to the preamble of their judgement.

## G: Granting/Not granting bail

There were two primary reasons why bail was refused: the proposed release address had not been approved by the Probation Service, or the applicant's deportation was imminent. In hearing (25/02), the judge refused to grant bail on the grounds that the applicant's Offender Manager had not approved the address which was one of the conditions of bail. The judge explained that '*the only barrier to release is that an address has not been approved*', stating with regret that '*my hands are tied*'. This is illustrative of the fact that the process of obtaining bail is frequently stymied by the inefficiency of the Probation Service and that Tribunal judges are often unable to do anything to speed up this process. Likewise, in hearing (04/02), the judge refused to grant bail as the release address had not been approved by the Probation Service, which meant that to release the applicant would constitute a breach of his licence. Another persuasive factor in the decision to refuse bail in this instance was the fact that there were '*no obstacles to [the applicant's] removal*' as the Home Office were in the process of subjecting him to a Deportation Order, meaning that his removal from the United Kingdom was imminent.

However, where the applicant's deportation was not imminent, Tribunal judges demonstrated greater willingness to grant bail. In hearing (25/03), the judge noted that as the '*asylum matter is in its infancy*', bail should be granted on the grounds that the applicant's removal was not imminent. The rationale behind this was that if bail were to be refused, the applicant could remain in detention for an indefinite period of time. In hearing (18/02), the judge similarly concluded that as the Home Office had delivered a First Stage Notice 8 months previously but had not yet delivered a Second Stage Notice, the applicant's removal was not imminent, meaning they should be released from detention. The judge noted that '*there have to be imperative grounds of public safety to maintain detention*' where the applicant's removal from the United Kingdom is not imminent. This suggests that where an applicant's deportation is not imminent, a very high threshold has to be met in order to justify refusing bail. In an observation conducted on 18/3, the judge commented that the prevention of further offences can never be the '*primary driver*' behind

the decision to refuse bail. In light of this, the judge was willing to grant bail without a Condition of Residence subject to approval by the Probation Service. That said, in hearing (23/02), the judge refused bail in spite of the fact that the Home Office were only in the early stages of carrying out deportation proceedings. The judge noted that the applicant had a history of absconding, having previously recanted on a signed declaration to leave the United Kingdom. He, therefore, concluded that, were bail to be granted, the applicant would likely disrupt the deportation process. However, broadly it appears that where deportation proceedings are in their infancy, Tribunal judges are more willing to grant bail so as to prevent the applicants' period of detention from being prolonged indefinitely.

## Newport Tribunal Hearing Centre

*Observed by Cordelia Lupson*

The bail hearings observed were conducted by the First-Tier Immigration Tribunal at Newport Immigration and Asylum Chamber located in South Wales. The hearings observed included bail hearings for detainees held in the following prisons: HMP Bristol, HMP Cardiff and HMP Portland (for young offenders). We observed 10 online hearings, and in 8 of these, bail was granted (two of these were 'in principle'). All of the bails granted were subject to conditions including electronic tagging, an approved home address and reporting requirements. Broadly, it appeared that the presumption in favour of release is reflected in practice, indeed on one occasion the judge did not require the applicant or their legal representative to present their case before granting bail.

### Section 1: *Bail Guidance* Criteria

**A: The reason or reasons why the person has been detained**

Each applicant observed was subject to deportation proceedings and had been detained as a result of a criminal charge. In all but two of the hearings observed, bail was granted. However, two of these were 'bail in principle' and depended on the Home Office providing suitable accommodation (11/02 and 25/02).

The criminal offences for which the applicants had initially been detained included: drugs-supply offences, violent crime, and stalking. Drugs-supply offences were the most common reason for detention (24/02, 25/02, 22/03, 01/04) and violent crime was also a common reason (15/02, 01/03, 11/03).

However, the reason for the delay following the end of the custodial sentence was unclear. The limited supply of approved accommodation, where a family address was not possible, provides an explanation for the delay in release following the bail hearing. It remains unclear the reason for immigration detention being immediately imposed following the end of the custodial offence, without the possibility of an immigration bail hearing. This seems especially unclear, as discussed throughout this report, in light of the judicial tendency to grant immigration bail. In one instance an applicant had been subject to eight months of immigration detention following the end of their custodial sentence, with the Home Office unable to provide an explanation for this extended period of detention. For the applicant, there is no tangible difference between serving the declared length of time in prison following a criminal offence, and the extended never-ending immigration detention. Indeed, 'prisons are not appropriate places to hold immigration detainees, including those who have previously served a custodial sentence' (Bail for Immigration Detainees, 2014).

**B: The length of the detention to date and its likely future duration**

Each of the hearings observed involved immigration detention following a custodial sentence. The future length of detention was generally not dealt with as overwhelmingly the judge granted bail, albeit bail 'in principle' on two occasions (11/ 02, 25/02). Within these two cases the judges were highly critical of any possibility of the future duration of the detention, and on both occasions organised review meetings in the subsequent weeks to hurry along the process.

The Tribunal judges were generally critical of the length of immigration detention preceding the hearings and suggested that these individuals would be better managed in the community (11/02, 04/02). In the hearings observed, the length of immigration detention spanned between one month to eight months. There did not appear to be any reason for the disparity in length of the immigration detention, highlighting concerns that immigration bail has 'no time limit…and it is almost always an unwarranted deprivation of liberty' (Bail for Immigration Detainees, 2017).

**C: The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable**

As bail was granted in the overwhelming number of hearings observed, alternatives to detention were explored to secure compliance with deportation proceedings. The immigration judges balanced the likelihood of reoffending, public safety and abscondment with the importance of liberty of the applicant (in all cases observed the applicants were subject to deportation proceedings following a criminal offence), reflecting the notion that the judge must conduct a 'risk assessment' (Bail for Immigration Detainees, 2010) in respect of granting bail at these hearings. All judges seemed supportive of the applicant's release, with one judge noting that detention should only continue if it was 'necessary and justified' (01/04) and therefore a wide range of alternative measures were observed and explored. The tendency to grant bail reflected the principle that 'liberty is a fundamental right of all people and can only be restricted if there is no reasonable alternative' (UK Tribunals Judiciary, 2018).

Electronic tagging, a suitable home address, financial supporters and agreement to report with the immigration office/a probation officer were the requirements explored upon the granting of bail. The common conditions upon which all observed bails were granted included: mandatory electronic tagging, an approved home address and agreement with reporting conditions. Since 31 August 2021 the Home Secretary has been obliged to 'electronically monitor those on immigration bail living in England and Wales who are subject to deportation proceedings or a deportation order' (Stevens and Hynes, 2022). Our observations reflect this change in the law and only on one occasion was there a suggestion this condition could be appealed (11/02), based on the applicant's mental health conditions. Concerns have been raised regarding the compulsory use of electronic tagging as 'people experience tagging as a continuation of punishment and confinement' (Bhatia, 2021).

It appears that the severity of these measures generally reflected the severity of the offence. For example, one applicant had been detained following 21 drugs-related offences from May 2017 to September 2020, he had spent 36 months in prison and had a history of non-compliance in the past. For this reason, the judge required a financial condition supporter, the applicant's mother, to encourage compliance in this instance (25/02).

Regarding the requirement for an approved home address, on two occasions the delay in availability of such an address (where a family address was not a possibility) resulted in the delay of bail being granted, instead bail was granted 'in principle'. The judge required an approved home address, but in one instance (11/02) such accommodation was not available until 3 May 2022, a somewhat lacking solution since this was three months after the date on which the bail was granted. This demonstrates an unfair extension of detention based on Home Office incompetence and not a risk of reoffending or concerns for public safety. The judge noted that this excessive length of detention had adversely impacted the applicant's mental health and arranged another meeting in six weeks' time to check on progress. This approach reflects that

‘even where the likelihood of immediate accommodation is low, detainees ought not be left in detention in perpetuity’ (Griffiths and Nicolaou, 2022). On another occasion, bail was again granted ‘in principle’ as the applicant’s proposed addresses were not yet approved by the Home Office, for this reason his release was dependent on the Home Office finding his accommodation. These lengthy delays in sourcing accommodation are not uncommon, indeed in the case of Mahboubian v Secretary of State for the Home Department [2020] an eight-month delay during the pandemic was found to be reasonable (Lock, 2020).

The condition which was observed less frequently was the requirement for a financial supporter. This was only noted in one case (as discussed above) (25/02). Again, it seems this was implemented as a result of previous non-compliance alongside a more serious offence. *Guidance on Immigration Bail for Judges of the First-Tier Tribunal* confirms that ‘a judge can impose a financial condition but should only do so where it is considered appropriate to ensure that the person released on immigration bail complies with one or more of the other bail conditions’ (Tribunals Judiciary, 2018).

**D: The effect of detention upon the person and his/her family**

The effect of detention upon the person and their family was noted in all hearings observed. Given the overall trend to grant bail, one can infer that the judge was sympathetic with the effect of detention upon the individual, and that this was the motivation for granting bail. However, it tended to be the family that was taken into consideration when granting bail, rather than the effect of detention upon the applicant. Only on two occasions was this explicitly dealt with in the hearings observed (11/02 and 01/04).

In one particular hearing it was quite clear that the detention had adversely impacted the applicant’s mental health, which the judge noted (11/2). The applicant suffered with autism and anxiety, and the judge noted that the risks posed by the applicant can be managed ‘short of

immigration detention', and indeed this would be a matter best managed in the community. While the applicant requested that the judge speed up the process of finding accommodation, the judge noted that it was not within his 'jurisdiction to make that recommendation'.

On two occasions, where the applicants had children (15/02, 24/02), the judge highlighted this as a reason they believed the applicant would not abscond or contravene their bail conditions. As such importance of being a parent was dealt with in a positive light. Indeed, 'evidence of personal or family connections in the UK…are considered favourable factors' (Lindley, 2017).

It appeared that judges noted the support and attendance of family members during these hearings. During one hearing (01/04), with the applicant being detained at HMP Portland for young offenders, both the applicant's mother and uncle were in attendance. Whilst the judge did not require a financial condition supporter in this case, their attendance and the mother's address were taken into consideration when making the decision to grant bail.

**E: The likelihood of the person complying with conditions of bail**

In each hearing observed, the judge discussed (sometimes at length) the likelihood of the applicant complying with the conditions of bail to demonstrate how they had reached their conclusion. However, as the vast number of applications were granted, the decision tended to favour the applicant, even where a history of non-compliance had been noted (25/02). In this case there had been a history of breaching licence conditions and failing to report, and as a result the judge noted that the conditions were likely to be in place for longer than usual. More broadly, guidance suggests that the judge must 'assess in terms of the evidence provided and what is reasonably foreseeable' (Tribunals Judiciary, 2018) when determining whether the applicant is likely to adhere to the conditions of bail.

On two occasions (15/02 and 25/02) the judge had decided to grant bail, without the requirement of either the legal representation or the individual to present their case. This reflects the presumption of bail, and the generous approach the judiciary appear to take when considering any likelihood of reoffending or absconding. One applicant (01/04) had been detained as a result of drug supply offences, and the judge noted that the individual had been offending 'non-stop since 2012, committing crimes of an increasingly serious nature'. Whilst bail was granted, the judge suggested that if his bail conditions were breached it would be unlikely that he would be granted bail in the future. The risk of absconding was felt to be limited since the applicant had been residing in the UK for many years.

As bail was granted in the overwhelming number of hearings observed, the judge determined that it was likely the applicant would comply with the conditions of their bail. On one occasion, where there had been a history of non-compliance the judge required financial supporters. In this case this was the applicant's mother, an attempt to discourage the applicant from repeating past behaviour (25/02). In each of the hearings observed, the judge concluded that detention was not necessary or justified when balanced with the risk of either absconding or reoffending.

## Section 2: The Decision

### F: How well was either side able to provide evidence to support their case?

The capacity for applicants to provide evidence to support their case was mixed across the hearings observed. While generally the judges were clear and keen to ensure that applicants understood the proceedings, this was often met with confusion and incompetence by the Home Office.

On one occasion (01/04), whilst the bail summary had been sent to the detention centre it had not been communicated to the applicant. However, the judge stated he would not let this administrative failure prevent bail being granted. To resolve this, the judge asked the Home Office Presenting Officer to explain his reasons for denying bail at the hearing to prevent it obstructing

the possibility of bail being granted. On another occasion, the bail summary was only provided to the judge the morning of the hearing (10/02). However, the *Guidance* confirms that the bail summary should be communicated to the hearing centre and representative by 2pm the day before the hearing (Home Office, 2019).

In an even more extreme instance (18/02), the applicant was not able to support their case, since due to administrative issues at the prison, he was not aware of his hearing and therefore failed to attend. This wholly prevented the applicant from presenting their case, in spite of having legal representation which was present at the hearing. The judge did not have any confirmation that the applicant was comfortable with the hearing proceeding *in absentia*, and as a result the bail hearing was delayed by a further two weeks.

In every hearing observed the Home Office Presenting Officer argued against bail. While the judge debated and explained the reasons for granting bail, and clearly balancing the possibility of reoffending or absconding, bail was granted nine times (twice in principle) and was only denied on the occasion that it had come to light that the applicant did not know their named financial supporter (11/03). It appears that the blanket approach of the Home Office, to be against the granting of bail, is not fair and I would argue that a more nuanced approach would be more suitable. That stance of the Home Office Presenting Officer in every hearing demonstrates that staff may be 'under pressure to meet refusal and efficiency targets' (Lindley, 2017).

In (15/02), immediately prior to the hearing, the approved address changed. The Home Office Presenting Officer accepted the change of address but questioned whether the electronic tagging would operate at this new address, which seemed an unrelated question, demonstrating a fundamental misunderstanding of electronic tagging. The judge noted that the question '*bears no relevance*'. These observations support what is widely acknowledged, that Home Office immigration work is 'best by serious administrative and managerial problems' as well as a 'culture of disbelief' (Campbell, 2017) amongst Home Office staff.

Only two of the ten hearings observed required a translator (15/02, 14/02). On both occasions the translators were adequate, and the judge checked with the translator and applicant alike that they understood one another.

The general impression given was that the judges were fair and broadly supported the approval of bail for each applicant, consequently allowing both the applicant and their legal representation (when present) to support their case. The closed-mindedness of the Home Office Presenting Officer on each occasion demonstrates a draconian approach to immigration bail.

**G: Granting/Not granting bail**

Bail was granted on eight occasions (although two of these were 'in principle') and only denied once across the observed hearings.

The key reason for the 'in principle' judgments was the failure of the Home Office to find suitable accommodation for the applicants. In (11/02), the applicant, having been detained overall for 32 months, and subject to immigration detention for eight months, had his bail was delayed by a further three months as a result of a lack of available suitable accommodation. For this reason, the judge not only listed the case for review in six weeks' time, in an attempt to put pressure on the Home Office to find accommodation more quickly, but specified that his bail was granted subject to approved accommodation, rather than an address, highlighting a more flexible approach. In this case, the judge noted the sensitivity of the applicant and reassured him that he would preside over the review in the coming weeks. This observation highlights that often as a result of 'Home Office inaction – the individual remains in detention' (Bail for Immigration Detainees, 2021) and corresponds with the trend that 'the number of people granted bail "in principl" by an immigration judge has increased dramatically' (Bail for Immigration Detainees, 2021).

The stage of deportation was also noted during these cases as a consideration when granting bail. However, this was not a barrier to bail being granted. In the earlier stages of deportation proceedings, one applicant who was granted bail was awaiting a stage 2 deportation order (15/02). Another applicant (11/02) had received their First Stage Deportation Notice seven months previously and was again awaiting the Second Stage Notice. When deportation is not immediate, and perhaps in light of the drawn-out nature of the deportation process, it appears the judiciary cannot be too influenced by the stage of the deportation process. Indeed, if they do not believe the applicant is likely to abscond then the stage of the deportation process is of little importance. It is interesting to note that a number of the applicants subject to deportation proceedings had been in the UK for many years, for example one applicant had been in the country since 2007 (25/02).

The hearing in which bail was not granted was abandoned for the reason that immediately prior to the hearing, the barrister was informed that the applicant's financial supporter claimed not to know him, as well as concerns being raised around the approved address. The judge agreed that the bail was likely to be refused if the tribunal proceeded before these issues were dealt with.

## Conclusion

The scope of this report is ambitious, considering not merely the practices of a single Immigration and Asylum Tribunal but offering a comparative analysis of regional tribunals in an attempt to correct an emphasis on London and the Southeast in preceding reports. We expected, perhaps naively, some novel conclusions to present here as product of a novel focus, but unfortunately, we find ourselves in the position of recapitulating the broad findings of previous reports in terms

of Home Office inefficiency, appalling lengths in detention and the attempts of the beleaguered judiciary to fulfil the 'presumption of liberty' established in the *Guidance*. However, by the same token, the fact that major considerations suggest themselves that bear comparison with previous reports demonstrates that these issues are not regional procedural or jurisprudential idiosyncrasies, but issues of national policy, and of national importance.

In almost all hearings, in all regional centres there was what the Bail for Immigration Detainee's 2014 report described as 'a worrying conflation…between criminal justice and immigration detention, which is enabling hundreds of immigration detainees to be held under restrictive prison conditions for months or years post-sentence, often for periods longer than their custodial sentence'. The fact that the bulk of our observations reflected this 'worrying conflation' eight years after the 2014 report was published demonstrates how little immigration policy and practice has changed despite increased scrutiny and purported reform.

In the majority of hearings observed, detention had begun as part of a criminal process before morphing into removal proceedings. This covered a huge spectrum of crime; from drug abuse, driving under the influence, possession of Class B drugs, to the 'most serious' offences, sexual crimes against minors and violent assault. However, despite this 'depressing litany', we were impressed by the judiciary's dedication to operating within their practice guidance and granting bail unless in the clearest cases of risk of reoffending or public policy interests. Indeed, some of the most serious offenders were granted bail, albeit under the most strenuous ATD measures.

The 'conflation' of criminal and immigration proceedings is not a quirk of circumstance. It reflects coherent Home Office policy articulated in the 'New Plan for Immigration', which prioritises the detention and subsequent deportation of Foreign National Criminals (FNCs) and reflects statute; 117C(1) of the Immigration Act 2014 states that 'the deportation of foreign criminals is in the public interest'. But important ethnographic research such as Mary Bosworth's 'Subjectivity and identity: Punishment and society in a global age' (2012) beg the question of the

theoretical implications of such detainment. HM Prison Service policy documents state that the purpose of custodial sentences is primarily rehabilitative, helping detainees 'lead law abiding and useful lives, both while they are in prison and after they are released'. But with FNCs, no such humane aim exists; there is no possibility of re-entering society after having served their sentence, but merely a further or 'dual confinement' in immigration detention (Bosworth, 2012). In the words of one detainee, 'my English friends, they did their time and now they're out. But I'm here. It's not right' (Bosworth, 2012). These words resonate strongly with observations discussed above in which FNCs spent months (in a range from 6-9 months in hearings observed) in Home Office detention after their original custodial sentence had been served. What are the implications of this dual confinement, 'and how can we begin understanding it within the intellectual framework of punishment and society'? (Bosworth, 2012).

Bosworth's survey was conducted primarily in custom built Immigration Removal Centres, of which there are seven in the UK. However, in the course of our observations we did not encounter a single detainee being held in these facilities. Instead, most were house within the normal prison system, some of them (as discussed above) max-security prisons for violent criminals serving longer custodial sentences (10+ years). The 2014 BID report discussed in detail how prisons are not suitable environments in which to house immigration detainees, but perhaps it can be admitted that it reflects certain logic that those detained under criminal charges initially should stay where they are. This defence collapses under the reality, observed in all centres, of immigration detainees who had committed no initial criminal act still being held in maximum security prisons. That these prisons were manifestly inappropriate environments in which to hold ostensibly innocent people is corroborated by the breadth of mental health issues observed across all centres. These were inevitably exacerbated by the 'incredible stress' of detention; judges in various circumstances registered concern at the suitability of further detention and reiterated Adults at Risk policy concerns, before allowing bail so as to deal with the issues in environments 'short of immigration detention'. Many detainees had diagnosed psychological conditions – autism, post-

traumatic stress disorder, depression – that required specialised medical care unavailable in the prison environment.

Intriguingly many of those suffering most adversely in the prison system were victims of human trafficking, a troubling commonality across the centres, but especially prevalent in the Bradford IAC. The 'New Plan' asserts that 'the UK's response to the evil of modern slavery is world-leading' and touts a new national referral mechanism and a separate processing procedure. However according to Sheona York, this process come with its own prohibitive 'reasonable grounds' test for identifying victims, provides them only with temporary accommodation, and fails to break the cycle of abscondment and reabduction; 'the stance is suspicious, and the measures proposed are weak and unhelpful' (York, 2021). The paucity of options available to genuine victims of human trafficking and the failures of the Home Office to implement their own suggestions is demonstrated in the recent High Court case NB & Others v Secretary of State for the Home Department (2020) EWHC 2291. The applicants were found to have been unlawfully placed in Napier Barracks, Kent after the Home Office had failed to consider whether, inter alia, they were victims of trafficking and/or torture (as well as failing to ensure that the barracks were Covid-19 secure or that quarantine measures could be safely imposed in the event of an outbreak).

The concerns considered above were registered again and again by the judiciary across multiple hearings in all centres considered. The 'presumption of liberty' has been taken seriously and strenuously by the judiciary in this regard, and in several cases admonitory speeches or disclaimers were appended to the judgements, registering the courts' displeasure with Home Office proceedings. In contrast, the Home Office, and the HOPOs, were consistently obstreperous in hearings observed. HOPOs actively approved ATD in one (1) case observed. Otherwise, hearings were often beset by Home Office inefficiencies, lost bail summaries, ineffective or tardy summons, failure to secure statutorily guaranteed accommodations and consistently weak or non-existent evidence as a basis for their submissions. To recapitulate Campbell's analysis, Home Office immigration work is 'beset by serious administrative and managerial problems' as well as

characterised by a pervasive ‘culture of disbelief’. The contrast between the Home Office and the judiciary could not be starker. While the basis of our legal system is adversarial, HOPOs’ reluctance to accept ATDs even in the most obvious and appropriate circumstances asks the question if the ‘New Immigration Plan’ includes hidden policy goals known only to Home Office operatives, perhaps reflecting transient political objectives which have no place in any system of justice.

The recently passed Nationality and Borders Act (2022) lends added urgency to this report and to the importance that these observations continue. Introducing a battery of reforms to tribunal procedures – expedited removal notices and hearings, limiting the right to appeal to the Secretary of State’s discretion, and heavy penalties for late submissions – it will require careful monitoring as the courts adjust to the new statute. The Act has received near universal condemnation from practitioners, academics and pressure groups; the Law Society has registered ‘significant concerns’ and suggested it breaches the UK’s commitment to the 1951 Refugee Convention. The Good Law Project has labelled it ‘racist’ and ‘astonishingly unjust’. Amnesty International argues the act is ‘improper’ and ‘unlawful’ and ‘falls short’ of creating any meaningful safeguards for asylum seekers; and many of these reforms would have cleared the threshold established in R (Cart) v Upper Tribunal for review by the High Court – the case in question must be of ‘general interest’ and bring up an ‘important point of principle or practice’ to be eligible – but this specific avenue of scrutiny was similarly abolished by the recent Judicial Review and Courts Act (2021). This coherent legislative programme and the ‘New Immigration Plan’ effectively give the government unfettered ability to detain and deport immigrants, no matter their reason for, or means of, entry into the country. The work of the Bail Observation Project, while often encountering the same themes and issues, has perhaps never been more important.

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# Appendix: Questionnaire

**(A) Bail Guidance criteria**

**A: The reason or reasons why the person has been detained**

- *Detention centre or prison where applicant held:*
- *Nationality and Ethnicity:*
- *Was there a bail summary?:*
- *Reasons for detention:*
- *Was the Bail Summary challenged by for inaccuracy or false statements? If so, by whom?:*
- *Did the Immigration Judge require the HOPO to produce evidence to support statements made in the Bail Summary?:*
- *If there was no bail summary, were other forms of information used?:*

**B: The length of the detention to date and its likely future duration**

- *Length of detention:*
- *Reason given for time:*
- *Did the Judge comment on length/proportionality of detention?:*

**C: The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable**

***Alternatives to detention (ATD) are any legislation, policy or practice, formal or informal, that ensures people are not detained for reasons relating to their migration status. For example:*

  - *Parole/release on own recognizance*
  - *Bond*
  - *Check-ins at ICE offices (Immigration and Customs enforcement)*
  - *Home visits and check-ins*
  - *GPS monitoring*

- *Where these options considered/evaluated during the hearing?:*
- *If so, what reasons were given:*

**D: The effect of detention upon the person and his/her family**

- *Does the applicant have a family?:*

- *Was the effect of detention upon the person/family commented upon?:*
- *Did the Immigration Judge adjourn the hearing in order to obtain expert opinion and evidence regarding the vulnerability, safety, age, health, etc. of the applicant?:*

**E: The likelihood of the person complying with conditions of bail**

- *Was the applicant noted as a Foreign National Prisoner?:*
- *Did the Immigration Judge consider the risk of absconding and note previous compliance?:*
- *The likelihood of the person complying with conditions of bail:*
- *The likelihood of the person reoffending:*
- *Public interest issue?:*

**B: The Decision**

**F: How well was either side able to provide evidence to support their case?**

- *Did the Immigration Judge explain clearly to all parties present how the hearing will proceed?:*
- *Did the Immigration Judge ensure that all parties had the same documentation to refer to?:*
- *Was there an interpreter provided in the correct language/dialect?:*
- *Was the interpreter satisfactory to all parties?:*
- *Any legal representation?:*
- *Was legal representation adequate?:*
- *Did the Immigration Judge allow the applicant/their legal representative time to present his/her case?:*
- *Did the Immigration Judge guide the applicant in presenting his/her case if the applicant was not represented?:*
- *Were the applicant or their legal representation allowed time to challenge or question the HOPO?:*
- *Did the Immigration Judge ensure at regular intervals that the applicant understood what was happening?:*

**G: Granting/Not granting bail**

- *Was bail granted/not?:*
- *What reasons were given?:*
- *If bail was granted, what conditions were imposed by the Judge?:*
- *If bail was refused, what recommendations were made, or directions issued by the Judge?:*
- *Was conditional bail granted ('bail in principle') pending accommodation granted?:*

**END**