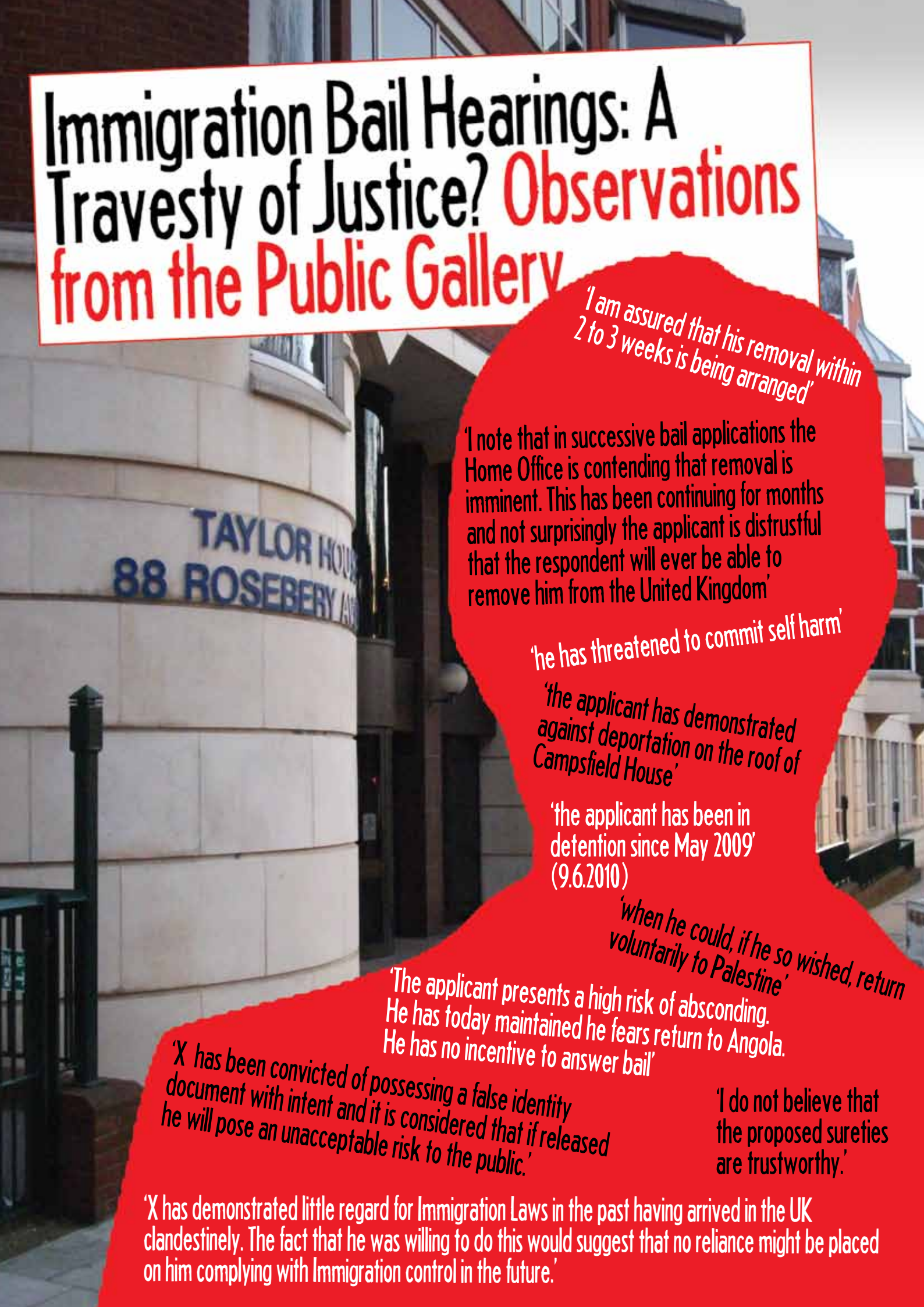

Immigration Bail Hearings: A Travesty of Justice? Observations from the Public Gallery

'I am assured that his removal within 2 to 3 weeks is being arranged'

'I note that in successive bail applications the Home Office is contending that removal is imminent. This has been continuing for months and not surprisingly the applicant is distrustful that the respondent will ever be able to remove him from the United Kingdom'

'he has threatened to commit self harm'

'the applicant has demonstrated against deportation on the roof of Campsfield House'

'the applicant has been in detention since May 2009' (9.6.2010)

'when he could, if he so wished, return voluntarily to Palestine'

'The applicant presents a high risk of absconding. He has today maintained he fears return to Angola. He has no incentive to answer bail'

'X has been convicted of possessing a false identity document with intent and it is considered that if released he will pose an unacceptable risk to the public.'

'I do not believe that the proposed sureties are trustworthy.'

'X has demonstrated little regard for Immigration Laws in the past having arrived in the UK clandestinely. The fact that he was willing to do this would suggest that no reliance might be placed on him complying with Immigration control in the future.'

Acknowledgements
To all the observers (see Annex 2); to Gill Baden who originated the project; to the project steering group: Gill Baden, Ionel Dumitrascu, Rosemary Galli, Bill MacKeith, Liz Peretz, Bridget Walker; to Steve Symonds (Immigration Law Practitioners Association) who provided training for observers; Ionel Dumitrascu (Bail for Immigration Detainees, Oxford) for drawing up the questionnaire; Caroline White and Rosemary Galli for extended comments on hearings; Jo Moffett-Levy for an early draft; Henry MacKeith for drawings; Bill MacKeith for photographs; Colm Massey for proof-reading. For comments on the drafts: Gina Clayton, Franck Düvell, Eiri Ohtani, Steve Symonds, Caroline White.

Steve Symonds' notes on bail hearings are reproduced in full in Chapter 1 with his permission.

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Front cover: Quotations from immigration judges' refusals of bail

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Note: In the text, references such as T24, N7, are made to individual bail application hearings, as recorded by observers in questionnaires. T indicates a hearing at Taylor House in London, N a hearing at Columbus House in Newport, B one in Birmingham, and H one at Hatton Cross, Feltham, Middlesex.

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Immigration Bail Hearings: A Travesty of Justice? Observations from the Public Gallery

Judges

Have you ever been to a court and watch any of the judges?
Those people carry some serious grudges
Don't get me wrong, breaking the law must be punish
But if you're innocent, your life shouldn't be tarnish
People who are guilty are getting away free
The ones that are innocent, lost their liberty
Most judges don't use their moral authority
Some just trample on one's dignity

I would like to see justice serve right
Not by someone using their might
I have seen judges made up their mind before the case is tried
By punishing victims because someone lied
Have you ever been to court for a trial?
You have to be firm while fighting for survival
Those egoistic people go on like they are God
But in their home they are treated like a Cod

There can be no peace without any justice
Time after time the UK Border Agency abused its office
I have even seen judges abusing their power
In the eyes of the law, they are treated differently from the others
What kind of example those judges are setting?
The justice system is only being, belittling.

C.C.,
detained under 1971
Immigration Act

Contents

Foreword

Asylum seekers and migrants in the United Kingdom have a right to liberty and should not be subjected to immigration detention. However, while detention does exist, it should be sanctioned by a court to which the person seeking bail should have free access accompanied by effective legal representation. Regrettably that was not the case in 1997 when I first became involved in assisting immigration detainees in seeking bail and it is still not the case.

Indeed, since the late 1990s, the situation has in many ways become worse. Many more people – tens of thousands – are now detained every year under the powers conferred by the 1971 Immigration Act, and the euphemistically styled 'detention estate' – the number of beds in detention centres – has expanded at least four-fold.

A network of immigration courts has been set up to hear cases concerning immigration status and to hear applications for bail from detainees. Video-link technology is now used in a very large proportion of bail hearings – the bail applicant sitting alone in a small room in the detention centre, miles away from the court, their lawyer – if they are lucky enough to have one – and their interpreter.

It is a world that is very little scrutinised by the media or members of the public at large.

Justice has to be seen to be done in order for us to know it has been done. Indeed, over time, justice without scrutiny is unlikely to be done. In that respect, the report from the Bail Observation Project carried out by the Campaign to Close Campsfield fulfils a vital need. The people who have carried out the observations and written the report, while they may be informed, are not themselves lawyers. They have given a timely and valuable 'view from the public gallery'.

Tim Baster
Founder, Bail for Immigration Detainees

Preface

For years, among those who are familiar with or have encountered the system of immigration courts in the United Kingdom, stories have been commonplace about unfairness or lack of due process. Trained lawyers have expressed concern, for example in the report *A Nice Judge on a Good Day* recently published by Bail for Immigration Detainees.

The authors of this report, and the observers who compiled the evidence, are all lay people. Some have been involved for years in pressing for an end to immigration detention, some have an academic interest, some are standing or have stood as sureties for people seeking bail, and many are people simply with sufficient interest in human rights to be concerned. As such we have no other vested interested other than that of wishing to see justice done.

This report gives an account of the systematic study we have carried out in observing 115 bail hearings and what we have found. Our findings bear out our initial, more anecdotally based, concerns. We believe this report shows that what is required is root and branch reform of a fatally flawed system.

We hope that the publication of this report will encourage the public and journalists to themselves monitor the activities of the immigration courts, in particular bail hearings. Such public scrutiny is the only sure way of ensuring that the necessary changes come about. We hope that general organisations of lawyers will 'main stream' concern with what goes on in immigration courts, to ensure that the treatment of migrants is not inferior to treatment of British citizens.

Bail Observation Project steering group, January 2011

A day at the immigration courts

The following account of two parents being 'heard' in immigration courts was published in the Campsfield Monitor of February 1997; apart from the fact that the detained father was allowed to join his family in the waiting room, and that immigration adjudicators are now called immigration judges, it could have been written today.

There are so many reasons to keep our eyes closed and our mouths shut. Not that we mean to – we can spot an injustice as much as the next person – but … and here come the excuses … There are so many things to do … If your own house is not in order how can you have time to look out for others … and then something hits you smack between the eyes.

Like today, when I went to stand bail for a detained asylum-seeker seeker, on the same day and in the same court that his wife's asylum case was heard.

A touching family scene: a father, mother and rather bright four-year-old in a public place, an immigration court. The infant runs first to one parent, then to the other, and thoughtfully, carefully plays with the toys provided. This family group stays in the building for five hours, moving from room to room, listening to different languages and formal statements in English. During the father's detention hearing they are finally together. Then they separate. The father is led off by a private Group 4 guard, a great burly fellow with institutional shoes and haircut. Back to detention; there is to be no bail. The adjudicator refuses to say why.

The mother contains her grief just as far as the stairs – this all takes place in a brand-new architect designed office block – then she throws her shawl over her head, collapses on the floor, and howls. The four-year-old plays with the lift, darting distressed glances at her mother. There is no searching for her father. She is used to Papa disappearing behind doors for weeks at a time. It's all she has known since she was eighteen months old. During the day she has suffered many separations already, and so have the rest of us.

In the morning, in the waiting area for the immigration hearing rooms (hardly an apt title for courts where so much is deliberately not heard), the girl hurls herself against the glass doors that keep her from her father. The door is labelled 'Detention Suite', if she could read. During the day her mother asks us to take her from her lap in the court so she can be spared the detail for her own asylum case which she is going through yet again, with yet another interpreter, the fourth time in the six years since she began with such hope and determination to ask for asylum on account of rape, the murder of her brother, arbitrary imprisonment. Later – much later, in the father's bail hearing, when the child wins her triumphant battle to clamber onto her father's lap so they can face the adjudicator together, we have to take her, puzzled and angry, away from the court.

All day the rooms are full of people of all ages who are smart, sombre, dejected and mainly not white. There are Sikhs, people from Turkey, Africa, Eastern Europe. The scene is out of a nightmare. The staff all smiles and concern in the corridors. No sign of the harder side at the beginning, except on the wall a cheerful performance indicator of 'Asylum Seekers – 3.0 disposal rate' (where? how? per hour? per day?). And the crimes? Both parents are 'being heard' – prosecuted by the Home Office who seem determined like blind old dogs on one thing only, the hounding of both parents from our shores. Both parents had turned to Britain in desperation, from their separate countries where they both experienced persecution and feared for their lives. The tale of one has already been told; the other was on hunger strike and forced by an army onslaught to flee. Both parents had correctly, officially, sought asylum within hours of arrival through immigration checks. Both are still 'being processed', one six years after applying for asylum, the other eight.

SUMMARY

115 Bail hearings

Over a period of eight months (December 2009 – July 2010), 18 observers travelled to attend 115 bail hearings at four courts: Columbus House, Newport, Wales; Sheldon Court, Birmingham; Taylor House, central London; and York House, Hatton Cross, Feltham.

From the 115 hearings only 33 detainees got bail; 22 applications were withdrawn, mainly (16) on the advice of the judge, but in at least two instances because of the judge's reputation for not granting bail (barrister's comments).

Over a third of applicants needed interpretation and this was particularly difficult if the application was heard via video-link. Interpretation was not always satisfactory and in one instance no interpreter was provided though one was needed.

75 detainees who were applying for bail had a legal representative: 28 of these were successful. Only 5 of the 40 applicants without legal representation were granted bail.

Nearly half the observers found that the proceedings were irregular in some way. A third said explicitly that, in their view, the process had been unfair. Some observers came to the conclusion that, given various faults in the system, a fair hearing was virtually impossible to obtain.

Some judges ensure that the applicant or legal representative is able to present the case and challenge the bail summary. Others accept the Home Office case without question, despite guidance which makes the immigration judge responsible for providing support in these unrepresented cases. Relations with Home Office Presenting Officers ranged from 'difficult' to 'collusive'.

At times the immigration judge failed to follow what rules do exist. For example, in regard to health issues, this included the refusal of bail to at least two mentally ill people and a torture survivor (with independent medical report) – people who are listed by UKBA as among those who should not normally be detained.

Different courts operate differently – video-link is used much more frequently in Newport and Birmingham. The chances of getting bail at Newport and Hatton Cross are much lower than in the other two courts. This is important for the compilers of this report, since most Campsfield detainees are 'heard' at Newport. The sureties are usually required to stay outside the courtroom at Newport and Birmingham, though they may be called in, while they are generally more likely to be admitted from the start at Taylor House and York House.

Nine applicants did not receive the bail summary (that is, the document giving the Home Office 'case' for continued detention) in advance, as is their right according to the Home Office's own rules. Despite guidance that failure to produce the bail summary in advance should normally lead to bail being granted, this happened only once.

Group 4/G4S failed to transport one applicant to court, and one hearing could not proceed because the detainee had suddenly been moved to another detention centre (Dungavel in Scotland).

The systematic observations demonstrated that there is an overarching issue of lack of due process, underpinned in many cases by a culture of disbelief. Overall, the survey shows that the bail system is

fundamentally flawed in terms of providing anything approaching a fair hearing. And that is leaving aside the question of whether a state should have the right to impose 'administrative detention' – unacceptable when it come to British citizens – on innocent migrants in the first place.

This report highlights clear differences between practices at the different centres, as well as between different judges, and the frustrations and repeated unfairness of the process as experienced by the lay people in the courts, be they observers, families, sureties or detainees.

Written as it is from the experiences of people not steeped in the day-to-day running of these tribunals, the report opens a window onto practices which it is hoped will alert a broad cross-section of the population.

The main report concludes by making a number of recommendations under the headings:

- Independence of immigration judges
- Legal entitlement and representation
- The conduct of hearings
- The bail summary
- Video-link hearings
- Accountability, scrutiny and monitoring
- Guidelines and training for immigration judges.

INTRODUCTION

i The Bail Observation Project

The project originated in concern shared by members of the Campaign to Close Campsfield and Bail for Immigration Detainees (BID) Oxford about many aspects of the bail system experienced particularly by detainees at Campsfield House Immigration Removal Centre near Oxford. These concerns were laid out in the Campsfield Monitor published by the Campaign, in the article 'Asylum and Immigration Tribunals (or: How to fail asylum seekers)' (November 2008) (see Annex 4).

The project was run by the Campaign to Close Campsfield and has benefited from advice from former detainees and from lawyers in the field. It was coordinated by a steering group and the aim was to publish a report. At an early meeting we discussed our project with representatives of the Immigration Law Practitioners Association (ILPA) and Bail for Immigration Detainees (BID). A questionnaire was drawn up (see Annex 3). Steve Symonds of ILPA provided a training session for volunteer observers. Between November 2009 and July 2010, 115 immigration bail hearings were observed (one, B8, was a bail review, so the applicant was out on bail and this hearing has not been counted) by a team of 18 volunteers. The hearings were observed at four courts: Taylor House, central London; York House, Hatton Cross, Feltham, Middlesex; Columbus House, Newport, Wales; and Sheldon Court, Birmingham. For each hearing, observers completed a questionnaire. In many cases the observer wrote additional notes.

The process of collating the completed questionnaires and further comments and of writing up this report was coordinated through the steering group.

ii Why we observed immigration bail hearings

Exchange outside the court:

Home Office Presenting Officer: *Who are you doing this for?*

Observer: *Myself*

Home Office Presenting Officer: *Yes, but who asked you to do it? Whose side are you on?*

The hearing centres where bail applications are heard are public courts. However, apart from the observers involved in the project, few, if any, other members of the public attended the hearings. With exceptions such as Taylor House in London, most of the hearing centres are not easily accessible from town centres. On occasion, observers were challenged or asked about their reason for wishing to be present in court. Usually the clerk or judge was satisfied to be told 'I am an observer'. Sometimes observers were asked to give their names. One observer, who insisted on his right to be present without having to explain his motives other than wishing to observe as a member of the public, was twice threatened by the immigration judge with being instructed to leave the court room; the threat was not carried out.

One of the main motives for this project is a belief that legal processes that have a huge effect on people's lives need to be better known to the public. Public awareness about this part of our legal system is very limited and political capital is made by acting tough. In a situation where there are 'unpopular' categories of people, dealt with away from the public eye, we believe that there is the potential for, even the likelihood of, injustice.

Some of those who took part in the project have been involved in campaigns to draw attention to the

conditions in immigration detention centres or to call for their closure, or have stood as sureties for those detained. All have witnessed the human cost of the decisions to keep people locked up, away from family and friends, for indefinite periods, with poor prospects of release.

There was an overarching need which led to this survey, that of examining the fairness of proceedings in immigration courts. The whole question of due process is up in the air as there are no current instructions to immigration judges (the last set of *Bail Guidance Notes for Adjudicators from the Chief Adjudicator*, 3rd edition, 2003, are no longer available on the web and have not yet been replaced).

There should always be a presumption in favour of bail (European Convention on Human Rights article 5(4), UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*).

> *The burden of proving that the presumption of liberty does not apply lies on the Secretary of State. As detention is an infringement of the applicant's human right to liberty, you have to be satisfied to a high standard that any infringement of that right is essential.*
>
> – Bail Guidance Notes for Adjudicators, 3rd edition, para 2.5.1

It was quite clear from the bail hearings observed in this survey, that this advice is frequently not followed in practice.

iii A note on detention and the political context

> *We now remove an immigration offender every eight minutes – but my target is to remove more, and remove them faster. . . .*
>
> *Even though asylum claims are at a 14-year low, we are removing more failed asylum seekers each year. That means we need more detention space.*
>
> – Immigration minister Liam Byrne, quoted in Home Office press release, 19 May 2008

Detention and deportation are promoted by UK governments as central to their immigration policy. We are subjected to constant propaganda to the effect that foreigners are the source of most of our problems. And it has to be said that there is some popular support for that view.

A central thread in this discourse is that government must be seen to be 'tough'. Immigration, particularly by black people, must be seen to be obstructed. The criminalisation of migration follows on naturally in a context of increasing state surveillance and control. Actions such as using 'false' documentation that are sometimes necessary in order to be able to arrive in the UK and claim asylum – a universal right recognised by the 1951 UN Convention on Refugees – have been criminalised and are now punishable by a prison sentence (there is a legal defence for people who attain refugee status, but there are problems with the use of this). Many, if not most, of the 'foreign criminals' referred to by Mr Byrne would be people who had worked without work permits, overstayed their visa, or entered with unofficial documents: hardly what most people would consider criminal offences, let alone serious ones. Moreover, they are detained after they have completed their prison sentence, an unjustified double punishment.

The right to seek bail is the recourse available to the immigration detainee seeking his/her liberty. (A liberty that does not however guarantee the right to work, study, or to enjoy family life.) As well as being the detainee's possible lifeline, the exercise of that right is a necessary check on the expansion of the 'detention estate'. If the decision to detain is not powerfully challenged by these courts, then they are complicit in an ever-increasing denial of basic liberties.

Immigration detention: A snapshot

In the third quarter of 2010,

- 6,780 people were put in detention, held solely under Immigration Act powers, 5 per cent less than in Q3 2009 (7,110). Of these,
- 3,305 (49 per cent of the total) were asylum detainees, 21 per cent lower than in Q3 2009 (4,170)
- 4,440 (66 per cent of the total) were put in UK Border Agency 'removal centres'
- 2,335 (34 per cent of the total) were put in UKBA 'short term holding facilities'.

On 30 September 2010,

- 2,890 people were detained solely under Immigration Act powers, the highest since these data became available (2001)
- 2,795 were held at UKBA removal centres and
- 95 at UKBA short term holding facilities
- 1,795 persons who had sought asylum at some stage were being detained solely under Immigration Act powers (62 per cent of all detainees)
- 89 per cent of asylum detainees were male.
- 1,140 of the 2890 had been in detention for less than 29 days
- 525 for between 29 days and two months
- 470 for between two and four months
- 195 for between four and six months
- 300 for between six months and a year, and
- 260 for over a year.

Note: Excludes people detained in prisons and police cells.

Figures from Home Office, Control of Immigration: Quarterly Statistical Summary, United Kingdom, July–September 2010
http://rds.homeoffice.gov.uk/rds/pdfs10/immiq310.pdf

This applies whether the detainee is a refugee making an application for political asylum, a person who has worked or entered the country with 'incorrect' or no official documentation, a person who entered the country with appropriate documentation but then stayed on after their visa had expired, or someone who has served their time after a conviction.

Important debates have taken place in parliament and the media over detention of 'terrorist suspects' without trial for 28 days or longer in Belmarsh, 'Britain's Guantánamo', and more recently over control orders. Politicians, lawyers, journalists and others have a duty to promote similar debate and change in relation to the much larger numbers – 25,000–30,000 people every year – detained under the 1971 Immigration Act without charge, without time limit and without proper judicial oversight. At present, comparative lack of such debate and change is doing serious damage to the well-being of everybody in the UK. If it is not good to experience being unfairly locked up, it is also not good to live in an atmosphere that allows that to happen.

Some encouraging signs are the strengthening of the work of organisations such as Bail for Immigration Detainees and Medical Justice, and the coming together of 27 organisations in the national Detention Forum, which in November 2010 held a meeting in Parliament attended by 130 people including 9 members of parliament and four peers. The Detention Forum seeks a radical review of the whole policy and practice of detention. The promise of the new Conservative/Liberal Democrat government to stop detaining children was welcome, but after nine months, at the time of writing, the practice continues. The central point to press is that what is damaging to a person under the age of 18 does not cease to be damaging when the person reaches the age of 18 or is over that age.

CHAPTER 1

Immigration courts and bail hearings

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release from detention ordered if the detention is not lawful.

Article 5(4), European Convention on Human Rights

1.1 Introduction

For a migrant who finds themselves in detention, applying for bail acts as a way to have an independent check on whether they should have been detained; whether they can be shown, in fact, to be likely to abscond. A person with the title 'immigration judge' (a person with a legal background who has been appointed to this role by the Tribunals Service) will receive a document from the Home Office outlining the case to refuse bail (the bail summary), while the applicant or 'appellant' (and their lawyer if they have one/can afford one) make the case for bail and produce sureties to back their case. The bail summary must be available to the judge and the detainee/their lawyer the day before the case is heard so they have time to read it and, if necessary, have it translated.

In the court are the immigration judge, the HOPO (Home Office Presenting Officer, the 'respondent'), and the detainee (by video link in many cases). There can also be in court an interpreter, the detainee's lawyer, and (it appears, at the judge's discretion) sureties. To one side, or at the back of the court room, there are seats so that family, friends, onlookers, can attend if they wish.

At the time of writing, there are no guidance notes in force for immigration judges on how a court should be conducted; the last notes were published in 2003, since when there have been changes in immigration law. Revised guidance notes were promised for July 2010. However, although they are not in force, the 2003 guidelines set out some useful standards to be followed. Reference is therefore made to them in this report.

Bail for Immigration Detainees (BID) has published a detailed and well researched report on the current practice, which gives a good indication of what should happen, in *A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty* (BID, July 2010). A judge should give full opportunity and encouragement to the detainee to put their case, through the lawyer or in person. The interpreter, if necessary, should be acceptable to the detainee (this is always difficult in video-link cases because the interpreter is in the court while the applicant is back in the detention centre). The judge at all times should preserve independence from all parties, including the Home Office representative in the court, since the presumption of bail is a presumption of liberty and the HOPO is making the case for continued incarceration. The lawyer (if there is one) and the sureties should be treated respectfully and without prejudice. And above all, what happens in the court – the argument that led to the immigration judge's decision – as well as the decision itself should be fully documented so that the person is clear about the reasons for the decision that has been made.

It is quite clear, from *A Nice Judge on a Good Day*, that the practice is often very different. With very few members of the public going to watch what happens in court, and with the exceptional vulnerability of the detainees, many of whom are fairly rapidly removed so cannot testify to poor practice, the system is not currently subject to monitoring or scrutiny. *A Nice Judge on a Good Day* shows the detail of what is wrong from the point of view of the lawyer; the observations in this report give a view 'from the public gallery'.

The immigration tribunal – i.e. the immigration courts – have fairly recently become part of the national tribunals system; and while they are the only courts in this system which can actually deprive people of their liberty, the change could be a hopeful sign that there will be more oversight, and better uniformity of practice.

A government website describes the courts which hear bail applications as follows:

> *On 15 February 2010, Immigration and Asylum Chambers were established in both tiers of the United Tribunals framework established by the Tribunals, Courts and Enforcement Act 2007. The new chambers replace the former Asylum and Immigration Tribunal. . . .*
>
> *The First Tier (Immigration and Asylum Chamber) is an independent Tribunal dealing with appeals against decisions made by the Home Secretary and his officials in immigration, asylum and nationality matters.*
>
> *Appeals are heard by one or more Immigration Judges who are sometimes accompanied by non legal members of the Tribunal. Immigration judges and non legal members are appointed by the Lord Chancellor and together form an independent judicial body. We hear appeals in a number of hearing centres across the UK. . . .*
>
> – www.tribunals.gov.uk/ImmigrationAsylum/index.htm (accessed 3.12.10)

1.2 Bail hearings: An introduction for the lay person

Steve Symonds, from the Immigration Lawyers Practitioners Association, kindly did an introductory training session for observers, setting out the general information a lay observer would need to know about Immigration Courts. His notes entitled *Immigration Bail Hearings* include a guide to what the best practice should look like. All observers had access to these notes before they carried out their bail hearing observations. They are reproduced below with some added side-headings and changes to numbering to fit the numbering of chapters and sections in this report.

The notes are also available on: www.ilpa.org.uk/ via 'Info service→papers and notes'.

1.2.1 Immigration bail hearings

An Immigration Court bail hearing is a court hearing before an immigration judge, where the issue for the judge is whether or not the person asking for bail should be released from immigration detention, and if so on what conditions.

1.2.2 The power to detain

The UK Border Agency is empowered to detain non-British citizens – either to prevent a person's unlawful entry to the UK, or in order to remove a person from the UK. This general power is subject to UK Border Agency policy and guidance, which sets out constraints on its use and procedures that are to be followed. It is also constrained by a general requirement in law that the exercise of the power to detain must be done in a way that is lawful, and according to a lawful process.

Key points of principle in relation to the power to detain:

- Detention must be for one of the two purposes identified above.
- Detention is a last resort. If it is not necessary to detain in order to achieve either of these purposes, a person should not be detained.
- Detention is to be for the shortest possible time. There is no fixed time limit on immigration detention. Also, the key issue is not how long has a person been in detention, but how much longer may a person be in detention in order to achieve either of the two purposes identified above.
- Someone who is detained should be given written reasons for their detention.
- A person's detention should be kept under review, and if detention is continued further written reasons should be supplied to explain why it is still considered necessary to continue detention.

Factors that must be taken into account in considering whether to detain

UK Border Agency policy sets out factors that must be taken into account in considering whether to detain or whether to continue detention:

- What is the likelihood of the person being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws?
- Is there a previous history of complying with the requirements of immigration control?
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they rely heavily on public welfare services for their daily needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, and application for judicial review or representations which afford incentive to keep in touch?

- Is there a risk of offending or harm to the public?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?

Normally considered unsuitable for detention

In addition to the general principles outlined above, UK Border Agency policy sets out that certain people are normally considered unsuitable for detention:

- Unaccompanied children
- The elderly
- Pregnant women
- Those suffering from serious medical conditions
- The mentally ill
- Torture survivors
- People with serious disabilities
- Victims of trafficking

The UK Border Agency policy on detention is significantly more complex than what is set out here. The policy (65 pages) is in Detention and Removals, Chapter 55, 'Enforcement Instructions and Guidance' available at: www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55?view=Binary

1.2.3 Immigration bail

A person in immigration detention may be released on bail by the UK Border Agency (by a chief immigration officer) or by an immigration judge.

- Immigration bail, if granted, will be subject to some (but not necessarily all) of the following conditions:
- That the person resides at a specified address
- That the person reports regularly (e.g. to an immigration officer)
- That the person comes back to an immigration judge after a fixed period of time (a bail renewal hearing)
- That the person gives a recognizance (a sum of money that he or she may forfeit of breaching any condition of bail)
- That another person (or other persons) stand surety (offer a sum of money that they may forfeit if the person breaches any condition of bail).

1.2.4 An immigration bail hearing

A person in immigration detention may apply to an immigration judge for bail. To do so, he or she must fill out and send a bail application form. A date should then be set for the bail application to be heard.

The bail summary

Before the hearing, the UK Border Agency should supply a bail summary – unless it is decided that bail should not be opposed. A bail summary is a document setting out the reasons why the UK Border Agency opposes the application for bail. It will usually set out the person's immigration history (i.e. such things as how and when the person entered the UK, whether he or she did so lawfully or not, whether he or she has previously been bailed, whether he or she has previously broken any conditions of bail or broken any conditions of being permitted to be in the UK, whether he or she has made any immigration applications or appeal, whether there are any applications or appeal outstanding and at what stage these are at). It should also explain why the UK Border Agency considers it appropriate to detain the person.

The bail summary is a critical document. If the bail summary does not justify continued detention, then it should normally follow that bail is granted. Bail summaries often contain errors. It is very important, therefore, that the bail summary is received by the detainee and any legal representative in good time before the bail hearing. This is important so that, firstly, any errors can be spotted; and, secondly, any evidence that is necessary to counter what is said in the bail summary can be obtained and presented. Bail summaries are often served late; and it is usually the case that the UK Border Agency does not produce any evidence to support the assertions in the bail summary.

Who is present in court

A person applying for bail may be legally represented. Many people applying for bail are not represented.

It is often the case that a person applying for bail is not produced at the bail hearing. He or she may 'attend' the hearing via video link from the centre where he or she is detained.

At the bail hearing, there may be the following people:

- applicant (the person applying for bail), possibly via video link
- immigration judge (and court clerk)
- presenting officer (for the UK Border Agency)
- legal representative (for applicant), though many applicants do not have a representative
- interpreter
- sureties
- members of the public
- others who are waiting for their own case to be heard

The procedure at the hearing is in the hands of the judge. Hence, what can be expected is explained in the next section dealing with the role of the immigration judge.

1.2.5 The role of the immigration judge

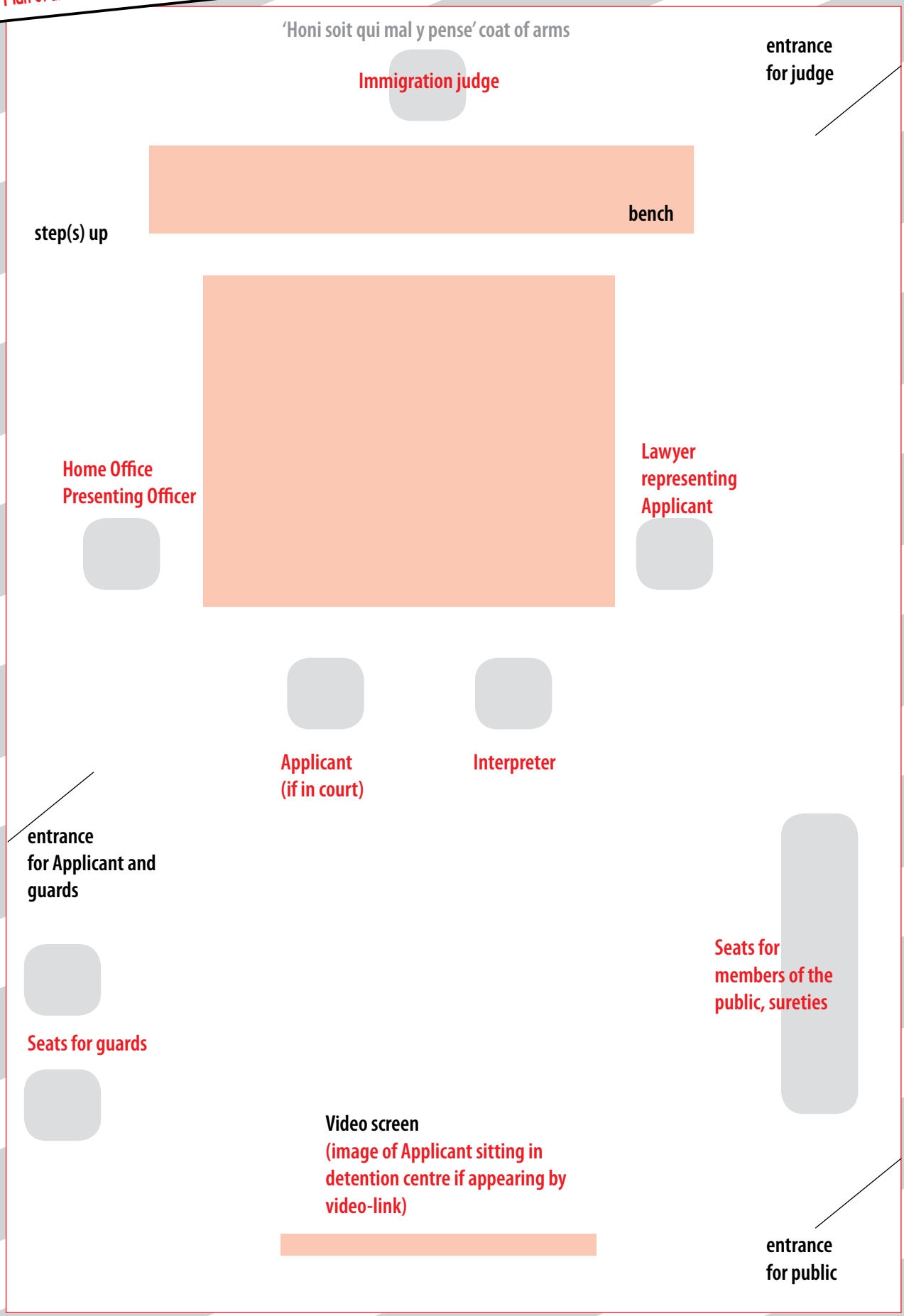
It is the responsibility of the immigration judge to ensure that the applicant receives a fair hearing; and ultimately it is for the judge to decide whether or not to grant bail.

However, the role of the immigration judge in ensuring a fair hearing may depend on whether the applicant is legally represented. If the applicant is represented, the judge's role may be more passive – i.e. ensuring that the hearing is conducted in a way that does not prejudice the applicant. If the applicant is not represented, the judge's role may need to be more proactive – i.e. taking positive steps to ensure fairness.

What follows would be appropriate if the applicant is not represented. If the applicant is represented, the role of the judge may be less proactive.

The judge should ensure that the applicant understands who is attending the hearing; and what procedure is to be followed. Given the importance of the bail summary, the judge ought to ensure that the applicant has received the bail summary and understands what it says. The judge should ensure that the applicant has an opportunity to say if there is anything inaccurate in the bail summary; and that opportunity should be clear – e.g. by the judge directly asking whether the applicant understands what is written there; and whether the applicant agrees that what is written there is correct. Whether or not the bail summary is correct, the judge should ensure that the applicant has an opportunity to explain why he or she says bail should be granted. Again that opportunity needs to be clear, so the judge may need to ask some direct questions – essentially directing the applicant's mind to why he or she says bail should be granted.

Plan of an immigration court (Columbus House, Newport)



The judge should also consider who else is present who may be able to help answer these points. If there are sureties, it would usually be appropriate to establish how the surety knows the applicant and why the surety considers the applicant will abide by any conditions if bail is granted. If there are family members (or friends) present, it may be that they are in a position to give information as to why bail should be granted.

The judge will give the presenting officer an opportunity to speak; and may permit the presenting officer to ask questions of anyone who has given evidence at the hearing (including the applicant). However, the judge should ensure that the applicant hears and understands what the presenting officer says; and has an opportunity to answer any of the points the presenting officer makes (unless the judge makes clear that the point does not need answering because the judge thinks the point is a bad point or one that is already satisfactorily answered).

Immigration judges sometimes divide bail hearings into two parts – firstly, considering whether bail should be granted or refused in principle; secondly, if in principle bail may be granted, asking questions of any surety to see whether the surety is satisfactory. Note, however, that a surety is not necessary for bail to be granted.

The judge's discretion

Ultimately, bail is at the discretion of the immigration judge. The guidance for adjudicators (what immigration judges used to be called) that used to be publicly available is no longer in use. The question for the immigration judge is little more than whether he or she thinks bail should be granted, though it would be appropriate for the judge to approach that question having regard to the principles outlined earlier in this note. However, the role of the immigration judge is not to rule on whether the detention of the applicant is lawful or unlawful.

1.2.6 Some key things to consider

The following bullet points summarise some key things that should be apparent in a fairly conducted bail hearing:

- The bail summary has been made available to the applicant (and his or her legal representative) in good time before the hearing
- The applicant and his or her legal representative have had sufficient time to discuss the bail summary before the hearing starts
- It is clear that the applicant can hear and understand what is said and what is happening throughout
- The applicant (or his or her legal representative) is given sufficient opportunity to explain why bail should be granted and to answer any points in the bail summary and any other points made by the presenting officer
- The immigration judge has made clear the procedure he or she is adopting before the hearing progresses; and if there are any departures from that the immigration judge makes clear what is happening and why
- If the immigration judge decides to refuse bail, he or she explains why
- At all times, the immigration judge ensures that the hearing is conducted in a clear and courteous manner
- If the applicant is not represented, the immigration judge ensures that the applicant has a proper opportunity to make his or her case for a grant of bail.

A court room at Taylor House, London

Taylor House, London

A daily court list

NEWPORT (COLUMBUS HOUSE)

11 March 2010

FIRST-TIER TRIBUNAL - IMMIGRATION AND ASYLUM CHAMBER

Substantive List

10:00 AM **CH/01303**
Respondent's rep: .....
Syeds Solicitors

10:00 AM **CH/01305**
Respondent's rep: .....
Pillai & Jones Solicitors

10:00 AM **TY/09038**
Respondent's rep: .....

....

NEWPORT (COLUMBUS HOUSE)

11 March 2010

FIRST-TIER TRIBUNAL - IMMIGRATION AND ASYLUM CHAMBER

Substantive List

2:00 PM **CH/01306**
Respondent's rep: .....
Azam & Co. Solicitors

These lists are available on the Home Office website – www.tribunals.gov.uk/immigrationasylum/DailyCourtLists/dailyCourtLists.htm – after 2p.m. the day before a hearing.

The cases referenced with two letters (indicating detention centre where the applicant was first held), a slash, and a single number, like these, are the bail applications to be heard on that day. CH = Campsfield House, TY = Tinsley House.

The morning of the hearing, further details are included in the lists posted in the court house / hearing centre, including the applicants' names and court room numbers.

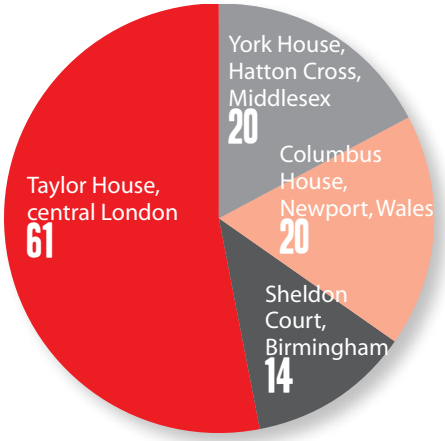
The bail hearings in numbers

Note: We do not pretend these accurately reflect what happens across all bail hearings nationally. However, we believe the number of bail applications observed to be sufficiently large to merit providing the following statistics. The total number of hearings observed was 115. Sometimes information was not available on a particular point from all the questionnaires completed by observers, in which case the smaller total number of hearings where the relevant information was available is indicated, e.g. (n = 103).

The observations

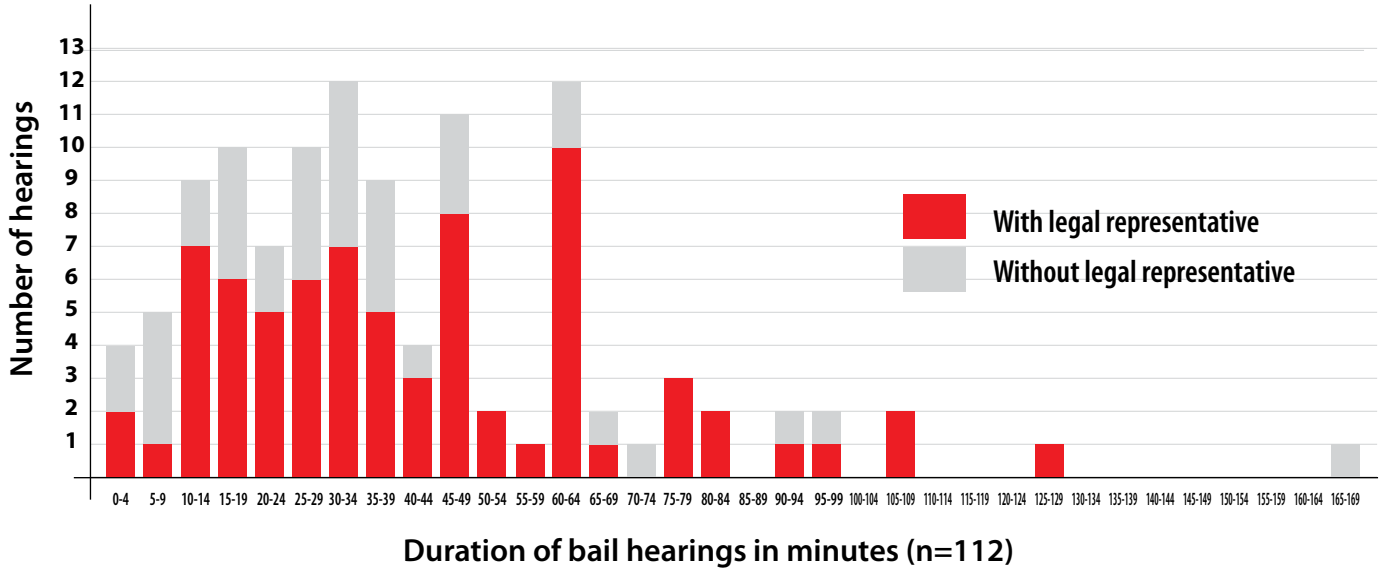
- **115** – bail hearings observed
- **34** – days on which hearings were observed
- **4** – courts / hearing centres where hearings were observed
- **18** – trained observers
- **8** – months over which observations were made

Where the hearings were observed (n = 115)



How long the hearings lasted (n = 112)

SHORTEST 4 MINUTES
LONGEST 165 MINUTES

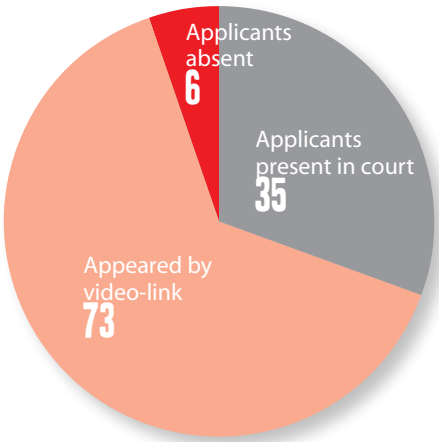


Duration of bail hearings in minutes (n=112)

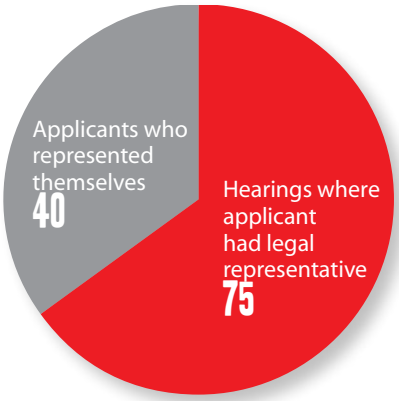
Who was in court and who wasn't

- **35** detainees present in person,
  73 appearing by video-link,
  6 not present at all;
  1 bail applicant appearing at 2 hearings
- **36** different immigration judges
- **75** hearings where legal representative present
- **40** detainees representing themselves
- **6** detainees not present at all at their own bail application
- **115** hearings (all) with Home Office presenting officer (HOPO)
- **46** hearings with interpreter(s) present
- **0** no journalists, official monitors, few if any members of public apart from BOP observer, sureties

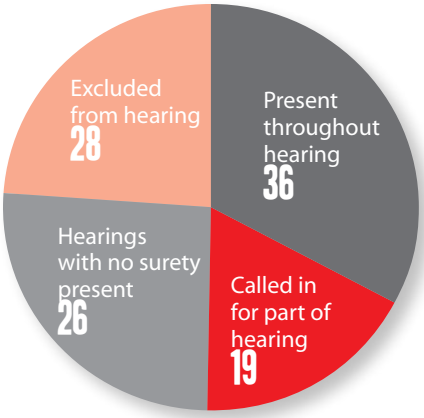
Attendance of applicant at hearings (n = 114)



Legal representation (n = 115)



Sureties (n = 109)



About those seeking bail

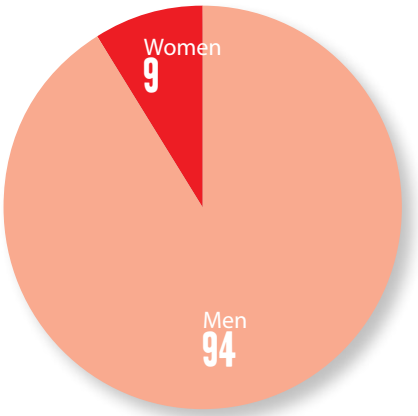
Place of detention (n = 71)

15	Campsfield	**4**	Colnbrook	**1**	Harmondsworth
15	Brooke	**3**	Oakington	**1**	*Hewell
10	Dover	**2**	*Maidstone	**1**	*Belmarsh
9	Yarl's Wood	**1**	*Wormwood Scrubs	**1**	*Borwood House
6	Tinsley	**1**	*Exeter	**1**	Dungavel

(* = prison)

The bail hearings in numbers

Men and women applicants [n = 103]



What happened at the hearing

Bail summary challenges (n = 96)

46 HEARINGS WHEN BAIL SUMMARY NOT CHALLENGED
50 HEARINGS WHEN IT WAS CHALLENGED

Bail summary available before hearing (n = 81)

72 HEARINGS WHEN BAIL SUMMARY WAS
9 HEARINGS WHEN BAIL SUMMARY WAS NOT

Hearings that went ahead (n = 93)

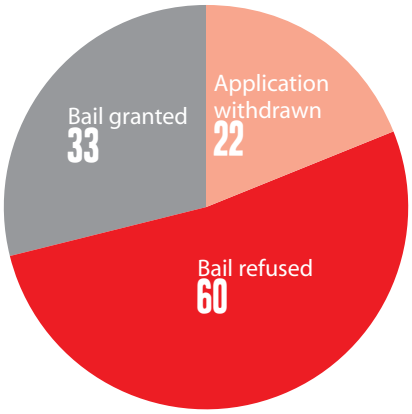
60 BAIL REFUSED
33 BAIL GRANTED

Nationality of applicant (n = 82)

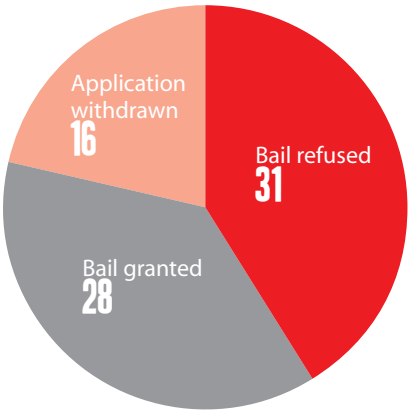
- 11 Nigeria
- 6 Afghanistan
- 6 Ghana
- 5 Bangladesh
- 5 Pakistan
- 5 Turkey
- 4 Jamaica
- 4 Ukraine
- 3 Algeria
- 3 Democratic Republic of Congo
- 3 India
- 3 Iran
- 3 Iraq/Kurdistan
- 2 China
- 2 Palestine
- 2 Vietnam

1 each: Bosnia-Herzegovina, Eritrea, Ethiopia, Gambia, Georgia, Guinea-Bissau, Lebanon , Mauritius, Portugal, Somalia, Trinidad and Tobago, Tunisia, Uganda, United States, Zimbabwe

Outcome of hearing (n = 115)



Where applicant had legal representation (75 of 115)



Where applicant represented themselves (40 of 115)

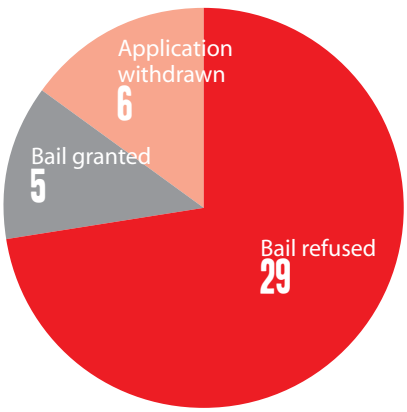


Table 1: Outcomes of bail hearings observed late November 2009–early July 2010, according to presence or absence of the detainee in court, of legal representative and of sureties (n = 109)

Presence of applicant	Bail granted	Bail refused	Application withdrawn	Total
Present in court + legal rep + sureties	11	7	0	18
Present in court + legal rep	0	1	0	1
Present in court + sureties	1	3	0	4
Present in court on own	2	8	2	12
By video-link + legal rep + sureties	16	17	10	43
By video-link + legal rep	0	2	0	2
By video-link + sureties	1	10	2	13
By video-link on own	1	7	2	10
Absent	1	3	2	6
Totals	**33**	**58**	**18**	**109**

Table 2: Outcomes of bail hearings observed late November 2009–early July 2010, by hearing centre

	Total	Bail application withdrawn	Bail refused	Bail granted	Success rate of applications heard
Hatton Cross	20	2 (10%)	12 (60%)	6 (30%)	33%
Newport	20	4 (20%)	14 (70%)	2 (10%)	13%
Sheldon Court	14	5 (35%)	5 (35%)	4 (30%)	44%
Taylor House	61	11 (18%)	29 (48%)	21 (34%)	42%
Total	**115**	**22 (19%)**	**60 (52%)**	**33 (29%)**	**35%**

Table 3: Outcomes of total bail hearings in United Kingdom, January–December 2009*, by hearing centre

	Total bail applications received ('receipts')	Bail application withdrawn	Hearings (applications that were heard in court)	Bail refused or application withdrawn in court	Bail granted	Success rate of applications heard
Hatton Cross	3040	985	2820	2495	325	13%
Newport	920	320	740	630	110	17%
Sheldon Court	1160	460	1015	725	290	40%
Taylor House	3680	1355	3300	2395	905	38%
Total	**8800**	**3120**	**7875**	**6245**	**1630**	**26%**
Total for all courts**	**11,270**	**3774**	**10,075**	**8055**	**2020**	**25%**

* Figures on 'Receipts, Withdrawn, Hearings, Granted' from Ministry of Justice reply to Freedom of Information request, 7 April 2010; the other two columns calculated by us.

** The other immigration courts listed on www.tribunals.gov.uk are: Belfast, Bradford, Bromley, Field House (London EC4), Glasgow, Harmondsworth, Manchester, North Shields, Nottingham, Stoke on Trent, Sutton (Surrey), Walsall, Yarl's Wood.

CHAPTER 2

A catalogue of inconsistencies: Policy and practice

These notes are issued for the assistance of adjudicators when they are considering applications for bail. Although for guidance, they are issued in the hope that you will find yourself able to follow them so that there is some uniformity in both the procedure we follow and the decisions we reach.
Bail Guidance Notes for Adjudicators from the Chief Adjudicator, 3rd edition, May 2003, para 1.1

My decision means nothing. Another judge can make a completely different decision.
Immigration judge, immediately after refusing bail

The guidance notes for adjudicators (as immigration judges were then called) were last issued in 2003. Formally, they are not in force and are currently under revision. In its report on immigration bail hearings (*A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty,* 2010) Bail for Immigration Detainees comments on the gap in guidance available to immigration judges about the expected conduct of a bail hearing (p.5). This may be a contributing factor to the serious lack of consistency in procedures and decision-making that we observed. There is a need for clear guidance on standards and safeguards to ensure that due process is followed to enable fairer decision-making. In this report we refer to the 2003 guidance notes as an interim benchmark until new guidance is published.

Some judges, as this study bears out, do their best to keep to the 'rules'. However, it is arguable that the whole system is itself wanting, since people have been deprived of their liberty for 'administrative' reasons, and are being offered the chance of 'bail' quite outside the system of justice that applies to British citizens, and without an effective and automatic right (and funding) to attend and be represented in the courts.

2.1 The immigration judge

Judges are men and women vested and trusted with considerable responsibilities. Depriving someone of his liberty is a vast power. Depriving a parent of his or her children is a vast power. Telling the government of the day that it is wrong in law is a vast power. It is a difficult enough responsibility for the best, and there is no room for those of lesser quality.
– Lord Chief Justice, Lord Judge, 11 March 2009, Diversity Conference, A Judiciary for the 21st Century

It is the responsibility of the immigration judge to ensure that the applicant receives a fair hearing; and ultimately it is for the judge to decide whether or not to grant bail.
– Symonds, Steve, Immigration Bail Hearings (2010)

Who are the immigration judges with the responsibility to decide on an applicant's liberty? A recent advertisement lists the following qualifications required:

If you have been a solicitor, barrister, advocate or Fellow of ILEX for at least five years, or you have other appropriate experience in asylum and immigration matters, you could be eligible to become a salaried Immigration Judge.
– www.judicialappointments.gov.uk (accessed 23/09/10)

The government's judicial appointments website features a senior immigration judge describing the attractions of the work. Previously a salaried partner specialising in employment law and general litigation, she writes enthusiastically: '*It is a fascinating, wonderful job.*' She compares the post favourably with the private sector, saying that *'there is little jostling for position or promotion, or tension about pay and conditions, and none of the job insecurity that you find in private practice nowadays.'* She appreciates the flexibility. You don't have to phone the office when you are on holiday and if you are ill, someone else will pick up your list. The Tribunals Service is modern, *'refreshingly egalitarian'* and family friendly, *'now attracting people at an earlier age including women with children, who are ambitious and want to progress within the judicial system'*. Another advantage is that '*you are expected to be IT literate and self-motivated - you don't have a clerk and you write up your own work and keep your own diary.'* (www.judicialappointments.gov.uk/262htm, accessed 23.09.2010)

It is a sad irony that precisely the flexibility and relative informality which are so attractive for the judge can have negative outcomes for the bail applicant. For the judge, it is an advantage to know that others can pick up her list. For the bail applicant, it can be a serious disadvantage to go before a second judge who may lack a complete written record of the initial judge's hearing, and who may have a different approach. When the same case is heard by two different judges this can lead to two different decisions. Clearly this may on occasion be a potential advantage for the applicant. However, a problem that was observed was that one judge may state that if a condition is not met at the first hearing then bail must be granted at the next, but another judge does not follow this through, so bail is not granted.

To take one of the cases observed (T24 – the reference is to the questionnaire filled out by the observer at a particular bail hearing, in this case at Taylor House in London): a man with a wife and five children in the UK had been detained for 10 months, and the immigration judge (IJ) at the previous hearing had said the Home Office must produce evidence to support claims in the bail summary – the clear implication being that if the Home Office did not produce evidence he would be released at a further bail application hearing. Even though the Home Office had not produced any such evidence, the second IJ decided that the applicant should not be released.

In another case (H16) the IJ commented that it was *'one of the few times I have granted bail without sureties'*. This was despite the fact that nothing had changed since the applicant had been refused bail a month earlier by a different IJ at a hearing when the applicant made a much better case for himself but was not granted bail (the same observer was at both hearings).

No comprehensive record is kept of all the proceedings at a bail hearing. The 2003 Guidance Notes say that there should be a record of the evidence given, the gist of the arguments, the decision taken and the reason for it (para 2.7.7). The immigration judge is the only person who officially keeps notes, and by definition selects what is recorded. The notes are not available to the public. The detainee and their representative (if there is one) only receive a copy of the reasons for refusal – a few short sentences.

When a detainee or his representative wants to challenge what has happened or complain about what a judge has said, they have no recourse to a verbatim record of what happened. In the experience of Bail for Immigration Detainees, when a complaint has been sent with a request for a copy of the record of proceedings, the reply has been that none is available. The prospect of a just outcome to a complaint against an immigration judge or a successful challenge to his/her decision appears to be virtually zero.

A further consideration is that a written record is necessary before current practice can be reviewed and analysed for future reform and improvements.

The same can be said of the Refusal sent to the unsuccessful applicant. As can be seen from the examples provided here, Refusals are often hand-written and not very legible (see pages 29, 31, 32), they are usually extremely brief and often altogether not a respectful response to someone seeking their liberty.

2.1.1 An independent judicial body? Different judges, different approaches

On the actual substance of the work the same senior immigration judge says:

> *I soon found that, on the days I was sitting, I was bouncing out of bed because I was finally doing what I had been trained to do which was to sit down and work out the right answer legally rather than being on one side or the other of the argument.*

Immigration judges and 'non-legal members' are appointed by the Lord Chancellor and form an independent judicial body. This independence is clearly valued by the immigration judge quoted above and was asserted by some of the judges in the hearings that we observed. However, in a significant number of cases the observer felt that the judge was not acting independently but taking one side of the argument – the side of the Home Office.

There was considerable variation in the approach of different judges to the conduct of the hearing. Observers were asked to assess whether the process had been a fair one in their opinion. Nearly half of those who responded to this question felt that there were problems with some aspects of the hearing and a third of all respondents explicitly described the conduct of the hearing as unfair. This presents a mixed and disturbing picture.

One observer made detailed notes of the contrast in the approach of different judges and the resulting outcomes for the bail applicants.

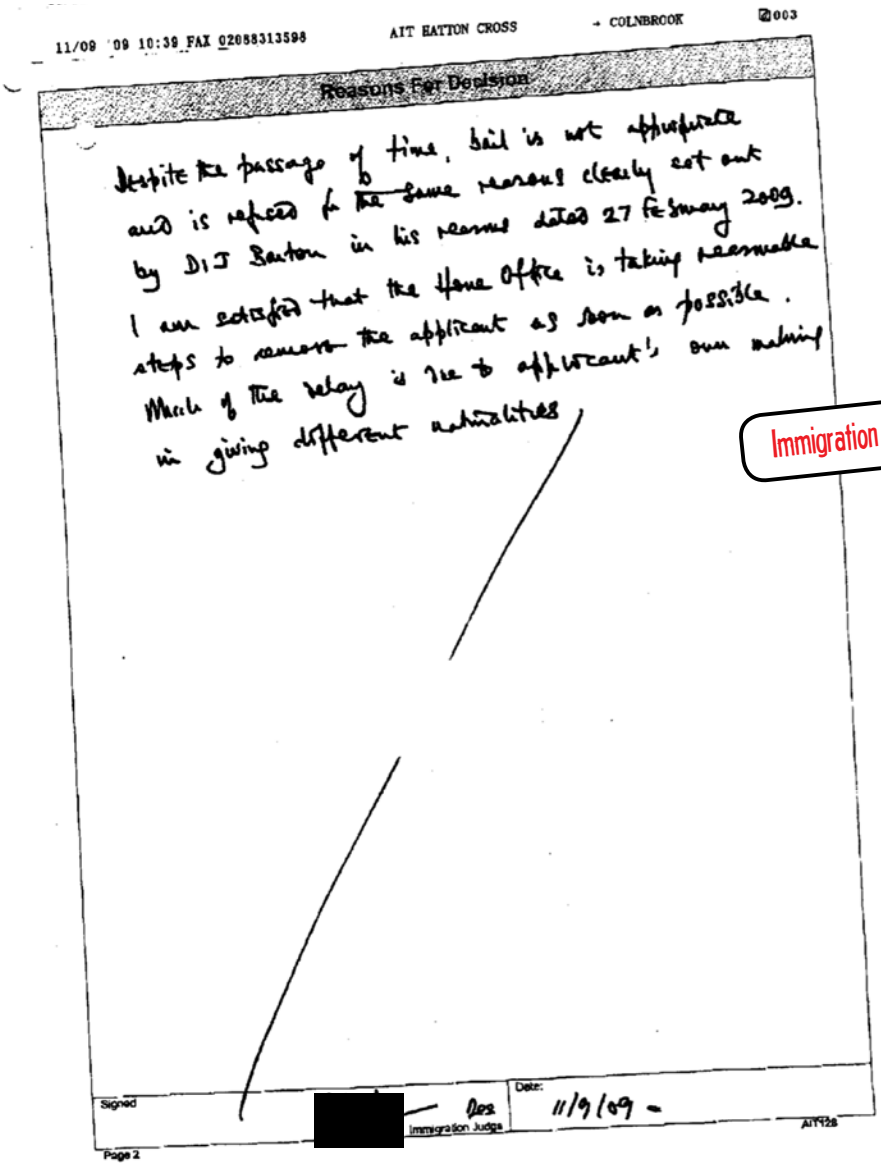
One immigration judge checked that the correct procedure had been followed prior to the hearing, i.e. in the provision of the bail summary in advance, and then conducted the hearing in a manner which enabled both the applicant and the Home Office presenting officer (HOPO) to make their case.

> *This judge was very meticulous in his/her approach to each case. In every case heard, after the explanation, the judge asked the applicant if he had received a copy of the bail summary beforehand and whether he had any comments, corrections, questions regarding it. The judge allowed time for these comments, questions and corrections and for the applicant or representative to make his case. Then the HOPO was asked to make the HO's case and the applicant or representative to respond. Then the judge left the room in order to make a decision. When the judge returned, s/he gave the decision and gave reasons and/or bail conditions.*

It is the role of the judge to ensure that the hearing is conducted in a way that does not prejudice the applicant and in the above case we can see that the judge's approach enabled this to happen, giving time and opportunity to the applicant or representative to put their case.
The role of the immigration judge may vary depending on whether the applicant is legally represented or not. If the applicant has no legal representative then the judge may need to take a more proactive role to ensure that the applicant is enabled to present his/her case fully.

In several cases, the judge suggested that the application be withdrawn so that the applicant would not have a refusal on record. In these cases the observers felt that the judge was acting fairly and appropriately. But some applicants with no experience of legal proceedings and acting for themselves found this advice difficult to understand.

> *IJ was exceptionally fair. Warned applicant that s/he was probably going to refuse and encouraged him to withdraw after s/he had heard copiously from him, so that he would not have a refusal on his record. Applicant insisted on continuing in the hope of convincing IJ of his poor mental state in detention. Unfortunately it was clear that had the applicant been represented, the Rep would have persuaded him to withdraw. The IJ did his/her best though.* (T16)



11/09 '09 10:39 FAX 02088313598 AIT HATTON CROSS → COLNBROOK 003

Reasons for Decision

Despite the passage of time, bail is not appropriate and is refused for the same reasons clearly set out by DIJ Saxton in his reasons dated 27 February 2009. I am satisfied that the Home Office is taking reasonable steps to remove the applicant as soon as possible. Much of the delay is due to applicant's own making in giving different nationalities

Signed [redacted] Des Immigration Judge Date: 11/9/09

Page 2 AIT/2s

Immigration judge's refusal of bail

In the cases described below, which the observer contrasted with the previous example, the bail applicants were doubly disadvantaged as they did not have legal representation and also required interpretation to understand what was going on as well as to present their cases. They were unfamiliar with the court proceedings and needed more time than they were given. In the view of the observer, the judge did not take positive steps to ensure a fair hearing. This could have been done, as witnessed in the other cases, by allowing time and asking probing questions which would help the applicant to clarify aspects of their cases. The applicants were given time to make their statements but little more, and the questions put by the judge came over to the observer as accusatory rather than sympathetic.

In the case of the first two bail applicants we observed, who were unrepresented, they required interpreters so that they were dependent upon the interpreter for the explanation of the proceedings and for their responses to the questions asked by the judge as they struggled to present their cases. These two cases were heard rather rapidly and the verdict was always the same even though the cases were different. No bail was granted. It was obvious that neither gentleman had been briefed beforehand on how to present their case, on what grounds to argue. And, in both cases, the judge put them on the defensive with the questioning. S/he put the 'burden of proof' on them in terms of getting bail instead of questioning the HO on its reasons for detention. The presumption was always that the decision to detain had been correct.

In a Guidance Note of 2004 regarding 'Unrepresented Appellants who do not Understand English', it is suggested to the immigration judge that

> *A useful question to ask is whether you are satisfied that an informed, independent representative would think the proceedings had been fair.*
> – www.tribunals.gov.uk/ImmigrationAsylum/RulesLegislation.htm (accessed 23/09/10)

It would appear that the judge above did not follow the guidance nor approach the hearing with a presumption of liberty where the burden of proof lies with the Home Office to provide evidence of the need for detention.

In two quite different cases before the same judge, the observer commented in the first (B 11) that the *'judge seemed to favour HOPO during proceedings'* and in the second (B12) that the judge *'was excessively partial to HOPO over documentation and appeared to have refused to consider evidence'.* In the first case a legal representative appeared for the applicant; in the second the applicant was unrepresented. Both were refused bail. These are illustrative of many cases where the observers felt that the judge did not act independently seeking to '*work out the right answer legally rather than being on one side or the other of the argument'.* All too often, the judge appeared to accept the Home Office case without question.

2.1.2 The judge and the HOPO

> *According to a barrister interviewed for the report: "As usual the Home Office presenting officer was not expected to adduce any evidence in support of the bail summary... There were no concerns from the immigration judge whatsoever. The UKBA never produce evidence to support claims in the bail summary and I have never seen this challenged" (despite the burden on the UKBA to justify detention).*
> – press release, 14 July 2010, Bail for Immigration Detainees

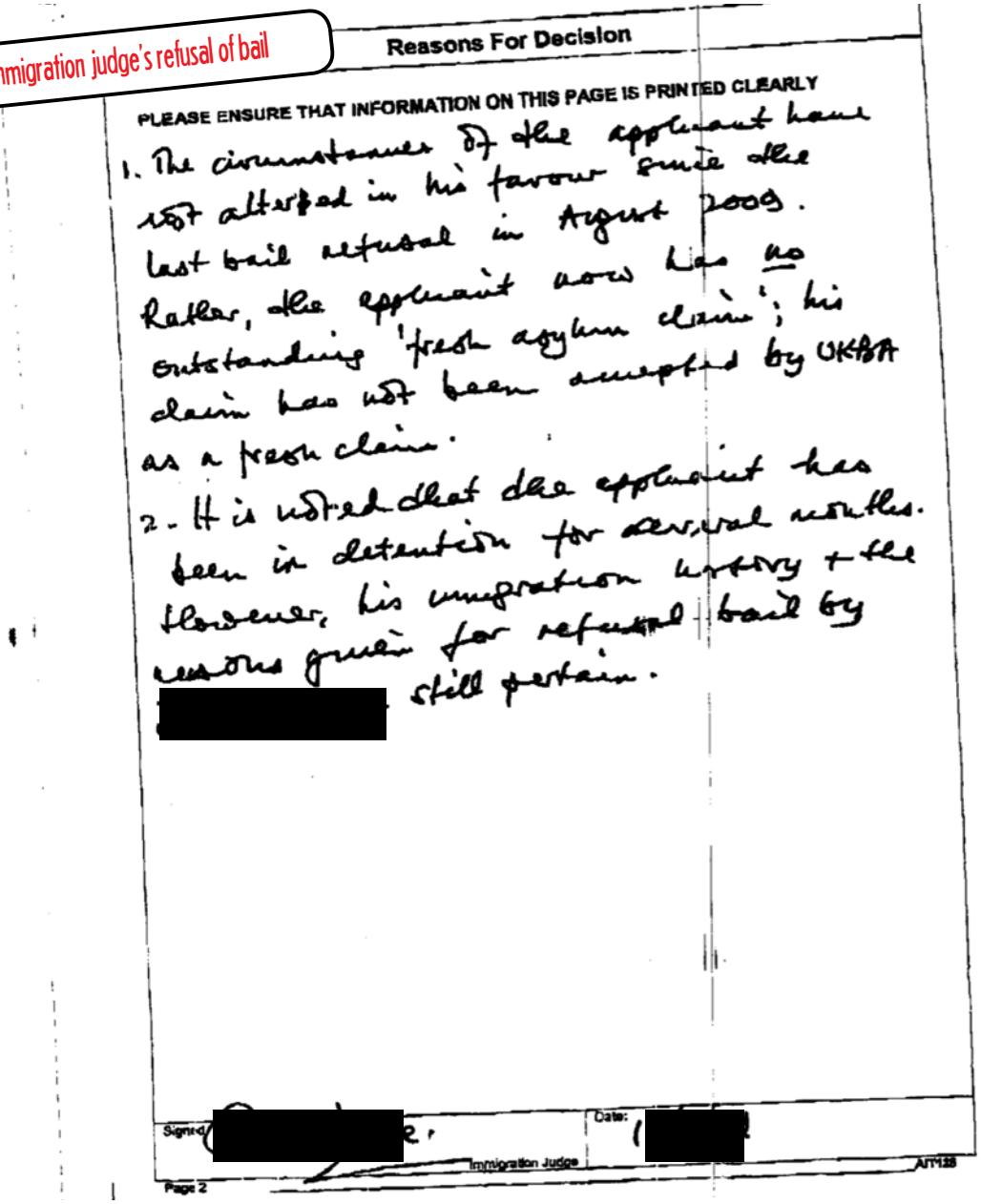
There was a great variation in the behaviour of the HOPOs, ranging from those who spoke little or not at all at the hearing to those who took an active part often to cast doubt on the applicant's evidence. In one case (N7) the HOPO, in a contribution described by the observer as *'poisonous'* accused the applicant of lying and subjected the sureties to what the observer described as *'harassment'*. Bail was refused and the observer commented that *'the judge … sided totally with HOPO emphasising lying several times'.*

In another case (B15) the observer felt that the judge's mind had been made up when the HOPO first spoke and that little weight was given to the arguments presented by the legal representative, together with the size of recognizance offered by the sureties and the written pledge from the applicant's community to ensure compliance with bail conditions. Bail was refused.

One observer commented that, in a few of the hearings he attended, where there was no legal representation, the judge acted as the applicant's advocate in the sense that he questioned the HOPO. However, the same observer said:

> *much more often, in hearings I observed, the judge appeared to be making points and asking questions which one would have expected the HOPO to do, while the HOPO remained mostly – sometimes almost entirely – silent. . . . The role played by the judge appears to include functions that are contradictory. Also, among the hearings I observed, I would find it hard to say when the judge was bearing in mind the principle of a 'presumption of bail': most of the time that appeared to be far from the case.*

Immigration judge's refusal of bail



Reasons For Decision

PLEASE ENSURE THAT INFORMATION ON THIS PAGE IS PRINTED CLEARLY

1. The circumstances of the applicant have not altered in his favour since the last bail refusal in August 2009. Rather, the applicant now has no outstanding 'fresh asylum claim'; his claim has not been accepted by UKBA as a fresh claim.

2. It is noted that the applicant has been in detention for several months. However, his immigration history + the reasons given for refusal bail by [redacted] still pertain.

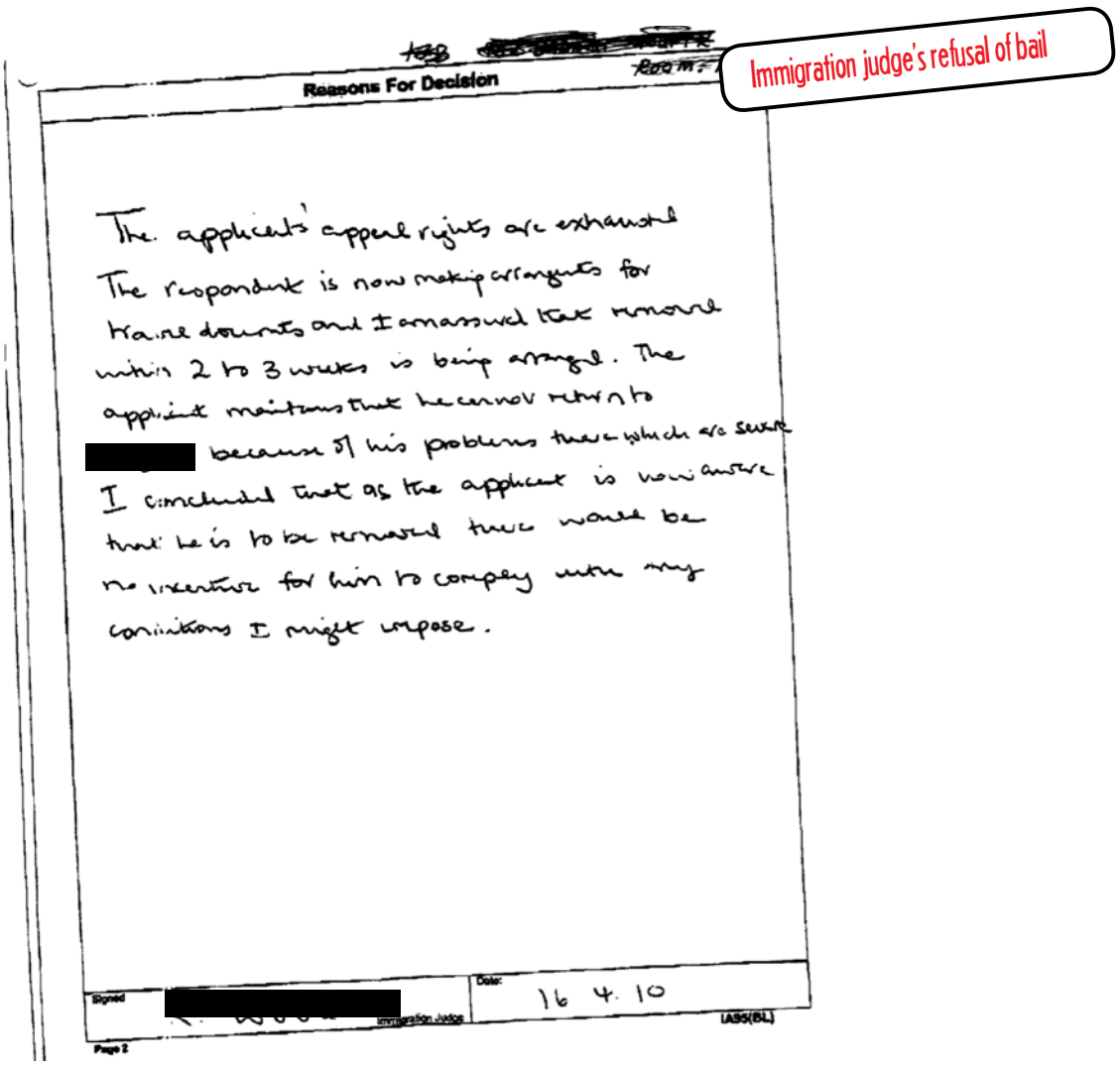
Signed: [redacted] Date: [redacted]

Immigration Judge

Page 2

The role of the judge is challenging. The length of the hearings – ranging from ten minutes to more than two hours – illustrates the different approaches of different judges. In one case (H4) lasting more than an hour and a half, the judge was faced with an applicant who had been in prison for serious drug offences. The applicant was well represented with a barrister who challenged the accuracy of aspects of the bail summary. The judge interviewed the sureties and after weighing all the considerations and describing himself as 'torn' decided to grant bail. Another judge, in the absence of a clear guidance framework, and aware of the risk in a case such as that described, might have taken less time and put more reliance on the Home Office case.

There are many inaccuracies in the bail summaries, the case for refusal of bail sometimes seems to fly in the face of the evidence, sureties are asked to raise their recognisance and doubt is cast on their integrity almost as a matter of course. There are several instances where the judge is critical of the HOPO. This does not necessarily mean that bail should be granted but rather that the case against bail is not presented in an appropriate manner. For example, in one case (T41) bail was not granted but the observer felt that the applicant had had a fair hearing and noted that 'the judge reprimanded the HOPO for misinterpreting and presenting evidence in a misleading way.'



2.1.3 What happened to the rules?

We have seen in an example above (T16) that the applicant was suffering from mental illness and that, although the observer felt that the judge had been fair and tried to help, bail was refused. Yet, the mentally ill are among those whom the UK Border Agency's own policy sets out as normally considered *unsuitable* for detention. A number of applicants had mental health problems. Organisations such as Medical Justice have shown how the experience of detention is damaging in itself.

Home Office guidelines also state that torture survivors should also not usually be detained. The following case is a particularly painful example of the human impact when what rules that exist are disregarded. The applicant had poor English, was not provided with an interpreter, had no legal representation and was clearly highly distressed. He had visible scars from his injuries and a medical legal report confirmed that he had been tortured. The HOPO was seen to treat the sureties rudely, they were said to offer too little money, and bail was refused. The observer commented that he had himself found this an upsetting experience. (N12)

Another disturbing case was that of an Iraqi (N4) who had been deported with a group of others but then sent back from Iraq. He had suffered broken bones in the process of removal and had attempted suicide. Bail was not granted. At the time of the hearings, there were obstacles to removal of Iraqis. In another case (H18), the applicant, who did not have legal representation, told the court that 36 Iraqis had been sent back in October 2009. His own ticket had been cancelled at the last minute. All had been returned to the UK. Nevertheless the HOPO claimed that removal was imminent and bail was refused. The observer commented:

I was amazed that IJ is not aware of current position: that Iraqis are not removable to Baghdad. IJ showed no concern that applicant had been detained for nearly a year.

It may be worth noting that at the time of writing, removals of Iraqis have resumed. One Iraqi is said to have committed suicide on return. Others attempted to break out of Campsfield House, risking injury on the razor wire. This demonstrates the desperation felt by so many going through the processes described in this report.

In one case (T37), although the Home Office did not argue that there was a risk of absconding, the judge ruled that the applicant should remain in detention until the outcome of the judicial review was known and then apply for bail. The observer commented:

Applicant clearly felt IJ was not listening to him and so kept trying to be heard. Maybe video-link contributed to his frustration. IJ relied entirely on the Bail Summary. Sureties knew applicant well, one an academic from ——— University, which enrolled him as an MA/PhD student.

The applicant had been arrested while complying with earlier bail conditions and no evidence was brought of non-compliance.

Appeals and requests for judicial review are part of the legal processes available to applicants. In one case (T45), the HOPO claimed that an applicant had *'frustrated removal by recourse to appeals'.* The legal representative for the applicant made a strong case, pointing out that parliament made laws that allow for appeals and that it had been a matter of *using* them not *abusing* them as had been claimed. The judge in refusing bail said '*I don't believe the Secretary of State would have said that he had frustrated removal if he hadn't done so.*' The observer felt that the judge did not attend properly to the question and seemed to want to punish the applicant for availing himself of his legal rights.

In two cases (T34, H20), two different judges stated that the bail applicant, who had medical problems, was receiving better medical care in detention than might be available if he was not detained. In the former case, the judge was reported as giving as a reason for refusing bail, that the applicant would have better health care in detention than in Section 4 accommodation with a cousin visiting to care for him. In this hearing, the details of the medical condition were not given. In the second, the applicant was suffering from glaucoma and ulcerative colitis. A medical report stated that his condition was deteriorating in detention and the detention centre had failed on more than one occasion to take him to hospital appointments. It is difficult to understand, in the face of this evidence, the judge's statement that, in refusing bail, that the applicant was receiving better medical attention than he might receive outside.

In two cases observers reported that the legal representatives withdrew the bail application, and indicated subsequently that they had done so when they saw which judge would be conducting the hearing. (T18, T21) The sample of hearings by individual judges was too small to draw further firm conclusions but it would appear that some judges have acquired a reputation for refusing bail.

2.1.4 Arbitrary judgements and inappropriate behaviour

Two cases were observed where there was an issue about the authenticity of documentation offered by the applicant. In the first case, a certificate of attendance from a British University was said by the HOPO to be false. The judge accepted this claim despite evidence from the applicant's legal representative. The observer felt that the judge was biased and the judgment unfair (T7). In another case, however, where the HOPO made similar claims that university documents were forged, this was not accepted by the judge and bail was granted. (T30)

A number of observers commented negatively on the behaviour of the judge. Applicants were not given time to make their cases nor treated with the courtesy and respect to which they are entitled. In one case (T44), a man came to the UK on illegal documents as he found that his son was having a severe episode of mental illness and had been imprisoned. There was no legal representation because the family had run out of money. The observer commented that the judge did not give any opportunity to the applicant to explain what had happened and seemed very dismissive. Another observer in a different case (T46) described the judge's behaviour as *'casual'* and there was no explanation of the process.

The *'capricious'* approach of the judge in another case (T30) was in the applicant's favour. Bail was granted without examination of the sureties because the HOPO claimed that the applicant had committed a number of more serious offences that were not listed in the BS. At one point the following bizarre exchange took place:

> IJ: *What evidence do you have?*
> HOPO: *I can't disclose it to you.*
> IJ: *What do you mean you can't disclose it? But you expect me to make a decision taking this into account.*
> HOPO: *My instructions include instructions that I can't disclose.*
> IJ: *Do you want to go and get your instructions changed?*
> HOPO: *I have a piece of paper saying that in addition to nine counts of possessing documents, one of fraud, there are other offences including Class A drugs . . .*
> Applicant (interrupting): *When did I have a conviction for Class A drugs? If I wait another 5 minutes you will mention murder as well.*
> . . .
> IJ: *I am going to grant bail. The reason why is because the Secretary of State has not been able to provide in the bail summary the very serious offences which they say they can't disclose here.*
> HOPO: *Sir, that should not be a reason for granting bail. The question is whether there is a risk of absconding . . .*
> IJ: *I am going to grant bail because . . .*
> HOPO: *Sir, sir. . . .*
> IJ: *Don't interrupt . . .*

This judge was felt by observers to be rather chaotic, did not follow any recognisable procedure and allowed the process to degenerate into interruptions and assertions. S/he made personal remarks about the applicants and sureties and appeared to be thinking aloud in places. S/he discussed the case with the HOPO before the applicant or representative was present. At the end of one hearing (T29) s/he commented:

> *My decision means nothing. Another judge can make a completely different decision.*

We have seen wide variations in the conduct of hearings. There would also appear to be an element of arbitrariness in some judgments and even shockingly inappropriate behaviour on the part of some immigration judges. This may indicate a serious lack of training to ensure consistency of decision-making and conduct of hearings.

On the question of training, one observer was told by a senior immigration judge (the lowest rung of the full-time permanent IJs) that immigration judges do not observe bail hearings during training before taking up their post, but that they did a few role plays as part of their training.

2.2 Court practice: Differences between courts

Observations were made at four different courts, and there were considerable differences in the way proceedings were held. These included the presence of the applicant in person or by video link, the presence of the sureties and the availability of interpreters.

2.2.1 Video-link

With video link it never runs smoothly. – Court usher

Just under two-thirds of all the hearings observed were held by video-link. In other words, bail applicants remained in the centre where they were detained while their legal representative (if any), and interpreter (if required) were present in the court.

Sureties, however, are almost always required to travel to the court.

Table 4 shows the differences in practice between courts, with almost all hearings held by video-link in Birmingham and Newport, and a more even distribution at Taylor House in London and at Hatton Cross. Is this a significant difference? Is there likely to be a different outcome for the applicant?

In some general observations about the process, one observer commented:

I question whether justice can be done in circumstances where the parties to the application are not in the same room, in eye contact and able to interact as human beings.

This is illustrated in a case (H17) where the video link was noisy and broke up once or twice. The judge seemed to find it hard to hear the applicant.

The video-link process presents both technical and human difficulties. The court usher quoted above was referring to the technical problems of getting the system up and running. This in itself can increase the level of anxiety experienced by the bail applicant. That particular case ended with the applicant in tears at the end of the video link and one of the bail sureties was called into court to comfort her. When the surety emerged she was in tears herself and entirely unclear what had actually been decided (personal communication of a bail surety).

The video-link presents difficulties for applicants who need interpretation. One applicant (N7) who needed interpretation was described as '*plainly uncomfortable with video-link*'. It disadvantages those in need of more time to make their case. In some instances, the applicant was not able to speak throughout the hearing. Many applicants find the experience of a hearing by video-link deeply upsetting.

The experience of undergoing a bail application by video-link can be particularly distressing when a detainee is presenting their own case in the absence of legal representation. This is illustrated by the fact that at Campsfield, GEO welfare officers instigated a process of counselling for people whose bail application had been refused. This was offered shortly after they leave the small room in which they sit, facing a camera and with a distant view of the court room in which individuals in it can barely be distinguished, while their application is heard.

Table 4: Bail hearings observed: Applicant present in court, appearing by video-link, or absent (n = 114)

Court	Applicant present	Video-link	Applicant absent
Sheldon Court, Birmingham n = 14	1	13	0
Columbus House, Newport n = 19	2	17	0
York House, Hatton Cross n = 20	11	9	0
Taylor House, London n = 61	21	34	6

2.2.2 Interpretation

In over a third of cases interpreters were needed. Again there was a lack of consistency in how interpretation was provided and used. Much depended on the approach of the judge. The judges regarded as fair by the observers made certain that the interpretation was appropriate for the applicant and made time for all communication in the court to be interpreted. This did not necessarily lead to the granting of bail but it ensured that the applicant had a better chance of a fair opportunity to make the case.

A substantial number of cases fell far short of this standard. In one example, the observer noted that:

> *the judge did not ask the interpreter to confirm that he and the appellant could understand one another. Moreover, the 'interpreter' only explained the ruling after the ruling had been handed down. He did not interpret any other part of the hearing.* (B11)

The applicant did not speak at all at this hearing. In another case (B15), the judge did not check on whether the interpreter provided was satisfactory. The judge, HOPO and detainee's representative were all interpreted through an interpreter in the court room while the applicant appeared through a video link. The observer commented that

> *The representative paused while speaking to give the interpreter time to relay the information to the detainee but the judge and Home Office representative didn't show the same consideration. This meant there were often two people speaking at once.*

In this case, too, the applicant was not given an opportunity to speak. The observer added:

> *There was a distancing between the court and the detainee, I felt, and the detainee herself made no comment except to confirm details at the beginning of the session, spending the rest of the time crying and hanging her head. When the decision of no bail was relayed to her, she cried more, and her sureties looked very upset and strained by the whole process.*

Sometimes the interpretation was inappropriate or entirely lacking. One applicant with no legal representation (T5) did not have suitable interpretation, but agreed to go ahead with a Punjabi speaker standing in, whom he appeared hardly to understand. The case was eventually withdrawn.

In another instance (H12), there was no interpreter in the court. According to the observer, the applicant, an Afghan, was

> *incensed because this was part of a pattern of ignoring the need for an interpreter. He asked the judge to make a formal complaint.*

This was communicated to the judge through one of the applicant's sureties who spoke good English. The judge's response is not recorded. The application was withdrawn.

2.2.3 Sureties

There is no consistent court procedure for sureties. In Birmingham and Newport, sureties were routinely made to wait outside the court room until the judge – if s/he decided in favour of bail in principle depending on the sureties – called them in (if the judge did not so decide, then the sureties were often not admitted at all). At Hatton Cross, sureties were usually allowed into the court from the start of the hearing, and at Taylor House in London, more often than not also. Overall, where sureties were present in the court building, out of 83 hearings for which the necessary information was provided, sureties were present throughout the hearing in 36 cases, admitted to part of the hearing (usually for questioning after the judge had reached a decision in principle to grant bail) in 19 cases, and excluded from the entire hearing in 28 cases.

The presence of the sureties can be an important resource to the applicant. In one case of renewal of bail (*comment from one of the observers, case not included in this survey*), the Home Office stated that the applicant had no children in the country and was therefore likely to abscond if released on bail. The surety was present in the court and was able to confirm that the applicant had six children in the country, to give their names and other details and to confirm that the applicant had close contact with them (e.g. taking them to and from school). The barrister said that without this intervention bail might not have been granted.

Being a surety can be time-consuming and costly. The surety must be present at the court. This can involve long and expensive journeys. In one case (B1), a surety who had already appeared at a previous hearing was not able to attend because the court was far away from where the surety worked. A request for a hearing at a nearer court had not been accepted. Bail was refused because of the absence of the surety, although it had been approved in principle.

In the case of the detainee who had been sent back from Iraq (N4), there were three sureties who had driven a long way to be at the hearing, for the second time in two weeks. This had cost all three money in lost earnings as well as petrol for the long journey. Bail was not granted and presumably the sureties would have to make the journey again. This applicant did not have a legal representative which, as we have seen, diminishes the likelihood of obtaining bail.

A substantial number (22) of the sample of hearings observed resulted in the withdrawal of the application. While this was often done to assist the applicant, e.g. by avoiding having a refusal on the record, it meant that the sureties had, in effect, had a wasted journey and would need to go through the process all over again.

Other issues for sureties include the evidence required to demonstrate their financial standing. This varies. In one case (N5) the judge ruled that the photocopies of bank accounts offered by sureties were not acceptable. The wife of the applicant had travelled from a long distance and was distraught. She was not allowed into court.

The guidance notes (3rd edition) point out (2.2.2) the difficulties for asylum seekers in finding sureties when they have fled to a country where they may be without family and have few friends. In about a

quarter of the hearings observed, applicants were without sureties and therefore at a disadvantage. In many cases questions were raised by the HOPO about the sureties. For example (N7), the observer felt that the HOPO treated the sureties with a lack of respect, casting doubt on their influence over the detainee, and demanding that a surety with a total of £4,000 in the bank could offer more than £1,000 as a recognizance. There seems to be a general trend to request a higher sum than that offered by the surety. This can be discouraging for the sureties.

Perhaps more important: there is no legal requirement for a detainee to offer a surety or sureties when applying for bail. However, immigration judges, in giving reasons for refusing bail, frequently cite absence of, or inadequate, sureties. One wonders whether adjudicators again need to be 'reminded that sureties are only required where you cannot otherwise be satisfied that the applicant will observe the conditions that you may impose' (guidance notes, 2.2.2).

One of the observers in the project, who was standing surety in an application not part of the survey, was asked to produce not only statements of current and savings accounts, as expected, but also the title deeds to the house where the surety lived. This seems disproportionate. The bail applicant was a 19-year-old young woman with a previous record of compliance with bail conditions, and whose bail address was at the house where her grandmother, aunt and father live. The risk of absconding was minimal. It was the first time that such a demand had been made, to the knowledge of colleagues with substantial experience of immigration bail hearings.

A final point concerning sureties is to do with common courtesy. If bail is granted, then sureties will usually be able to see the successful applicant. If not, and the sureties have been excluded from the courtroom, there appears to be no formal mechanism to inform the sureties of the outcome. Sometimes the judge called in the sureties to inform them of the outcome, on occasion allowing them to communicate with the detainee by video-link after the hearing had finished. But all too often sureties were told by the usher simply that they are 'not needed'. Since the sureties may have waited outside the courtroom for an hour, or half a day or more, at considerable financial cost, as illustrated above, they should be at least formally thanked for travelling to and attending the court, either by the judge or the usher or the applicant's legal representative if any.

2.3 The bail summary

> *A bail summary is a document setting out the reasons why the UK Border Agency opposes the application for bail. . . . The bail summary is a critical document. If the bail summary does not justify continued detention then it should normally follow that bail is granted.*
> – Symonds, Steve, Immigration Bail Hearings, pp. 14, 15

The bail summary is a key document and should be available to the applicant well in advance; the 2003 guidance notes stated that it should be received by 2 p.m. the day before the hearing. This is to enable the applicant to identify errors in the summary and obtain any evidence needed to challenge false assertions.

In nine cases observed the bail summary was not available to the applicant or representative in advance. In one case, the applicant could not read the summary (T27). In another case (H6) the bail summary was received late (at 10 p.m. the previous day), and the applicant, unable to read English, could not get it translated at that stage. In court the interpreter read the summary and resisted the judge's attempt to hurry this along. In one case (T13) the bail summary had been sent to the lawyer, who did not turn up. The judge argued for a withdrawal but the applicant wanted to proceed. Bail was not granted.

In only one case (T17) of these nine where no bail summary was produced in advance was bail granted in line with the guidance notes. The HOPO attempted to question this; but the argument was not accepted by the judge. The relevant part (2.7.2) of the guidance notes is clear:

If no bail summary is available, then you should proceed without it. This implies that bail would have to be granted.

In only just over half (50) the cases where the issue of the bail summary was recorded (96) there was some challenge by the applicant or legal representative. Bail summaries frequently contain erroneous information and it seems that the judge has no sanctions to apply to the Home Office in such instances and little option, other than that of granting bail, when this is so. An example of this can be seen in a case (T11) where the judge granted bail and expressed criticism of the Home Office:

I do express some displeasure with the way that the bail summary has been put together. I do not expect the Home Office to rely on newspapers when someone's liberty is at issue. ... I do object to other items in the bail summary and I do accept other evidence given by the applicant. ... The gentleman here has served his sentence. Mr B. I am trusting you and I don't expect you to let me down.

This was a positive outcome for Mr B but provides no assurance that similar problems with bail summaries will not arise for other applicants before different judges in future hearings.

2.4 Legal representation: An option for those who can afford it, or a basic right?

Is it arguable that applications without legal representation are a waste of everyone's time?
– Comment from an observer

The work of Bail for Immigration Detainees (BID) helping applicants to present their own bail applications is invaluable in providing an opportunity to get bail, and in giving the applicants some agency in their otherwise disempowered state. The BID training sessions assisting detainees to this end are in more and more demand from detainees. A recent workshop at one detention centre was inundated with applicants.

However, it is notable that of the 40 applicants without legal representation only five were granted bail. The applications were withdrawn in six cases and bail was refused for the remaining 29. One observer, drawing on the experience of observing approximately 10 unrepresented bail hearings out of a total of 20 observed as part of this survey, suggested that with such a high rate of refusal, applications without legal representation are not a good use of everyone's time. There is also a substantial cost to the public purse. He went on to say:

My experience was that in no case I observed did the applicant do a good job of representing himself. The reasons for this are not difficult to adduce and may include: intimidation experienced by the applicant, lack of familiarity with procedure, language difficulties, inability to perform when the applicant cannot see the faces of any of the other players in the hearing (video- link hearings), difficulty hearing what people are saying, e.g. the Home Office Presenting Officer or HOPO will often direct remarks to the judge rather than the applicant.

The experience of other observers confirms this. In one instance (T27), where the applicant was representing himself, and had no sureties, the judge tried to assist him by recommending withdrawal of the application. In refusing bail, the judge went on to recommend that the applicant contact family members to act as sureties. He was also advised to find better solicitors than he had had previously. It was likely to be easier to follow the first recommendation rather than the second.

Where applicants were represented by a lawyer, their success rate was markedly greater. Out of 75 such cases, bail was granted in 28, refused in 31, and the application was withdrawn in 16. Of the 40 applicants without a lawyer present, only 5 were successful in getting bail.

But, finding a suitable lawyer is increasingly difficult. The closure of Refugee and Migrant Justice in June 2010 left many clients without support. Legal aid is limited and few of those in detention are in a position to pay the fees demanded by private lawyers. There is no quality guarantee for those who do find the funds. In the months following closure of Refugee and Migrant Justice, there were reports of some law firms stepping in to take on cases, but then taking no action. One applicant, who represented himself, was asked by the judge why he had no lawyer, to which he replied:

> *Because they do nothing, and because if they are private they cost a lot. The last lawyer I had promised a lot and did nothing.*

It is not suggested that this is typical, but that it is the experience of some seeking bail.

While lack of legal representation actively put the bail applicants at a disadvantage, legal representation did not guarantee a fair hearing. In a case mentioned above (N7), the applicant's lawyer was described by the observer as '*totally docile*'. In two other cases (N2, N6), two different observers commented negatively on the contribution from the barrister. In the second case the observer wrote '*Rotten legal representation, ill briefed*'. In one case it seemed that the observer was more informed than the legal representative of the applicant. At a hearing in April (H15) of an application from an Iranian, the observer noted that s/he was '*surprised the representative did not mention current impossibility of removing Iranians. Most are now out on bail*'. It might be pointed out that in this hearing the judge rebuked the HOPO for omitting from the bail summary the fact that the applicant had made an appeal based on Article 8 of the European Convention on Human Rights (right to respect for private and family life, home and correspondence). The application was withdrawn. Even when a legal representative makes a case that in the opinion of the observer was informed, detailed, and well argued, the judge may attach more weight to what the HOPO has to say (B15).

There is some correlation between the presence or absence of a legal representative for the detainee and the duration of bail hearings: where the detainee represented him-/herself, the hearing tended to be shorter than when there was a representative (see figure on page 22). A similar correlation was observed between success or failure of the application and the duration of the hearing: unsuccessful applications tended to bunch towards the shorter end of the time-scale (the hearings observed ranged from 4 to 165 minutes long).

2.5 Obstacles to fairness

Some of the obstacles to fairness have been detailed above. It should be emphasised that some immigration judges were seen to exercise impressive fairness and courtesy but a substantial number were said to have a generally casual and dismissive attitude. A few made seemingly arbitrary and capricious decisions. The relationship between the judges and the Home Office officials varied. There seemed to be considerable friction between some of the more independent judges and the Home Office presenting officers. Other judges accepted the Home Office case without question. In the absence of guidelines and routine monitoring there are serious lapses in standards of justice in immigration bail hearings.

Other obstacles to fairness detailed above include the problems and limitations with the video-link process, difficulties with interpretation and a system which militates against those applicants unable to obtain good sureties and effective legal representation.

It was suggested in some cases that although the conduct of the judge was fair the outcome was not, because the system is fundamentally flawed. There would appear to be serious shortcomings at the most basic level.

2.5.1 Confusion, chaos and poor communication

Some examples demonstrate the inadequacy of the system.

When an applicant is to appear in court in person, transport must be arranged. In one case G4S, the company with this responsibility, failed to organise transport and so the applicant did not arrive in court although his surety and legal representative were there (T3).

In another case (T48), the legal representative and sureties were in court but it appeared that the applicant had suddenly been removed to Scotland. The application was withdrawn. The observer commented: '*Difficult for representative. No applicant. IJ quite chaotic.*'

On occasion, electronic tagging is a condition of bail. Here are the comments from one observer.

> *This is someone who has just been granted bail by the IJ with an electronic tag as a condition. The IJ, who has been very fair and clear throughout the hearing, tells the applicant that he will need to stay in detention for a couple of days while the tag is fitted. The Applicant replies 'It is taking longer than 2 days. People are staying a long time after getting bail because the system is not working.' The IJ then says that it must not take longer than 48 hours. The guards comment that then they may have to release him, and the IJ admits that he can't enforce that. It's left unclear what will happen if the tag is not put on in time.* (T11)

It is surely quite wrong for an applicant to be left in uncertainty about release because the system is not working.

In a case described in more detail below (T22), the applicant had been held in a kind of limbo for nearly three years because of delays in the system. He had lodged an asylum claim in February 2007, but had his interview only in March 2009. There was still no decision on his claim. Meanwhile he had been imprisoned for using false documents and had been detained on completion of the prison sentence.

Another applicant (T5) had been held in detention for 14 months and it was unclear how his situation would be resolved as there was a dispute over his nationality. In September 2008, the Home Office declared the applicant to be an Afghan, as he himself claimed, and then in December the Home Office claimed that he was from Pakistan. In March 2009, the Home Office issued a ticket for removal which was cancelled. The bail application was withdrawn. The delay for the applicant continued.

Delay is a constant factor. Given the impetus for removal, it might be assumed that when an applicant has indicated willingness to leave, the return will be effected expeditiously. This may not be the case. We learned earlier of the applicant who was served with a late bail summary which he could not read (H6). This is an applicant who wants to return home.

> *The applicant said: 'I want to return to my country. I have been detained for a long time. I am in detention with criminals. The only thing I have done is to work with false papers in order to be able to live and not have to rob in order to eat. I entered legally'*

He was not granted bail even though there was no immediate likelihood of him being allowed to return home, because of the long delay in getting his travel documents from the embassy.

This is not an isolated case. Here are the comments from an observer of another similar case.

An Ethiopian who is trying to return home had been detained for nearly two years while efforts are made to obtain papers for him from the embassy. He was not represented and the IJ treated the case casually and without any kind of explanation of the process. It was a very short hearing and the IJ seemed quite uninterested in the man's long period of detention. He did not give him much chance to speak. (T46)

We have mentioned earlier how IJs sometimes state that if a condition is not met then bail must be granted at the next hearing. Then another IJ does not follow through. In one case (T24), the judge had a note from the judge at the previous bail hearing saying that the Home Office must provide evidence of their claims that the applicant was frustrating the process of obtaining emergency travel documents (ETDs) and demonstrate that the relevant embassy was producing ETDs. At this second hearing the judge did not act on the Home Office's failure to comply.

Sometimes the proceedings worked in favour of the applicant for reasons that were not clear to the observer. For example, in one case bail was granted possibly as a result of what the observer described as *'an extraordinary intervention by the HOPO indicating her support of the sureties and (tacitly) in support of bail'* (T52). In another case (T53) where bail was granted, the role of the HOPO was again key. The observer noted: *'HOPO raised no objections and did what she could to facilitate release. Clear that applicant should never have been " re-called", let alone kept in Belmarsh Prison for three months.'*

2.5.2 Catch-22

Sometimes there seems to be a double bind or Catch-22 for those struggling to make sense of the system.

In one case (B14), the sureties were faced, on the one hand, with saying that they did not know about the illegal status of the applicant, thus leaving themselves open to the argument that they were not close to the applicant and/or that the applicant was able to deceive the sureties. On the other hand, if the sureties admitted to knowing the undocumented status of the applicant, they were then regarded as being untrustworthy. One of the observers stated:

I saw this argument being put by the HOPO on almost all occasions when sureties were being questioned. One IJ observed something like 'Don't bother to answer that. You are damned if you did and damned if you didn't'

In a similar case (B15), the HOPO commented that the surety should have reported the applicant.

There was a lack of logic in the treatment of some applications where bail was refused on the grounds that removal was imminent even though it had been made clear in the hearing that removal was not possible (N4). In one such case (T20), where there was a dispute over nationality and no country was willing to grant travel documents, detention seemed indefinite. There is no clear guidance on the length of detention, or legal time limit, but this must surely be unreasonable and we understand that it is not lawful when there is no end in sight.

It would appear that a key problem is that there is no ready remedy for the faults observed, because there is no right of appeal. At present the only remedy, apart from repeated bail applications, is a judicial review, an expensive High Court action which needs the permission of the court and is almost impossible without a lawyer.

Detention becomes a second punishment for those who have already served a prison term and are then detained for a further period which can extend indefinitely. In one case (T22), the applicant had used a false passport, which is an immigration offence, had served a prison sentence for this, and was then detained while waiting for the outcome of his asylum claim. He was not granted bail for the reason that he had committed offences. The applicant's legal representative pointed out that the

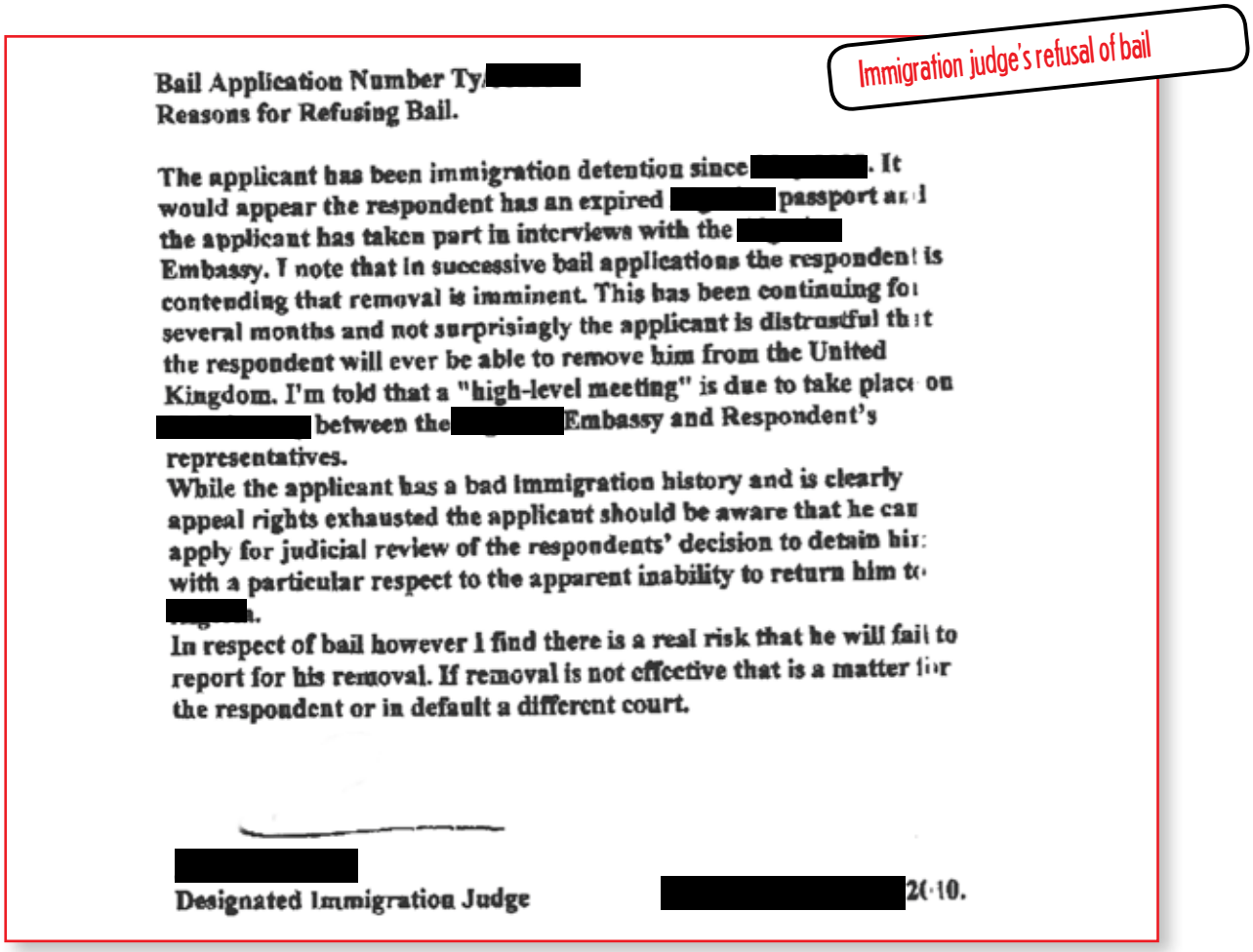
applicant had served his time and a further ten months. The representative also cited the Immigration Act in relation to immigration offences, specifically the decriminalisation of the use of false passports in situations of flight from grave danger. It was pointed out that the applicant's claim for protection was still outstanding. The representative argued that the applicant was willing to comply with bail conditions, presented no risk to the public, had a good surety and a satisfactory bail address and removal was not imminent. Bail was refused.

In a similar case (N3), the applicant had come into the country in 2008 on a false passport and had claimed asylum. As in the previous case, he had served a prison sentence and was now detained pending a decision on his outstanding appeal.

It is difficult to understand the reasoning behind some decisions. One applicant, born in Europe and resident in the UK for most of his life, was facing deportation to a middle eastern country where he has no family or contacts, a country furthermore which has been described as a war zone (TI9). This decision may be legally acceptable but appears humanly and morally deficient.

2.5.3 The cards stacked against them

Lack of independence on the part of some immigration judges, lack of legal representation, lack of familiarity with court proceedings, lack, on occasions, of appropriate interpretation, lack of opportunity for applicants to make their case, lack of human contact because of the distancing effect of hearing by video-link, all these make up a serious justice deficit for those seeking bail. It is not surprising that so many applicants may feel that the cards are stacked against them.



Immigration judge's refusal of bail

Bail Application Number Ty[redacted]
Reasons for Refusing Bail.

The applicant has been immigration detention since [redacted]. It would appear the respondent has an expired [redacted] passport and the applicant has taken part in interviews with the [redacted] Embassy. I note that in successive bail applications the respondent is contending that removal is imminent. This has been continuing for several months and not surprisingly the applicant is distrustful that the respondent will ever be able to remove him from the United Kingdom. I'm told that a "high-level meeting" is due to take place on [redacted] between the [redacted] Embassy and Respondent's representatives.
While the applicant has a bad immigration history and is clearly appeal rights exhausted the applicant should be aware that he can apply for judicial review of the respondents' decision to detain him with a particular respect to the apparent inability to return him to [redacted].
In respect of bail however I find there is a real risk that he will fail to report for his removal. If removal is not effective that is a matter for the respondent or in default a different court.

[redacted]
Designated Immigration Judge [redacted] 20.10.

Immigration judge's refusal of bail, sent to the detainee after the bail hearing. Even when there are no removal directions (i.e. deportation is not imminent), bail is routinely refused. Where a detainee has a lawyer or is being assisted by, for example, Bail for Immigration Detainees, the reasons given are often more detailed. None of the refusals of bail reproduced here relates to hearings observed in this study.

CHAPTER 3

Conclusion and recommendations for change

This report exposes the workings of an integral and under-reported part of the system of immigration control in the UK, as seen through the eyes of observers with a concern about the issue but no vested interest in particular cases.

The human impact of the asylum and immigration system is enormous, not only on those in detention but also on their families and friends. In several cases, observers were profoundly affected by the experience and recorded their distress and shock.

3.1. The human cost

> *The asylum system is a source of shame.*
> – deputy prime minister Nick Clegg, March 2010, quoted in the *Guardian* 17.9.2010

The human impact of the detention system became painfully clear in the course of the immigration bail hearings observed. Families are torn apart. One case can stand for many other examples given in this survey. A woman with young children (B1) is detained for three months, and although bail has been agreed in principle it is refused on what seems almost a technicality. By the end of the hearing she is sobbing uncontrollably. The observer was also deeply upset. (See also 'A Day at the Immigration Courts'.)

A number of the detainees applying for bail had physical or mental health issues. Numerous studies have shown the disastrous effect on the mental health of children in detention (cf. the report *State Sponsored Cruelty: Children in Immigration Detention* published by Medical Justice in September 2010). The applicants appearing at these bail hearings were adults, but for them, too, the deprivation of liberty and the conditions of detention are deeply damaging.

Extreme stress and depression are the common lot of immigration detainees, and this has been borne out over the years by the many occurrences of suicides, attempted suicides and self-harm by detainees, by the many individual and collective protests by detainees. It has been reported in medical and academic studies (see *Causing Mental Illness is Cruel and Inhuman Treatment*, submission to Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Barbed Wire Britain Network to End Refugee and Migrant Detention, September 2008).

The uncertainty of the length of detention, and the serious delays in the system are disempowering. The unacceptable attitude and behaviour, sometimes violent, of private company employees (e.g. the death of Angolan Jimmy Mubenga at the hands of G4S guards on a BA flight at Heathrow in November 2010) and UKBA representatives have been recorded also in numerous reports, from those by Amnesty and Liberty in the 1990s to more recent ones by London Detainee Support Group, Bail for Immigration Detainees and Medical Justice/National Coalition of Anti Deportation Campaigns/ Birnbeg Peirce. Lives are put on hold, sometimes for many years, with no end in sight. It is shocking that this has become routine.

3.2 The financial cost

There are also financial impacts which should be of interest to the taxpayer. Nearly 20% of applications observed were withdrawn, 16 of these at the recommendation of the judge. We have

pointed out the cost to the sureties and, where present, legal representatives. There is also a high cost to the public purse.

It has been suggested earlier in this report that it is also a waste of public money, time and resources to hold hearings where the applicants have no legal representation. It was clear to several observers that it was not possible for such applicants to present their case adequately. It is likely to be more cost effective as well fairer to provide free legal aid to all applicants, thus saving on the costs of hearings that are aborted or where the applicant does not receive a fair hearing for lack of legal support.

There is also the huge financial burden of continuing to detain people. According to a parliamentary answer on 4 February 2010, this is £840 per week or £43,680 per year per person, that is, over £100,000,000 a year across the immigration 'detention estate'.

It would cost us all less in pain and money if refugees seeking asylum and other migrants were not imprisoned, but lived in the community, with full access to services, worked and paid taxes while they are in the country.

3.3 Recommendations for change

It did not appear to us, as lay observers, that justice was done even within the limits of what is within the courts' power. There are some recurring areas of concern which we think need to change. Our particular recommendations come under different headings, and are:

Independence of immigration judges

- We observed, as lay observers, that some immigration judges interacted with the Home Office Presenting Officer in a partial manner. This is inappropriate and must stop. Immigration courts should be independent of government and seen to be so. Immigration judges must be consistent in not showing bias in favour of the representative of the state, the Home Office Presenting Officer. We observed that some immigration judges appeared not to establish whether the Home Office had evidence which showed that detention is necessary.

- The immigration judge should demonstrate that he/she is approaching each bail hearing with a presumption of liberty where the burden of proof lies with the Home Office to provide evidence of the need for detention.

- We observed that in some cases the applicants were not treated with respect . The applicants must be given sufficient time to speak and to be listened to, and treated with dignity. The immigration judge should show proper human respect to all parties, particularly the applicant, who is in a vulnerable position.

Legal entitlement, representation

- Many applicants did not have legal representatives. There should be an automatic right to free legal representation in bail applications. (See ECRE/ELENA Recommendations, Annex 6).

- There should be a right of appeal that is easily exercised in practice.

Conduct of hearings

- Sureties who came to the bail hearings were often not admitted. Sureties should be admitted to all bail hearings.

- On occasion our presence as observers in the quarter was questioned. The public should be admitted to all bail hearings as a matter of course without questioning, harassment or hindrance.

- Some applicants did not appear to have appropriate interpreters, or not enough time was made available for the interpreters properly to convey information to the applicants. Appropriate interpreters should always be available, and immigration judges must ensure that the interpreter is appropriate for the applicant and that enough time is made available for all communication in the court to be interpreted.

- We are concerned that sometimes the Home Office failed to carry out what was directed by an immigration judge at a previous hearing. Failure to take steps necessary to progress the situation of a detainee, should normally be sufficient reasons for granting bail.

- There should be a practice direction putting the burden of proof on the Home Office to demonstrate, with evidence, imminence of removal, and to show all alternatives to detention have been considered (i.e. to show detention is 'necessary').

Bail summary

- Failure to produce the bail summary by 2 p.m. on the day before a hearing should automatically result in the granting of bail.

- In the absence of a lawyer to represent the applicant, the judge should question the bail summary.

- The Home Office should be required by the judge, even if it is not challenged by the applicant or his/her lawyer, to provide evidence for statements made in the bail summary.

- Home Office statements about the likelihood of absconding should not be part of the bail summary unless there is evidence to back them up (at present there isn't any, to our knowledge, but there is academic evidence to the contrary: Irene Breugel & Eva Natamba (June 2002), *Maintaining Contact: What happens when detained asylum seekers get bail?,* South Bank University).

Video-link hearings

- Video-link hearings should be discontinued as they clearly produce more refusals than hearings where the applicant is present in court. Until such time, detainees should be enabled to choose between a hearing conducted by video-link and one where the applicant is in court.

Accountability, scrutiny, monitoring

- Immigration judges' decisions on bail applications should be typed and include the reasons for refusal or granting of bail, taking into account what was said in the hearing.

- There should be a written record of proceedings at bail and other hearings in immigration courts, available to the public/interested parties.

- Statistics on bail hearings should be gathered, collated and regularly published. This is an essential part of monitoring the system.

- There should be an accessible and transparent mechanism for complaints about the conduct of immigration judges.

Guidelines and training for immigration judges

- The issuing of up-to-date guidance notes to immigration judges must be an urgent priority. They should be publicly available so that the applicants as well as observers can understand the framework in which judges work. New guidelines for immigration judges should be published now and be publicly available on a website.

- In many cases imminent removal was used repeatedly as the reason for the applicants to remain in detention. We find it odd that removal can remain imminent for many months and believe this

should not be repeatedly accepted as a reason to keep someone in detention. What constitutes an 'imminent removal' should be clearly defined in guidance notes to immigration judges.

- The training of immigration judges should be reviewed to ensure that more weight is given than is currently often the case to: independent medical evidence; the effects of detention on the mental health of detainees, and on the well-being of their families, and the consequent undesirability of prolonging detention; and to ongoing familiarisation with current conditions in the country of origin of bail applicants.

We call on the following bodies to act to carry out the above recommendations:

The Senior President of Tribunals
President of the First-Tier Tribunal (Immigration and Asylum Court)

The Home Office and UK Border Agency

Copies of this report have been sent for information and possible action to:

The Independent Chief Inspector of UK Border Agency
HM Inspectorate of Prisons
Independent Monitoring Boards

Bar Council and Bar Standards Board
Solicitors Regulation Authority

Private contracting companies

Amnesty International
Churches Together for Racial Justice
Home Affairs Committee of the House of Commons
Joint Committee for Human Rights, UK Parliament
Joint Council for the Welfare of Immigrants
Liberty
National Union of Journalists
Refugee Council

Glossary

Appellant
Legal term for a person appealing to a higher court (in bail hearings the appeal is against the Home Office decision to detain).

Applicant
The person applying for something (in this instance, bail).

Bail
Release from custody usually on the strength of the usually financial security (the bail) given.

Bail summary
Document in which the Home Office gives reasons for continuing to detain a person.

Home Office presenting officer (HOPO)
The person in an immigration court who represents the Home Office; the respondent in the case.

Immigration judge (IJ)
A person with a legal background (solicitor, barrister or legal academic) appointed by the Lord Chancellor to preside over, and make decisions at hearings in, immigration courts.

Judicial review
A procedure by which a judicial body reviews a decision made by another body such as the government or a court of law.

Recognizance
A legal obligation entered into before a judge to undertake a particular course of action; money pledged against the performance of that course of action.

Removal directions
An order made by the UK Border Agency and served on an individual that s/he must leave the UK.

Respondent
The person in a legal case who is answering a case put by the appellant (in immigration bail applications, the Home Office).

Surety
A person who offers to take responsibility for another person (in this case the detainee applying for bail) meeting a condition of bail such as reporting regularly to the police.

Video-link
Technology that allows a hearing to take place while a person (in this case the detainee applying for bail) is in another place (a detention centre), not in the court room.

ANNEX 2

List of participants in the project

The following people helped prepare and/or carry out the Bail Observation Project (see also the Acknowledgements at the front of this report):

Gill Baden, Christopher Christmas, Emma Cushing, Gosia Danthon, Ionel Dumitrascu, Jonathan Flynn, Rosemary Galli, Jo Garcia, Ella Goschalk, Michael Haggar, Samuel Hawke, Emma Johnston, Hilda Joy-Jones, Bill MacKeith, Aghileh Djafari Marbini, Bob Nind, Liz Peretz, Sophie Roumat, Max Schaub, Rebecca Sparrow, Ruth Stokes, Bridget Walker, Caroline White.

A further 14 people attended the training day but did not take part in the bail observations.

Bail questionnaire

Section 1 – Information to be taken from court list posted at AIT entrance

1.1 Date of hearing:

1.2 AIT location:

1.3 Court Room no:

1.4 Applicant's initials:

1.5 Bail reference first two initials:

1.6 Name of Immigration Judge:

1.7 Any legal reps (Yes or No):

Section 2 – Information to be taken in the court room

2.1 Scheduled time of hearing: – Time it started: – Duration of hearing:

2.2 Type of hearing: Video-link / In person / In absentia (please circle which).

2.3 Detention centre where applicant held if known:

2.4 Length of detention if known:

2.5 Nationality:

2.6 Sureties: Present in court / Kept waiting outside / None (please circle which)

2.7 Recognizance offered by sureties (amount in £):

2.8 Was the Applicant asked by the Immigration Judge if he/she could understand the interpreter provided by the court? (Y yes/N no – please circle which)

2.8.1 Was the Applicant/Lawyer happy that the interpreter provided, if any, was satisfactory? (Y yes/N no/ Unknown)

2.9 Were you asked by a court official about your affiliations/why you wished to attend, as opposed to simply being admitted to an open court as a member of the public? (Y/N – plus a few words of explanation if you wish):

2.10 If the bail application was withdrawn at any stage please state here who requested withdrawal and for what reason.

Section 3 – Representations by the Applicant or legal representative

3.1 Was the Bail Summary made available to the applicant/his or her lawyer in advance of the hearing (Y/N/Unknown)

3.2 Was the Bail Summary challenged for inaccuracy or false statements? (Y/N)

3.3 Was the applicant or his/her legal rep allowed time to make their case? (Y/N)

3.4 Were they allowed time to challenge/question the Home Office presenting officer (HOPO)? (Y/N)

3.5 Did they ask the HOPO to provide evidence to support statements made in the Bail Summary? (Y/N)

Did the Applicant or their legal representative refer to:

3.6 Length of detention (Y/N)

3.7 Lack of travel document (Y/N) – Impossibility of removal (Y/N)

3.8 Disputed nationality (Y/N)

3.9 Family ties in the UK (Y/N)

3.10 Medical conditions: Physical (Y/N) – Mental (Y/N) Medico-legal report referring to torture (Y/N)

3.11 Low risk of absconding (Y/N)

3.12 Previous compliance with terms of bail or temporary admission (Y/N)

3.13 Current obstacles to removal (Y/N)

3.14 Any other representations that were made, concerning, e.g. human rights:

3.15 Do you have any comments on this part of the hearing? Make them here.

Section 4 – The Home Office presenting officer (HOPO)

Did he/she say that bail was inappropriate because:

4.1 Removal was imminent (Y/N)

4.2 Travel documents were available/could be produced shortly (Y/N)

4.3 There was a risk of absconding (Y/N)

4.4 There was a risk to the public (Y/N) Risk of repeat offence (Y/N)

4.5 The Applicant had shown unwillingness to cooperate with the removal or travel documentation process (Y/N)

4.6 There were no sureties (Y/N) The sureties offered were unacceptable (Y/N) Reason?

4.7 That the amount of the recognizance was insufficient (Y/N)

4.8 That there was no / an unsatisfactory bail address (Y/N)

4.9 Any other representations made:

4.10 Do you have any comment on this part of the hearing? Make them here.

Section 5 – The Immigration Judge

Did he/she:

5.1 Explain the process clearly to the Applicant? (Y/N)

5.2 Appear to listen to the Applicant/Legal representative? (Y/N)

5.3 Allow the Applicant to give evidence in court? (Y/N)

5.4 Appear to listen to Home Office presenting officer (HOPO)'s representations? (Y/N)

5.5 Allow the sureties to be in court? (Y/N)

5.6 Treat the sureties with courtesy? (Y/N) Were matters explained to the sureties? (Y/N)

5.7 Ask the HOPO to provide evidence in support of statements made in the Bail Summary? (Y/N)

5.8 Was bail granted? (Y/N)

If bail was granted:

5.9 What reporting requirements were imposed as condition of bail?:

5.10 Was electronic tagging part of the conditions of bail? (Y/N)

5.11 Other restrictions imposed as a condition of grant of bail:

If bail was refused:

5.12 Did the judge state/explain reasons for refusing bail? (Y/N)

5.13 Make any recommendations or issue directions (Y/N) – If so what?:

5.14 In your opinion did the applicant have a fair hearing (Y/N)

5.15 Here add any personal comments/opinions about the overall conduct of the hearing, its fairness to the applicant. You may wish to refer to, e.g. – whether the video link was satisfactory or not from the Applicant's point of view and why, – whether the judge was impartial in your view between the Applicant and the Home Office representative(s)

Section 6 – Signing off

6.1 Volunteer's name: Tel. no.:

6.2 Date: Email address:

Please return form to :-

Asylum and Immigration Tribunals (or: How to fail asylum seekers)

'The purpose of a tribunal is to hear and decide appeals against decisions made by the Home Office in matters of asylum, immigration and nationality, including bail hearings' (Home Office website). Asylum and Immigration Tribunals are a parallel system of hearings which do not operate on the same basis as court hearings in the normal legal system in the UK and are presided over by immigration judges.

These are 'lawyers (barristers, solicitors, or legal academics). For most, it will be their first judicial appointment. They are not always originally immigration lawyers, but will have shown that they are able to learn this complex and challenging type of law. This involves:

- Applying international human rights and refugee law,
- Keeping up with the case law,
- Working with interpreters (the appellants often do not speak English),
- Evaluating medical and other expert evidence,
- Becoming familiar with country conditions all over the world, and the political and other problems in those countries' (Home Office website).

There is a great deal of unease amongst those representing immigrants and asylum seekers about the knowledge, accountability, independence and decisions of these immigration judges, also about the training they receive. A culture of disbelief pervades the AITs. The system is geared to deter and remove, not to provide sanctuary or a humane solution and the immigration judges appear to uphold that system.

- Human rights are frequently denied, e.g. Article 8 in the European Convention on Human Rights (ECHR), the right to respect for private and family life for long term overstayers who have established families here.
- The government's own rules are frequently ignored in the use of immigration detention.
- No public record is kept of all the proceedings at tribunals.
- Evidence is often disregarded or ignored (e.g. independent medical evidence of torture).
- Home Office information given to judges prior to a hearing frequently contains significant errors (e.g. in the Bail Summary).
- Lack of up-to-date country information is common.

The recent case reported on 27 October 2008, by Afua Hirsch, legal affairs correspondent for the *Guardian*, illustrates the disregard of expert knowledge:

'A tribunal has admitted making inappropriate remarks about an academic at Oxford University, issuing a public apology and agreeing to pay costs and damages after he accused it of libel in what is believed to be the first instance of its kind.

'The asylum and immigration tribunal has withdrawn the comments it made about Dr Alan George in a judgment published on its website, in which two judges warned that the accuracy of his evidence should be treated with caution in future. That warning was quickly seized upon by another tribunal, which followed the remarks, saying it was entitled to have "fears about his objectiveness". Those remarks have also now been withdrawn.

'George, an expert on the Middle East, had been invited to provide evidence in the case of a woman who was due to be deported to Lebanon. Experts say the incidents involving George are the latest examples of unacceptable measures taken by immigration judges seeking to reject asylum claims, raising questions about the integrity of the asylum appeals system.

' "Impartiality is a non-existing concept," says Dr Sabah al-Mukhtar, a specialist on the Middle East who has been instructed in a number of asylum cases. "The political agenda to reduce the number of immigrants tends to colour the view of those who are sitting in judgment."
'Another expert, David McDowall, who has ended his 15-year practice of giving evidence in asylum cases, said: "There has been a desire by the adjudicators to fall in line with the government's anxiety about asylum."

' "Judges generally do not display a deep understanding of conditions in certain parts of the world," George said. "Independent knowledgable experts are so important because our function is to assist the court and not to act on behalf of either of the parties. This sort of unwarranted attack is a relatively frequent feature and one can only question the motives of those judges who indulge in this sort of conduct."

'In a letter to the president of the asylum and immigration tribunal, Sir Henry Hodge, seen by the Guardian, 14 academics from universities including Oxford, Cambridge and the London School of Economics have accused the tribunal of allowing expert witnesses to be "harangued, unreasonably and abusively, over matters that are self-evidently irrelevant."

'The experts wrote: "We are dismayed that the Home Office, when confronted by expert reports which they cannot challenge, routinely resort to attacking the integrity and credentials of the experts ... Judges usually do not intervene to support and protect experts from such abuse. Equally regrettably, in their written determinations, judges often record the unjustifiable attacks, thereby conferring a degree of legitimacy upon them." ' (*Guardian*, 27/1/08)

Frequently cases are not given a fair hearing. Lack of legal representation means that many asylum seekers have to present their own case. This has been made even harder by the introduction of video-link hearings. The human cost for detainees of the whole detention 'industry' is unacceptable. It is well documented that immigration detention has a devastating effect on the mental health of asylum seekers.

The financial burden for the taxpayer is another story.

We need a complete review of the Asylum and Immigration Tribunal system.

– from *Campsfield Monitor*, November 2008

Recommendations from Bail for Immigration Detainees

As an aide mémoire, we produce here the section '4.4 Recommendations' from *A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty* published by Bail for Immigration Detainees in July 2010.

Our concern: lack of knowledge about bail (pages 21 to 22)

1. The proposals for automatic bail hearings contained with the Immigration and Asylum Act 1999 should be re-introduced.
2. There should be a requirement in the Home Office's Detention Centre Rules for information to be given to all immigration detainees about bail in a language they understand.

Our concern: difficulties accessing high-quality legal advice (pages 22 to 24)

3. Publicly-funded legal advice should be provided to all immigration detainees making an application for bail every 28 days or sooner if fresh evidence arises.

Our concern: difficulties acquiring a bail address (pages 27 to 29)

4. Government-provided bail addresses provided under Section 4(1)(c) of the Immigration and Asylum Act 1999 should be accepted as suitable accommodation by immigration judges and Home Office presenting officers at bail hearings.
5. Immigration judges should be provided with guidance about the Home Office's provision of Section 4 bail accommodation. Where an immigration judge decides that the particular Section 4 accommodation offered is not suitable and presents a barrier to a decision to grant bail, the judge should make this explicitly clear in the written decision to refuse bail and should direct that the Home Office provides alternative, appropriate accommodation that will not serve as a barrier to a future decision to grant bail.
6. The Home Office should provide bail addresses promptly in time for all bail hearings, regardless of the applicant's history of offending. If a bail hearing is refused the offer of a government provided bail address should roll over to the next hearing without the need to re-apply.
7. If the Home Office insists on operating a separate system providing bail addresses for certain ex-offenders it must be based on published criteria and operated to the same timescales as all other applications.

Our concern: difficulties listing a bail hearing (pages 29 to 30)

8. The Tribunal must be adequately resourced to meet its three-day target for listing bail applications in the light of the Home Office's increased use of immigration detention.

Our concern: barriers arising from the use of video link bail hearings (pages 31 to 34)

9. There should be published guidance and training for immigration judges on conducting videolink bail hearings.
10. The use of video-link bail hearings should only take place where bail applicants are consulted about the impact, informed about the process and given a meaningful choice between a video link and an in-court hearing.

Our concern: barriers arising from the treatment of interpreters (pages 35 to 37)

11. Guidance for immigration judges on the conduct of hearings with the use of an interpreter must be strengthened to ensure the judge checks the applicant and interpreter understand each other before the hearing starts, that everything at the hearing is interpreted, and that interpreters are not inappropriately used as experts.
12. Interpreters should be provided by the FTTIAC for the pre-hearing consultation between legal representatives and bail applicants.

Our concern: barriers arising from the service and content of Home Office documents (pages 37 to 47)

13. The Tribunal's Practice Directions should include a direction to release bail applicants if the Home Office has not opposed bail through the service of a bail summary. The direction should also make clear that the Home Office must defend contested facts in bail summaries through the use of documentary evidence. These directions should be replicated in the Home Office's Enforcement Instructions and Guidance.
14. Home Office decisions to detain/maintain detention must be based upon clear, contemporary evidence.
15. Home Office presenting officers should be empowered to amend the Home Office's position at bail hearings in the light of counter evidence presented by the applicant.
16. The Probation Service must produce pre-release reports for foreign national prisoners subject to deportation proceedings at end of their sentence in the same way as for British citizens and prisoners without deportation action pending. Probation records available for the Home Office (including the risk of re-offending pro forma) must also be available to bail applicants and their legal representatives.

Our concern: barriers arising from the actions and decision-making of immigration judges (pages 48 to 57)

17. The Tribunal's reasons for refusing bail should be typed and disclosed to all parties, as currently happens in Scotland. They must include a written record of the judge's approach to different pieces of information presented by the parties and a clear argument for why a decision to refuse bail has been reached.
18. The findings of subsequent bail hearings and any judicial reviews or civil actions should be fed back to immigration judges who have previously heard bail applications from the applicant.
19. Legal challenges to appeal refusals of bail and to challenge the legality of the decision to detain must be accessible to detainees. This requires actions to address the imbalance between the demand for and supply of publicly-funded legal advice for actions in the High Courts and the length of time it takes to list a judicial review.

Our concern: the need to re-think immigration bail

20. The bail jurisdiction should not be restrictively interpreted. For example judges should consider how the Hardial Singh principles apply to arguments about the imminence of a bail applicant's removal/deportation and assess the impact on arguments about absconding.
21. The statutory restrictions on bail in the Immigration Act 1971 should be amended so that they relate solely to detention for the purposes of immigration control and not for the protection of people with mental ill-health or to prevent future criminal offending.
22. The bail training received by immigration judges should include attending criminal bail training and shadowing in a magistrate's courts.
23. There should be a statutory time limit to detention in line with the 2007 recommendation of the Joint Committee on Human Rights that 'where detention is considered unavoidable […] subject to judicial oversight the maximum period of detention should be 28 days.'
24. There must be new guidance notes for immigration judges on the immigration bail process which should reflect the findings of this research. The use of new guidance notes should be monitored by the Tribunal to ensure uniformity and fairness.

ECRE/ELENA recommendations on legal aid for asylum seekers

The European Council of Refugees and Exiles (ECRE) and the European Legal Network on Asylum (ELENA), in their *Survey on Legal Aid for Asylum Seekers in Europe* (October 2010), conclude section 3.5.2, 'Access to Legal Aid in Detention' as follows:

ELENA calls upon States to implement principle 9.2.9 of the Resolution 1707 (201) by the Council of Europe Parliamentary Assembly on the detention of asylum seekers and irregular migrants in Europe, which states "detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge."

Recommendation 25
All detained asylum seekers should automatically be granted a legal aid representative both for the purposes of their asylum application and review of their detention.

Recommendation 26
Upon arrival detention centre officials should provide asylum seekers with an information leaflet (translated in relevant languages) on their rights including the right to legal aid. Such a leaflet should also contain a contact list for lawyers and/or legal advisors.

Recommendation 27
States should facilitate 'legal aid clinics' on a regular basis within detention centres. The purpose of such clinics would be to provide general legal assistance to all detainees. If further legal representation is required on an individual basis, legal aid providers could then be instructed to represent individual asylum seekers.

Recommendation 28
Consultation rooms for lawyers and detainees should be provided in such a way as to ensure privacy and effective communication. Where necessary, access to interpreters either by phone or in person must be ensured.

Recommendation 29
Detained asylum seekers should not be prevented from contacting their lawyers and/or legal advisors either by phone or other means of correspondence.

The Campaign to Close Campsfield

The campaign was established in 1993 in opposition to the detention centre of that name opened near Oxford that year.

The aims of the Campaign to Close Campsfield are:

- Stop immigration detentions and imprisonment;
- Close Campsfield, other detention centres, and detention wings in prisons;
- Stop racist deportations;
- Repeal immigration laws which reinforce racism.

Put simply, the rationale for the campaign is that it is wrong to lock up people who have not been convicted of a crime (or who have completed a prison sentence following conviction for a crime). The problem is compounded by the lack of time limit and proper judicial oversight. The underlying legal problem is current law that provides for the administrative detention of migrants. So, on the narrow basis of opposition to arbitrary detention of migrants, a primary aim is Repeal of the 1971 Immigration Act Section 11.1 and Schedule II, which provide for detention of migrants.

Since 1993 the campaign has played a leading role in the movement against immigration detention. It has:

- organised monthly demonstrations at Campsfield and monthly campaign meetings in Oxford;
- worked closely with detainees protesting at their detention;
- worked closely with local trade union, student and human rights organisiations;
- worked nationally with other bodies and helped set up the Barbed Wire Britain anti detention network and more recently the Detention Forum;
- helped establish the Campsfield Nine, Yarl's Wood 13 and Hamondsworth Four defence campaigns in the 'show trials' of protesting detainees;
- published the bulletin *Campsfield Monitor;*
- organised a conference on immigration detention in Europe attended in 2000 by over 120 people from over 20 countries;
- helped establish the Migreurop network and initiate the European Days of Action against detention and deportation, and supported actions and meetings for migrants' rights in other countries, NoBorders camps etc.;
- submitted evidence about the harmful effects and injustice of immigration detention to national and international parliamentary, European, and human rights organisations.

Financial support is from individuals and small affiliation fees. Grants have assisted publication of this report and the organisation of the European conference in 2000.

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Campsfield: detainees in the yard

Campsfield: detainees waving to demonstrators

Campsfield rooftop demo, 12 March 1994

CAMPAIGN TO CLOSE CAMPSFIELD