The Law Commission
(LAW COM No 269)

BAIL AND THE HUMAN RIGHTS ACT 1998

Item 10 of the Seventh Programme of Law Reform: Criminal Law

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THE LAW COMMISSION

BAIL AND THE HUMAN RIGHTS ACT 1998

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ABBREVIATIONS

In this report we use the following abbreviations:

ACPO:	Association of Chief Police Officers of England, Wales and Northern Ireland
CPS:	Crown Prosecution Service
DTI:	Department of Trade and Industry
ECHR:	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR:	European Court of Human Rights
HRA:	Human Rights Act 1998
MCA 1980:	Magistrates' Court Act 1980
NACRO:	National Association for the Care and Resettlement of Offenders
PACE:	Police and Criminal Evidence Act 1984

EUROPEAN COURT OF HUMAN RIGHTS CASES

In this report, wherever possible we give references to judgments of the European Court of Human Rights in both the official series of reports and the European Human Rights Reports, a commercial English series (published by Sweet and Maxwell). Up to 1996, the relevant official publication was called "Series A (Judgments and Decisions)". This we cite in the form: *Brogan v UK* A 145-B (1988); that is Series A (Judgments and Decisions), volume 145, case B (ie the second case reported in that volume; if there is no letter, the volume contains a single judgment). The year is that of judgment. After 1996, the official series became "Reports of Judgments and Decisions". Reports in this series are cited in the form: *Assenov v Bulgaria* 1998-VIII; that is the 1998 volume, part VIII.

References within a report are given to paragraph rather than page numbers. In more recent reports, all paragraphs in a judgment are numbered in a single series. In earlier cases, only the paragraphs of the judgment proper were numbered, not the preparatory matter. In some of these earlier cases, there is a separate number sequence for each section of the report ("The procedure"; "As to the facts" etc). Our paragraph reference is always to the paragraph number in the judgment proper (headed "Judgment" or "As to the law"), unless we state otherwise.

Until the Eleventh Protocol to the ECHR came into force on 1 November 1998, applications to the Convention organs were first subject to an admissibility *decision* by the European Commission on Human Rights. If the application was found to be admissible, the Commission would prepare a *report* setting out the facts of the case, as it found them, and giving its opinion on the merits of the application. As with the Court, individual members of the Commission sometimes gave dissenting opinions. Where we refer to decisions and reports of the Commission, we cite where they can be found in the official series where possible. That series is called "Decisions and Reports" and is published by the Council of Europe. The citations we have used are in the form *Schertenlieb v Switzerland* (1980) 23 DR 137 (Commission decision); that is volume 23, page 137.

Where we refer to the opinion of the Commission in respect of an application that has subsequently been the subject of a judgment by the Court, however, we refer to the report of the judgment, indicating that the paragraphs we refer to are from the opinion. Both the official series of the Court's reports and the reports of judgments in the European Human Rights Reports contain the full or partial opinion of the Commission which was provided in the Commission's report.

The Eleventh Protocol put in place a new procedure in which the Court, rather than the Commission, decides the admissibility of a case. As of 30 October 1999 all applications were transferred to the Court.

The application numbers and dates of unreported judgments are given. Transcripts are obtainable on the European Court of Human Rights website (http://www.echr.coe.int).

THE LAW COMMISSION

Item 10 of the Seventh Programme of Law Reform: Criminal Law

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To the Lord High Chancellor of Great Britain

PART I
INTRODUCTION AND OVERVIEW

1.1 The Human Rights Act 1998 (HRA) makes provision for the majority of the rights[1] contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to be directly relied upon in the English courts against public authorities, who may not act incompatibly with them unless required to do so by primary legislation.

THE SCOPE OF THIS REPORT

1.2 In this report we consider the impact of the HRA on the law governing decisions taken by the police and the courts to grant or refuse bail[2] in criminal proceedings. In November 1999 we published a consultation paper.[3] We are grateful to the judges, academic commentators, non-governmental organisations, professional bodies, private individuals, and government departments and agencies who took time to respond. The quality of our reports would suffer considerably without the benefit of the views and experiences of consultation respondents.

1.3 We have confined ourselves to an examination of the detention of accused persons between the time when they are charged or appear in court, and the time of the verdict or other termination of the case.[4] During that period, the accused

[1] Articles 2–12 and 14 of the ECHR, Articles 1–3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, all as read with Articles 16–18 of the ECHR (see HRA, s 1(1)).

[2] That is, the release from detention of a person suspected or accused of a criminal offence, subject to an obligation to surrender to the custody of the court or the police at a later date.

[3] Consultation Paper No 157 (1999). This project has been undertaken pursuant to Item 10 of the Law Commission's Seventh Programme of Law Reform (1999) Law Com No 259, which recommended "that an examination be made of particular areas of criminal law, evidence and procedure where issues arise in connection with the application of the Human Rights Act 1998".

[4] We therefore do not consider the bail position of people who have been detained by the police but not yet charged, nor of those who have been convicted and sentenced but seek bail, eg, because they wish to appeal. Nor do we look at the law as it relates to children and young persons, because to do so would encompass many further issues.

person must be presumed innocent of the offence of which he or she has been accused.[5]

1.4 Nevertheless, both English law and the Convention recognise that there may be a need to detain a defendant prior to his or her guilt or innocence being decided, for example, where, if released, the person would be likely to abscond. The circumstances in which a person who is presumed to be innocent can be detained, possibly for a considerable period, must be subject to certain safeguards, and the detention of a defendant for any more than a very short time should not take place without judicial scrutiny. The ECHR sets out certain minimum standards relevant to pre-trial detention. In this report, we consider whether English law meets those standards.

THE HUMAN RIGHTS ACT 1998

1.5 The main provisions of the HRA came into force on 2 October 2000. Section 6 of the Act states that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless primary legislation allows it no other option. Section 3 states that, "[s]o far as it is possible to do so", legislation must be "read and given effect in a way which is compatible with the Convention rights".

1.6 Where legislation cannot be interpreted and applied compatibly with those rights, it nonetheless remains valid. Although the higher courts[6] may issue a "declaration of incompatibility",[7] such a declaration does not directly affect the dispute between the parties to the litigation in which the declaration is issued. The incompatible provision remains good law.[8]

1.7 The declaration of incompatibility is a "remedy" of last resort. The HRA provides two other ways in which the domestic courts can protect Convention rights without recourse to such a declaration:

(1) by interpreting legislation in such a way as is compatible with the Convention; and

(2) by preventing public authorities from acting incompatibly with Convention rights.

1.8 If a provision can be applied so that Convention rights are not violated, legislative action will be *unnecessary* to ensure Convention-compatibility. There may, however, be situations in which such a provision is liable to mislead persons taking decisions under it into applying it in ways which would violate

[5] ECHR, Art 6(2).

[6] A list is provided in HRA, s 4(5).

[7] HRA, s 4(4).

[8] It is for the Government and Parliament to remedy the incompatibility, if they so wish. HRA, s 10, provides Ministers of the Crown with a speedy method of doing so.

Convention rights. In such cases, although legislative reform may not be necessary, it may be *desirable*.

OUR APPROACH

1.9 This project has been an unusual one for the Law Commission to have undertaken. Our primary focus has been to determine whether English bail legislation can be applied in a way which is compatible with the Convention rights, not to reform or simplify the law. We have concluded that there are no provisions which, upon analysis, *cannot* be interpreted and applied compatibly, or which, given appropriate training, decision-takers would be likely to apply in a way which would violate Convention rights.

1.10 This does not mean that we have given the law of bail in England and Wales an unequivocal "clean bill of health" in the sense of being incapable of improvement following a general review. Where appropriate, we indicate where such improvement might, in due course, be made.

1.11 We hope that this report may be of assistance to those providing training to decision-takers and their advisers, and that courts may find it useful to refer to it, at least until the issues discussed have become the subject of reported decisions in the higher courts. A secondary purpose of this report has therefore been to provide pointers for bail decision-takers on how the English legislation can be interpreted and applied compatibly with the Convention rights.

APPLYING THE HRA TO THE ENGLISH LAW OF BAIL

Section 3: The duty to interpret legislation as Convention-compatible

1.12 Section 3(1) of the HRA states:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

1.13 A court must, if it is possible to do so, read and give effect to legislation in a way which is compatible with the Convention rights even if an otherwise binding pre-HRA judicial decision exists which would require that the legislation be applied in an incompatible way. Furthermore, public authorities relying on the law must also, if possible, read and give effect to legislation in a compatible way. The rule does not, however, affect the validity of primary legislation which *cannot* be interpreted compatibly with the Convention,[9] nor the validity of incompatible secondary legislation where primary legislation prevents the removal of the incompatibility.[10]

1.14 Both the police and the courts must therefore interpret the Bail Act 1976 and other legislation relevant to bail in a way which is compatible with the

[9] HRA, s 3(2)(b).

[10] HRA, s 3(2)(c).

Convention "[s]o far as it is possible to do so". At this stage in the life of the HRA, it is difficult to say with any certainty how powerful section 3 will be as a tool of interpretation.

1.15 Academic opinion is divided on the issue. Section 3 has been described as the most important provision contained in the HRA,[11] but also as a "deeply mysterious" one.[12] Under the previous law, the courts would interpret legislation so that any ambiguities therein were resolved in a way which was compatible with the Convention. This observed the common law presumption that Parliament does not intend to legislate inconsistently with the UK's obligations under an international treaty, and had the advantage of avoiding unnecessary violations of international obligations.[13]

1.16 The White Paper which led to the passage of the HRA suggested that section 3 went

> far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision.[14]

1.17 At the Committee stage of the Bill in the House of Lords, Lord Cooke of Thorndon suggested that what was then clause 3 "enjoins a search for possible meanings as distinct from the true meaning which has been the traditional approach".[15] Such an approach envisages the courts looking at a provision, identifying the range of possible meanings it is capable of supporting, and choosing only a meaning which is compatible with the Convention rights.

1.18 There is, understandably, likely to be a judicial reluctance to resort to a declaration of incompatibility unless driven to it. Nevertheless, the Home Secretary stated before the enactment of the HRA that it was not the Government's intention that the courts "should contort the meaning of words to produce implausible or incredible meanings".[16]

1.19 We have worked on the basis that, where the clearly unambiguous language of the statute requires a particular result to be reached which would be incompatible

[11] Sir Anthony Hooper, "The Impact of the Human Rights Act on Judicial Decision-making" [1998] EHRLR 676, 682.

[12] Geoffrey Marshall, "Interpreting Interpretation in the Human Rights Bill" [1998] PL 167.

[13] See, eg, *Garland v British Rail Engineering (No 2)* [1983] 2 AC 751, 771; the Court of Appeal in *R v Home Secretary, ex p Brind* [1991] 1 AC 696. For a useful summary, see R Clayton and H Tomlinson, *The Law of Human Rights* (2000) paras 2.13 – 2.17.

[14] Rights Brought Home (1997) Cm 3782, para 2.7.

[15] *Hansard* (HL) 18 November 1997, vol 583, col 533. In *R v DPP, ex p Kebilene* [2000] 2 AC 326, 373, Lord Cooke suggested that it was at least a *possible* meaning of s 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 that it imposed an evidential, rather than a persuasive, burden of proof on the defendant, though that did not accord with the most natural interpretation of the statutory language.

[16] *Hansard* (HC) 3 June 1998, vol 313, col 422.

with the Convention, that section cannot be saved by section 3. One example of such a provision was the unamended section 25 of the Criminal Justice and Public Order Act 1994, which we discuss in Part VIII. That *required* the denial of bail to persons who were accused of one of a number of specified serious offences and had previously been convicted of such an offence. It could only have been saved by the device of "reading in" a speculative raft of additional words to provide for exceptions to the rule. In our view, section 3 would not permit the courts to go that far.[17]

Reading in

1.20 The degree to which the courts will adopt the technique of reading words into legislation to make it compatible with Convention rights is not clear.

1.21 Some might regard the decision of the House of Lords in *Litster v Forth Dry Dock*,[18] concerning the construction of UK subordinate legislation enacted to comply with an obligation imposed by an EC Directive, as supporting the validity of the technique.[19]

1.22 In Canada, where "the Constitution of Canada is the supreme law … and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect",[20] the courts have sometimes been willing to interpolate words into the statute to ensure its compliance with the Canadian Charter of Rights and Freedoms.[21]

1.23 Conversely, the Constitutional Court of South Africa appears to have rejected the "reading in" technique.[22] Similarly, in a decision of the New Zealand Court of Appeal, Thomas J stated that section 6 of New Zealand's Bill of Rights Act "does not authorise the court to legislate".[23]

1.24 Recently, in the House of Lords,[24] Lord Hope also stated of section 3 of the HRA: "But the rule is only a rule of interpretation. It does not entitle the judges

[17] See Richard A Edwards, "Reading Down Legislation under the Human Rights Act" (2000) 20 LS 353.

[18] *Litster v Forth Dry Dock and Forth Estuary Engineering* [1990] 1 AC 546.

[19] In that case the House of Lords was willing to interpolate additional words into the UK regulations in order to give effect to the purpose of the Directive. In so doing, their Lordships adopted an interpretation which clearly strained the language of the regulations. They acted under the European Communities Act 1972, which makes EC law effectively supreme.

[20] Constitution Act 1982, s 52.

[21] By including a certain class of individuals which the legislation had not originally protected: *Schachter v Canada* (1992) 93 DLR (4th) 1, 13, *per* Lamer CJC. See also *Vriend v Alberta* (1998) 156 DLR (4th) 385, cited by Lord Lester in "The Art of the Possible" [1998] EHRLR 665, 672.

[22] *Coetzee v Republic of South Africa* 1995 (4) SALR 631, para 62, *per* Sachs J.

[23] *Quilter v Attorney-General* [1998] 1 NZLR 523, 542.

[24] *A* [2001] UKHL 25.

to act as legislators".[25] In the same case, however, Lord Steyn stated: "The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions".[26] Despite this divergence, the House was able to reach a unanimous conclusion about the compatibility with the Convention of the provision in issue. In a passage with which the other Law Lords were in agreement,[27] Lord Steyn stated:

> … under section 41(3)(c) of [the Youth Justice and Criminal Evidence Act 1999] construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998 … the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded.[28]

Their Lordships thus achieved a synthesis of conclusion that the provision was compatible with the Convention, having taken a variety of routes to that conclusion. It has not been necessary for us to form a view about the extent to which the courts may or may not read words into primary legislation in order to make it compatible. This remains, however, a difficult and fundamental question for the English courts.

Reading down

1.25 Section 3 might be used not only to interpret legislation but to restrict its scope, by reading it as subject to certain limits. This technique seems most apt in situations where the legislation permits a public authority, including a court, to do something which, in some circumstances, would be a violation of the Convention, but, in other circumstances, would not.[29] The technique is sometimes known as "reading down", and is relevant to our purpose. It appears to accord with the language of section 3, which requires that primary and secondary legislation "be *read and given effect* in a way which is compatible with the Convention rights".[30]

[25] *Ibid,* para [108].

[26] *A* [2001] UKHL 25, para [44].

[27] See Lord Slynn, para [13]; Lord Hope, para [110]; Lord Clyde, para [136]; and Lord Hutton, para [163].

[28] At para [46].

[29] An example from New Zealand is *Ministry of Transport v Noort* [1992] 3 NZLR 260, which concerned the right to seek legal advice by telephone before submitting to a compulsory blood or breath test. It was held that, notwithstanding the lack of provision in the Transport Act, the Act could be read as subject to the right, under the Bill of Rights, of an arrested person to consult a lawyer without delay. See Lord Cooke of Thorndon, "The British Embracement of Human Rights" [1999] EHRLR 243, 249–50.

[30] The Lord Chancellor has also given some support to the view that the scope of the powers granted by primary legislation can be pared down so that they do not allow Convention rights to be transgressed. See Lord Irvine of Lairg LC, "The Development of Human

1.26 Such an approach is not wholly unfamiliar to the English courts, which have already held that certain fundamental rights inherent in the common law can only be limited by Parliament through the use of the clearest statutory language.[31]

1.27 It also overlaps with the obligation imposed on public authorities, by section 6, to act in a manner that is compatible with the Convention, which we now consider.

Section 6: Public authorities must not act incompatibly with the Convention rights

1.28 Section 6(1) of the HRA states:

> It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The term "public authority" embraces the courts[32] and the police. It is therefore unlawful for either of these to act in a way which is incompatible with a Convention right in relation to pre-trial detention.

1.29 Refusals of bail almost always involve the exercise of discretion by the police or the courts. The exceptions to the right to bail contained in Schedule 1 to the Bail Act provide that the defendant *need not* be granted bail if one of a number of specified circumstances exists.[33] The exceptions are expressed in such terms as may be capable of encompassing refusals of bail in a wide range of situations, including some where the refusal would be compatible with the Convention rights, and some where it would not. These provisions may be "read down" so that they permit the refusal of bail only where this would be compatible with the Convention.

1.30 Even if such legislation were interpreted as permitting a court to refuse a defendant bail in circumstances where this would not be compatible with the Convention rights, the legislation would serve only to give the decision-taker a *discretion* whether or not to detain the defendant. As public authorities, the courts and the police must not exercise that discretion in a way which results in any of the defendant's Convention rights being violated.

1.31 To illustrate this approach, paragraph 3 of Parts I and II of Schedule 1 to the Bail Act 1976[34] permits courts to refuse bail if "the court is satisfied that the

Rights in Britain under an Incorporated Convention on Human Rights" [1998] PL 221 at 228–229. A helpful discussion of the application of s 3 of the HRA, including the possible relevance of the techniques of "reading in" and "reading down", is provided in Clayton and Tomlinson's *The Law of Human Rights* (2000) vol 1, paras 4.04 – 4.38.

[31] Eg *R v Lord Chancellor, ex p Witham* [1998] QB 575.

[32] HRA, s 6(3).

[33] Such as the court being satisfied that there are substantial grounds for believing that the defendant, if released on bail, would fail to surrender to custody.

[34] These provisions are discussed in Part V below.

defendant should be kept in custody for his own protection". Our examination of ECtHR decisions suggests that, while this can be a legitimate purpose for pre-trial detention, where it is for the purpose of protecting a defendant from harm from others, it should only be relied upon in exceptional circumstances and where that purpose could not be adequately pursued by imposing appropriate bail conditions. In our view, a court may exercise its discretion to detain a defendant under paragraph 3 only where the more restrictive requirements of the Convention are met.

Section 2: Interpreting Convention rights

1.32 Section 2(1) of the HRA states:

> A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any –
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
>
> (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
>
> (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
>
> (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
>
> whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

1.33 Section 2(1) does *not* require the UK court to regard the decisions of the Strasbourg institutions[35] as binding precedents. It only requires it to take such decisions into account. The national court will have to show that it has done so by dealing with the relevant Strasbourg case law and, where appropriate, explaining why it has not been followed.

1.34 The ECtHR has itself adopted a dynamic approach to interpreting the ECHR which would be incompatible with a system of binding precedent.[36] As the Court stated in *Tyrer v UK:*

> The Court must also recall that the Convention is a living instrument which … must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the

[35] The Eleventh Protocol to the ECHR, which came into force on 1 November 1998, put in place a new procedure in which the Court, rather than the Commission, decides the admissibility of a case. As of 30 October 1999 all applications were transferred to the Court. Despite the abolition of the Commission, its decisions remain valid indications of the meaning of the Convention where there is no decision from the Court itself.

[36] See Luzius Wildhaber, President of the ECtHR, "Precedent in the European Court of Human Rights" (contained in Mahoney, Matscher, Petzold, Wildhaber, *Protecting Human Rights: The European Perspective - Studies in memory of Rolv Ryssdal*).

> developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.[37]

1.35 Another inhibition on the development of a system of binding precedent is the "margin of appreciation".[38] This has been most relevant in cases where moral judgments are in play, such as decisions whether or not to censor certain publications in order to protect public morals, where the national authorities are likely to have a better knowledge than international judges of local circumstances and attitudes.[39] The margin in respect of pre-trial detention is comparatively small.

1.36 For our purposes, we have chosen to regard the Strasbourg decisions as establishing an authoritative framework for pre-trial detention, based on a reasonably well-developed body of jurisprudence.[40] In the absence of any developed body of English case law interpreting Convention rights, we have therefore based our analysis of the scope of those rights on the Strasbourg cases. We believe that the English courts are likely to do the same.

THE RIGHT TO DAMAGES UNDER THE HRA

1.37 Article 5(5) of the ECHR states:

> Everyone who has been the victim of arrest or detention in contravention of the provisions of [Article 5] shall have an enforceable right to compensation.

1.38 Section 8(3) of the HRA states that an award of damages may only be made where it is necessary to afford "just satisfaction to the person in whose favour it is made".[41] The Act makes special provision in respect of judicial acts done in good faith.[42]

[37] A 26 (1978), 2 EHRR 1, para 31. We commend to readers the discussion of precedent in the ECtHR by Professor David Feldman of the University of Birmingham, contained in Consultation Paper No 157, Appendix C.

[38] The "margin of appreciation" is the degree of flexibility which the ECtHR allows to national authorities in deciding whether there is a pressing social need to interfere with rights, and how great an interference is necessary.

[39] See, eg, *Handyside v UK* A 24 (1976), 1 EHRR 737, para 48. In controversial areas, such as the giving of official recognition to the new status of transsexuals, the ECtHR has refused to find violations of Convention rights until a pan-European consensus has developed: see, eg, *Rees v UK* A 106 (1986), 9 EHRR 56; *Cossey v UK* A 184 (1990), 13 EHRR 622; *Sheffield and Horsham v UK* 1998-V, 27 EHRR 163.

[40] The ECtHR regards its previous decisions as authoritative interpretations of the Convention under the social and moral conditions, and the state of scientific knowledge, current at the time when they were made. Previous decisions are usually followed and applied, "such a course being in the interests of legal certainty and the orderly development of the Convention case law" (*Cossey v UK* A 184 (1990), 13 EHRR 622, para 35).

[41] This reflects the test set out in Article 41 of the ECHR. When deciding whether to award damages, or the amount of an award, English courts are required to take into account the

1.39 Since the publication of the consultation paper,[43] we have produced a full report specifically on the subject of damages under the HRA.[44] We refer readers to that report.

THE STRUCTURE OF THIS REPORT

1.40 In Part II we consider the requirements of Article 5 of the ECHR in relation to pre-trial detention. In Parts III to VIII we consider whether certain exceptions to the right to bail in English law which might seem to pose problems of compatibility with those requirements can in fact be applied in a Convention-compatible way.

1.41 In Parts IX(A) and IX(B) we consider when the courts and the police can attach conditions to bail in a way which is compatible with the Convention, as well as when they must do so rather than keep the defendant in custody.

1.42 In Part X we consider the standard of reasoning in bail decisions required by the Convention, and whether practice in the English courts needs to change in order to ensure compliance. In Part XI we consider the right of defendants to challenge the legality of pre-trial detention, and in Part XII we discuss how frequently defendants should be able to make further challenges.

1.43 Throughout the report, we have endeavoured to provide suggestions on how the English legislation can be applied by bail decision-takers without violating defendants' Convention rights. For ease of reference, we have identified our suggestions in bold, italicised text. In addition, they are set out in the summary of conclusions provided in Part XIII.

1.44 Relevant extracts from the Bail Act 1976 are contained in Appendix A. Appendix B contains Articles 5 and 6 of the ECHR. Appendix C lists those who responded to our consultation paper.

1.45 We have found it convenient to refer to the Convention, on the one hand, and "English law" on the other. In this context, by "English law" we mean pre-HRA

principles applied by the ECtHR in relation to the award of compensation under Article 41 of the Convention (HRA, s 8(4)). The ECtHR cases show that, unless the victim can show that he or she has suffered pecuniary loss that would not have been suffered had Article 5 not been violated, or special facts exist warranting an award for non-pecuniary loss, the finding that a violation has occurred will frequently be considered sufficient "just satisfaction".

[42] "In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention": HRA, s 9(3).

[43] We considered the right to obtain damages for violations of Convention rights in Part I of Consultation Paper No 157.

[44] Damages under the Human Rights Act 1998 (2000) Law Com No 266, Scot Law Com No 180, Cmnd 4953. That report includes detailed consideration of the availability of damages in the domestic courts for breaches of Article 5 (paras 6.27 – 6.80), including damages in respect of judicial acts (Appendix A).

English law. Of course, the Convention rights are now, in reality, *part* of English law.

OUR MAIN CONCLUSIONS

1.46 Certain of the grounds for pre-trial detention provided for in Schedule 1 to the Bail Act 1976 are plainly compatible with the Convention. These include detention on grounds of a fear that the defendant will fail to surrender to custody,[45] or will interfere with witnesses or otherwise obstruct the course of justice.[46] We also believe that detention where a case is adjourned for inquiries or a report and it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody,[47] is also plainly compatible with the Convention, because this would fall within the legitimate purpose of preventing the defendant from obstructing the course of justice.

1.47 The other exceptions to the right to bail[48] are all capable of being applied in a Convention-compliant manner. In some cases we draw attention to the need for appropriate training to avoid decisions being made that would not be compatible with the Convention, but **we make no recommendations for immediate legislation.**

1.48 The English provisions on the granting of conditional bail, the giving of reasons for bail decisions, scrutiny of pre-trial detention by a court, and the making of repeated bail applications,[49] are capable of being applied compatibly with the Convention rights. We highlight, where relevant, the need for training and for providing appropriately drafted forms. **In Part IX(A), however, we highlight a lacuna in English law for which we believe that legislative reform is particularly desirable.**

[45] See para 2.29, n 44 below.

[46] See para 2.29, n 45 below.

[47] As permitted by the Bail Act 1976, Sch 1, Part I, para 7.

[48] Examined in Parts III–VIII below.

[49] See Parts IX–XII below.

PART II
THE SUBSTANTIVE RIGHTS: ARTICLE 5

2.1 Article 5(1) of the Convention provides that

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law …

Six situations are then set out in which the deprivation of a person's liberty may be permissible. The ECtHR has stated that

> the list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim and purpose of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty.[1]

Any deprivation of liberty must therefore be justifiable at all times under one of the six exceptions. If, even for a time, a detention does not fall within one of the exceptions, Article 5 will have been violated.[2]

2.2 The exception of primary relevance to bail is Article 5(1)(c),[3] which permits

> the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

2.3 The Court has held that paragraph (1)(c) of Article 5 must be read in conjunction with paragraph (3), "with which it forms a whole".[4] Paragraph (3) provides that

> Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

[1] *Quinn v France* A 311 (1996), 21 EHRR 529, para 42. See also *Engel v Netherlands* A 22 (1976), 1 EHRR 647, para 57; *Ireland v UK* A 25 (1978), 2 EHRR 25, para 194; *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, para 37; *Guzzardi v Italy* A 39 (1980), 3 EHRR 333, para 96.

[2] *Quinn v France* A 311 (1996), 21 EHRR 529, para 42.

[3] Some respondents to the consultation paper suggested that exception (b) may also be relevant. This is discussed at paras 2.39 – 2.51 below.

[4] *Lawless v Ireland (No 3)* A 3 (1961), 1 EHRR 15, para 14; *Schiesser v Switzerland* A 34 (1979), 2 EHRR 417, para 29.

2.4 These provisions, "both separately and as inter-related, present considerable difficulties of interpretation", with the result that, to bring them into line with the requirements of the administration of criminal justice in Europe, the Strasbourg institutions have had to pay "only limited respect to the text".[5]

2.5 In this Part, we seek to provide an overview of these key provisions. After explaining the purpose of Article 5, we examine the interpretation the Court has given the key phrases in paragraphs (1)(c) and (3). We also briefly examine the potential significance of paragraph (1)(b) in the bail context, and the requirements of paragraph (4).

THE PURPOSE OF ARTICLE 5

2.6 The Court recently noted that it had

> frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities … In that context, it has repeatedly stressed that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention.[6]

2.7 The notion of the protection of the individual from arbitrary detention is founded on the rule of law. The Court has stated that

> Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society … which is expressly referred to in the Preamble of the Convention" … and "from which the whole Convention draws its inspiration".[7]

[5] D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995) p 115.

[6] *Çakiki v Turkey* App No 23657/94, 8 July 1999, para 104. See also *Kurt v Turkey* 1998-III, 27 EHRR 373, para 122; *Timurtas v Turkey* App No 23531/94, 13 June 2000, para 103. For an example of the Court interpreting Article 5 in accordance with its purpose of protecting the individual from arbitrary detention see *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, para 37. An arbitrary detention can never be "lawful": *X v UK* A 46 (1981), 4 EHRR 188, para 43; *Van Droogenbroeck v Belgium* A 50 (1982), 4 EHRR 443, para 48.

[7] *Brogan v UK* A 145-B (1988), 11 EHRR 117, para 58. The quotations are from *Klass v Germany* A 28 (1978), 2 EHRR 214, para 55, and *Engel v Netherlands* A 22 (1976), 1 EHRR 647, para 69.

ARTICLE 5(1)

"Liberty and security of person"

2.8 Although paragraph 1 of Article 5 refers to both "liberty" and "security" of the person, the ECtHR has stated that these terms

> must be read as a whole and, in view of [their] context, as referring only to physical liberty and security.[8]

"Procedure prescribed by law" and "lawful arrest or detention"

2.9 The phrases "procedure prescribed by law" and "lawful arrest or detention" overlap. A deprivation of liberty may be said to be "lawful" only if it is carried out in accordance with "a procedure prescribed by law".[9] The Court has reiterated on many occasions that the terms "law" and "lawful", as they occur in the phrases in question, refer back to national law.[10] It is a matter for national courts to determine whether national law has been complied with. The ECtHR nonetheless exercises a jurisdiction to review their decisions, subject to an appropriate margin of appreciation.[11] The national law in question must itself conform to the purpose of Article 5 and to the Convention as a whole, including the general principles expressed or implied in it.[12] The notions of "law" and "lawfulness" have implications for the *quality* of domestic law. Thus, "where a national law authorises deprivation of liberty … it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness".[13]

[8] *Adler and Bivas v Germany* App Nos 5573/72 and 5670/72, Commission decision, Yearbook 20 (1977), p 102, 146. See P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998) pp 344–345. It should be noted that the article is not applicable to mere restrictions on liberty of movement, which are regulated by Article 2 of the Fourth Protocol. Having said that, the distinction between physical deprivation of liberty and restriction of liberty of movement is one of degree rather than kind. Thus the confinement of the applicant (with a number of other suspected members of the mafia) to a set of buildings in a small corner of an island, otherwise largely occupied by a prison, amounted to detention rather than a mere restriction on freedom of movement: *Guzzardi v Italy* A 39 (1980), 3 EHRR 333.

[9] *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, para 39.

[10] In *Herczegfalvy v Austria* (1993) 15 EHRR 437, para 63, the Court stated that "if detention is to be lawful … it must essentially comply with national law and the substantive and procedural rules thereof".

[11] See, eg, *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, para 45; *Kemmache v France (No 3)* A 296-C (1994), 19 EHRR 349, paras 37, 42; *Scott v Spain* 1996-VI, 24 EHRR 391, para 56; *Benham v UK* 1996-III, 22 EHRR 293, paras 40-41.

[12] See references in n 6 above.

[13] *Amuur v France* 1996-III, 22 EHRR 533, para 50.

Article 5(1)(c)

"Effected for the purpose of bringing him before ... "

2.10 The Court has determined that this phrase governs the whole of Article 5(1)(c).[14] Paragraph (1)(c) provides three circumstances in which a person may be detained:

(1) "on reasonable suspicion of having committed an offence";

(2) "when it is reasonably considered necessary to prevent his committing an offence"; and

(3) to prevent a person "fleeing after having done so".

2.11 One reading of (2) might be thought to provide a justification for a general power of preventive detention in advance of any offence having been committed. That possibility has effectively been avoided by the ECtHR's insistence that the whole of Article 5(1)(c) is governed by the purpose of producing the person detained to a judge. Were it otherwise,

> anyone suspected of harbouring an intent to commit an offence could be arrested or detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention … [S]uch an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention ….[15]

2.12 The result is that the second circumstance in which a person may be detained may have only very limited application. It has been suggested that it might cover the power to arrest a person to prevent murder, or in anticipation of an imminent breach of the peace.[16]

"The competent legal authority"

2.13 The phrase "the competent legal authority" is "a synonym, of abbreviated form", for the phrase "judge or other officer authorised by law to exercise judicial

[14] *Lawless v Ireland (No 3)* A 3 (1961), 1 EHRR 15, paras 13–14.

[15] *Ibid*, para 14.

[16] D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995) pp 117–118. For a rare case in which the second limb of Article 5(1)(c) was used to provide an additional justification for a detention, see *Eriksen v Norway* 1997-III, 29 EHRR 328. Norwegian law allows for the extension by a court of a form of detention of an insane or mentally handicapped offender. As part of the procedure, it is possible for the offender to be detained for four weeks after the end of an authorised period of detention and before he or she is brought before the court that considers extending the detention. Detention for that four week period was justified under Article 5(1)(a), but also under Article 5(1)(c), as one of the conditions for detention was that there was a likelihood that the applicant would offend again if released. The Court, however, effectively confined the circumstances in which such detention could be justified under the second limb of Article 5(1)(c) to a case in which the detention was concurrently justified by Article 5(1)(a): see para 86.

power" which occurs in Article 5(3).[17] The term "other officer" has a wider meaning than "judge", but there is "a certain analogy" between the two.[18]

2.14 The Convention requires that the legal authority be independent,[19] and hear an application for bail rather than delegate it.[20] There is a linked "substantive requirement" which imposes on a judicial officer the obligations of "reviewing the circumstances militating for or against detention, and of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons".[21] These obligations cannot be discharged if the officer is prevented by national law from properly exercising this essentially judicial discretion.[22]

"Reasonable suspicion"

2.15 A person arrested or detained in accordance with Article 5(1)(c) must be *reasonably* suspected of having committed an offence. This is an objective standard. In *Fox, Campbell and Hartley v UK* the Court explained that

> The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5(1)(c). The Court agrees with the Commission and the Government that having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.[23]

ARTICLE 5(3)

"Promptly"

2.16 Article 5(3) requires that a person arrested or detained be "brought promptly before a judge or other officer authorised by law to exercise judicial power". The purpose of this requirement is to ensure "prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of Article 5(1)(c)".[24] The Court has refused to define the word "promptly" in

[17] *Lawless v Ireland (No 3)* A 3 (1961), 1 EHRR 15, para 9; *Ireland v UK* A 25 (1978), 2 EHRR 25, para 199; *Schiesser v Switzerland* A 34 (1979), 2 EHRR 417, para 29.

[18] *Schiesser v Switzerland* A 34 (1979), 2 EHRR 417, paras 27–31.

[19] *Ibid*. See also, eg, *Assenov v Bulgaria* 1998-VIII, para 146; *Nikolova v Bulgaria* 1999-II, 31 EHRR 64, para 49; *Hood v UK* 1999-I, 29 EHRR 365, paras 57–58.

[20] *Schiesser v Switzerland* A 34 (1979), 2 EHRR 417, para 31.

[21] *Ibid*.

[22] As in the case of s 25 of the Criminal Justice and Public Order Act 1994, before it was amended by the Crime and Disorder Act 1998, s 56: *Caballero v UK (*aka *CC v UK)* (2000) 30 EHRR 643, Commission opinion, paras 40–45. This provision is discussed in Part VIII below.

[23] A 182 (1990), 13 EHRR 157, para 32.

[24] *De Jong, Baljet and van den Brink v Netherlands* A 77 (1984), 8 EHRR 20, para 51.

terms of a specific time limit. Instead, it has said that "the issue of promptness must be assessed in each case according to its special features".[25]

2.17 The Commission suggested in *Brogan v UK*,[26] however, that ordinarily the period should be no longer than four days. In *Brogan* itself, the shortest time that any of the applicants had spent in custody was four days and six hours. It was found by the Court to be a violation of Article 5(3).[27]

2.18 It would appear that the time limits laid down in English legislation, which we described in Part II of the consultation paper,[28] meet the requirements of the Convention. Specifically, there is nothing to suggest that the regime set down in section 46 of PACE for the production to a magistrates' court of a person following charge falls foul of the requirement of "promptness" which has emerged from the case law of the Court. For this reason, in this report we do not discuss the obligation imposed by the first part of Article 5(3).

"A judge or other officer authorised by law to exercise judicial power"

2.19 The purpose of Article 5(3) is to provide, as a safeguard against arbitrary detention, an independent scrutiny of the reasons for an accused person's detention, and to ensure release if continued detention is not justified. It is therefore essential that the "judge or other officer" have two characteristics:[29]

(1) independence from the prosecuting authorities; and

(2) the power to order that the accused person be released.

2.20 The "judge or other officer" is required to consider the circumstances militating for and against continued detention, and must have the power to release the accused person if continued detention would not be justified. It is insufficient if the officer is able to do no more than recommend release.[30]

"Trial within a reasonable time or release pending trial"

2.21 Read literally, Article 5(3) appears to give the national authorities a choice between two courses of action, either of which will satisfy the requirements of the Convention: *either* to bring the defendant to trial "within a reasonable time" *or* to release the defendant pending trial. In the early case of *Wemhoff v Germany*, however, the Court decided that

[25] *Ibid*, para 52; see also *Wemhoff v Germany* A 7 (1968), 1 EHRR 55, para 10.

[26] A 145-B (1988), 11 EHRR 117, Commission opinion, para 103.

[27] A 145-B (1988), 11 EHRR 117, para 62.

[28] Consultation Paper No 157, paras 2.70 – 2.78.

[29] Identified by the ECtHR in *Schiesser v Switzerland* A 34 (1979), 2 EHRR 417, paras 27, 31.

[30] *De Jong, Baljet and Van den Brink v Netherlands* A 77 (1984), 8 EHRR 20, paras 47, 48.

> such an interpretation would not conform to the intention of the High Contracting Parties. It is inconceivable that they should have intended to permit their judicial authorities, at the price of release of the accused, to protract proceedings beyond a reasonable time.[31]

2.22 The second part of Article 5(3), therefore, confers *both* a right to trial within a reasonable time *and* a right (albeit not an absolute right) to release pending trial.

Trial within a reasonable time

2.23 In *W v Switzerland* the Commission decided that the applicant's detention for four years before trial was a breach of Article 5(3) because that Article "implies a maximum length of pre-trial detention".[32] However, the Court had already remarked in *Stögmüller v Austria* that the concept of a "reasonable time" could not be translated into "a fixed number of days, weeks, months or years, or into various periods depending upon the seriousness of the offence".[33] In *W v Switzerland* the Court preferred this latter view to the Commission's suggestion, which, it said, found no support in the case law:

> The case law in fact states that the reasonable time cannot be assessed *in abstracto*. As the Court has already found in the *Wemhoff v Germany* judgment …, the reasonableness of an accused person's continued detention must be assessed in each case according to its special features.[34]

On the facts, the Court found that W's detention for four years did not violate the guarantee of trial within a reasonable time.

2.24 In assessing the reasonableness of the length of time taken to bring the detained person to trial, account must be taken of the continuing interference with the liberty of a person who has a right to be presumed innocent until proved guilty.[35] As the Court stated in the early case of *Neumeister v Austria*,

> The reasonableness of the time spent by the accused person in detention … must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent and the purpose of [Article 5(1)(c)] … is essentially to require his provisional release once his continuing detention ceases to be reasonable.[36]

[31] A 7 (1968), 1 EHRR 55, para 5.

[32] A 254-A (1993), 17 EHRR 60, para 30.

[33] A 9 (1969), 1 EHRR 155, para 4.

[34] *W v Switzerland* A 254-A (1993), 17 EHRR 60, para 30.

[35] The right of persons charged with a criminal offence to be presumed innocent until proved guilty is contained in ECHR Art 6(2).

[36] A 8 (1968), 1 EHRR 91, para 4.

2.25 Thus, when an accused person has been detained, the national authorities must show "special diligence" in the conduct of the investigation.[37] In English law, the right of detained persons to trial within a reasonable time is protected by the custody time limit regime, which, as Lord Bingham CJ noted, imposes "an exacting standard" by comparison with the law of some other European countries.[38]

Right to release pending trial

2.26 The approach of the Court is that

> The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention of the person concerned … However, after a certain lapse of time, it is no longer sufficient; in such circumstances the Court must examine "the grounds which persuaded the judicial authorities to decide"[39] that the detention should be continued.[40]

DETENTION MUST BE NECESSARY

2.27 After "a certain lapse of time", the Court will focus on the actual reasons advanced for denying bail in the national courts, and the applicant's arguments in favour of bail being granted, to decide whether the continuation of the detention beyond that time was justified. Detention will be found to have been justified only if it was *necessary* in the circumstances of the case.

> Before being referred to the organs set up under the Convention …, cases of alleged violations of Article 5(3) must have been the subject of domestic remedies and therefore of reasoned decisions by [the] national judicial authorities. It is for them to mention the circumstances which led them, in the general interest, to consider it *necessary* to detain a person suspected of an offence but not convicted. …
>
> It is in the light of these pointers that the Court must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that detention was not unreasonably prolonged and contrary to Article 5(3) of the Convention.[41]

[37] Eg *B v Austria* A 175 (1990), 13 EHRR 20, para 42; *Herczegfalvy v Austria*, A 244 (1992), 15 EHRR 437, para 71.

[38] *R v Manchester Crown Court, ex p McDonald* [1999] 1 WLR 841, 850.

[39] *Stögmüller v Austria* A 9 (1969), 1 EHRR 155, para 4.

[40] *B v Austria* A 175 (1990), 13 EHRR 20, para 42. Similar passages occur in, eg, *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 12; *Letellier v France* A 207 (1991), 14 EHRR 83, para 35; *Yargci and Sargin v Turkey* A 319-A (1995), 20 EHRR 505, para 50.

[41] *Wemhoff v Germany* A 7 (1968), 1 EHRR 55, para 12 (italics supplied).

DETENTION MUST BE FOR A LEGITIMATE PURPOSE

2.28 Detention will be found to be justified only if it was necessary in pursuit of a legitimate purpose (or ground). The Court has recognised a number of purposes which are capable of justifying detention. They all relate to feared events for the prevention of which detention may be necessary, such as the defendant absconding.[42] Detention will be considered necessary only if there is a *real risk* that the feared event will take place if the defendant is granted bail.

2.29 ***The ECtHR has recognised that pre-trial detention may be compatible with the defendant's right to release under Article 5(3) where it is for the purpose of avoiding a real risk that, were the defendant released,***[43]

(1) he or she would

(a) fail to attend trial;[44]

(b) interfere with evidence or witnesses, or otherwise obstruct the course of justice;[45]

(c) commit an offence while on bail;[46] ***or***

(d) be at risk of harm against which he or she would be inadequately protected;[47] ***or***

(2) a disturbance to public order would result.[48]

[42] In each case, a further prerequisite of the legitimacy of the ground in question is that it is recognised by the national law of the relevant Contracting State as a legitimate ground for pre-trial detention.

[43] In addition to the grounds specified here, it is arguable that the ECtHR's judgment in *Clooth v Belgium* A 225 (1991), 14 EHRR 717, paras 41–46, may permit detention where it is necessary for the purposes of the investigation into the defendant's case. The better view seems to be, however, that detention can only be justified where it is necessary both because the investigation is continuing *and* for one of the recognised grounds for detention, such as the need to prevent the defendant from interfering with the course of justice.

[44] See, eg, *Wemhoff v Germany* A 7 (1968), 1 EHRR 55, para 14; *Neumeister v Austria (No 1)* A 8 (1968), 1 EHRR 91, paras 9–12; *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 8; *Stögmüller v Austria* A 9 (1969), 1 EHRR 155, para 15; *Letellier v France* A 207 (1991), 14 EHRR 83, paras 40–43; *W v Switzerland* A 254-A (1993), 17 EHRR 60, para 33; *Kemmache v France (Nos 1 & 2)* A 218 (1991), 14 EHRR 520, paras 55–56; *Toth v Austria* A 224 (1991), 14 EHRR 551, paras 71–72; *Tomasi v France* A 241-A (1992), 15 EHRR 1, paras 96–98; *Van der Tang v Spain* A 326 (1995), 22 EHRR 363, paras 64–67; *Muller v France (No 1)* 1997-II, para 43; *IA v France* 1998-VII, para 105.

[45] See, eg, *Wemhoff v Germany* A 7 (1968), 1 EHRR 55, para 14; *Clooth v Belgium* A 225 (1991), 14 EHRR 717, paras 41–44; *Letellier v France* A 207 (1991), 14 EHRR 83, paras 37–39; *Kemmache v France (Nos 1 & 2)* A 218 (1991), 14 EHRR 520, paras 53–54; *Tomasi v France* A 241-A (1992), 15 EHRR 1, paras 92–95; *W v Switzerland* A 254-A (1993), 17 EHRR 60, paras 35–36; *Muller v France (No 1)* 1997-II, paras 39–40; *IA v France* 1998-VII, paras 109–110.

[46] See, eg, *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 9; *Clooth v Belgium* A 225 (1991), 14 EHRR 717, paras 38–40; *Muller v France (No 1)* 1997-II, para 44.

[47] See, eg, *IA v France* 1998-VII, para 108.

2.30 Although these grounds are *capable* of justifying pre-trial detention, the ECtHR will only accept that detention is necessary for one of those grounds if that conclusion is supported by adequate reasons put forward by the national court which are clearly addressed to the facts of the case.[49]

2.31 Moreover, the circumstances in which some grounds can be relied upon are more restricted than in the case of other grounds. If, for example, there is good reason to suppose that the defendant would abscond if granted bail, the ECtHR is likely to accept that a remand in custody is justified. Detention on the grounds of a supposed risk to public order or a need to protect the defendant, however, will be appropriate only in exceptional circumstances.[50]

How does English law measure up?

2.32 Some of the grounds for pre-trial detention provided for in Schedule 1 to the Bail Act 1976 are manifestly acceptable under the Convention. These include detention on the grounds of a fear that the defendant will fail to surrender to custody, or will interfere with witnesses or otherwise obstruct the course of justice. We also believe that, where a case is adjourned for inquiries or a report, and it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody,[51] such detention is plainly compatible with the Convention, because this would fall within the legitimate purpose of preventing the defendant from obstructing the course of justice. Accordingly, although the detention of a defendant on these grounds *can* be a violation of Article 5 – for example, because there is insufficient evidence to substantiate the ground in question – our conclusion is that these grounds, as they exist in English law, can be applied in a way which is compatible with the Convention. Provided that decision-takers apply their discretion to refuse bail on these grounds in accordance with the general standards applicable to bail decisions which we identify in this report,[52] it is unlikely that those grounds would be relied upon in a way which would not be compatible with Article 5.

2.33 Some of the remaining exceptions to the right to bail in English law, however, require closer examination. They are as follows:

(1) the existence of grounds for believing that the defendant would commit an offence if released on bail;

(2) the fact that the defendant was on bail at the time when he or she allegedly committed the offence charged;

[48] See, eg, *Letellier v France* A 207 (1991), 14 EHRR 83, paras 47–51; *Tomasi v France* A 241-A (1992), 15 EHRR 1, paras 90–91; *IA v France* 1998-VII, para 104.

[49] The quality of reasons required is discussed in Part X below.

[50] See *IA v France* 1998-VII, paras 104, 108. See also Part V below.

[51] As permitted by the Bail Act 1976, Sched 1, Part I, para 7.

[52] See paras 13.2 – 13.5 below.

(3) the need to detain the defendant for his or her own protection;

(4) where it has not been practicable to obtain sufficient information for the purpose of taking a proper decision about bail;

(5) the fact that the defendant has been arrested under section 7 of the Act (for breach of a bail condition, for example); and

(6) the fact that the defendant is charged with an offence of homicide or rape, and has previously been convicted of such an offence.

2.34 In Parts III to VIII of this report we examine each of these grounds in turn.

"RELEASE MAY BE CONDITIONED BY GUARANTEES TO APPEAR FOR TRIAL"

2.35 Article 5(3) provides that a defendant may be released subject to "guarantees to appear for trial". The Court has held that where the sole ground cited for detaining a defendant consists in the risk that he or she will abscond, and that risk can be surmounted by the imposition of appropriate bail conditions, a failure to release the defendant will constitute a violation of Article 5(3).[53]

2.36 Article 5(3) does not refer to the imposition of conditions for purposes other than to secure the defendant's appearance for trial. We assume, however, that conditions may also be imposed for any of the other purposes which the ECtHR has said are capable of justifying detention, and that conditions should be used in preference to detention. We consider conditional bail further in Parts IX(A) and IX(B) below.

CONCLUSIONS

2.37 Although a reasonable suspicion that the defendant has committed an offence can be sufficient justification for pre-trial detention for a short time, after that time Article 5(3) requires that the defendant be released unless further reasons can be found to justify continued detention. Our examination of the ECtHR case law has led us to conclude that continued detention can only be justified in accordance with the following principles:

(1) A defendant should be refused bail only where detention is necessary in pursuit of one of the five purposes which the ECtHR has recognised as legitimate.[54]

(2) A legitimate purpose will exist only where there is a real risk that the feared event will occur if the defendant is released on bail.

[53] *Wemhoff v Germany* A 7 (1968), 1 EHRR 55, para 15. Where the condition involves the payment of a sum of money to secure the defendant's return to court, the amount payable must be fixed with reference to that purpose, and hence to the defendant's assets and resources. It may *not* be determined with reference to the losses which the alleged offence may have caused, nor set at a level that is unnecessarily high to achieve its legitimate purpose. See *Neumeister v Austria (No 1)* A 8 (1968), 1 EHRR 91, paras 12–14.

[54] For these five purposes, see para 2.29 above.

(3) Detention will be necessary only if that risk could not be adequately addressed, to the point where detention would no longer be necessary, by the imposition of appropriate bail conditions.

(4) The court refusing bail should give reasons for finding that detention is necessary. Those reasons should be closely related to the individual circumstances pertaining to the defendant, and be capable of supporting the court's conclusion.

2.38 ***A refusal of bail by an English court will be compatible with the Convention rights only where it can be justified under both the Convention, as interpreted by the ECtHR, and domestic legislation.***

ARTICLE 5(1)(b)

2.39 Some respondents to our consultation paper suggested that Article 5(1)(b) may be relevant in the bail context. Article 5(1)(b) permits

> the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

2.40 Article 5(1)(b) may be relevant to bail in two possible ways. The first is that, as a person awaiting trial is obliged by law to do certain things, such as to surrender to the court at the appointed time and to refrain from interfering with witnesses, detention to secure that he or she complies with those obligations would be justified under Article 5(1)(b). We do not accept that view.

2.41 Article 5(1)(c) and its surrounding case law establish a regime of minimum standards governing pre-trial detention. Persons who have been deprived of their liberty under Article 5(1)(c) have certain rights under Article 5(3) which do not apply to persons detained under Article 5(1)(b). Such persons must be brought before a "judge or other officer" who, the ECtHR has stated, must decide whether the detention is justified. Detention will be justified only if it is necessary for a purpose which the ECtHR is prepared to recognise as capable of justifying pre-trial detention. Were suspects to be detained under Article 5(1)(b), the protections afforded them under Article 5(1)(c) and (3) would be circumvented. The ECtHR has stated that such a result should be avoided.[55] In the many cases in which the Court has examined the detention of persons awaiting trial, it has always looked at them under paragraph (1)(c) of Article 5, not paragraph 5(1)(b).

2.42 The second way in which Article 5(1)(b) might be relevant to bail is to justify the detention of a defendant who has breached a bail condition. It could be argued that the defendant would be arrested and detained "for non-compliance with the lawful order of a court or in order to secure the fulfilment of [an] obligation

[55] See *Engel v Netherlands (No 1)* A 22 (1976), 1 EHRR 647, para 69.

prescribed by law". There does not appear to be any case law on the issue whether a bail condition amounts to either "the lawful order of a court" or an "obligation prescribed by law", so we must approach it from first principles.

The first limb of Article 5(1)(b): Is a bail condition a "lawful order of a court"?

2.43 The first limb of Article 5(1)(b) allows for the lawful arrest and detention of a person for "non-compliance with the lawful order of a court". The aim of this limb is to allow civil detention to enforce court orders. It has been used to justify detention for failure to pay a fine,[56] refusal to undergo a psychiatric examination,[57] refusal to undergo a blood test,[58] and refusal to be bound over to keep the peace,[59] where the applicant had been ordered to do one of these things by a court.

2.44 One immediate objection to the argument that a bail condition is a "lawful order of a court" is that conditions attached to *police* bail cannot fall within that description.

2.45 Where the bail conditions are imposed by a court, however, the issue becomes less clear-cut. One view is that there is a difference between *ordering* a person not to do *x* and releasing a person on bail *on condition that* he or she does not do *x*. In the former case, doing *x* will be a contempt of court and will itself lead to a penalty being imposed. In the latter, doing *x* may lead to the person's liberty being withdrawn, not as a penalty for non-compliance but to address the risk against which the condition was intended to guard. If a bail condition is a "lawful order of a court", then why is it called a condition rather than an order? Why would breaching it not be a contempt of court?

2.46 On another view, however, bail conditions amount to "the lawful order of a court" because the court is giving the defendant instructions as to his or her conduct, and adverse results will flow from a failure to abide by those instructions.

2.47 If this second view were correct it could be argued that Article 5(1)(b) would permit the detention of the defendant for non-compliance with the condition alone, without any need to consider the risks that he or she would pose if granted bail. This would substantially diminish the limits placed on pre-trial detention by Article 5(3), which only applies to persons who are detained under Article 5(1)(c). On the other hand, where the condition has proved ineffective to achieve the purpose for which it was imposed, it may be that the defendant can then be detained, compatibly with Article 5(1)(c), for that same purpose. Reliance on Article 5(1)(b) would then be unnecessary.

[56] *Airey v Ireland* (1977) 8 DR 42 (Commission decision).

[57] *X v Germany* (1975) 3 DR 92 (Commission decision).

[58] *X v Austria* (1979) 18 DR 154 (Commission decision).

[59] *Steel v UK* 1998-VII, 28 EHRR 603, paras 69–70.

2.48 Whatever may be the correct answer to this knotty legal problem, the ECtHR has been wary of allowing Article 5(1)(b) to be used in a fashion that would deprive an individual of the other Article 5 rights.[60]

The second limb of Article 5(1)(b): Is a bail condition an "obligation prescribed by law"?

2.49 The second limb of Article 5(1)(b) allows for the arrest and detention of a person "in order to secure the fulfilment of any obligation prescribed by law". A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the Convention draws its inspiration, and the scope of the second limb must therefore be defined narrowly.[61]

2.50 The ECtHR has said that the second limb applies only where the law permits the detention of a person to compel that person to fulfil a specific and concrete obligation which he or she has until then failed to satisfy.[62] Although this requirement would not seem to exclude the detention of a person who has failed to comply with a specific bail condition, it is questionable whether the detention would genuinely be "in order to secure the fulfilment of" the condition. There is a difference between an obligation to do something, where detention may be used *to compel a person to comply with the obligation*, and the release of a person on bail subject to a condition, where breach of that condition may lead to detention *to fulfil the objective at which the condition was directed*.

Our view of the relevance of Article 5(1)(b) to bail

2.51 In our view it is difficult to say with any confidence that Article 5(1)(b) is of any assistance when considering pre-trial detention. We have, therefore, thought it right to test the English law of bail against the requirements of Article 5(1)(c), as interpreted by the ECtHR, rather than relying on Article 5(1)(b). In doing so, we

[60] *Engel v Netherlands (No 1)* A 22 (1976), 1 EHRR 647, para 69.

[61] *Ibid*. In *McVeigh, O'Neill and Evans v UK* (1981) 5 EHRR 71, para 176, the Commission stated that "the nature of the obligation whose fulfilment is sought must itself be compatible with the Convention." It added that "the obligation in question cannot, in particular, consist in substance merely of an obligation to submit to detention."

[62] *Engel v Netherlands (No 1)* A 22 (1976), 1 EHRR 647, para 69. In *McVeigh, O'Neill and Evans v UK* (1981) 5 EHRR 71, para 173, the Commission expressed the view that the second limb of Article 5(1)(b) "is primarily intended … to cover the case where the law permits detention as a coercive measure to induce a person to perform a specific obligation which he has wilfully or negligently failed to perform hitherto".

The Commission went on to state that "the person concerned must normally have had a prior opportunity to fulfil the 'specific and concrete' obligation incumbent upon him and failed, without proper excuse, to do so", but accepted that there could be "other limited circumstances of a pressing nature which could warrant detention in order to secure the fulfilment of an obligation" (para 175). In that case, such pressing circumstances were found to exist. The case concerned the use of special powers under anti-terrorist legislation to detain persons at a border for 45 hours for the purpose of securing the fulfilment of a statutory obligation incumbent upon them to submit to an examination. We are not aware of any other cases in which special circumstances have been found, removing the need for the detained person to have had a prior opportunity to fulfil the obligation.

leave open the possibility that Article 5(1)(b) may be of some relevance to pre-trial detention following breaches of bail conditions, and we consider this issue in Part IX(B).[63]

ARTICLE 5(4)

2.52 Article 5(4), which applies to all detainees, states that

> 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 ordered if the detention is not lawful.

2.53 Where a person has been detained under Article 5(1)(c), the requirements of Article 5(4) differ somewhat from those imposed by Article 5(3). Article 5(3) requires that the accused person be brought "promptly" before a "judge or other officer". Article 5(4) requires that after arrest or detention the detained person shall be entitled to have the lawfulness of the detention reviewed by a "court"[64] and that the determination of lawfulness should be made "speedily".[65] Where the body to which the defendant has been brought for a hearing under Article 5(3) has the characteristics of a court, the initial requirement of judicial supervision imposed by paragraph (4) may be satisfied by that hearing. We have assumed that this is so in the case of the arrangements in English law under which a person charged must be brought before a court.[66] Article 5(4) has continued relevance, however, in that the detained person may be entitled to have his or her detention scrutinised by a court *again* at periodic intervals.[67]

2.54 The requirements of Article 5(4) are discussed in greater detail in Parts XI and XII of this report.

[63] See paras 9B.10 – 9B.14 below.

[64] The term "court" denotes a body which exhibits "not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees of judicial procedure": *De Wilde, Ooms and Versyp v Belgium* A 12 (1971), 1 EHRR 373, para 76–78. See also Part XI below.

[65] The term "speedily" connotes a lesser degree of urgency than the term "promptly" used in Art 5(3): see *E v Norway* A 181-A (1990), 17 EHRR 30, para 28.

[66] PACE, s 46. See para 2.18 above.

[67] See Part XII below.

PART III
EXCEPTIONS TO THE RIGHT TO BAIL (1): THE RISK OF OFFENDING ON BAIL

3.1 English law permits detention on the ground that it is feared that the defendant would commit an offence if released on bail. Section 38(1)(a)(iii) of PACE permits the police to detain a person charged with an imprisonable offence where "the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence".[1] In the case of a defendant who is before a court and has a right to bail under section 4 of the Bail Act 1976, paragraph 2 of Part I[2] of Schedule 1 to the Act provides that a defendant "need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would … (b) commit an offence while on bail".

THE CONSULTATION PAPER

3.2 In the consultation paper we noted that the ECtHR has accepted in principle that a defendant may be detained because of a risk that he or she will offend while on bail.[3] We suggested that Strasbourg case law requires three conditions to be satisfied before a refusal of bail on this ground would be justified under Article 5.

(a) The offence which it is feared the defendant may commit whilst on bail must be a *serious* one, since all of the Strasbourg cases where detention has been held to be justified on this ground have involved offences at the upper end of the scale of seriousness (murder[4] or serious fraud[5]). We expressed the view that an offence which would not attract a custodial

1 In the case of a person charged only with a non-imprisonable offence, the power to detain arises only where "the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property": s 38(1)(a)(iv). A person charged with any offence, even one that is non-imprisonable, may also be detained if "the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence": s 38(1)(a)(v). Interference with the course of justice may, of course, itself entail the commission of an offence.

2 Which applies to defendants accused or convicted of imprisonable offences.

3 See, eg, *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 9. The Court in that case said that this justification for withholding bail applied "in the special circumstances of the case". This formulation has not, however, been repeated in later cases, and we do not consider that it adds an independent qualification to the application of the principle. See, eg, *Clooth v Belgium* A 225 (1991), 14 EHRR 717, paras 38–40; *Muller v France (No 1)* 1997-II, para 44.

4 *Clooth v Belgium* A 225 (1991), 14 EHRR 717.

5 *Matznetter v Austria* A 10 (1969), 1 EHRR 198; *Toth v Austria* A 224 (1991), 14 EHRR 551.

sentence would presumably not be sufficiently serious, but found it difficult to go beyond that.

(b) The danger of the defendant committing offences if released must be "plausible"[6] and the fear of further offending "reasonably" held.[7] We concluded that the risk must be real, and the reasons for that conclusion adequately explained.

(c) Detention must be an *appropriate* way of averting the risk.[8] Detention must therefore be *necessary* to prevent the defendant committing the feared offence.

3.3 We observed that, according to *Clooth v Belgium*, the second and third requirements were to be judged "in the light of the circumstances of the case and in particular the past history and personality of the person concerned".[9] Although the defendant's criminal record may often be of importance, and a record of offences similar to that charged might justify a conclusion that there is a risk of the defendant committing further offences of that kind if released on bail,[10] it was said in *Muller v France (No 1)* that "a reference to a person's antecedents cannot suffice to justify refusing release".[11] We argued that this does not mean there must be some *further* evidence of a risk of the defendant committing offences while on bail, over and above the defendant's criminal record. What it may, at most, mean is that to deny bail on account of the defendant's criminal record would only be justified if the court *does in fact* draw the inference from that record that there is a real risk that the defendant will offend while on bail. In *Muller* the French authorities appeared to have proceeded directly from the defendant's record of similar offences to the conclusion that he must *therefore* be detained in case he should reoffend or abscond.

6 *Clooth v Belgium* A 225 (1991), 14 EHRR 717, para 40.

7 *Toth v Austria* A 224 (1991), 14 EHRR 551, para 70.

8 In *Clooth v Belgium* A 225 (1991), 14 EHRR 717, detention in prison was found not to be justified when the defendant was actually in need of psychiatric treatment. The Commission criticised the national authorities for keeping the applicant in detention for a long period "without considering whether there was another way of safeguarding public security and preventing him from committing further offences" (Commission opinion, para 75). The ECtHR stated that "the [national] courts in question should have taken measures more suited to Mr Clooth's psychological deficiencies", and that detention "without an accompanying therapeutic measure" had been inappropriate (judgment, paras 39–40).

9 *Clooth v Belgium* A 225 (1991), 14 EHRR 717, para 40.

10 A record of offences wholly *dissimilar* to, and unconnected with, that charged is unlikely to be an adequate basis for fearing "repetition" of the offence charged. The previous convictions in *Clooth v Belgium*, for example, related to an attempted aggravated theft and desertion, whereas the offences which gave rise to the ECtHR hearing were murder and arson.

11 1997-II, para 44. More details of this case are given at para 9B.30, n 21 below.

3.4 In the ECtHR cases, the offence *charged* was similar in nature and gravity to that which it was feared the applicant might commit if released. We expressed the view that this coincidence did not necessarily mean that such a similarity was essential. Rather, we concluded, there must be an appropriate *connection* between the offence charged and that which it is feared the defendant might commit. We gave, as an example of a sufficient connection, the case of a defendant obsessed with a particular person who was arrested for some comparatively minor act of criminal damage directed at that person. If, in custody following that arrest, the defendant were to indicate an intention to kill that person, we considered that a court *might* be justified in denying bail on the grounds of a real risk that the defendant would carry out the threat.

3.5 In the light of this analysis we considered whether the law of England and Wales on this subject was likely to be applied in a Convention-compatible manner. We reminded ourselves of the terms of paragraph 2(b) of Part I of Schedule 1 to the Bail Act and the obligation imposed on the court to have regard to a number of considerations *if* they appear to the court to be relevant.[12] Read literally, the Act permits a refusal of bail where, for example, the offence that it is feared the defendant might commit is not of a serious nature – perhaps not even serious enough to attract a sentence of imprisonment – or has no connection with the offence charged. We suggested that a refusal of bail in such circumstances, even if permissible under the Act, would probably be a violation of Article 5(3).

3.6 We considered that one way of avoiding such violation would be to amend the Act so as to provide expressly that bail may be refused on the ground of a risk that the defendant would offend while on bail *only* in the circumstances where this would be in line with the requirements of the Convention which we had identified. We were not persuaded that this was necessary. We suspected that, in practice, it was not common for bail to be refused on this ground in such circumstances that the detention could not be justified under Article 5(3). We pointed out that it was quite possible for these provisions to be applied in a Convention-compatible way if decision-takers were given appropriate guidance.

CONSULTATION RESPONSES

3.7 There was general agreement among respondents that guidance would be sufficient, and was preferable to legislation.[13] Some respondents, however, disagreed with our analysis of the Strasbourg jurisprudence. In particular, the CPS and the Home Office argued that there is no requirement that the offence which the defendant may commit whilst on bail must be a serious one. The fact that the cases which have reached the ECtHR have involved serious offences does not justify the inference that *only* such cases are capable of meeting Convention requirements. Similarly (concurring with our reasoning on this point) they said that, merely because the cases considered by the ECtHR have concerned a fear of

[12] Sched 1, Part I, para 9.

[13] Only NACRO and the Justices' Clerks Society preferred legislation – the latter because of its concern about the increase in governance by circular and guidance.

offences that are similar in nature and gravity to the offences charged, it does not follow that such similarity is essential. They agreed, however, that there should be an appropriate connection between the offence charged and the offence feared, and that detention must be appropriate to the risk of offending.

3.8 A number of respondents thought that a requirement that the offence feared must be "serious" and "likely to attract a custodial sentence" could pose problems of definition, and might in practice be particularly troublesome for a custody sergeant considering police bail. The Metropolitan Police and the Police Federation, along with two academics, feared that, out of an abundance of caution, persons would be released who should not be released.

CONCLUSIONS

3.9 In the light of these responses, we have looked afresh at the ECtHR case law and have concluded that our provisional conclusions were overstated. We do not now believe that the feared offence must be of any specific level of seriousness, nor that it must be likely to be punished by any particular type of sentence, for pre-trial detention to be justified.

3.10 The Bail Act 1976 and PACE comply with the requirements of the ECHR in these respects. In our view, the factors identified by the ECtHR as relevant in determining whether there has been a breach of Article 5(1)(c) or (3) constitute a sensible and measured approach to the issue. Furthermore, its approach is consistent with that which the courts and the police should already be employing in considering whether to withhold bail under paragraph 2(b) of Part I of Schedule 1 to the Bail Act 1976 (taking into account the relevant considerations under paragraph 9) or section 38 of PACE.

3.11 ***Pre-trial detention for the purpose of preventing the defendant from committing an offence while on bail can be compatible with Article 5(1)(c) and (3) of the ECHR, provided that it is a necessary and proportionate response to a real risk that, if released, the defendant would commit an offence while on bail. Previous convictions and other circumstances may be relevant, but the decision-taker must consider whether it may properly be inferred from them that there is a real risk that the defendant will commit an offence.***[14]

[14] This is particularly so if the previous convictions are not comparable in nature or degree with the offence charged: *Clooth v Belgium* A 225 (1991), 14 EHRR 717, para 40.

PART IV
EXCEPTIONS TO THE RIGHT TO BAIL (2): DEFENDANT ON BAIL AT THE TIME OF THE ALLEGED OFFENCE

4.1 In English law, the right to bail[1] is subject to paragraph 2A of Part I of Schedule 1 to the Bail Act,[2] which provides:

> The defendant need not be granted bail if –
>
> (a) the offence is an indictable offence or an offence triable either way; and
>
> (b) it appears to the court that he was on bail in criminal proceedings on the date of the offence.[3]

THE CONSULTATION PAPER

4.2 In the consultation paper we argued that, although the ECtHR has recognised that a *risk* that, if granted bail, the defendant *would* commit an offence can justify detention, the facts specified in paragraph 2A cannot *in themselves* constitute a ground for detention under the Convention. The fact that the defendant *was* on bail at the time of the commission of the alleged offence might be a relevant factor in weighing the risk of the defendant committing an offence whilst on bail, but it is not in itself equivalent to such a risk.

4.3 Domestic law has already made provision for bail to be refused because of a risk of *future* offences in paragraph 2(b) of Part I of Schedule 1.[4] The text of paragraph 2A would not be out of place in paragraph 9, which lists a number of factors to be considered in taking the decisions required by paragraph 2. We argued that it was both inappropriate and unnecessary for it to be listed as a *separate ground* in paragraph 2A unless a court could properly refuse bail on that ground alone, where none of the other exceptions arose. If a court were to refuse bail *solely* because the defendant was already on bail, and there were no substantial grounds to believe that, if granted bail, the defendant would commit

[1] Under the Bail Act 1976, s 4.

[2] Inserted by Criminal Justice and Public Order Act 1994, s 26. In the second reading debate in the House of Commons, the then Home Secretary (the Rt Hon Michael Howard QC MP) promoted this provision by saying:

> It is estimated that 50,000 offences are committed every year by people on bail. … [T]he Bill removes the presumption in favour of bail for those charged with serious offences that appear to have been committed while the defendant was on bail.

Hansard 11 January 1994, vol 235, col 25.

[3] The word "offence" includes an alleged offence: Bail Act 1976, s 2(2).

[4] See para 3.1 above.

an offence, this would be a breach of Article 5.[5] Thus we concluded that, structurally, the requirement was placed in the wrong paragraph of Schedule 1. It should have been added to paragraph 9.

4.4 We therefore proposed that

(1) paragraph 2A of Part I of Schedule 1 of the Bail Act 1976 should be repealed; and

(2) paragraph 9 of Part I should be expanded to include, within the list of considerations to be taken into account in taking the decisions required by paragraph 2, whether the defendant was on bail at the time of the alleged offence.

ANALYSIS OF RESPONSES

4.5 Most respondents agreed with this proposal, though in some cases (notably the Magistrates' Association, ACPO and the Police Federation) with a degree of reluctance. Only four dissented. Of those four, the DTI, the CPS and the Home Office emphasised that paragraph 2A did not *oblige* the court to refuse bail, but merely indicated that it might do so having regard to the relevant considerations set out in paragraph 9. They argued that this combination prevented the decision not to grant bail from being taken *solely* on the basis of the defendant's bail status at the time of the alleged offence.

OUR VIEWS

4.6 In our view this dissenting argument is not convincing. Read literally, paragraph 2A permits the court to withhold bail in the circumstances specified, even where no other ground for detention exists. The fact that the court is not obliged to withhold bail, but has a discretion not to do so, is not the point. Paragraph 2A elevates to the status of an independent ground that which can, in truth, only be a factor which the court ought to take into account as relevant to the question whether there are substantial grounds for believing that, if granted bail, the defendant would commit an offence.

4.7 The important questions for us, however, are (a) whether courts are in practice *likely* to refuse bail solely on the basis of the facts specified in paragraph 2A, and (b) whether such a decision would be permissible under English law.

4.8 As to (a), the CPS thought it unlikely that bail would ever be refused on the basis of the facts specified in paragraph 2A alone, and we think they are right. Their view was reinforced by the responses we received from the Magistrates' Association and ACPO, both of whom, though agreeing with our analysis of the law, thought it unlikely that the legislative amendments which we were proposing

[5] In the consultation paper we also suggested that to rely on para 2A offended against the presumption of innocence. We are now persuaded, however, that this concern was overstated. A person who is charged is under reasonable suspicion of having committed an offence, and the ECtHR has repeatedly stated that this is a proper starting point for a decision, on relevant and sufficient grounds, to refuse bail.

would make any difference to actual decisions. We believe that the vast majority of courts addressing questions of bail do make the connection between the grounds set out in paragraph 2A and those set out in paragraph 2(b). There will seldom, if ever, be cases where a person is denied bail under paragraph 2A where paragraph 2(b) is not made out. It is inevitable, however, that the prosecution will be tempted to open its case in opposition to a bail application by reminding the judge or the magistrates that the offence was allegedly committed whilst the defendant was on bail so that the "presumption of bail" has been "lost". This loss of presumption may colour the way in which the remainder of the application is approached by the court. Thus the question is not wholly academic, as it may make a difference in a marginal case.

4.9 As to (b), paragraph 2A gives the court a discretion not to grant bail to a person who falls within its remit. The paragraph must be "read down" so that it does not permit detention where this would breach the ECHR.[6] Furthermore, under section 6 of the HRA, the court is obliged to exercise its discretion in a way that is compatible with the Convention.[7]

CONCLUSION

4.10 In our view paragraph 2A is capable of being applied, and must be applied, in a Convention-compliant manner. The application of the Convention requirements for pre-trial detention that we identified in Part II means that ***a court should not exercise its discretion to refuse bail solely on the basis of paragraph 2A. A defendant should be detained under that paragraph only where the court is also relying on another ground for detention specified in Part I of Schedule 1 to the Bail Act, such as that provided for in paragraph 2(b). A decision to refuse bail* solely *because the circumstances set out in paragraph 2A exist would not only infringe Article 5, but would also be unlawful under sections 3 and 6 of the HRA.***

4.11 ***The fact that the defendant was on bail at the time of the alleged offence should not, therefore, be regarded as an independent ground for the refusal of bail. It is just one of the considerations which the court should take into account when considering withholding bail for one of the purposes recognised by both English law and the ECtHR, such as a real risk that, if granted bail, the defendant would commit an offence.***

4.12 If these guidelines are followed, it is highly unlikely that paragraph 2A will be applied in a way that would be incompatible with Article 5. Nevertheless, it must be recognised that paragraph 2A is misleading. A straightforward reading of the provision, without the aid of the HRA, suggests that the fact that the defendant was on bail at the time of the alleged offence can itself be an independent ground

[6] See paras 1.25 – 1.27 above. The Foreign and Commonwealth Office agreed that para 2A could not itself constitute a ground but only a factor, but wondered whether it might be "read down" in a manner compatible with Article 5.

[7] See paras 1.28 – 1.31 above.

for the refusal of bail. **We recommend that the Bail Act 1976 be amended to make it plain that the fact that the defendant was on bail at the time of the alleged offence is not an independent ground for the refusal of bail, as paragraph 2A of Part I of Schedule 1 to the Bail Act may appear to suggest, but is *one* of the considerations that the court should take into account when considering withholding bail on the ground that there is a real risk that the defendant will commit an offence while on bail.**

(Recommendation 1)

PART V
EXCEPTIONS TO THE RIGHT TO BAIL (3): FOR THE DEFENDANT'S OWN PROTECTION

5.1 Schedule 1 to the Bail Act permits a court to refuse bail if it is satisfied that the defendant should be kept in custody for his or her own protection.[1] A custody officer may also refuse bail on this ground.[2]

THE CONSULTATION PAPER

5.2 We provisionally concluded that a refusal of bail for the defendant's own protection can be compatible with the Convention, but only if there are exceptional circumstances and (perhaps) only if those exceptional circumstances relate to the nature of the alleged offence and the conditions or context in which it is alleged to have been committed. We provisionally proposed that guidance be issued to reflect this. We invited comments on what form such guidance might take, and asked for information on how often the power to refuse bail for this purpose is used, in what circumstances and, in particular, whether it is commonly used to guard against self-harm as distinct from harm from others.

5.3 Our provisional conclusions were based on the only case of which we were aware in which the ECtHR has considered the lawfulness of detention pending trial on the ground of protecting the defendant from harm, *IA v France*.[3] The applicant had been charged with the murder of his wife. He had been continuously detained for over five years, partly because the judicial authorities feared that his wife's family would attack him. The ECtHR held that there are cases in which "the safety of a person under investigation requires his continued detention, for a time at least".[4] It is thus a true "ground" for denying bail, rather than a reason for concluding that a ground is substantiated.[5] The ECtHR held that, on the facts of that case, the ground was not made out.[6]

1 Bail Act 1976, Sched 1, Part I, para 3 (imprisonable offences); Sched 1, Part II, para 3 (non-imprisonable offences).

2 PACE, s 38(1)(a)(vi).

3 1998-VII.

4 *Ibid*, para 108.

5 The grounds which the ECtHR has found capable of being "relevant and sufficient" to justify detention have been listed at para 2.29 above. The distinction between grounds and reasons is explained further at para 10.2 below.

6 The Court was influenced by the fact that the need to protect the applicant was relied on only intermittently by the judicial authorities. It also found that no real reason had been given for fearing a revenge attack by the applicant's wife's family. (He was Lebanese, as was his wife. Her family lived in Lebanon, and the only reason given for fearing an attack consisted of a curious reference to "barbaric" Lebanese customs.)

5.4 Having concluded that the protection of the defendant was capable of being a relevant and sufficient reason for detention, the Court added, without further explanation:

> However, this can only be so in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place.[7]

5.5 Although these words would not seem to encompass a risk of *self*-harm unconnected to the circumstances of the offence, we warned that it would be unwise to rely too heavily on one rather enigmatic statement, particularly since the possibility of self-harm had not arisen in that case.

CONSULTATION RESPONSES

5.6 There was broad agreement among respondents that detention for the defendant's own protection was capable of being compatible with the Convention. The Justices' Clerks' Society, the Law Society and the CPS were clear that the power, though used infrequently, was used not only to protect from harm by others but also to protect the defendant from self-harm. The Inner London Magistrates' Courts Service thought the youth court used the power for the welfare of young persons but, on the rare occasions when it was used in the adult court, it was to protect from harm by others.

5.7 The Justices' Clerks' Society and the Law Society suggested that the power was used to protect the defendant from self-harm where, in a murder case, there was a close relationship between the defendant and the deceased, and there was a fear of suicide. The Law Society and one of the respondents from the Office of the Judge Advocate General indicated that the power was used where there was a medical or psychiatric history, when it might be a useful holding device pending an assessment for the purposes of the court considering the exercise of its powers under the Mental Health Act 1983.

5.8 Some respondents doubted whether we were justified, on the basis of sparse authority, in coming to any conclusion on the issue of whether detention to protect the defendant from self-harm could ever be compatible with the Convention. The Foreign and Commonwealth Office and the Home Office thought the better view was that the point had not been sufficiently tested in the ECtHR. ACPO and an Assistant Chief Constable, however, saw no reason for thinking that such detentions might not be compatible with the Convention, provided that they are justified by a proper factual basis in each particular case.

OUR VIEWS

5.9 The ECtHR did consider interference with the right to liberty based on a need to protect a person from a risk of self-harm in *Riera Blume v Spain*, which concerned a family's detention of their relatives for "deprogramming" after

[7] 1998-VII, para 108.

exposure to a religious sect.[8] The Court indicated that a risk of suicide would not justify "a major deprivation of liberty", but the ruling does not rule out a fear of suicide as a reason which may justify *some* level of detention. This case may be of limited utility. Its facts are far removed from a court considering the question of bail for a defendant who presents a risk of suicide, where detention for fear of self-harm is being used as a holding measure for a very short time pending medical assessment under the Mental Health Act.

5.10 We conclude that ***a refusal of bail for the defendant's own protection, whether from harm by others or self-harm, can be compatible with the Convention where***

- ***detention is necessary to address a real risk that, if granted bail, the defendant would suffer harm by others or self-harm, against which detention could provide protection, and***
- ***there are exceptional circumstances in the nature of the alleged offence and/or the conditions or context in which it is alleged to have been committed.***

5.11 ***Given the absence of authority, we can presently see no reason why a decision of a court to order detention because of a risk of self-harm should not be compatible with the ECHR even where the circumstances giving rise to the risk are unconnected with the alleged offence, provided that the court is satisfied that there is a real risk of self-harm, and that a proper medical examination will take place rapidly so that the court may then consider exercising its powers of detention under the Mental Health Act 1983.***

[8] App No 37680/97, 14 October 1999. The Court held that the Catalan authorities had been implicated in the detention, and could be held responsible for it, because the police delivered the applicants to the hotel after a raid on the cult's premises, and interviewed them while they were there. The investigating judge had feared suicide, and so had ordered the police to deliver the applicants to their families so that they could receive psychiatric help on a voluntary basis.

PART VI
EXCEPTIONS TO THE RIGHT TO BAIL (4): LACK OF INFORMATION

6.1 Paragraph 5 of Part I of Schedule 1 to the Bail Act 1976, which applies to defendants accused of imprisonable offences, states:

> The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.

6.2 This provision enables the court to refuse to release a defendant where it does not have sufficient information to decide whether or not the other grounds for refusing bail specified in Part I of Schedule 1 exist. When this power is exercised, it is not regarded in practice as the making of any "bail decision". Rather, the making of the bail decision is deferred and as a result the restrictions on repeated bail applications found in Part IIA of Schedule 1 (discussed in Part XII below) do not apply.[1]

6.3 In the consultation paper we regarded paragraph 5 as not giving rise to any problem of Convention-compatibility, and so did not give it detailed consideration.[2] Whilst that position was not questioned by the vast majority of respondents, one respondent, the solicitor Anthony Edwards, did question the compatibility of paragraph 5. He identified a risk that, in some cases, it might be used to refuse bail because of a lack of information caused by incompetence or dilatoriness on the part of the prosecution.

THE CONVENTION REQUIREMENTS

Detention because of insufficient information

6.4 The detention of a person who is reasonably suspected of having committed an offence is permitted by Article 5(1)(c) of the Convention. At the stage of arrest, reasonable suspicion is all that is necessary. Under Article 5(3), however, the detained person must be "brought promptly before a judge or other officer authorised by law to exercise judicial power". At that stage, the detained person "shall be entitled to trial within a reasonable time or release pending trial".

6.5 In *Letellier v France* the ECtHR stated:

[1] See *R v Calder Justices, ex p Kennedy* (1992) 156 JP 716, in which it was held that a decision under para 5 merely expresses the justices' satisfaction that they are not in a position to make a proper bail decision. It does not, therefore, restrict further bail applications.

[2] Consultation Paper No 157, paras 1.28 – 1.31.

> It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. … The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the [ECtHR] must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty.[3]

6.6 Thus, a judge may rely on reasonable suspicion to justify detention for a short period of time, but only for as long as is necessary for the investigation to reach a point where proper consideration can be given to the factors militating for and against a grant of bail. Thereafter, there will be an obligation to bail the defendant unless there are sufficient Convention-compatible grounds, and reasons for believing that those grounds exist, to justify detention.

Insufficient information attributable to the dilatoriness of a state body

6.7 The ECtHR has repeatedly made it clear that, where a person has been detained, the national authorities must show "special diligence" in the conduct of the investigation.[4] This accords with the entitlement of the detained person under Article 5(3) to "trial within a reasonable time", as well as the principle of the presumption of innocence.[5] Although the requirement of "special diligence" has been employed by the ECtHR in cases where the point at issue was whether or not the time between arrest and trial was unreasonably long, it is reasonable to assume that the principle also applies in other situations where the speed of a state body's investigations may affect the length of pre-trial detention.[6]

[3] A 207 (1991), 14 EHRR 83, para 35. Similar passages occur in, eg, *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 12; *B v Austria*, A 175 (1990), 13 EHRR 20, para 42; *Yargci and Sargin v Turkey* A 319-A (1995), 20 EHRR 505, para 50.

[4] *Tomasi v France* A 241-A (1992), 15 EHRR 1, para 84; *Herczegfalvy v Austria* A 244 (1992), 15 EHRR 437, para 71; *Abdoella v Netherlands* A 248-A (1992), 20 EHRR 585, para 24.

[5] Enshrined in Article 6(2) of the ECHR.

[6] The case law on Article 5(4) (the right of a detained person to take proceedings by which the lawfulness of the detention can be decided *speedily* by a court) also recognises that national authorities have a duty to act with "due diligence" where a person's liberty is at stake. The state has an obligation to provide an efficient judicial system capable of reaching speedy determinations of the lawfulness of detentions. See *Bezicheri v Italy* A 164 (1989), 12 EHRR 210, paras 23–24; *E v Norway* A 181-A (1990), 17 EHRR 30, para 66.

OUR VIEWS

The scope of paragraph 5 and its compatibility with the Convention

6.8 *Letellier v France* has provided a standard formula to describe the hierarchy of reasons for arrest and detention pending trial. Reasonable suspicion will suffice initially but, after a certain lapse of time, it no longer suffices. There must then be additional grounds, recognised by the ECtHR case law, to justify the continuation of detention.

6.9 The language of paragraph 5 requires that the court be satisfied that it has not been practicable to obtain sufficient information for *want of time* since the institution of proceedings. We conclude that it would normally be used only on the first occasion that the defendant comes before the court. On that occasion a defendant may be remanded in custody for a maximum period of eight days.[7] Furthermore, there is the clearest possible guidance from a non-judicial source that, where this is the basis of detention, the period of remand should be a short one, and should be *no longer than necessary to enable the required information to be obtained*.[8]

6.10 It is very difficult to see, in the light of this analysis, how paragraph 5 could, as a matter of English law, be *properly* relied on by the English courts in circumstances which fall outside the time permitted by *Letellier* for lawful detention based on reasonable suspicion of an offence having been committed.

Where lack of information is attributable to the dilatory conduct of a state body

6.11 Paragraph 5 applies to situations where "it has not been *practicable* to obtain sufficient information". It would, in our view, be a violation of Article 5 and a misconstruction of paragraph 5[9] for a court to detain a defendant because of a lack of information which could have been provided if the prosecution, the police, the court office or another state agency had displayed the required level of diligence.[10]

6.12 Detention would, however, be compatible with the Convention if the court had enough information to be satisfied of *one* of the grounds for detention recognised by both English law and the ECtHR. It would then be immaterial whether the lack of information on some *other* ground was attributable to a want of diligence, because it would be unnecessary to rely on paragraph 5 at all. It may

[7] MCA 1980, ss 128 and 128A.

[8] Home Office Circular 155/1975 said, at para 21: "The Working Party were strongly of the opinion that the length of such remands should be kept to the minimum necessary to enable the inquiries to be completed, and that a week's remand should not be ordered as a matter of course in these circumstances; the police should be asked how long their inquiries were likely to take and the length of remand fixed accordingly."

[9] Legislation must be "read and applied" in a way which is compatible with the Convention rights: HRA 1998, s 3.

[10] See para 6.7 above.

be, for example, that, on the basis of the information available, the court might conclude that it is necessary to detain the defendant because of a real risk that, if granted bail, he or she would abscond, commit an offence, or interfere with witnesses or the course of justice.

CONCLUSION

6.13 We conclude that ***the refusal of bail by a court because of a lack of information, as permitted by paragraph 5, can be compatible with Article 5 provided that***

- ***detention is for a short period, which is no longer than necessary to enable the required information to be obtained, and***
- ***the lack of information is not due to a failure of the prosecution, the police, the court, or another state body to act with "special diligence".***

6.14 ***Where these tests are met, the requirements for lawful pre-trial detention that we identified in Part II of this report will not apply.***

6.15 ***Where these tests are not met, detention will only be compatible with the Convention where it is based on one of the other grounds for detention provided for in English law, and where the requirements set out in Part II above are satisfied.***

6.16 ***After that short period of time has passed, a lack of information that is not due to a failure of a state body to act with "special diligence" may be taken into account as a factor militating in favour of detention, in support of the existence of another Convention-compliant ground for detention.***

6.17 It is entirely possible for the courts to apply paragraph 5 in a way which is compatible with the ECHR. **We therefore make no recommendation in respect of this provision.**

PART VII
EXCEPTIONS TO THE RIGHT TO BAIL (5): ARREST UNDER SECTION 7

ARREST UNDER SECTION 7 OF THE BAIL ACT 1976

Arrest for absconding

7.1 Sections 7(1) and (2) empower a court to issue a warrant for the arrest of a person who has been released on bail and who fails to attend court at the appointed time or absconds during proceedings. A person who fails to surrender to the court without reasonable cause or, if with reasonable cause, as soon after the appointed time as is reasonably practicable, commits an imprisonable offence contrary to section 6 of the Bail Act.[1]

7.2 Arrest pursuant to such a warrant would be justifiable under Article 5(1)(c), both to prevent the defendant from fleeing after having committed the original offence and on reasonable suspicion of the offence of absconding.

Arrest for breach, or anticipated breach, of a bail condition

7.3 In Part IX(B) of this report we consider conditional bail as an alternative to unconditional bail. Here we do no more than indicate that ***bail conditions should be imposed only where, if those conditions were broken or reasonably thought likely to be broken, the arrest of the defendant would be compatible with the Convention.***[2] If this advice is followed, arrest under section 7(3) (see below) should not give rise to any problems of non-compliance with the Convention.

7.4 Section 7(3) empowers a constable to arrest a person without warrant in three situations:

(1) where the constable has reasonable grounds for believing that that person is not likely to surrender to custody;

(2) where the constable has reasonable grounds for either believing that the person is likely to break a bail condition or suspecting that the person has broken a bail condition; and

(3) where a surety notifies a constable in writing of a wish to be relieved of his or her obligations because the person on bail is unlikely to surrender to custody.

7.5 Breach of a bail condition is not an offence under the Bail Act 1976.

[1] This offence is punishable either on summary conviction or as a contempt of court.

[2] See paras 9B.2 and 9B.36 below.

The power to refuse bail to defendants arrested under section 7(3)

7.6 Where a person has been arrested without warrant in pursuance of section 7(3), section 7(4) requires that that person be brought before a justice of the peace within 24 hours, or, where the person is arrested within 24 hours of the time appointed for his or her attendance at court, before the court before which he or she is required to appear.[3]

7.7 Section 7(5) provides that a justice of the peace before whom a person is brought under subsection (4) may, if of the opinion that the person

(a) is not likely to surrender to custody, or

(b) has broken or is likely to break any condition of bail,

remand the defendant into custody or grant bail subject to the same or different conditions as before.[4] If the justice is not of one of those two opinions then bail must be granted subject to the same conditions as were originally imposed.[5] Section 7(5) therefore provides threshold criteria which must be satisfied before the previous release on bail (and the conditions imposed with it) can be interfered with.

THE COMPATIBILITY OF SECTION 7(5) PROCEEDINGS WITH THE ECHR

The Havering Magistrates *case*

7.8 The High Court has recently considered the extent to which the procedure under section 7(5) of the Bail Act 1976 is compatible with Articles 5 and 6 of the ECHR. In the joined cases *R (on the application of the DPP) v Havering Magistrates' Court* and *R (on the application of McKeown) v Wirral Borough Magistrates' Court*[6] (which we will call the *Havering Magistrates* case) the High Court dealt with two related applications for judicial review of bail decisions taken by justices of the peace under section 7(5). The justices in each of these cases had taken opposite views on whether the aspects of Article 6 of the ECHR which apply to persons charged with a criminal offence should apply in relation to section 7(5) proceedings.

[3] Section 7(4) applies only to those arrested without warrant pursuant to subsection (3). It does not apply to a person arrested under a warrant issued under subsection (1) or (2), whose conduct prima facie constitutes an offence.

[4] This power is subject to subsection (6) (which requires children or young persons to be remanded into the care of the local authority).

[5] In *R (on the application of Ellison) v Teesside Magistrates' Court* [2001] EWHC Admin 12, Lord Woolf LCJ and Newman J held that, where a person is arrested under s 7(3) and brought before a justice under s 7(4), the justice must personally exercise the discretion under s 7(5). If of the view that one of the threshold conditions in s 7(5) is met, the justice must either remand the person in custody until trial or grant bail subject to the same or different conditions as before. In a s 7(5) hearing concerning a defendant who had been granted bail by the Crown Court and was awaiting trial in that court, the Teesside Magistrates were therefore acting ultra vires in remanding the defendant in custody until a bail application could be made to, and heard by, the Crown Court.

[6] [2001] 1 WLR 805.

7.9 Paragraph 3 of Article 6 sets out five minimum rights to which everyone charged with a criminal offence is entitled. These include the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". It was submitted on behalf of the DPP that the Havering justices were wrong in concluding (i) that Article 6 applied to the section 7(5) procedure, and (ii) that oral evidence from the complainant who alleged breach of the bail condition was required in the circumstances of the case.[7] In contrast, in the Wirral justices case, submissions were made on behalf of Mark McKeown that, in a section 7(5) hearing, justices could only form an opinion that a person has broken a bail condition if the prosecution proves such a breach to the criminal standard.[8]

7.10 The Divisional Court therefore had to decide three issues:

(1) whether Article 6 applies to section 7(5) proceedings;

(2) even if Article 6 does not apply, whether justices in such proceedings may or must hear oral evidence; and

(3) whether the criminal standard of proof applies in such proceedings.

Section 7(5) and the requirements of Article 6

Do proceedings under section 7(5) amount to charging the arrested person with a criminal offence?

7.11 The High Court rejected the submission that proceedings under section 7(5) amount to charging the arrested person with a *criminal offence*, so as to give rise to all the Article 6 rights and, in particular, those in Article 6(3).[9] Having referred to the Strasbourg cases of *Engel v Netherlands (No 1)*[10] and *Campbell and Fell v UK*,[11] the court noted that, in contrast to section 6 of the Bail Act,[12] section 7 does not create any offence. Section 7 is intended to provide the means by which the purposes of any conditions imposed under section 3[13] can be achieved. It followed that

> The liability of the defendant to be detained in the events specified in section 7 is therefore consequent upon his liability to be detained by reason of the charge which he faces in order to secure these purposes. It is not … to be equated to the imposition of any form of punishment or sanction which would justify the conclusion that

[7] *Ibid,* para 5.

[8] *Ibid,* para 25.

[9] *Ibid,* paras 15–22. This view was endorsed by Lord Woolf LCJ in *Wildman v DPP* [2001] EWHC Admin 14, *The Times* 8 February 2001.

[10] A 22 (1976), 1 EHRR 647, paras 80–83.

[11] A 80 (1984), 7 EHRR 165.

[12] This makes it an offence, punishable with imprisonment, for a person to abscond.

[13] In *Havering Magistrates* [2001] 1 WLR 805, paras 21–22, the court observed that it had not been suggested that these conditions in any way contravene the ECHR.

> proceedings under section 7(5) are equivalent to his facing a criminal charge. That would … be a wholly inappropriate way of categorising a claim that the defendant was not likely to surrender to custody, or was likely to break any condition of his bail, both of which are matters which would justify the exercise of the power under section 7(5) …. In these circumstances, I do not consider that article 6 has any direct relevance to these applications.[14]

Section 7(5) and the requirements of Articles 5 and 6

7.12 The High Court regarded it as clear that Article 5 was applicable. The court emphasised that, as the principal purpose behind the provisions of Article 5 is "to ensure that persons are not subject to arbitrary deprivation of liberty", it was necessary for the judicial procedure to ensure equal treatment of the parties and to be truly adversarial, with equality of arms between the parties.[15] Whilst the ECtHR has borrowed *some* of the general concepts of fairness in judicial proceedings from Article 6,

> that does not mean that the process required for conformity with article 5 must also be in conformity with article 6. That would conflate the Convention's control over two separate sets of proceedings which have different objects.[16]

Nature and purpose of proceedings under section 7(5)

7.13 The High Court stated that, ***although "a literal reading of section 7(5) could lead to the conclusion that the mere fact of a breach of condition could justify detention", that approach would not be compatible with the Convention because it would allow detention where detention is not necessary for a purpose that is valid under the Convention.***[17] ***Even where one of the two threshold conditions for detention or the imposition of new conditions contained in section 7(5) is met, the defendant should only be detained or granted bail subject to additional conditions where this would be compatible with the Convention.***[18] The fact of a breach is no more than one of the factors which a justice must consider in exercising his or her discretion under s 7(5).[19]

[14] *Havering Magistrates* [2001] 1 WLR 805, para 22, *per* Latham LJ.

[15] *Ibid*, paras 26-27, 34. Latham LJ cited the ECtHR cases: *Kemmeche v France (No 3)* A 296-C (1994), 19 EHRR 349, para 37; *Schiesser v Switzerland* A 34 (1979), 2 EHRR 417, para 30.

[16] *Havering Magistrates* [2001] 1 WLR 805, para 35, *per* Latham LJ.

[17] See paras 2.26 – 2.31 above.

[18] The Convention requirements relating to detention are discussed in Part II above. The imposition of bail conditions as an alternative to granting unconditional bail is discussed in Part IX(B) below.

[19] *Havering Magistrates* [2001] 1 WLR 805, para 38, *per* Latham LJ.

The standard of proof required

7.14 None of the cases cited before the High Court suggested that Article 5 required the underlying facts relevant to detention to be proved to the criminal standard of proof.[20]

The evidence the justices should hear and take into account

7.15 The High Court took the view that ***justices hearing section 7(5) proceedings are not required to hear oral evidence in every case, but should take account of the quality of the material presented, which may range from mere assertion to documentary proof. If the material includes oral evidence, the defendant must be given an opportunity to cross-examine. Likewise, defendants should be permitted to give relevant oral evidence if they wish to do so.***[21]

7.16 Although it was not an issue raised in either case, brief consideration was given to the difficulties that might arise where an adjournment might be necessary. In *R v Liverpool Justices* the court had held that justices do not have a power to adjourn section 7(5) proceedings.[22] The court in the *Havering Magistrates* case noted that, even if that view were wrong and justices did have a power to adjourn the proceedings, a mere power to adjourn would be of little value because

> there is clearly no power to detain for the purposes of the adjournment. A solution is likely to be that, Parliament having determined that there should be a swift and relatively informal resolution of the issues raised, the justice must do his best to come to a fair conclusion on the relevant day; if he cannot do so, he will not be of the opinion that the relevant matters have been made out which could justify detention.[23]

Disclosure

7.17 ***Article 5 does not require that the whole of the prosecution file be disclosed to the defence prior to a bail hearing. It is sufficient if disclosure is provided of the material the defendant needs in order to enjoy "equality of arms" with the prosecution in relation to the issue to be decided by the court.*** In section 7(5) proceedings, that will generally include the information necessary for the defendant to argue that the threshold conditions for detention specified in that section have not been met, and that, even if they are met, detention is not necessary for a lawful purpose.[24]

[20] *Havering Magistrates* [2001] 1 WLR 805, para 39, *per* Latham LJ.

[21] *Ibid*, para 41, *per* Latham LJ. See also paras 11.17 – 11.28 below.

[22] *R v Liverpool JJ, ex p DPP* [1993] QB 233. See also n 5 above.

[23] *Havering Magistrates* [2001] 1 WLR 805, para 44.

[24] This matter is discussed in greater detail at paras 11.29 – 11.34 below.

THE COMPATIBILITY OF PARAGRAPH 6 OF PART I AND PARAGRAPH 5 OF PART II OF SCHEDULE 1 WITH THE ECHR

7.18 The right to bail conferred by section 4 of the Bail Act 1976 is, in the case of defendants accused of imprisonable offences, subject to paragraph 6 of Part I of Schedule 1, which provides:

> The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act.

7.19 An identical provision is included in paragraph 5 of Part II of the Schedule, in relation to defendants accused of non-imprisonable offences.

The inter-relationship between section 7(5) and paragraphs 6 of Part I and 5 of Part II

7.20 We have noted above that a person arrested under section 7(3), that is by a constable without warrant,[25] must be brought before a justice of the peace within 24 hours.[26] The powers of a justice of the peace to detain a defendant arrested under section 7(3) are constrained by the specific criteria in section 7(5).[27] The Act makes no express provision as to how the broad terms of paragraph 6 of Part I, and paragraph 5 of Part II, interact with the considerably narrower terms of section 7(5).

7.21 We describe below[28] how we believe these paragraphs should be applied. They will, in our view, be relevant in relation to defendants arrested pursuant to warrants issued under section 7(1) and 7(2) in any court proceedings after arrest.[29] However, we do not believe this to be the case in respect of arrests under section 7(3) because section 7(5) expressly limits the powers of a justice to detain such a defendant. The general words of paragraph 6 of Part I, and paragraph 5 of Part II, should not be construed so as to water down the more specific requirements of section 7(5).[30]

[25] Such an arrest will have been for a breach or an anticipated breach of a bail condition, or an anticipated failure to surrender to custody, rather than for the commission of an offence.

[26] Except where the defendant was arrested within 24 hours of the time appointed for surrender to custody, in which case the defendant must be brought before the court at which he or she was to have surrendered.

[27] See para 7.7 above. No constraint appears in s 7 in relation to a person arrested pursuant to a warrant.

[28] See paras 7.23 – 7.31, 7.33 below.

[29] A defendant who has absconded is liable to be charged with a Bail Act offence which is imprisonable. If so, or if the main offence is an imprisonable one, the defendant's right to bail under section 4 of the Act will be subject to the provisions of Part I of Sched 1, including para 6. On the other hand, if the defendant is only charged with non-imprisonable offences then Part II of Sched 1, including para 5, will apply.

[30] Support for this approach can be inferred from the judgment in the *Teesside Magistrates* case, discussed at n 5 above.

7.22 Thus, ***where a defendant arrested under section 7(3) is brought before a justice of the peace under section 7(4) to be dealt with under section 7(5), paragraphs 6 of Part I and 5 of Part II of Schedule 1 should be read as subject to the provisions of section 7(5). In practice, this means that where someone is arrested pursuant to section 7(3), then, regardless of paragraphs 6 and 5, he or she should be granted bail unless the justice is satisfied that the section 7(5) threshold criteria for reconsidering the grant of bail are met, and detention is otherwise necessary for a purpose permitted by the Convention.***

Other bail hearings concerning defendants who have been arrested under section 7

7.23 Where a person has been arrested pursuant to a warrant issued under section 7(1) or (2), however, he or she has a right to bail under section 4 which is subject to the exceptions in Schedule 1. Paragraphs 6 of Part I and 5 of Part II of the Schedule are relevant, and, as we have seen, provide that bail need not be granted where the defendant has been arrested under section 7. These paragraphs may also be applicable to defendants who have been dealt with under section 7(5) and who make a subsequent application for bail.

The consultation paper

7.24 Paragraph 6 of Part I and paragraph 5 of Part II of Schedule 1 would appear, on a literal reading, to entitle a court to deny a defendant bail *simply* because he or she has been arrested in pursuance of section 7. In the consultation paper we provisionally concluded that refusal of bail under either of these paragraphs would violate Article 5 unless the decision could be bolstered by the existence of another ground for refusing bail. We pointed out that paragraph 9 of Part I of Schedule 1 implicitly recognises the position of paragraph 6 as being subsidiary to the other grounds for refusing bail by including the defendant's past record of fulfilling his or her obligations under a grant of bail as a factor to which the court should have regard in taking the decisions required by paragraph 2.[31] Our provisional view was that both paragraph 6 of Part I and paragraph 5 of Part II of Schedule 1 should be repealed.

The consultation responses

7.25 Whilst the majority of respondents agreed with our provisional proposal, several respondents took a different view. As in the case of paragraph 2A,[32] the latter group argued that, as paragraphs 6 of Part I and 5 of Part II merely confer a *discretion* to withhold bail, they *can* be applied in a Convention-compliant manner. This argument was put forward by the Foreign Office, the Home Office, the DTI and the CPS.

[31] Consultation Paper No 157, para 8.7.

[32] See para 4.5 above.

The Havering Magistrates *case*

7.26 It is troubling that these statutory provisions appear to permit the court to withhold bail *simply* because the defendant has been arrested under section 7. Indeed, it was recognised in the recent *Havering Magistrates* case that, if interpreted literally, the provisions would not be Convention-compatible. Although paragraphs 6 and 5 were not strictly at issue, the court said that it could usefully deal with the question of their compatibility with Article 5.[33]

7.27 The court cited with approval the view we expressed in our consultation paper, that if paragraph 6 was given its most ordinary and natural meaning so that bail could be refused *simply* because the defendant had been arrested under section 7, this would lead to a breach of Article 5. Whilst the circumstances of a section 7 arrest are capable of providing good *reason for concluding* that a ground for denying bail exists, it cannot properly be a ground in itself.[34]

7.28 In accordance with the duty imposed upon courts by section 3 of the HRA "to construe the Act in accordance with the Convention, if [the court] can", the High Court concluded that

> paragraph 6 of Part I and paragraph 5 of Part II of Schedule 1 … are to be construed as providing that such an arrest is capable of being taken into account in determining whether or not any of the grounds for refusing bail set out in paragraph 2 of Part I or paragraph 2 of Part II of the Schedule exist.[35]

7.29 These remarks are obiter. In respect of paragraph 6 of Part I, this construction would render the provision compatible with the Convention because all of the grounds in paragraph 2 of Part I are recognised as grounds that can justify detention under Article 5.

7.30 We believe, however, that this dictum is unduly restrictive of the application of paragraph 5 of Part II, which applies to defendants accused of non-imprisonable offences. Paragraph 2 of Part II contains just one exception to the right to bail, based on a risk of the defendant absconding, which applies only where the defendant has previously failed to surrender to custody in accordance with his or her obligations under a grant of bail.[36]

7.31 In our view, paragraph 5 of Part II enables bail to be refused at a hearing *subsequent* to a section 7(5) hearing. In the absence of paragraph 5, it would not be possible to detain a defendant who had been arrested under section 7(3) for

[33] *Havering Magistrates* [2001] 1 WLR 805, para 45.

[34] See para 2.28 – 2.30 above.

[35] *Havering Magistrates* [2001] 1 WLR 805, para 47.

[36] The only other exceptions to the right to bail in respect of defendants accused of non-imprisonable offences (contained in Part II of Sched 1) permit the refusal of bail: (i) for the defendant's own protection, (ii) where the defendant is in custody in pursuance of the sentence of a court, and (iii) where the defendant has been arrested in pursuance of s 7.

non-compliance with a bail condition and who applies for bail subsequent to a section 7(5) hearing, otherwise than to avoid the risk of a defendant who has previously failed to surrender to custody failing to surrender again. In other words, it would not be possible to detain such a defendant to avoid a failure to surrender (where the defendant had not previously failed to surrender), the commission of an offence, or the course of justice being obstructed, where the defendant had failed to comply with conditions imposed for those purposes.

Conclusion and recommendation

7.32 The consultation responses we received suggest that *in practice* the courts do not withhold bail *solely* on the ground that the defendant has been arrested under section 7. According to the Law Society, the Magistrates' Association and the CPS, repeal of paragraphs 6 and 5 would make little or no difference. Furthermore, the dicta of the High Court in the *Havering Magistrates* case make it highly unlikely that either paragraph would be construed or applied in a manner which was incompatible with Convention rights.

7.33 We conclude that ***section 7(5) and paragraphs 6 of Part I and 5 of Part II of Schedule 1 to the Bail Act 1976 can be interpreted and applied so that Convention rights are not violated. The courts should not refuse to grant a defendant bail simply because he or she has been arrested under section 7. These provisions can and should be applied so that bail is only refused where this is necessary for a purpose which is capable of justifying detention under Article 5, as interpreted by the ECtHR. The circumstances leading to the defendant being arrested under section 7 may properly be taken into account as a possible reason for concluding that detention is necessary for such a purpose.***

7.34 Although we have noted that paragraph 5 of Part II has a useful role as part of the scheme for dealing with defendants charged with non-imprisonable offences, paragraph 6 of Part I, which applies to defendants charged with imprisonable offences, is superfluous. Paragraph 2 provides courts with the power to detain such persons for all of the purposes for which bail conditions can properly be imposed. Paragraph 9(c) requires that courts taking decisions under paragraph 2 have regard to relevant considerations, including "the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings".

7.35 **We recommend that**

(1) paragraph 6 of Part I of Schedule 1 to the Bail Act 1976 be repealed; and

(2) paragraph 5 of Part II of Schedule 1 to the Bail Act 1976 be amended by adding a requirement that the court must be satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody, commit an offence while on bail, or

interfere with witnesses or otherwise obstruct the course of justice.

(Recommendation 2)

7.36 The amended statute would then make it plain that the courts should not refuse to grant bail to a defendant charged with an imprisonable offence simply because the defendant has been arrested under section 7. Rather, the circumstances leading to the defendant being arrested under section 7 may properly be taken into account under paragraph 9(c) as a possible reason for concluding that one of the Convention-compatible grounds for withholding bail is satisfied. Similarly, the courts should not refuse to grant bail to a defendant charged with a non-imprisonable offence simply because the defendant has been arrested under section 7. Rather, the circumstances leading to the defendant being arrested under section 7 may properly be taken into account as a possible reason for concluding that one of the specified Convention-compatible grounds for withholding bail is satisfied.

PART VIII
EXCEPTIONS TO THE RIGHT TO BAIL (6): SECTION 25 OF THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

8.1 Section 25 of the Criminal Justice and Public Order Act 1994, as amended,[1] provides:

> A person who in any proceedings has been charged with or convicted of an offence to which this section applies in circumstances to which it applies shall be granted bail in those proceedings only if the court, or as the case may be, the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it.

8.2 The offences to which section 25 applies are murder, attempted murder, manslaughter, rape and attempted rape.[2] The circumstances to which it applies are that the defendant charged with such an offence has previously been convicted of one of these offences.[3] In these cases the onus is on the defendant to show that there are "exceptional circumstances" justifying release. Whereas the other exceptions to the right to bail (contained in Schedule 1 to the Bail Act) merely provide that the defendant *need* not be granted bail, the effect of section 25 is that the defendant *must* not be granted bail unless there are exceptional circumstances.

THE BACKGROUND

8.3 As originally enacted, section 25 was introduced as part of a "package of measures"[4] intended to reduce the incidence of offending by people on bail, then estimated by the Government at 50,000 offences a year.[5] In its original form, section 25 prevented bail from being granted *at all* in cases where it applied. Opponents of the provision argued that it was unnecessary, because the courts could be relied upon to exercise their discretion properly, and unfair, because it

[1] By the Crime and Disorder Act 1998, s 56, which came into force on 30 September 1998: Crime and Disorder Act 1998 (Commencement No 2 and Transitional Provisions) Order 1998 (SI 1998 No 2327).

[2] Criminal Justice and Public Order Act 1994, s 25(2).

[3] *Ibid*, s 25(3).

[4] This package included a new exception to the right to bail (para 2A of Part I of Sched 1 to the Bail Act 1976, inserted by Criminal Justice and Public Order Act 1994, s 26). That exception has been discussed in Part IV above.

[5] *Hansard* (HC) 10 March 1994, vol 239, col 386.

left no room for exceptional cases in which bail might be justified.[6] There seems to have been no discussion of a possible conflict with the Convention.[7]

The original section 25 and Article 5

8.4 In *Caballero v UK*[8] the Government conceded that the application of the original section 25 had violated the applicant's rights under Article 5(3), and the ECtHR accepted that concession. This was not unexpected in the light of the ECtHR case law and, specifically in relation to section 25, the views expressed by the Commission.[9] The section did not allow for the examination of *all* the relevant facts. It caused bail to be denied to certain offenders simply because they fell within a particular category, irrespective of whether a deprivation of liberty was necessary in the individual circumstances and without any room for judicial discretion.[10]

The 1998 amendment

8.5 The section, as amended in 1998, provides that bail may be granted in such cases only if the court or constable is satisfied that there are "exceptional circumstances" justifying this. The Government introduced the amendment to "restore to the police and to the courts their rightful discretion in relation to the

[6] "Where the Executive seeks to interfere with the established discretion of the judiciary, it has a very heavy burden to discharge – and the Government have not got within miles of doing so on this occasion": Lord Ackner, *Hansard* (HL) July 5 1994, vol 556, col 1234.

[7] Such discussion of rights as there was took the form of querying whether defendants should have a right to bail at all. Mr Robert MacLennan (a Liberal Democrat MP) referred to bail as "a privilege that is too often abused": *Hansard* (HC) January 11 1994, vol 235, col 60. Mr Roger Evans MP said that the Bail Act 1976 had "removed the good sense of the courts" and "created the topsy-turvy general presumption in favour of bail, subject only to limited exceptions": *Hansard* Standing Committee B, 25 January 1994, col 280.

[8] App No 32819/96, 8 February 2000, 30 EHRR 643.

[9] See *BH v UK* App No 30307/96, Commission decision of 1 December 1997, 25 EHRR CD 136; *Caballero v UK* (aka *CC v UK)* App No 32819/96, (2000) 30 EHRR 643, Commission opinion, paras 43–49. "BH" and "CC" both complained that their rights under Article 5(3) (among others) had been violated by their detention under s 25 as they had not been "brought promptly before a judge or other officer authorised by law to exercise judicial power". The Commission accepted the validity of these complaints, and noted that, according to settled ECtHR case law, before authorising pre-trial detention a judicial officer must hear the accused and examine all the facts arguing for or against the existence of a genuine requirement of the public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty.

[10] The ECtHR has stated that the mere fact that a defendant has previous convictions cannot *in itself* justify pre-trial detention, eg *Muller v France* 1997-II, para 44. Similarly, in *Morganti v France (No 1)* A 320-C (1995), 21 EHRR 34, Commission opinion, para 62, the Commission stated that the seriousness of the charge which the defendant faces cannot be taken *alone* as justifying detention.

granting of bail in certain cases".[11] It believed that this would prevent the Convention being violated.[12]

8.6 The *Caballero* judgment has also contributed to the recent repeal of certain provisions of Scottish bail legislation which were similar in their effects to section 25.[13] The Scottish Executive considered introducing an "exceptional circumstances" test, but decided against this course, believing that it would "add nothing to a clear common law position in Scotland" which already enables a sheriff to refuse bail to defendants charged with serious offences whenever it is deemed necessary to do so.[14]

THE COMPATIBILITY OF SECTION 25 (AS AMENDED) WITH THE ECHR

The consultation paper

8.7 In the consultation paper we noted that some sources had doubted whether the amendment to section 25 was sufficient to make it compatible with the Convention. We cited Philip Leach, at that time the legal director of Liberty, as saying:

> As the European Commission has re-affirmed in *CC v UK*, the fundamental objective of Article 5 is to prevent arbitrary detention. There is no statutory definition of what is meant by "exceptional circumstances" and it is not apparent whether, for example, the defendant will need to establish that there is a particularly low risk of interference with justice, or of further crimes being committed, or that there is very little danger of absconding or of public disorder, or whether the defendant must go further than that. If so, it is not at all clear what would, exceptionally, justify granting bail. Furthermore, to single out a category of suspects in this way may not pay "due regard to the presumption of innocence" which the Convention requires.[15]

8.8 We noted that this view might appear to derive support from the ECtHR's judgment in *Nikolova v Bulgaria*.[16] The applicant in that case was charged with

[11] Lord Falconer of Thoroton, *Hansard* (HL) 31 March 1998, vol 588, col 239.

[12] During the Committee stage in the Commons, the Home Office Minister Mike O'Brien referred to *CC* and *BH* (see n 9 above), saying "there is a question mark over the current construction of section 25 in relation to the ECHR … [The cases] make this amendment to section 25 essential": *Hansard* (HC) Standing Committee B, 19 May 1998.

[13] The Bail, Judicial Appointments, etc (Scotland) Act 2000 repealed certain provisions of the Criminal Procedure (Scotland) Act 1995 which had precluded sheriffs (though not the High Court or the Lord Advocate) from granting bail to defendants charged with murder or treason, or to those charged with attempted murder, culpable homicide, rape or attempted rape who had a previous conviction for any of those offences or for murder or manslaughter.

[14] Policy memorandum relating to the Bail, Judicial Appointments, etc (Scotland) Bill, Session 1 (2000) SP Bill 17-PM.

[15] [1999] Crim LR 300, 304–305.

[16] *Nikolova v Bulgaria* 1999-II, 31 EHRR 64.

an offence which, under Bulgarian legislation, constituted a "serious and wilful" offence, with the consequence that she had to be detained on remand unless she could demonstrate

> beyond doubt, the burden of proof being borne by … her, that there did not exist even a hypothetical danger of absconding, re-offending, or obstructing justice.

This burden could be discharged only in exceptional circumstances, such as the detained person being immobilised by illness.

8.9 The applicant appealed against her detention. A Bulgarian court dismissed her appeal on the ground that she had submitted medical certificates relating only to her *past* state of health,[17] and that there were therefore no *current* circumstances justifying a departure from the mandatory detention requirement. The court ignored as irrelevant the "concrete facts" relied upon by the applicant – for example, that she had not attempted to abscond or to obstruct the investigation, and that she had a family and a stable way of life.

8.10 The applicant's complaint[18] was based on Article 5(4), which confers on a detained person the right to have the lawfulness of his or her detention decided by a court.[19] She complained that the court's decision had been "purely formal" and "nothing more than a rubber-stamping process". The ECtHR upheld her complaint and emphasised that its task was to ascertain whether the applicant's rights had in fact been violated, not whether the relevant Bulgarian law could have been applied without violating them.[20] While Article 5(4) does not require a judge hearing a challenge to detention to address every argument put forward by the detainee,

> its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty. The submissions of the applicant … contained such concrete facts and did not appear implausible or frivolous. By not taking these submissions into account the [court] failed to provide the judicial

[17] It was claimed that at the time of the applicant's arrest she had not completely recovered from gynaecological surgery.

[18] She also complained under Article 5(3). However, this was on the basis that, after her arrest, she had not been promptly brought before "a judge or other officer authorised by law to exercise judicial power", but only before an investigator who did not have power to make a binding decision as to her detention and was not procedurally independent from the prosecutor. The Court confirmed its previous decision in *Assenov v Bulgaria* 1998-VIII that this procedure was incompatible with Article 5(3).

[19] See Part XI below.

[20] *Nikolova v Bulgaria* 1999-II, 31 EHRR 64, para 60.

review of the scope and nature required by Article 5(4) of the Convention.[21]

8.11 It could not be assumed from the decision in *Nikolova* that any refusal of bail under section 25 would also be a violation of Article 5. The complaint was not that the Bulgarian court had infringed the applicant's right to release under Article 5(3), but that, by simply "rubber-stamping" the initial decision, it had failed to provide the independent judicial review required by Article 5(4). The ECtHR did not have to consider whether there is necessarily an infringement of Article 5(3) where pre-trial detention is authorised on the ground that the circumstances raise a presumption against release, and that presumption has not been rebutted.

Do statutory presumptions always lead to arbitrary decision-making?

8.12 As amended, section 25 gives the court a strong indication of the way in which its discretion should be exercised, but does not prevent it from exercising that discretion altogether. Ultimately it is for the court to determine whether a given defendant should be detained or released. The Convention does not prohibit the legislature from requiring the courts to have regard to particular *criteria* in making judicial decisions. It prohibits provisions which deprive them of their power to make the final decision. It is instructive to examine the way in which the ECtHR has dealt with legislative attempts to influence judicial decision-making by means of statutory provisions reversing the burden of proof in respect of certain facts which form an element of an offence, or are necessary foundations of certain exculpatory defences.

8.13 In the consultation paper we referred to *Salabiaku v France*,[22] which involved certain provisions of the French Criminal Code which, in some circumstances, created a rebuttable presumption of guilt.[23] The ECtHR held that the application of these provisions to the applicant's case had not violated his right to be presumed innocent under Article 6(2) of the Convention, because the French courts retained "an unfettered power of assessment with regard to evidence adduced by the parties before it". It was clear from the judgments of the various courts who had heard the applicant's case that they had been careful *not* to resort automatically to the presumption laid down in the Criminal Code, but had properly considered the evidence.[24]

8.14 Similarly in *Hoang v France*, the ECtHR noted that the French court had

[21] *Ibid*, para 61.

[22] A 141-A (1988), 13 EHRR 379.

[23] The Code allowed the French courts to find a defendant guilty of certain customs offences on the basis that certain prohibited goods had been found in his or her possession. The defendant could rebut that presumption of liability only by proving to the court's satisfaction that his or her possession of them was the result of *force majeure*.

[24] A 141-A (1988), 13 EHRR 379, paras 29–30.

> duly weighed the evidence before it, assessed it carefully and based its finding of guilt on it. It refrained from any automatic reliance on the presumptions created in the relevant provisions of the Criminal Code …[25]

8.15 The House of Lords considered the Convention-compatibility of certain provisions in English law which reverse the burden of proof on the issue of substantive liability, in *R v DPP, ex parte Kebilene*.[26] Lord Hope of Craighead drew a distinction between a "mandatory presumption of guilt as to an essential element of the offence" and a "discretionary" one. In the case of the former, once the facts upon which it rests are proved, guilt must follow. It is, therefore, inconsistent with the presumption of innocence. Such prima facie breach of the presumption of innocence will not however lead inevitably to the conclusion that the provision is incompatible with Article 6(2).[27] In the case of a discretionary presumption, the "tribunal of fact may or may not rely on the presumption, depending upon its view as to the cogency or weight of the evidence". In such a situation, it may be necessary to consider the facts of the particular case before it can be determined whether the presumption of innocence has been violated.[28]

8.16 This classification applies to presumptions of guilt and Article 6(2) rather than limits on the discretion of national courts and Article 5(3), but it provides a helpful analogy.

Can section 25 be interpreted compatibly with the Convention?

8.17 Section 25 states that a person to whom it applies can be granted bail *only* if the court or constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it. The meaning of "exceptional circumstances" is therefore crucial.

8.18 In the consultation paper we suggested three possible approaches to the proper construction and application of the section:

(1) The court might approach the section on the basis that it left the court with no real discretion at all. The court might construe the words "exceptional circumstances" as applying only to the circumstances of *the offences themselves* which made the case highly unusual, and which eliminated virtually all risk of the defendant committing a further such

[25] A 243 (1992), 16 EHRR 53, para 36.

[26] [2000] 2 AC 326. Such provisions, and *ex p Kebilene*, were further considered in *Lambert, Ali and Jordan* [2001] 1 All ER 1014. This case is considered at paras 8.31 – 8.34 below.

[27] *Ibid*, at 379D and 380B–D. Lord Hope explained that this classification is not an exact science (380C). A finding that a provision is inconsistent with the presumption of innocence will not lead inevitably to the conclusion that the provision is incompatible with Article 6. Lord Hope said that the European jurisprudence showed that other factors need to be brought into consideration at this stage (at 380D).

[28] [2000] 2 AC 326, 379.

offence whilst on bail. We considered that this approach would be incompatible with Article 5.

(2) The section might be construed so that *any* circumstances which persuaded a court that bail was appropriate in the circumstances to which the section applied would *of themselves* be "exceptional". We concluded that this construction would not infringe Article 5, but we doubted whether section 25 could properly be so construed, as it would make the section redundant.

(3) In considering the question of bail, the court would be free to consider all the circumstances, but be required to give *special weight* to the circumstances triggering the section, so that bail could be granted only if, balancing the factors and having regard to that special weight, the circumstances were sufficiently "exceptional" as to justify bail. This would involve the court going through the usual process of balancing the considerations in favour of bail against those pointing towards detention. A court adopting this interpretation would take all relevant circumstances into account, but might refuse bail because the case falls within section 25, in circumstances where, but for that section, bail would have been granted.

8.19 On the question whether the third construction of section 25 would be compatible with Article 5, we stated two contending views:

(a) It would not be compatible with Article 5, in that it elevates the question whether the offence and the offender fall within a preordained disadvantaged category above the proper question – namely, whether the facts of the individual case are such as to present an unacceptable risk of reoffending were bail to be granted.

(b) Alternatively, there would not necessarily be a breach of Article 5 were bail to be refused because of the need to establish exceptional circumstances, even if, but for section 25, the defendant would have been granted bail. The fact that the court gives special weight to certain factors identified by Parliament does not prevent it from taking all relevant considerations into account in reaching its decision.

8.20 Approach (b) does not require "the exclusion from the risk assessment of a consideration of all the particular circumstances and facts of each accused's case".[29] We tentatively concluded that this view of the third construction was probably correct and would enable section 25 to be interpreted and applied in a way that was compatible with the Convention.

[29] *Caballero v UK* (aka *CC v UK)* App No 32819/96, (2000) 30 EHRR 643, Commission opinion, para 49. See para 8.4 above.

8.21 We recognised, however, that in its present form the provision might be misconstrued and applied in an incompatible way. We suggested that this risk could be averted either by amending the section so as to clarify its intended effect, or by the provision of guidance. Our provisional view was that amending the legislation would be the most appropriate course.

Analysis of responses

Respondents who supported our provisional conclusions that section 25 was capable of being construed compatibly with the Convention but, in its present form, was liable to be misconstrued

8.22 Approximately two thirds of respondents supported this conclusion. There was broad support in this group for the amendment or repeal of section 25.[30]

Respondents who doubted whether section 25 was capable of being construed compatibly with Article 5

8.23 Several respondents doubted that section 25 could be applied in a manner which would be compatible with the Convention and advocated its repeal. NACRO thought that the obvious construction of the word "exceptional" is that bail would hardly ever be granted in circumstances where section 25 applied. The Bar Council and the Criminal Bar Association jointly suggested that, given that bail is, in any event, unlikely to be granted in all but a very small number of cases where section 25 would apply, the imposition of a further requirement that in such cases bail should be granted only in "exceptional circumstances" would have "the effect of reducing the decision maker's discretion to the vanishing point". Their view was that this provision inhibits the proper consideration of all the relevant circumstances required by the Convention.

Respondents favouring the repeal of section 25 for reasons of policy and principle

8.24 A number of respondents supported the repeal of section 25 wholly or partly on the ground that the provision was an unnecessary fetter on the discretion of decision-makers. The Magistrates' Association stated that magistrates knew how to exercise their discretion properly and the provision was unnecessary.[31]

Respondents who believed that section 25 was not liable to be misconstrued in a manner that was not compatible with Article 5

8.25 The Foreign and Commonwealth Office thought that, given the extreme circumstances in which section 25 applies, it would only be in exceptional cases

[30] Those who supported this view included the Justices' Clerks' Society and the Police Superintendents' Association.

[31] This view received support from the Bar Council and the Criminal Bar Association (joint response), the Inner London Magistrates' Courts Service and an academic who noted that the law already made provision for the giving of reasons for the grant of bail in these circumstances.

that bail would be appropriate anyway. This view was echoed by the Home Office, who stated that

> the finding of law and fact involved in determining the presence of exceptional circumstances allows a court the freedom to release on bail a person who does not present a serious risk. Further the presence of exceptional circumstances cannot be considered without a proper consideration of all the aspects of the case.

8.26 The Home Office stated that the lack of statutory guidance would be "filled by judicial freedom and therefore by the Convention." Lord Davidson thought that any future challenge could be successfully resisted on the ground that the amendment, combined with the pre-trial time limit, afforded ample protection against arbitrary detention. The DTI, ACPO and the CPS also took the view that section 25 was not liable to be misapplied in a non-compliant manner, but they supported the idea of issuing appropriate guidance.

Respondents supporting section 25 for reasons of policy and principle

8.27 The Police Federation argued that the provision was necessary because, prior to its introduction, "very serious offenders who had been charged with further serious offences were being granted bail in circumstances that were simply making a mockery of the Criminal Justice System". ACPO viewed it in the context of the large number of serious offences committed by individuals on bail, and cited *Kebilene* in support of the propriety of the reverse burden of proof.[32] The CPS noted that normally only the defendant would have knowledge of the exceptional circumstances.

Our views

Arguments of policy and principle

8.28 Our task is not to judge the merits of section 25, but to consider whether it can be read in a Convention-compatible manner and, if so, whether that reading is so problematic that the law is liable to be applied in an incompatible way.

Is section 25 capable of being interpreted and applied compatibly with the Convention?

8.29 We remain of the view, with which a clear majority of consultation respondents agreed, that section 25 is capable of being interpreted and applied compatibly with the Convention.

8.30 We are confirmed in our view by two recent decisions of the Court of Appeal. One relates to the Convention-compatibility of reverse onus presumptions. The other provides an interesting examination of "exceptional circumstances", albeit in a different context from bail decisions.

[32] See para 8.15 above.

THE CONVENTION-COMPATIBILITY OF REVERSE ONUS PRESUMPTIONS – THE IMPORTANCE OF PUBLIC POLICY CONSIDERATIONS

8.31 Since the consultation paper, the Court of Appeal has considered the question of reverse onus presumptions in *Lambert, Ali and Jordan*.[33] The appellants argued that statutory provisions requiring defendants to discharge a burden of proof on the balance of probabilities in order to establish a successful defence to what would otherwise be a criminal offence were contrary to Article 6 of the Convention, and should therefore be interpreted as imposing only an evidential burden.

8.32 The Court of Appeal rejected these arguments. Lord Woolf CJ stated that "a broad and purposive approach" should be given to the language of the Convention. He considered the case of *Salabiaku v France*[34] in which the ECtHR said:

> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. …
>
> Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

Lord Woolf also referred to the words of Lord Hope in *R v DPP, ex parte Kebilene* where he stated that account may be taken of the problem the legislation was designed to address, and that

> As a matter of general principle … a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual.[35]

8.33 Lord Woolf noted that the ECHR jurisprudence makes clear that the courts do not have to ignore the wider interests of the public in applying those Convention provisions which do not themselves contain an express limitation. He held that the reverse onus provisions at issue in the case[36] were justifiable under the

[33] [2001] 1 All ER 1014. The defendant Lambert appealed to the House of Lords, but judgment was awaited at the time of writing.

[34] A 141-A (1988), 13 EHRR 379, para 28.

[35] [2000] 2 AC 326, 384.

[36] Lambert argued that certain defences to a charge of being in possession of a controlled drug (contained in ss 5(4) and 28(2) and (3) of the Misuse of Drugs Act 1971), which can succeed only where the defendant proves certain facts on the balance of probabilities, violated the rights to a fair and public hearing, and to be presumed innocent until proved guilty, contained in Article 6 of the ECHR. Ali and Jordan argued that s 2 of the Homicide Act 1957 violated Article 6 because, on a charge of murder, a defendant can secure a conviction of manslaughter on the grounds of diminished responsibility only by proving,

Convention because they were enacted by Parliament on the basis of understandable policy considerations and were not a disproportionate response to those considerations.

8.34 We believe that this decision supports our view that it is unlikely that section 25 poses a serious risk of incompatibility with the Convention. Lord Woolf appears to have taken the view that, even if an article of the Convention does not itself contain express limitations, this does not prevent the courts from identifying the wider interests of the community and balancing these against the interference with the Convention right.

8.35 We are not dissuaded from this view by the recent judgment in *R (on the application of H) v Mental Health Review Tribunal.*[37] The case concerned section 73 of the Mental Health Act 1983, which places on a restricted patient the burden of satisfying the tribunal that he or she no longer suffers from a mental disorder warranting detention. The Court of Appeal issued a declaration that section 73 was incompatible with Article 5(1)(e), which permits the lawful detention of persons *reliably shown* to be of unsound mind.[38]

8.36 Whilst there is an apparent similarity between the provisions in issue in this case and the reverse onus presumption in section 25 of the Criminal Justice and Public Order Act 1994, we regard section 25 as more closely analogous to section 2 of the Crime (Sentences) Act 1997 (which has been held to be compatible with the Convention)[39] than to section 73 of the Mental Health Act 1983.

8.37 Section 25 of the Criminal Justice and Public Order Act 1994 and section 2 of the Crime (Sentences) Act 1997 were both enacted in response to public concern about the threat of serious offences committed by repeat offenders. Each contains a rebuttable presumption that arises where certain factual matters have already been established by the prosecution. The true effect of section 25 is that, once the prosecution has established that certain circumstances exist which bring the provision into play, attention shifts to whether the defendant poses a substantial risk to the public. A rebuttable presumption arises that the defendant does pose such a risk. Under section 73 of the Mental Health Act 1983, by way of contrast, there is no requirement that the state establish any presumptive facts. A

on the balance of probabilities, that he or she was suffering from diminished responsibility as defined by s 2(1).

37 [2001] EWCA Civ 415, *The Times* 2 April 2001.

38 See *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, para 39.

39 The proper interpretation of this provision and its compatibility with the Convention was considered by the Court of Appeal in *Offen* [2001] 2 All ER 154. We discuss this case at paras 8.39 – 8.42 below.

tribunal can decline to order release for no reason other than that the defendant failed to satisfy them that he or she was not of unsound mind.[40]

8.38 We believe that, provided that section 25 is interpreted so that the courts are not prevented from giving genuine consideration to whether the defendant poses a risk to the public, it is highly likely that the courts would find that the provision can be objectively justified and is not disproportionate. This is particularly so since a defendant is likely to be the person best able to bring to the attention of the court any exceptional circumstances militating in favour of bail. Thus, no injustice is caused to the defendant if he or she bears the burden of displacing a statutory presumption that those who have been once convicted of a very serious offence and are alleged to have committed a further very serious offence pose a substantial risk to the public and should therefore be detained. Furthermore, the burden can be characterised as a "discretionary" rather than a "mandatory" one.[41] Where the court is satisfied that it is not necessary to detain the defendant, it is not obliged to detain the defendant simply because the defendant has not adduced evidence capable of displacing the presumption.

WHAT WILL CONSTITUTE "EXCEPTIONAL CIRCUMSTANCES"?

8.39 We believe that the recent Court of Appeal decision in *Offen*[42] provides a useful guide to the construction of the phrase "exceptional circumstances". That case concerned the proper interpretation of section 2 of the Crime (Sentences) Act 1997, which provides for automatic life sentences for defendants convicted of two serious offences unless the court is of the opinion that there are "exceptional circumstances relating to either of the offences or to the offender which justify its not doing so".[43] The appellants contended that section 2 of the 1997 Act was incompatible with Articles 3, 5, 7 and 8 of the Convention.

[40] The Court of Appeal did not accept the view that s 73 could, in line with s 3 of the HRA, be interpreted so as to require a patient's release where the tribunal is *not* satisfied that the patient is suffering from mental illness and needs to be detained, rather than only where the tribunal *is* satisfied that the patient is *not* suffering from such illness or does *not* need to be detained:

> It is of course the duty of the court to strive to interpret statutes in a manner compatible with the Convention and we are aware of instances where this has involved straining the meaning of statutory language. We do not consider however that such an approach enables us to interpret a requirement that a tribunal must act if satisfied that a state of affairs does not exist as meaning that it must act if not satisfied that a state of affairs does exist. The two are patently not the same.

[2001] EWCA Civ 415, para [27], *per* Lord Phillips MR (giving the judgment of the court).

[41] See paras 8.15 – 8.16 above.

[42] [2001] 2 All ER 154.

[43] This provision is now contained in the Powers of Criminal Courts (Sentencing) Act 2000, s 109. The Act also provides for minimum sentences to be imposed where the defendant is convicted of a third offence of trafficking "class A" drugs (s 110) or domestic burglary

8.40 In a previous Court of Appeal decision on this provision,[44] decided before the coming into force of the Human Rights Act, Lord Bingham CJ had set out a two-stage process for determining whether the duty to impose a life sentence under section 2(2) of the 1997 Act arose. The first was to determine whether exceptional circumstances existed. Lord Bingham said:

> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art … To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.[45]

Only at the second stage was the policy and intention of Parliament, to protect the public against defendants who had committed serious offences, considered. The assumption was that persons who had committed two serious offences posed a danger to the public. If the facts showed that the statutory assumption was misplaced, this could justify a court in not imposing a life sentence.

8.41 The consequence of this test was that, even where the defendant did not pose a danger to the public, the court would still have to impose a life sentence where it was unable to find any exceptional circumstances. In *Turner (Ian)*[46] the Court of Appeal stated that the effect of section 2 could be to compel a judge to impose an automatic life sentence even if, in the circumstances of the case, it offended his or her sense of justice.

8.42 In *Offen*, Lord Woolf CJ stated that Article 5 required that detention should not be arbitrary or disproportionate, and that passing a life sentence on a person who did not pose a danger to the public might fail those tests. He construed section 2 by focusing on its purpose of protecting the public from repeat offenders who commit serious offences. Section 2 established a norm that persons convicted of a second serious offence posed a significant risk to the public. If, taking into account all the circumstances relating to the offender, he or she did not pose such a risk, then that constituted a departure from the norm, and thus an exceptional circumstance which may justify the court in not imposing a life sentence. We believe that *Offen* provides a sensible model for the interpretation of section 25, which was also enacted because of Parliament's concern that such defendants posed a threat to the public.

8.43 If section 25 were construed so that circumstances in which the defendant would not pose a significant risk to the public if released on bail were regarded as "exceptional", then that would meet the purpose of the legislation. We do not believe that such an interpretation would prevent section 25 from having some

(s 111) unless there are "particular circumstances which – (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances."

44 *Kelly (Edward)* [2000] QB 198.

45 *Ibid*, at p 208.

46 [2000] 1 Cr App R (S) 472.

effect. Where there is a significant risk that the defendant would commit a serious offence or endanger the public while on bail, then notwithstanding any factors (such as the defendant's health, employment or family responsibilities) that reduce that risk or might for other reasons persuade a court to grant bail, bail cannot be granted. The Convention permits the detention of defendants where there is a real risk that they will commit an offence while on bail, and detention is necessary to avert such a risk. Section 25 focuses the court's attention on that risk, leaving it free to have regard to all relevant factors.

8.44 In the light of the authorities, therefore, "exceptional circumstances" encompasses situations where the court believes that the defendant would not pose a significant risk to the public if released on bail. In addition, there may be other situations where the circumstances affecting the appropriateness of detention are regarded as exceptional for some other reason.[47]

CONCLUSION

8.45 We conclude that section 25 *can* be interpreted compatibly with the Convention, and that, if bail decision-takers are given adequate training and guidance on the legal obligation to construe and apply section 25 in a manner compatible with the Convention, they are unlikely to experience serious difficulties in so doing. **We therefore make no recommendations for legislation.**

8.46 ***Section 25 should be construed as meaning that where the defendant would not, if released on bail, pose a real risk of committing a serious offence, this constitutes an "exceptional circumstance" so that bail may be granted. This construction would achieve Parliament's purpose of ensuring that, when making bail decisions about defendants to whom section 25 applies, decision-makers focus on the risk the defendant may pose to the public by re-offending.***

8.47 ***There may be other "exceptional circumstances" which may permit bail to be granted.***

8.48 ***Even if "exceptional circumstances" do exist, bail may, nonetheless, be withheld on a Convention-compatible ground if this is deemed to be necessary in the individual case.***

[47] In *Frost (Paul William), The Times* 5 Jan 2001 the Court of Appeal held that there may still be situations in which "exceptional circumstances" may be found to exist for the purposes of s 2(2) of the Crime (Sentences) Act 1997 even if the offender *does* present a significant risk to the public. The defendant had committed his first serious offence when he was 15 years old and had been sentenced to a supervision order, which effectively functioned as a probation order for a person under 17 years of age. Had he been sentenced to a probation order, s 2 of the Crime (Sentences) Act 1997 would not have applied. The Court of Appeal held that this constituted an "exceptional circumstance" for the purposes of the section.

PART IX(A)
CONDITIONAL BAIL AS AN ALTERNATIVE TO CUSTODY

9A.1 In English law, bail may be granted subject to conditions. Issues of compatibility with the Convention may arise in respect of this power in two ways. First, a defendant who is *refused* bail might claim that Article 5 required that bail should have been granted, albeit subject to conditions. Secondly, a defendant who is *granted* conditional bail might claim that less restrictive conditions should have been imposed, or none at all. We will consider the first of these issues in this part, and the second in Part IX(B).

THE ECHR

9A.2 Article 5 of the Convention establishes a presumption in favour of liberty. It provides:

> … No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

It then lists a number of circumstances in which detention may be justified.

9A.3 A court should not detain a person in pursuit of a legitimate aim where there is another way to achieve that aim which would interfere with the defendant's liberty to a lesser extent.[1] Article 5(3) states that release from lawful arrest or detention before trial "may be conditioned by guarantees to appear for trial". It does not explicitly mention the possibility of imposing bail conditions for other reasons, such as a risk of the defendant committing an offence or interfering with witnesses while on bail. The ECtHR has recognised, however, that it can be legitimate to *detain* a defendant before trial on the ground that it is *necessary* to do so in order to avert these risks. It therefore seems reasonable to assume that those risks can also justify the imposition of bail conditions, as this entails a lesser encroachment on the defendant's liberty. If a condition could be imposed which would eliminate a risk or reduce it to an acceptable level, it could not then be said that detention was *necessary* for that purpose.

9A.4 The ECtHR has stated that a defendant who might abscond if unconditionally released must nonetheless be released if bail conditions are available which are capable of averting that risk. Detention is a last resort. Thus, in *Wemhoff v Germany* the Court emphasised that

[1] In *Clooth v Belgium* A 225 (1991), 14 EHRR 717, Commission opinion para 75, the Commission pointed out that the judicial authorities had kept the applicant in detention for a long period "without considering whether there was another way of safeguarding public security and preventing him from committing further offences". The question in that case, however, was not whether the defendant should be detained in custody or released on conditional bail, but whether he should be detained in custody or transferred to a psychiatric institution.

> when the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance.[2]

9A.5 The reasoning in that case should apply whenever suitable conditions would meet concerns about other risks recognised by the ECtHR as capable of justifying detention. Thus, ***a defendant must be released unless (i) that would create a risk of the kind which can, in principle, justify pre-trial detention, and (ii) that risk cannot, by the imposition of appropriate bail conditions, be averted, or reduced to a level at which it would not justify detention.***

The compatibility of English law with the ECHR

The role of conditions in the powers of courts to refuse bail

THE POWERS OF COURTS TO REFUSE BAIL

9A.6 Section 4 of the Bail Act 1976 gives a defendant a right to be granted bail on appearing before a court *except* as provided in Schedule 1. Parts I and II of Schedule 1 concern, respectively, those accused or convicted of imprisonable and non-imprisonable offences.

Part I of Schedule 1: Defendants accused of imprisonable offences

9A.7 Paragraphs 2 to 7 of Part I of Schedule 1 set out exceptions to the right to bail. Paragraph 2 expressly refers to the relevance of bail conditions. It provides that

> The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (*whether subject to conditions or not)* would –
>
> (a) fail to surrender to custody, or
>
> (b) commit an offence while on bail, or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice.

9A.8 The remaining exceptions, listed in paragraphs 2A to 7, make no express reference to the alternative course of imposing bail conditions rather than detaining the defendant.

Part II of Schedule 1: Defendants accused of non-imprisonable offences

9A.9 Paragraph 2 of Part II expressly refers to the relevance of bail conditions. It provides that a court need not grant bail to a defendant who has previously failed to surrender to custody in accordance with his or her obligations under a grant of bail if, in view of that failure, the court believes that, were the defendant to be

[2] A 7 (1968), 1 EHRR 55, para 15.

released on bail *(whether subject to conditions or not)*, he or she would fail to surrender to custody. The remaining exceptions in Part II make no express reference to conditions.

THE POWERS OF COURTS TO IMPOSE BAIL CONDITIONS

9A.10 Section 3(3) of the Bail Act 1976 provides, in part, that "Except as provided by [section 3] … (c) no … requirement shall be imposed … as a condition of bail".[3]

9A.11 Section 3(4) and (5) permit a court granting bail to require the defendant, before release on bail, to provide one or more sureties to secure, or to give security for, his or her surrender to custody. Section 3(6) permits a court granting bail to require the defendant to comply, before release on bail or later, with such requirements as appear to the court to be *necessary to secure* that

(a) he surrenders to custody,

(b) he does not commit an offence while on bail,

(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence, or that

(e) before the time appointed for him to surrender to custody, he attends an interview with an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990.

9A.12 In addition, section 3(6ZA) provides that, where a defendant is required (under subsection (6)) to reside in a bail or probation hostel, he or she may also be required to comply with the rules of the hostel; and, in the case of a defendant accused of murder, section 3(6A) requires the imposition of a condition that the defendant undergo a medical examination (unless satisfactory reports have already been obtained).

9A.13 In effect, therefore, and with limited exceptions,[4] the legislation embodies two general principles which are in line with the requirements of Article 5:

(1) Conditions may not be imposed for any purpose other than the prevention of conduct which may, under the Convention, be prevented by refusing bail altogether.

[3] Paragraph 8 of Part I of Schedule 1 ("Restriction of conditions of bail") makes additional provision in respect of the exercise of those powers. These are discussed at paras 9B.20 – 9B.21 below.

[4] Conditions under s 3(6)(d) (to secure co-operation with the preparation of any report for sentencing purposes), s 3(6)(e) (to secure that the defendant attends an interview with an advocate or litigator) and s 3(6A) (relating to medical examinations of those accused of murder) are examined at paras 9B.7 – 9B.14, 9B.23 – 9B.25 below.

(2) Even for the purpose of preventing such conduct, conditions may not be imposed unless they are *necessary* for that purpose.

Analysis

9A.14 A useful initial approach to whether English law is compatible with the Convention may be to consider whether the courts have the power under the Bail Act to attach a condition to bail in every circumstance where they can deny bail altogether.

9A.15 The circumstances in which bail can be denied under paragraphs 2 and 2A of Part I, and paragraph 2 of Part II, plainly give rise to no difficulty in this regard.[5] This is because the terms of the exceptions to the right to bail (that is, the purposes for which detention is permitted) contained in that paragraph correlate with the purposes for which conditions can be imposed in section 3(6)(a)–(c). It is of no concern that there is no precise condition which correlates with the exception in paragraph 2A because, as explained earlier, the paragraph 2A exception should not be regarded as an independent ground, but as a consideration to be taken into account in determining whether there is a real risk of the defendant committing an offence while on bail.[6] The exception in paragraph 7 of Part I (detention where it would otherwise be impracticable to complete inquiries or make a report) also presents no difficulties, since it correlates with the purpose in section 3(6)(d).

9A.16 Similar reasoning can be extended to the exception in paragraph 6 of Part I and paragraph 5 of Part II, both of which permit detention of persons who have been arrested under section 7.[7] These provisions exist to facilitate the detention of those who have either failed to surrender to custody in the past, or have broken a bail condition. Detention of such persons would either be to prevent the defendant from failing to surrender to custody again, or in pursuit of the purpose for which the condition which the defendant has broken was originally imposed.[8] It is obvious that the courts are able to impose conditions for the same purposes for which bail could be denied under this exception. In relation to the exception in paragraph 5 of Part I (lack of sufficient information for the making of a bail decision),[9] no need for any condition of bail can arise, since the exception relates to the time *prior* to the making of any bail decision.

[5] Para 4 of Part I and para 4 of Part II, which allow a court to refuse bail to a defendant already in custody in pursuance of a sentence of a court, also present no difficulty under Article 5, as Article 5(1)(a) provides that "the lawful detention of a person after conviction by a competent court" is a case when deprivation of liberty may be justified.

[6] See Part IV above.

[7] Eg for breach of a bail condition.

[8] The exception to the right to bail based on the defendant having been arrested under s 7 is discussed in Part VII above.

[9] See Part VI above.

9A.17 There is a problem, however, in relation to paragraph 3 of both Parts I and II, which state that a court need not grant bail where it is satisfied that the defendant should be kept in custody for his or her own protection or, if the defendant is a child or young person, for the child's own welfare. In Part V above we concluded that detention on this ground could, in exceptional circumstances, be compatible with the Convention. The purposes for which bail *conditions* may be imposed under section 3(6) of the Act, however, do not include any purpose relating to the defendant's protection. Thus, there is a lacuna in the domestic legislation in any case where the imposition of a condition would suffice to protect a defendant who would otherwise need to be detained for his or her own protection.

9A.18 As public authorities, courts must not exercise their discretion to refuse bail under paragraph 3 in a manner which would violate the Convention,[10] so this lacuna could present a problem. Such situations will be rare. Article 5 permits the use of detention to protect the defendant from harm only where there are exceptional circumstances.[11] Where such exceptional circumstances do exist, we suspect that detention would often be the only appropriate way to address them, even if English law did allow bail conditions to be used for the purpose.

9A.19 In some situations, however, a real difficulty may arise. Consider, for example, a defendant accused of committing sexual offences against a child whose family lives in the same street as the defendant. The court may be of the opinion that the defendant is in real danger of being attacked by the parents of the child. This danger may be averted by the defendant going to live at a secret address, but the address may only be available if residence were the subject of a bail condition. In the absence of a domestic power to impose a suitable condition, it would seem that the court, required as it is to act in accordance with the Convention, would have to grant unconditional bail, however unattractive that might appear to be, unless the circumstances of the case could justify the imposition of a bail condition for another purpose which *is* recognised by English law and would have the secondary effect of protecting the defendant.[12]

9A.20 The explicit terms of section 3 of the Bail Act preclude it from being construed, pursuant to section 3 of the HRA, in a way which would permit a power to impose conditions for such a purpose to be implied.[13] There is no room either for "reading down" or "reading in", even if these were recognised as permissible tools of construction.[14]

[10] HRA, s 6, discussed at paras 1.28 – 1.31 above.

[11] *IA v France* 1998-VII, para 108, discussed at paras 5.3 – 5.5 above.

[12] Such as a condition to secure the defendant's attendance at trial, or to prevent the defendant from interfering with witnesses or obstructing the course of justice.

[13] Section 3(3) of the Bail Act states that "Except as provided by this section … no other requirement shall be imposed on [the defendant] as a condition of bail".

[14] See paras 1.20 – 1.27 above.

The powers of the police to refuse bail and the availability of conditions

POLICE POWERS TO REFUSE BAIL

9A.21 In respect of both imprisonable and non-imprisonable offences, section 38(1) of PACE requires the custody officer to release a defendant charged with an offence, either on bail or without bail, unless one of the specified exceptions applies. These exceptions, which permit the custody officer to detain the defendant, are similar to those allowing courts to detain defendants charged with imprisonable offences. They include the custody officer having reasonable grounds for believing that the defendant will (inter alia) fail to appear in court in answer to bail, or that detention is necessary to prevent the defendant interfering with the administration of justice, or for the defendant's own protection. In addition, a person charged with an imprisonable offence can be detained if the custody officer has reasonable grounds for believing that this is necessary to prevent that person from committing an offence. A person charged with a non-imprisonable offence can be detained if the custody officer has reasonable grounds for believing that this is necessary to prevent that person from causing physical injury to any other person or from causing loss or damage to property.[15]

9A.22 All but two of these exceptions make express reference to circumstances in which "the custody officer has reasonable grounds for believing that the detention of the person is necessary" to secure the stated purpose. Clearly it would not be *necessary* to detain the defendant for one of these purposes if that purpose could be secured by granting conditional bail.[16]

POLICE POWERS TO IMPOSE BAIL CONDITIONS

9A.23 Although none of the exceptions in section 38(1) refers expressly to the possibility of release subject to conditions, section 47(1A) of PACE states that, where a custody officer releases an arrested person under section 38(1), the "normal powers to impose conditions of bail" (as defined in section 3(6) of the Bail Act 1976) are available. Section 3(6) of the Bail Act defines these "normal powers" as empowering the custody officer to impose such requirements as appear to the officer to be *necessary to secure* the objectives in section 3(6)(a), (b)

[15] Thus a custody officer has wider powers to detain a person charged with a non-imprisonable offence than are available to a *court* dealing with a defendant accused of such an offence.

[16] One of the two other exceptions is that the custody officer "has reasonable grounds for believing that the person arrested will fail to appear in court in answer to bail". No such reasonable grounds would exist if the risk of the defendant's failing to appear could be averted by imposing suitable bail conditions. The remaining exception permits detention if the arrested person's name and address cannot be ascertained, or if the custody officer has reasonable grounds for doubting the truth of the name and address information the person has provided. Since this exception does not refer to a risk of any particular consequences if the arrested person is released, the possibility of averting such consequences by imposing bail conditions does not arise.

or (c).[17] Each of these conditions relates to matters that would permit the custody officer to detain the arrested person under section 38(1) of PACE.

9A.24 As with the courts' powers to impose conditions, although a custody officer can detain a defendant for his or her own protection, the officer cannot impose conditions for the same purpose, and the same points we make in relation to the courts are equally applicable to custody officers.

Conclusion

9A.25 ***A court should not detain a person pursuant to an aim which has been recognised by the ECtHR where there is another way to achieve that aim which will interfere with the defendant's liberty to a lesser extent. Thus, a defendant must be released, if need be subject to conditions, unless (i) that would create a risk of a kind which can, in principle, justify pre-trial detention, and (ii) that risk cannot, by imposing suitable bail conditions, be averted, or reduced to a level at which it would not justify detention***.

9A.26 ***The lack of a power in English law for the courts or police to impose a bail condition where this is necessary for the defendant's own protection could thus present difficulty where such a condition, had it been possible to attach one, could have averted the risk, or reduced it to a level at which it would not justify detention. In such cases, unless the defendant can be legitimately detained for another Convention-compatible purpose, or the protective condition can be legitimately imposed for one of the purposes for which English law does permit conditions to be imposed, the court should not refuse the defendant bail.***

Recommendation

9A.27 **We recommend that the Bail Act 1976 be amended to empower the police and the courts to impose such conditions as appear necessary for the defendant's own protection, consonant with the exception to the right to bail at paragraph 3 of Part I of Schedule 1 to the Bail Act.**[18]

(Recommendation 3)

[17] See para 9A.11 above.

[18] Discussed in Part V above. Since a condition should only be imposed where detention would be compatible with the Convention if the condition were broken (see para 9B.2 below), it will be necessary for the police and the courts to interpret this power in the same way that they are required to interpret that exception. The only Strasbourg authority on that exception of which we are aware is *IA v France* 1998-VII, in which the ECtHR stated that detention for the defendant's own protection from harm by others should be limited to cases where there were exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed or the context in which they took place. In Part V above, we suggested that this restriction may not be applicable to detention for the purpose of protecting the defendant from *self*-harm.

PART IX(B)
CONDITIONAL BAIL AS AN ALTERNATIVE TO UNCONDITIONAL BAIL

9B.1 In this part we consider whether English law permits the imposition of bail conditions in circumstances in which Article 5 would require that the defendant be granted unconditional bail or bail with less stringent conditions.

CONVENTION PRINCIPLES

The purpose of a condition

9B.2 If a court conditionally releases a defendant, it is, by implication, authorising the defendant's re-arrest in the event of the condition being broken.[1] Until there is a detention, there can be no breach of Article 5. Nevertheless, it would be unwise for a court to impose a condition which would be liable to lead to an arrest which might violate the Convention. Therefore, to comply with Article 5, a court should only impose a condition for a purpose which the ECtHR will recognise as capable of justifying detention.[2]

A condition must be necessary

9B.3 Article 5 requires that a defendant who has not been convicted by a court (and is therefore presumed innocent under Article 6(2)) should not have his or her liberty curtailed to an extent that is disproportionate to the reasons or risks said to justify the limitations. While it may be legitimate to demand a financial security if its amount is fixed with a view to ensuring that the defendant has an adequate incentive to appear for trial, it would not be legitimate if it were related solely to the loss that the defendant were alleged to have caused.[3] A demand for a sum which is higher than necessary may infringe Article 5 if the defendant is unable to pay and has to remain in custody.[4] Thus, a bail condition should only be imposed where, if it were broken, it may be necessary to arrest the defendant in order to pursue the legitimate purpose of the condition.[5]

THE COMPATIBILITY OF ENGLISH LAW WITH THE ECHR

9B.4 We have seen, then, that Article 5 does not permit detention arising as a consequence of a bail condition which

[1] The power of arrest conferred by s 7(3) of the Bail Act is discussed in Part VII above.

[2] See paras 2.28 – 2.29 above.

[3] *Neumeister v Austria* A 8 (1968), 1 EHRR 91, para 14.

[4] *Schertenlieb v Switzerland* (1980) 23 DR 137, 195, Commission opinion paras 166–175.

[5] This would include arrest where a constable reasonably believes that the defendant is likely to break the condition or reasonably suspects that the defendant has done so, or, in the case of a defendant granted bail with a surety, if the surety has notified a constable in writing that the defendant is unlikely to surrender to custody. These are the circumstances in which a constable may arrest a person who has been granted conditional bail (Bail Act 1976, s 7(3)).

(1) was imposed for a purpose other than those that, under the ECHR, can justify pre-trial detention; *or*

(2) was imposed for one of those purposes, but was not necessary for that purpose – either because the constraints that it imposed on the defendant's conduct were out of proportion to the risk that it sought to avert, or because that risk could have been eliminated (or reduced to an acceptable level) by the imposition of a less burdensome condition, or because there was no real risk of the consequence that the condition was designed to avert.

9B.5 We will now briefly examine the various powers in English law for imposing bail conditions, focusing in turn on each of the two requirements above, concerning the *purpose* of a condition and whether the imposition of the condition is *necessary*, with a view to assessing the compatibility of those powers with the Convention.

The purposes for which conditions may be imposed

9B.6 Are the purposes for which English law permits the imposition of bail conditions equivalent to those that can justify pre-trial detention under the Convention? The purposes for which an English court or custody officer[6] can impose bail conditions under section 3(6)(a), (b) and (c) of the Bail Act 1976[7] are all capable of justifying detention under the Convention.[8] A requirement that a defendant provide sureties to secure, or to give security for, his or her surrender to custody is permitted by subsections (4) and (5) of section 3. This too pursues a purpose permitted by the Convention.

Section 3(6)(d)

9B.7 Section 3(6)(d) authorises the attachment of bail conditions for the purpose of securing that the defendant "makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence". This condition will typically be imposed only after the defendant has been convicted.[9] Article 5(1)(c) of the Convention would not then apply.

[6] Section 47(1A) of PACE makes "the normal powers to impose conditions of bail", as defined in s 3(6) of the Bail Act 1976, available to a custody officer who releases a person on bail after charge, irrespective of whether that person has been charged with an imprisonable or non-imprisonable offence. These "normal powers" enable the officer to impose conditions for the purposes set out in section 3(6)(a), (b) and (c) of the Bail Act.

[7] Namely, to secure that the defendant (a) surrenders to custody, (b) does not commit an offence while on bail, and (c) does not interfere with witnesses or otherwise obstruct the course of justice. These purposes go beyond the limited grounds upon which a court may, under paras 2–5 of Part II of Sched 1, refuse bail to a defendant accused of a non-imprisonable offence. There is nothing in s 3(6) which limits the power to impose conditions to the same purposes for which bail could have been withheld altogether. These provisions are set out at para 9A.11 above, and in Appendix A below.

[8] See paras 2.28 – 2.29 above.

[9] Section 11 of the Powers of Criminal Courts (Sentencing) Act 2000 requires the imposition of a condition under s 3(6)(d) of the Bail Act in circumstances where the defendant has not been formally convicted of an offence. Where a magistrates' court is

Detention would be justified under Article 5(1)(a), which permits "the lawful detention of a person after conviction by a competent court". Even where Articles 5(1)(c) and (3) continue to apply, our view is that this bail condition could be justified "to ensure that the defendant does not obstruct the course of justice". The condition in section 3(6)(d) is to ensure that the court has all the information it needs for sentencing purposes. A failure to comply may well constitute a failure to co-operate with the effective progress of the case. Such a failure would be highly likely to obstruct the progress of the court's business. If the defendant complies with the condition, there will be no loss of liberty; if the defendant does not, that demonstrates the need for the condition, and any subsequent detention arising from a breach of the condition would be capable of complying with the Convention.

Section 3(6)(e)

9B.8 The above reasoning would also apply to conditions imposed for the purpose of securing that the defendant attends an interview with an authorised advocate or litigator. If the court believes that it is necessary for the defendant to attend such an interview for the case to proceed effectively, a failure to co-operate with the requirement could well obstruct the course of justice.

Section 3(6A)

9B.9 Section 3(6A) provides that, where the defendant is charged with murder, the court must impose a condition that the defendant undergo a medical examination for the purpose of enabling reports to be prepared on his or her mental condition, unless it considers that satisfactory reports have already been obtained. Our reasoning in relation to the purpose of conditions imposed under section 3(6)(d) would also apply to those imposed under section 3(6A). If a court requires a medical report, a failure to co-operate with the making of such a report could well obstruct the course of justice.

The relevance of Article 5(1)(b)

9B.10 The above arguments presuppose that conduct which obstructs the progress of court proceedings falls within the Convention-compatible ground for detention of being necessary to ensure that the defendant does not obstruct the course of justice. It might be contended, though in our view incorrectly, that "obstruct the course of justice" does not encompass such conduct. For this reason, we will discuss, briefly, the possible relevance of Article 5(1)(b) as an alternative basis for detention following a breach, or anticipated breach, of conditions imposed under section 3(6)(d) or (e), or 3(6A), of the Bail Act.

9B.11 Article 5(1)(b) permits deprivations of liberty in accordance with a procedure prescribed by law in the case of

satisfied that the defendant did the act or made the omission charged, but requires a medical report before the method of dealing with the defendant is determined, the court should adjourn the case and, if the defendant is granted bail, a condition must be imposed to ensure that the defendant co-operates with the production of the medical report. This provision is discussed further at paras 9B.26 – 9B.29 below.

> the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.[10]

9B.12 Article 5(1)(c), with the attendant case law, provides a comprehensive code for pre-trial detention, including that following a grant of conditional bail. The inappropriate use of Article 5(1)(b) might circumvent the protections inherent in the case-law surrounding 5(1)(c).[11] We have not considered Article 5(1)(b) in relation to the imposition of conditions for the purposes of ensuring that the defendant surrenders to custody, does not commit offences and does not obstruct the course of justice, as these are all purposes that the ECtHR has expressly recognised as capable of justifying detention under Article 5(1)(c).

9B.13 With respect to conditions imposed under section 3(6)(d) or (e), or 3(6A), of the Bail Act, we believe that a criminal court should be able to require defendants to do certain things to enable it to secure the information necessary to carry out its functions. It would be illogical if Article 5(1)(b) permitted the arrest of a witness for failing to answer to a witness summons or to surrender relevant evidence to the court,[12] but the Convention did not permit the arrest of a defendant for failing to co-operate with the court.

9B.14 Our view is that, whilst an argument can be made out that Article 5(1)(b) might be of possible relevance, recourse need not be had to it. The detention of a defendant for the purpose of ensuring that he or she co-operates with the preparation of a report which the court needs, or attends an interview with a lawyer, is capable of justification under Article 5(1)(c).

Ancillary conditions

9B.15 One response to the consultation paper raised the question whether ancillary bail conditions are compatible with the Convention. An example of this is a set of conditions imposing: (i) a requirement to reside at a particular address; (ii) a requirement to observe a curfew; and (iii) as an aid to the enforcement of the first two conditions, a further condition that the defendant present himself to a police officer calling at the address during the hours of curfew. Because of the requirement that the purpose of a condition must be one that can justify detention under the Convention, it was argued that if the last of these conditions

[10] Article 5(1)(b) is discussed at paras 2.39 – 2.51 above.

[11] See, eg, *Ireland v UK* A 25 (1978), 2 EHRR 25.

[12] *K v Austria* App No 16002/90, Commission report of 13 October 1992, unreported, concerned an applicant who had been accused of buying heroin from a couple. He had been fined and imprisoned for his refusal to give evidence against the couple because of the risk that his evidence could be used against him when he was himself on trial. The Government contended that his detention was justified under Art 5(1)(b). In its opinion, the Commission does not appear to have disputed that Art 5(1)(b) was capable of justifying detention for a refusal to co-operate with a court, but found in the particular case that the obligation imposed on the defendant was not "lawful" because it contravened Art 10 by requiring him to incriminate himself. Sir Basil Hall, whose dissent from the finding that Art 10 had been violated was joined by another member of the Commission, took the view that the detention was justified under Art 5(1)(b). The merits of the case were never decided by the ECtHR as a friendly settlement was reached.

was imposed not to prevent the defendant committing offences, but for the ancillary purpose of securing compliance with the primary conditions, it would contravene Article 5.

9B.16 We note that the Bail Act recognises the function of ancillary conditions, providing as it does in section 3(6ZA) that, where a defendant is required under subsection (6) to reside in a bail hostel, he or she may also be required to comply with the rules of the hostel.[13] While not imposed *directly* in pursuance of a purpose recognised by the ECtHR as capable of justifying detention, such a condition ensures the effectiveness, or the effective enforcement, of another bail condition. Without the ancillary condition the court may believe that the main condition would not be a sufficient precaution to ensure that the defendant surrenders to custody.

9B.17 In our view, the imposition of an ancillary condition in such circumstances would be compatible with the Convention because its purpose is to support, and facilitate the achievement of, the legitimate primary purpose behind the main condition. This interpretation is supported by the fact that paragraph 8(1) of Part I of Schedule 1 applies to subsections (6ZA) and (7) of section 3. Thus, where the defendant is accused or convicted of an imprisonable offence, one of these ancillary conditions should not be imposed unless it is necessary to impose it for the purpose of preventing one of the events specified in paragraph 2 of that Part.

9B.18 We see no reason why similar reasoning should not also apply to the purpose of ancillary conditions which are not expressly permitted by the Bail Act. Provided that the main condition which is supported by the ancillary condition is imposed for a purpose that is permitted by the Bail Act, and the ancillary condition is necessary to ensure that the main condition is effective, the ancillary condition can itself also be said to have been imposed for a purpose which is permissible under the Bail Act. If a condition imposed in these circumstances meets the requirements we have set out above, we believe that it would be compatible with the Convention.[14]

The requirement that conditions be necessary

Necessary for the purpose

9B.19 Section 3(6) of the Bail Act 1976, which empowers the court to impose bail conditions, authorises the making of "such requirements as appear to the court to be *necessary* to secure" any of the purposes specified in that subsection. In addition subsections (4) and (5) state that a defendant may be required, before release on bail, to provide a surety or sureties *to secure*, or security *for*, the defendant's surrender to custody. Subsection (7) concerns requirements that may be imposed upon a parent or guardian acting as surety for a child or young person "to secure that the child or young person complies with" a bail condition.

[13] A further example is s 3(7), which applies where a parent or guardian agrees to act as surety for a child or young person: the parent or guardian may be required to ensure that the child or young person complies with a bail condition imposed under subsection (6) or (6A).

[14] See Alisdair A Gillespie, "Curfew and Bail" (2001) 151 NLJ 465.

9B.20 The requirement that conditions be imposed only if they are necessary is repeated in Part I of Schedule 1 to the Act (which relates to imprisonable offences), in respect of most of the types of condition. Paragraph 8(1) provides that a court may not impose conditions under section 3(4) to (7), except under section 3(6)(d) or (e), "unless it appears to the court that it is *necessary*[15] to do so for the purpose of preventing the occurrence of any of the events mentioned in paragraph 2".[16] Paragraph 8(1A) adds that a condition may not be imposed under section 3(6)(d) "unless it appears to be necessary to do so for the purpose of enabling inquiries or a report to be made".[17]

9B.21 There is no additional provision in paragraph 8 requiring that conditions be imposed under section 3(6)(e) only if they are necessary. Nor is there a comparable provision in Part II, which applies to defendants accused of *non-imprisonable* offences. We do not believe that this poses any problem as section 3(6), the empowering provision, itself provides that conditions can be imposed only when it is "necessary" for the purpose of securing the permitted objective.[18]

9B.22 Thus, subject only to limited exceptions discussed below,[19] neither a court nor a custody officer can lawfully impose conditions unless it appears that it is necessary to do so.

SECTION 3(6A)

9B.23 The effect of section 3(6A) is that, where the defendant is charged with murder, the court *must* impose a condition that the defendant undergo a medical examination for the purpose of enabling reports to be prepared on his or her mental condition, unless it considers that satisfactory reports have already been obtained. Paragraph 8(3) of Part I of Schedule 1 expressly excludes such conditions from the restriction in paragraph 8(1A) that conditions may be imposed only where it is necessary to do so.

[15] Italics supplied.

[16] Namely, the defendant's failing to surrender to custody, committing an offence while on bail or obstructing the course of justice.

[17] Para 8(3) does, however, state that the restriction imposed by para 8(1A) does not apply to the conditions that a court is required to impose under s 3(6A) of the Bail Act 1976 or under s 11(3) of the Powers of Criminal Courts (Sentencing) Act 2000. These provisions are discussed below at paras 9B.23 – 9B.25 and 9B.26 – 9B.29 respectively.

[18] In *R v Mansfield Justices, ex p Sharkey* [1985] QB 613, 625, Lord Lane CJ commented on the duplication between para 8 and s 3(6):

> The justices, when the defendant is going to be bailed, are not concerned with paragraph 2 of [Schedule 1], which deals with the refusal of bail. They are concerned with section 3(6) and with paragraph 8(1) of the Schedule. The reference to "any of the events mentioned in paragraph 2" is to sub-paragraphs (a), (b) and (c) … There is a duplication between paragraph 8 and section 3(6) due to indifferent drafting …

[19] These exceptions apply only when the defendant is accused of murder (Bail Act 1976, s 3(6A)) or where, having found the defendant to have committed the conduct elements of the offence, the court requires medical reports (Powers of Criminal Courts (Sentencing) Act 2000, s 11(3)).

9B.24 While such a condition will doubtless be appropriate in the great majority of cases, section 3(6A) appears to require the court to impose it even if the court does *not* think it necessary: for example, in a case of a crime of compassion where the defendant has actively sought psychiatric help and attended all appointments, so that there is little doubt that he or she will co-operate in future. If the condition is complied with, however, there would be no possibility of detention. If, without good reason, the defendant fails to comply with the condition, that would suggest that the condition was necessary, so as to justify detention.

9B.25 Unsurprisingly, therefore, as far as we are aware, this provision does not give rise to any significant problems in practice, nor any real risk of complaints under the Convention. It may, in any event, be designed for the protection of the defendant on the basis that, if he or she suffers from mental disorder, it should be identified as soon as possible. We therefore conclude that, although section 3(6A) could, theoretically, compel a court to act in a way which might be regarded as potentially incompatible with the Convention, the likelihood of its actually doing so is minimal and there is therefore no need to amend or repeal this provision.

SECTION 11(3) OF THE POWERS OF CRIMINAL COURTS (SENTENCING) ACT 2000

9B.26 Section 11(3) of the Powers of Criminal Courts (Sentencing) Act 2000 applies where a magistrates' court is satisfied that the defendant did the act or made the omission charged, but is of the opinion that a medical report is required before the method of dealing with the defendant can be determined. In such circumstances, the court must adjourn for the report to be produced and, where the defendant is granted bail, must impose a bail condition under section 3(6)(d) of the Bail Act to ensure that the defendant co-operates with a medical examination.

9B.27 This situation may arise before the defendant has been formally convicted.[20] There is no decision of the ECtHR whether a finding that the defendant committed the conduct elements of the offence is sufficient to constitute a conviction for the purposes of the Convention. If it did, Article 5(1)(a) would apply. If not, Article 5(1)(c) and 5(3) would continue to apply.

9B.28 Section 11(3) applies only where the court is of the opinion that a medical report is required. The report would, therefore, be necessary. The only issue is whether, in some cases, it might be unnecessary to impose a condition that the defendant co-operate with the production of that report.

9B.29 We accept that it is possible to conceive of circumstances in which it may not be strictly necessary to impose the condition. Nevertheless, bearing in mind that Article 5 only bites at the point of arrest or detention for breach of the condition,

[20] Although, for the purposes of the Bail Act 1976, s 2 provides that "unless the context otherwise requires, 'conviction' includes … (c) a finding under section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (remand for medical examination) that the person in question did the act or made the omission charged", this is irrelevant because we are concerned here with the definition of "conviction" adopted by the ECtHR rather than that in the Bail Act.

we see little chance of a defendant being arrested under section 7 of the Bail Act for breach of a condition imposed as a result of section 11(3) of the 2000 Act, where it could sensibly be said to have been unnecessary to detain the defendant for a short period until he or she could be brought before a justice of the peace. If the defendant has failed, or is reasonably thought likely to fail, to comply with the condition, that would strongly support the conclusion that the condition was necessary, and that a short period of detention following arrest under section 7(3) would also be necessary in pursuit of the legitimate purpose of the condition.

The level of risk

9B.30 Detention can only be justified under Article 5 to avert a real risk.[21] We can see no problem with the practical application of this principle since a condition would not be *necessary* unless the risk comprising the reason for its imposition were real.[22] Furthermore, when considering whether a bail condition is necessary, the principle of proportionality is relevant. When a court imposes a bail condition, it is, by implication, authorising the arrest of the defendant under section 7(3) if the condition has been, or is likely to be, broken. The period of detention following such an arrest would be a maximum of 24 hours.[23] It would not, in our view, be difficult to justify such a short period of detention as an emergency measure in response to a suspected or anticipated breach of a condition.

9B.31 As we will see in Part X, the ECtHR requires that reasons be given for decisions affecting a person's liberty which demonstrate that a proper decision-making process was adhered to. There is, therefore, a need for decision-makers to state their reasons for imposing bail conditions. This should include the purposes for which the conditions were imposed, so as to enable the ECtHR, if need be, to see what informed the imposition of those conditions. It would also assist a court dealing with the defendant following his or her arrest to address properly the reason for detention arising from any actual or anticipated breach of the condition.

[21] We review the ECtHR case law in this regard in Parts II and X of this report. In *Muller v France (No 1)* 1997-II, paras 43–45, the ECtHR held that the pre-trial detention of a person accused of armed robbery and other serious offences violated Article 5(3) because it was "not apparent from the decisions not to release the applicant that there was a real risk of his absconding". The applicant's detention was not, therefore, based on "relevant and sufficient reasons".

[22] In the context of imprisonable offences, para 2 of Part I of Sched 1 provides that the defendant need not be granted bail if the court is satisfied that there are *substantial grounds* for believing that the defendant, if released on bail, would do one of three specified things. Section 3, which sets out when the court can impose bail conditions, does not include a "substantial grounds" requirement.

[23] The defendant must be brought before a justice within that time for the question of bail to be considered again: Bail Act 1976, s 7(4).

Consultation responses

9B.32 In the consultation paper we provisionally concluded that English law does not permit the imposition of bail conditions in circumstances in which Article 5 requires the granting of unconditional bail or of bail subject to less stringent conditions, and that English law is therefore compatible with the ECHR in this regard. This view was supported by a significant majority of the respondents who referred to these conclusions.

9B.33 The Justices' Clerks Society and the Society of Public Teachers of Law, however, reminded us that a condition which does not violate Article 5 might fall foul of Articles 8–11.[24] We said in the consultation paper that the imposition of particular conditions might violate rights guaranteed by other Articles of the Convention, but we observed that this possibility lay outside the scope of the paper. We agree that these matters may become relevant in particular cases but, beyond making the point that decision-makers should be alert to such issues,[25] we can see no benefit at this stage in our speculating as to what those issues might be or how they ought to be determined.

9B.34 The Metropolitan Police expressed concern that bail conditions were being imposed by the police for non-imprisonable offences where there were no grounds to detain those charged. This was particularly so in respect of certain types of offence, such as soliciting or begging, where conditions, such as that the person charged should not enter a specific area, were being imposed in answer to perceived community concerns about anti-social activities.[26] As we have seen, the purposes for which English law permits the imposition of bail conditions are in principle *capable* of justifying *detention* under Article 5.[27] Logically, if the purpose of a condition can justify detention under the ECHR then it can justify the imposition of conditions. Whether, in any particular case, a condition should be

[24] These articles set out, respectively, the right to respect for private and family life; the right to freedom of thought, conscience and religion; the right to freedom of expression; and the right to freedom of assembly and association.

[25] This should not pose a serious problem. When contemplating the imposition of a condition which may impact on one of a defendant's Convention rights, the decision-taker should ensure that the restriction imposed would not be disproportionate to the legitimate aim pursued. In an analogous case, *Kwame* (1974) 60 Cr App R 65, 70, the Court of Appeal pointed out that magistrates should take into account the consequences of a condition. In that case, the condition imposed was that the defendant should not drive. On pleading guilty, he was disqualified from driving for 12 months as the court had no power to take into account the time awaiting trial during which the condition applied. The result was that he was, in effect, prevented from driving for longer than the statutory 12 months' disqualification. Roskill LJ, giving the judgment of the court, stated that justices considering the imposition of a "no driving" condition should take into account that such a condition "may sometimes have unexpected and unjust results".

[26] The exercise of this power was based upon advice received that there was nothing in the legislation which made the imposition of conditions dependent upon there being parallel grounds upon which bail could be refused.

[27] This is re-emphasised in the context of police bail by s 3A(5) of the Bail Act 1976, under which a constable can impose conditions only where this appears necessary to ensure that the defendant surrenders to custody and does not commit an offence or obstruct the course of justice.

imposed will require consideration of the level of risk and the need for a proportionate response. We therefore conclude that, while there may be grounds for concern over the width of the police's power to impose conditions in respect of non-imprisonable offences, that concern is independent of the need to ensure compliance of the law with the ECHR, and it would therefore be inappropriate to address it in the present context.

Conclusion

9B.35 Having given careful consideration to the responses we received, we found nothing that caused us to doubt the correctness of the provisional views that we expressed on this issue in the consultation paper. We therefore conclude that it is unlikely that English law permits the imposition of bail conditions in circumstances in which Article 5 requires the granting of unconditional bail or of bail subject to less stringent conditions, and that English law is therefore compatible with the Convention in this regard.

GUIDANCE RELATING TO DECISIONS TO IMPOSE CONDITIONAL BAIL

9B.36 ***In order to comply with Article 5:***

(1) a court should only impose a bail condition for a purpose or purposes that the ECtHR will recognise as capable of justifying detention;[28]

(2) a bail condition should only be imposed where, if the defendant were to break that condition, or be reasonably thought likely to do so, it may be necessary to arrest the defendant in order to pursue the purpose for which the condition was imposed; and

(3) decision-makers should state their reasons for imposing bail conditions and specify the purposes for which any conditions are imposed.

Decision-makers should also be alert to the defendant's other Convention rights, in particular those protected by Articles 8–11.

[28] Where an ancillary condition is imposed in support of a primary condition, provided that the purpose of the primary condition is one that the ECtHR will recognise as capable of justifying detention, and the ancillary condition aims to ensure that the main condition is effective, we believe that the ancillary condition should itself be regarded as being imposed for a purpose which is permissible under the Convention.

PART X
REASONS AND REASONING IN BAIL DECISIONS

10.1 In this Part we consider the significance of the reasons given by a national court for denying bail. The ECtHR has laid down requirements for the reasoning processes which it expects national courts to use. In determining whether a national court has observed these requirements, the ECtHR assumes that the national court's underlying reasoning process is reflected in the reasons it gives for its decision.

THE CONVENTION

Grounds and reasons

10.2 In Part II, we listed the grounds which the Court has found *capable* of being "relevant and sufficient" to justify denying bail.[1] Whether these grounds do in fact justify detention in a particular case will depend on the cogency of the *reasons* put forward by the national court. This distinction between *grounds* and *reasons* is crucial to the Strasbourg case law.

The importance of reasons

10.3 The following paragraph, or one very like it, commonly occurs by way of introduction to the Court's judgments in Article 5(3) cases:

> It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5(3).[2]

10.4 Thus, the ECtHR approaches the question whether the proper consideration of the circumstances militating for and against the accused's detention, as required

[1] Para 2.29 above.

[2] *Toth v Austria* A 224 (1991), 14 EHRR 551, para 67. See also *Letellier v France* A 207 (1991), 14 EHRR 83, para 35; *Clooth v Belgium* A 225 (1991), 14 EHRR 717, para 36; *Kemmache v France (Nos 1 & 2)* A 218 (1991), 14 EHRR 520, para 45; *Tomasi v France* A 241-A (1992), 15 EHRR 1, para 84; *W v Switzerland* A 254-A (1993), 17 EHRR 60, para 30; *Contrada v Italy* 1998-V, para 54; *IA v France* 1998-VII, para 102; *Assenov v Bulgaria* 1998-VIII, 28 EHRR 652, para 154.

under Article 5(3), was carried out, and whether the detention was justifiable, by close analysis of the reasoning of the "judge or other officer".[3]

The nature of the requirement for reasons

10.5 A national court has no *independent* Convention duty to make an adequate record of the reasons for its decision.[4] Nevertheless, the ECtHR has refused to accept bald assertions that the national court decision was justified by the facts and for reasons which are compliant with the Convention. In practice, it will usually be impossible for a Government to *establish* that the national court had sound reasons unless they are recorded in sufficient detail.[5]

The standard of reasoning required

10.6 It is possible to identify from the case law three different requirements which the reasoning of the national court must satisfy. In addition, the ECtHR has held that certain inferences *cannot* be drawn.

Reasons must be "concrete", not "abstract" or "stereotyped"

10.7 The ECtHR has stated repeatedly that the reasons put forward by domestic courts will be regarded as inadequate if they are "abstract" or "stereotyped". This arises where the court has failed properly to scrutinise the facts relating to the particular defendant and to relate its conclusions closely to those facts.[6]

Reasons must be consistent with, and sustained by, the facts of the case

10.8 The ECtHR will not accept the reasoning of the national courts unless the reasoning is sustained by the facts upon which it was based. The Court is surprisingly willing to substitute its own assessment of the facts for that of the national court. There is little discernible "margin of appreciation" in Article 5 cases.[7]

[3] See, eg, *Ringeisen v Austria (No 1)* A 13 (1971), 1 EHRR 455; *Letellier v France* A 207 (1991), 14 EHRR 83; *IA v France* 1998-VII; *Muller v France* 1997-II.

[4] *Van der Tang v Spain* A 321 (1995), 22 EHRR 363, para 60.

[5] *Letellier v France* A 207 (1991), 14 EHRR 83, para 43.

[6] Examples include *Clooth v Belgium* A 225 (1991), 14 EHRR 717, where the national court in part justified detention by merely referring "by means of a stereotyped formula" (para 44) to an earlier decision; *Letellier v France* A 207 (1991), 14 EHRR 83, where an appeal to a supposed threat to public order amounted to taking "a purely abstract point of view" (para 51); *Yagci and Sargin v Turkey* A 319 (1995), 20 EHRR 505, where the national court "nearly always used an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding" (para 52); and *IA v France* 1998-VII, where the decisions of the national court "refer in an abstract manner" (para 104) to various features of the case.

[7] In *Ringeisen v Austria (No 1)* A 13 (1971), 1 EHRR 455, the national court cited evidence in support of its conclusion that the applicant would collude with witnesses and commit further offences. The ECtHR considered the evidence and concluded that it was insufficient to justify the national court's conclusion. This shows that, where liberty is in

10.9 Moreover, the facts must *continuously* sustain the view that a relevant ground for detention exists. Thus, if the facts initially support the belief that, if released, the defendant would abscond or commit an offence, but after a time they cease to support that belief, the ECtHR will hold that, thereafter, reliance upon the ground in question is not supported by the requisite "relevant and sufficient" reasons.[8]

Reasons must take into account the counter-arguments put forward by the defendant

10.10 The reasons of the national courts must deal with any counter-arguments put forward by the defendant. To the extent that they fail to do so, the Court will treat them as inadequate.[9]

Reasons must avoid drawing automatic inferences

10.11 Certain circumstances, whilst *relevant* to the question of whether a defendant should be kept in custody, are not *sufficient in themselves* to justify detention. Thus, the Court has ruled that:

(1) The strength of the evidence against the defendant cannot *in itself* serve to justify, for the purposes of the Convention, the inference that his or her detention is necessary. Although "the persistence of a reasonable suspicion that the person arrested has committed an offence is a sine qua non of the validity of the continued detention", after a certain period the domestic authorities must be able to point to *further* factors which justify his or her continued detention.[10]

(2) The severity of the sentence which the defendant faces, if convicted, does not *in itself* justify the inference that he or she would attempt to evade trial if released from detention.[11] Other factors, especially those relating to the

issue, the ECtHR is prepared to concern itself directly with the merits of the decision of the domestic court.

8 See, eg, *Neumeister v Austria (No 1)* A 8 (1968), 1 EHRR 91, para 10; *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 11; *Letellier v France* A 207 (1991), 14 EHRR 83, para 51; *Clooth v Belgium* A 225 (1991), 14 EHRR 717, para 43. In some cases, the Court has concluded that reliance on a particular ground is mistaken because it is only intermittently used as a justification. In *IA v France* 1998-VII, for instance, two grounds (protection of the applicant and the risk that he would pressurise witnesses) were treated in this way, leading the Court to reject them partly on the basis that "it was hard to understand how such risks could fluctuate in such a way" (para 110).

9 In *Letellier v France* A 207 (1991), 14 EHRR 83, the national court did not properly address the applicant's arguments that she would not abscond because she had young children and derived her income from a small business she ran on her own. See also *Neumeister v Austria (No 1)* A 8 (1968), 1 EHRR 91, para 11; *Stögmüller v Austria* A 9 (1969), 1 EHRR 155, para 15; *Matznetter v Austria* A 10 (1969), 1 EHRR 198, para 11; *Tomasi v France* A 241-A (1992), 15 EHRR 1, para 98.

10 See paras 2.26 – 2.29 above.

11 Similarly, the Commission has expressed the opinion that the seriousness of the offence of which the defendant has been accused cannot *in itself* justify pre-trial detention: *Morganti v France (No 1)* A 320-C (1995), 21 EHRR 34, Commission opinion para 62.

defendant's character, morals, home, occupation, assets, family ties and other links with the country in which the prosecution is taking place, may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial.[12]

(3) The fact that it is *possible* for the defendant to escape from the jurisdiction does not *in itself* warrant the conclusion that he or she would abscond if released.[13]

(4) The existence of a risk that the defendant would commit an offence if released on bail cannot be automatically assumed from the fact that he or she has a criminal record.[14]

The underlying rationale: proper exercise of judicial discretion

10.12 The ECtHR requires that the reasons given should be sufficient to make it plain that a Convention-compatible decision has been made. They must not consist simply of a statement of the existence of particular facts about the defendant. This could allow the domestic court to slide into the drawing of automatic inferences. Rather, the reasons must state the circumstances which were found to be relevant, and the conclusions drawn from them. The circumstances cited must be sufficient to justify the conclusion reached. There must be a clear nexus between the two that amounts to more than an assumption. Thus, the court should state that the defendant was refused bail not just because he or she had six previous offences of the same type as that charged, which occurred without a substantial break between them, but also that the court *therefore believes that there is a real risk* that, if released, the defendant would commit such an offence again. If the defendant raises arguments, such as a long period of time since the last conviction during which he or she has taken part in a rehabilitative programme, the reasons given for the refusal of bail should address them.

10.13 The ECtHR's approach need not be seen as imposing overly cumbersome requirements. Rather, it has the potential to enhance the quality of decision-making and increase the legitimacy of bail decisions. Underlying the positive requirements and the forbidden inferences is an insistence on the proper exercise of judicial discretion, with particular emphasis on detailed consideration of the individual facts of each case. Giving full reasons ensures that a proper

[12] *Neumeister v Austria (No 1)* A 8 (1968), 1 EHRR 91, para 10. See also *Tomasi v France* A 241-A (1992), 15 EHRR 1, para 98; *W v Switzerland* A 254 (1993), 17 EHRR 60, para 33; *Yagci and Sargin v Turkey* A 319 (1995), 20 EHRR 505, para 52; *Muller v France* 1997-II, para 43.

[13] Thus in *Stögmüller v Austria* A 9 (1969), 1 EHRR 155, although the applicant had a pilot's licence, and ready access to an aeroplane, the Court held that, nonetheless, his detention could not be justified on the ground that he would abscond if released: for he had in fact been released under court supervision for various periods, during which he had made several journeys out of Austria, and had kept constantly in contact with the investigating authorities and returned on each occasion.

[14] *Muller v France* 1997-II, para 44.

process is followed, relevant considerations are not overlooked, and the defendant understands why his or her arguments did not prevail.

10.14 Nevertheless, the above discussion of the ECtHR's approach illustrates the difficulties that may face domestic courts having to take a large number of bail decisions in a short time. Perforce, their reasons will be brief and based upon a recitation of standard grounds and factors, such as "previous offending". The problem may be compounded if "tick box" forms for the recording of reasons encourage the giving of reasons in such a brief form.

ENGLISH LAW AND PRACTICE

The Bail Act scheme and practice in the magistrates' courts

10.15 Under section 5(3) of the Bail Act 1976 an English court which withholds bail is required to give reasons, so that the defendant can consider making an application in another court.[15] This scheme is capable of producing reasons which demonstrate a reasoning process compatible with Article 5. In practice, however, the reasons given by English courts on a variety of standard forms are frequently short and not explicitly based upon particular facts and factors. *Stone's Justices' Manual* suggests that magistrates announce any decision to refuse bail merely by relating the grounds and statutory reasons in short form.[16]

10.16 We have identified[17] certain reasons which are *insufficient, in themselves,* to justify refusing bail, without proper attention being given to the particular facts in each individual case. These reasons closely resemble the considerations which, under the Bail Act, may be *relevant* to the decision to refuse bail.[18] The ECtHR regards such considerations as potentially relevant. It would not be right, however, to use what can only be one relevant consideration, such as a previous conviction, as the basis for an *assumption* that a Convention-compatible ground for detention, such as a real risk of offending while on bail, exists. This would be an example of the kind of "automatic reasoning" of which the ECtHR has disapproved. Moreover, research suggests that, in practice, inferences which the ECtHR has held to be

[15] Legislation has recently been enacted which, when brought into force, will require magistrates' courts and the Crown Court to give reasons for their decisions where they grant bail after hearing representations from the prosecutor in favour of withholding bail (Criminal Justice and Police Act 2001, s 129). Such a requirement has the potential to promote thoughtful decision-making and the proper consideration of the risks that a defendant might pose if granted bail. We do not believe that it would pose any problems of compatibility with the Convention, provided that courts do not allow themselves to be distracted from the fact that, under both the Bail Act and Art 5, it is the *refusal* of bail that must be justified as being necessary for a Convention-compatible purpose by the giving of clear and cogent reasons.

[16] *Stone's Justices' Manual 2000,* para 1-432.

[17] At para 10.11 above.

[18] Bail Act 1976, Sched 1, Part I, para 9.

impermissible are in fact relied on by the courts as a basis for their decisions to refuse bail.[19]

Administrative law principles

10.17 English administrative law also requires that, where there is an existing obligation to give reasons for a decision, the reasons given be clear and adequate, and deal with the substantial issues in the case.[20] If this test applies to the duty to give reasons which is imposed by section 5(3) of the Bail Act 1976, and we can see no reason why it should not, then the standards thus expressed are likely to be regarded as co-extensive with those required by the ECtHR.

The recording of the grounds and reasons for not granting bail

The use of "tick box" forms

10.18 Courts use standard forms to provide documentary evidence of the basis of bail decisions. These forms vary in their precise configuration, but in broad terms their layout is the same: they set out the grounds for refusing bail in one column, and a number of possible reasons for finding those grounds established in another. The decision is recorded by ticking the relevant box in each column.[21]

10.19 The main problem with such forms is that they usually set out in the "grounds" column a number of headings, such as that the offence charged is alleged to have been committed while the defendant was on bail, which we have identified as not being proper grounds for the refusal of bail under the ECHR. While the forms reflect the drafting of the domestic legislation, such matters can, under the Convention, only be *reasons* capable of justifying detention on the ground that it is necessary for a purpose which complies with the Convention. A form which includes in the "grounds" column what should really be regarded only as a reason capable of supporting the conclusion that one of the grounds is made out is liable to mislead decision-takers into either making decisions which are not compatible with the Convention, or giving reasons for them which fail to demonstrate that they have been arrived at in a Convention-compatible way.

10.20 In the consultation paper we identified a further concern. Decisions recorded on standard forms might be at risk of being characterised as "abstract" or "stereotyped", and therefore inadequate. The ECtHR assumes that the quality of the reasons given directly reflects the quality of the decision-making process. We expressed the view that a refusal of bail, the reasons for which were recorded in insufficient detail on a standard form, might be held to violate Article 5. It might also be difficult to establish that the reasons relied upon were sufficiently

[19] See Consultation Paper No 157, Appendix D.

[20] See M Fordham, *Judicial Review Handbook* (2nd ed 1997) para 62.3; de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed 1995) paras 9-049 to 9-053; H W R Wade and C F Forsyth, *Administrative Law* (8th ed 2000) pp 918–919.

[21] One such form, which was in use in the Inner London area, was reproduced in Consultation Paper No 157 as Appendix E.

supported by the facts, particularly if there was no record showing that the defendant's arguments have been addressed.

Consultation responses

10.21 Respondents to the consultation paper agreed that the Convention required that cogent reasons be given for the refusal of bail. They were divided in their attitudes towards the use of forms with tick boxes. Some regarded such forms as a useful shorthand capable of guiding decision-takers through a complex statutory scheme. Even amongst this group there was concern that such a form may be regarded as evidence of automatic or stereotyped decision-making. We were referred to other forms, such as the custody record form used by the police, where such decisions were recorded and where there was said to be provision for a short individual statement of reasons to be given. Some respondents stated that decision-takers were only required to give their reasons, not to justify them. Since the boxes addressed both the grounds and the reasons for the grounds, the forms were adequate to satisfy this requirement.

10.22 The CPS noted that, in its experience, the form is only a shorthand. Whilst it shared the concern that the use of pro forma documentation might, on its own, be insufficient evidence of proper reasoning, it stated that, in practice, clerks and prosecutors made full notes of the arguments put forward and the reasons given by the magistrates. It suggested that preservation of these notes with the case file would so supplement the documentation of the decision that the reasons would pass muster, both domestically and under the Convention.

10.23 On the other side of the divide, the Bar Council and the Criminal Bar Association jointly expressed the view that the tick box form should be consigned to history as inimical to the requirement for a reasoned decision which incorporates an analysis and conclusion based on the strengths and weaknesses of the contending arguments. One respondent stated that the use of tick boxes often distracts the decision-taker's mind from the proper issues, or reveals that the decision-taker did not properly understand the distinction between the *grounds* for denying bail, and the *reasons* supporting the existence of such grounds.

Efficient and adequate recording practices

Standard forms

10.24 Whilst the concern we expressed in the consultation paper about the use of standard forms was justified, our judgment is that the use of such forms can be a boon to persons taking a large number of decisions in a short time, applying a complex statutory scheme. A properly drafted form would lead the decision-taker through the scheme in a demonstrably proper way. Appropriate use of a standard form requiring decision-takers to tick the relevant boxes is an important discipline likely to contribute to the taking of lawful decisions, provided that the form accurately reflects the decision-making process required under the Bail Act 1976, interpreted in accordance with the ECtHR case law. Nevertheless, it cannot be a substitute for a full note, made by the clerk of the

court, of the arguments put forward and of the oral decision recording the reasoning of the court. The reasons which a court gives for denying bail should explicitly deal with the facts of the individual case, not simply state a recognised relevant consideration or a circumstance pertaining to the accused, without going further and explaining fully why it is necessary to detain the defendant.

10.25 It is not for us to design forms for use in the courts. It may, however, be useful for us to suggest what might be included in a standard form. It is vital that it should distinguish between "grounds" and "reasons", perhaps in two columns, with one column for grounds, and the other for the considerations taken into account and reasons for the conclusion that the ground(s) exist.

GROUNDS

10.26 The grounds stated in the first column should only include those recognised *both* in the Bail Act *and* by the ECtHR case law, as identified in this report.[22] The form might usefully make clear that both the Convention and the Bail Act standards must be satisfied before a particular ground can be deemed applicable to a particular case. In the context of a defendant accused of an imprisonable offence, for example, domestic legislation provides that a fear that, if granted bail, the defendant would commit an offence while on bail can only be relied upon where there are "substantial grounds for believing" that he or she will commit an offence while on bail.[23] This test presumably either exceeds or is co-extensive with the "real risk" standard adopted by the ECtHR.

CONSIDERATIONS AND REASONS

10.27 The second column might comprise a series of tick boxes identifying the paragraph 9 considerations plus those "grounds" we have identified as being, truly, only "reasons". There might usefully be provision for any other relevant considerations to which regard has been had in reaching the decision. In addition, we suggest that a reasonably large space be provided next to each box in this column. This space could be used for recording the reasons for the court concluding that the ground exists and rejecting the defendant's counter-arguments. We would expect more detailed information to be recorded in the full note made by the clerk of the court. It may also be useful to include on the form a note that reasons given should include the reasons why bail conditions, though considered as a possible alternative to custody, were believed to be inadequate. Where a defendant is granted bail, standard forms could also beneficially be used for recording the grounds and reasons for the imposition of any bail conditions.[24]

[22] Accordingly, factors such as those in paras 2A and 6 of Part I and para 5 of Part II should not appear on any form as independent grounds upon which bail may be withheld.

[23] Bail Act 1976, Sched 1, Part I, para 2.

[24] It may be possible to use the same form for recording the reasons for the imposition of bail conditions as would be used for the recording of the reasons for refusing bail altogether. The form for recording bail decisions that was reproduced as Appendix E to

10.28 There may be benefits in providing a well designed flow chart to accompany the form, to guide decision-takers through the process of making decisions and applying the Bail Act in a Convention-compatible way. Such a chart might be usefully modelled on the Magistrates' Association's sentencing guidelines.

CONCLUSION

10.29 Section 5(3) of the Bail Act 1976 requires an English court to give reasons when refusing bail. The ECHR and domestic administrative law require that the reasons given be clear, adequate to demonstrate the proper exercise of judicial discretion, and address the points put to the court in argument.[25] Thus, there is every reason to believe that English law is, in this respect, capable of being applied in a way which is compatible with the Convention, and **we therefore make no recommendations for legislation.**

10.30 It is important that decision-takers understand how to apply the relevant statutory provisions in a manner that accords with the Convention, and to provide proper reasons for their decisions. In our view, given appropriate training, decision-takers and court clerks can make proper decisions and give proper reasons for them. A well-designed form, coupled with proper training and a flow chart, would be of assistance to them in doing so.

10.31 ***We therefore conclude that:***

(1) the use of standard forms as a means of formally recording the reasons for decisions to refuse bail should be continued;

(2) the content of such forms should be reviewed to ensure that the decisions they assist are compatible with the ECHR as well as the relevant domestic legislation;

(3) magistrates' clerks should, as part of their initial and continuing training and guidance, be reminded of the particular importance in bail applications of noting, and retaining for the file, the gist of the arguments for and against the grant of bail, and the oral reasons given by the bench for their decision; and

(4) consideration could be given to the Crown Court and the High Court routinely tape-recording bail hearings, in order that there may be a record of the arguments put forward and the reasons for the decision taken.

Consultation Paper No 157 provides a space for the recording of any conditions imposed, but not for the recording of the reasons for their imposition.

[25] See paras 10.5 – 10.12, 10.17 above.

PART XI
THE RIGHT TO CHALLENGE THE LEGALITY OF PRE-TRIAL DETENTION

ARTICLE 5(4): THE RIGHT TO TAKE COURT PROCEEDINGS TO CHALLENGE THE LEGALITY OF PRE-TRIAL DETENTION

11.1 Article 5(4) of the Convention gives a detained person the right to challenge the lawfulness of his or her detention in court at periodic intervals. It provides:

> 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 ordered if his detention is not lawful.[1]

11.2 The ECtHR has stated that

> the purpose of Article 5(4) is to assure to persons who are arrested or detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected.[2]

The relationship between Article 5(3) and Article 5(4)

11.3 Article 5(3) provides that a person arrested in connection with an alleged offence as permitted by Article 5(1)(c) must "be brought promptly before a judge or other officer authorised by law to exercise judicial power".[3] Although the procedures required by Articles 5(3) and 5(4) may both result in the defendant's release, their functions remain distinct. Article 5(3) requires that a *judicial officer* should determine whether the defendant's detention should be *extended* pending trial; Article 5(4) requires that the defendant be allowed the opportunity to persuade a *court* that his or her *current* detention is unlawful.

11.4 The distinction is blurred where a detention has been ordered by a body with the procedural safeguards and characteristics which the ECtHR requires of a court. Under English law, a person arrested for an alleged offence must be brought before a *court,* not just an officer with judicial power. The person's first appearance before a magistrates' court will (if sufficiently "prompt") satisfy Article 5(3), and may also provide the opportunity for the court challenge which Article 5(4) requires.[4]

[1] The purpose of this provision is to ensure that a person detained by administrative action can challenge the legality of that detention in a court of law. In England and Wales this purpose is, in general, served by the law of habeas corpus.

[2] *De Wilde, Ooms and Versyp v Belgium* A 12 (1971), 1 EHRR 373, para 76.

[3] See Part II above.

[4] Thus, where a person has been imprisoned under Article 5(1)(a) having been convicted and sentenced by a court, the requirement of judicial supervision of the lawfulness of the detention contained in Article 5(4) will have already been satisfied by the decision of the trial court: *De Wilde, Ooms and Versyp v Belgium* A 12 (1971), 1 EHRR 373, para 76.

11.5 Where this is so, Article 5 does not give the detained person an immediate right to challenge the legality of the detention in another court. As we shall see in Part XII, however, a right to have the detention scrutinised by a court again may arise after a period of time has passed.

PROCEDURAL SAFEGUARDS REQUIRED OF A COURT HEARING UNDER ARTICLE 5(4)

11.6 In *De Wilde, Ooms and Versyp v Belgium (No 1)*[5] the ECtHR held, contrary to the ruling in *Neumeister*,[6] that the term "court" in Article 5(4) imported certain procedural requirements:

> … in order to constitute … a "court" an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. … [T]he Convention uses the word "court" in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question (see, in addition to Article 5(4), Articles 2(1), 5(1) (a) and (b), and 6(1) (tribunal)). In all these different cases, it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees of judicial procedure.[7]

11.7 The guarantees of judicial procedure that arise wherever the Convention uses the word "court" are not identical in all instances.[8] The ECtHR has identified certain essential characteristics of the "judicial procedure" necessary to satisfy Article 5(4). In the consultation paper we suggested that these include:

(1) that the defendant is able to participate in the hearing, if only through a legal representative; and

(2) that the hearing is "adversarial", with the parties enjoying "equality of arms".

11.8 Article 5(4) requires that the defendant be given a "speedy" opportunity to challenge the lawfulness of the detention, and to secure his or her release if the detention is not proved to be justified. The Convention is not violated merely because a *particular* bail hearing does not comply with the necessary procedural requirements, but only if the defendant cannot obtain a hearing that is compliant.

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5 A 12 (1971), 1 EHRR 373.

6 In *Neumeister v Austria (No 1)* A 8 (1968), 1 EHRR 91, the ECtHR had held that the principle of "equality of arms" inherent in the right to a fair trial conferred by Article 6(1) was not applicable to an examination of a request for provisional release. At para 24, the Court had said that the term "court"

> implies only that the authority called upon to decide [upon a request for release] must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed.

7 *De Wilde, Ooms and Versyp v Belgium (No 1)* A 12 (1971), 1 EHRR 373, paras 76, 78.

8 *Ibid*, para 78.

Participation by the defendant

11.9 Although the requirements of Article 5(4) are not coterminous with those of Article 6(1), the opportunity to be heard, "either in person or, where necessary, through some form of representation", is essential.[9] The opportunity to attend and make submissions *in person* may be required where the failure to provide such an opportunity would result in unfairness or a risk of injustice;[10] for example, if some personal characteristic of the defendant was especially pertinent.

11.10 English legislation does not expressly entitle the defendant to be present or to make oral representations personally at a bail hearing, either at first instance or on appeal.[11]

Consultation responses relating to participation by the defendant

11.11 A broad spectrum of respondents expressed the view that the defendant should usually be present when his or her liberty was being considered.[12] Some pointed out that it would avoid adjournments for instructions to be taken. The Society of Public Teachers of Law emphasised the concern of the ECtHR to avoid trial in absentia. Liberty asserted that Article 5(4) gave the defendant a right to be present.

11.12 The CPS agreed that defendants should usually be present when their liberty was being considered. They accepted that in practice this is often not the case in the higher courts, but expressed the view that it sufficed that the defendant was represented.

Our views

11.13 Although many respondents thought that, ideally, the defendant should be present, others noted the countervailing considerations of the expense and inconvenience of ferrying defendants to and from court for bail applications, as well as the discomfort this might cause to some defendants. Some respondents

[9] *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, para 60; *Toth v Austria* A 224 (1991), 14 EHRR 551; *Kampanis v Greece* A 325, (1995) 21 EHRR 43; *Hussain v UK* (1996) 22 EHRR 1; *Assenov v Bulgaria* 1998-VIII, 28 EHRR 652; *Nikolova v Bulgaria* 1999-II, 31 EHRR 64.

[10] *Sanchez-Reisse v Switzerland* A 107 (1986), 9 EHRR 71, para 51.

[11] Magistrates may proceed in the absence of the defendant where he or she is legally represented (MCA 1980, s 122; *Baxter v Chief Constable of West Midlands, The Independent* 15 June 1998), and may remand the defendant in custody in his or her absence with his or her consent (MCA 1980, s 128(3A)). They may also do so where the defendant is already in custody, and cannot be produced at court due to accident or illness (MCA 1980, s 129); but we have been informed that in these circumstances the court would proceed with the bail application only if the defendant's advocate so requested. The defendant may also be permitted to participate in the hearing via a live television link (Crime and Disorder Act 1998, s 57).

[12] Those who took this view included the Law Society, the Office of the Judge Advocate General, the Society of Public Teachers of Law, and a criminal defence solicitor.

mentioned the use of video links between prisons and courts. If video link technology can accommodate confidentiality between client and representative, this may achieve many of the benefits of defendants being "present" while avoiding the practical difficulties of ferrying them about.

11.14 None of the responses cast any serious doubt on our provisional conclusion that ***it is unlikely that Article 5(4) would be infringed simply because the defendant was not present, provided that he or she was represented. Nevertheless, the court should not hear a bail application to a conclusion in the absence of a defendant where the defendant's presence is essential to fair proceedings. Indeed, we have been informed that magistrates treat defendants as entitled to be present.***[13]

An adversarial hearing with each party enjoying equality of arms

11.15 To satisfy Article 5(4), a hearing must be "adversarial". The defendant must be given an equal opportunity to present his or her case to the court, and to respond to the submissions of the prosecution. In *Nikolova v Bulgaria* the ECtHR said:

> A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceeding must be adversarial, and must always ensure equality of arms between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention.[14]

11.16 We now consider two issues that appear relevant to whether a hearing is sufficiently "adversarial" and provides "equality of arms". First, we consider whether sworn evidence must be heard. Secondly, we consider how much evidence must be disclosed by the prosecution to the defence, prior to the hearing.

Does the court need to hear sworn evidence?

11.17 Two questions arise. Must the prosecution call evidence on oath which is subject to cross-examination? Can the defendant insist on giving or calling evidence on oath?

11.18 We are unaware of any ECtHR decision on the issue of whether Article 5(4) requires the hearing of sworn evidence. There is case law under Article 6, which provides *expressly* that defendants at trial have the right to examine or have

[13] Moreover, we have been told that, where the defendant is so unruly that the prison staff say he or she cannot be brought into court, the magistrates will go down to the cells to hear the application with the prosecution and defence lawyers present. We have also been told that magistrates would expect the procedure to be challenged by judicial review if they gave their decision in the defendant's absence against his or her wishes.

[14] 1999-II, 31 EHRR 64, para 58.

examined witnesses against them.[15] The procedural safeguards required under Article 5(4), however, are not the same, nor as exacting, as those required under Article 6. In the *Havering Magistrates* case[16] the High Court regarded the *de Wilde* case[17] and *Winterwerp v Netherlands*[18] as representing

> the high watermark of the argument that the procedural requirements of article 6 are to be in some way assimilated to consideration of issues under article 5. Neither decision does more … than to underline the fact that, where a decision is taken to deprive somebody of his liberty, that should only to be done after he has been given a fair opportunity to answer the basis upon which such an order is sought …. [I]n testing whether or not such an opportunity has been given, it is essential to bear in mind the nature and purpose of the proceedings in question.[19]

Thus, the procedural safeguards implied in Article 5(4) cannot be expected to be any *stricter* for a bail hearing than is required for a trial.

11.19 Even under Article 6, the ECtHR has held that not every defence witness need be called and examined for the trial to be fair.[20] The important point is that the trial should accord with the principle of "equality of arms", which underlies the right to examine prosecution witnesses:

> … this provision does not require the attendance and examination of every witness on the accused's behalf. Its essential aim … is a full "equality of arms" in the matter. With this proviso, it leaves it to the

[15] Article 6(3)(d) expressly sets out a minimum right of a person charged with a criminal offence "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

[16] *R (on the application of DPP) v Havering Magistrates' Court* and *R (on the application of Mark McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805. Distinguishing between processes required for conformity with Article 5 and with Article 6 of the Convention, Latham LJ said, at para 36:

> … that does not mean that the process required for conformity with Article 5 must also be in conformity with Article 6. That would conflate the Convention's control over two separate sets of proceedings, which have different objects.

[17] *De Wilde, Ooms & Versyp v Belgium (No 1)* A 12 (1971), 1 EHRR 378, discussed at para 11.6 above.

[18] [1979] 2 EHRR 387, in which the ECtHR said, at para 60:

> The judicial proceedings referred to in Article 5(4) need not, it is true, always be attended by the same guarantees as those required under Article 6(1) for civil or criminal litigation. Nonetheless, it is essential [that] the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty".

[19] *R (on the application of DPP) v Havering Magistrates' Court* and *R (on the application of Mark McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805, para 35.

[20] *Engel v Netherlands (No 1)* (1976) 1 EHRR 647.

> competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6 …[21]

11.20 In *Bricmont v Belgium* the Court stated that normally it will be for the domestic courts to decide whether or not to call a witness, but added:

> There are exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6.[22]

11.21 The question of evidence on oath at bail hearings was considered by the Home Office Working Party on Bail Procedures in Magistrates' Courts (1974).[23] The report states:

> The suggestion has been made to us that when giving their views on a bail application the police should take the oath. We do not think that this would be appropriate, since it often happens that the prosecution is represented on a bail application by a prosecuting solicitor or by a police officer other than the officer directly concerned in the case. Moreover, the taking of an oath might involve calling witnesses to give first-hand evidence, and this would inevitably slow down the proceedings, often to the defendant's disadvantage. There may, however, occasionally be circumstances where particular facts are in dispute and where it is desirable for the officer in the case or an officer who can speak from his personal knowledge to attend. In these circumstances it may be desirable to put the officer on oath, but in general we consider it preferable for the present practice of making unsworn statements to continue.[24]

11.22 The English courts have not taken the view that sworn evidence is necessary in every case to prove the "facts" upon which a bail decision is based. In the pre-HRA case of *In re Moles*[25] the High Court held that, where a court had to decide whether it was "satisfied" that there were "substantial grounds" for believing something to be the case, such as the existence of a ground for denying bail under paragraph 2 of Part I of Schedule 1 to the Bail Act 1976, strict rules of evidence (as used in trials) were inappropriate. Similarly, in *ex parte Sharkey*[26] Lord Lane LCJ stated that there was no requirement for formal evidence to be given in a bail hearing. It was, for example, sufficient for the facts to be related second hand by police officers.

[21] *Ibid*, para 91.

[22] A 158 (1989), 12 EHRR 217, para 89.

[23] This report led to the enactment of the Bail Act 1976.

[24] Bail Procedures in Magistrates' Courts: Report of the Working Party (Home Office 1974) para 93.

[25] [1981] Crim LR 170.

[26] *R v Mansfield Justices, ex p Sharkey* [1985] 1 QB 613.

CONSULTATION RESPONSES

11.23 There was much comment that evidence is seldom given on oath or subject to cross-examination.[27] It was said that bail applications are not wholly adversarial, as there is no need to call evidence, and that they are not in practice adversarial. Concern was also expressed about the standard of proof required by the court and the nature of the evidence presented. One academic said that the prosecution case was regarded, even by defence solicitors, as factually accurate, whereas much of the information from the defence was seen as subjective and unable to be validated. This comment may be valid, but may reflect the different types of information typically given by the different sides: the Crown's evidence may often be matters of record such as the antecedent history or the content of witness statements, whereas the defence evidence may be aspirational.

11.24 None of the respondents, however, went so far as to say that bail proceedings without sworn evidence would not satisfy the requirements of Article 5(4).

OUR VIEWS

11.25 In the recent *Havering Magistrates* case it was held that, in proceedings following a defendant's arrest for suspected breach of a bail condition,[28] it was not necessary in every case for the justice to hear sworn evidence:

> … the justice is simply required by the statute to come to an honest and rational opinion on the material put before him. In doing so he must bear in mind the consequences to the defendant, namely the fact that he is at risk of losing his liberty in the context of the presumption of innocence.[29]

11.26 Although the case concerned the emergency procedure under section 7(5) of the Bail Act in which the justice is required to form an "opinion" as to certain matters before the defendant may be detained, the High Court's decision appears to be equally applicable to normal bail applications.[30] Latham LJ endorsed the decisions in *In re Moles* and *ex parte Sharkey*.[31] The court did state, however, that there were some circumstances in which a court should be prepared to hear oral evidence. Furthermore, the justice should take into account the quality of the material before him or her when forming the necessary opinion:

[27] This practice was noted by London Legal Lectures, the Office of the Judge Advocate General, the Justices' Clerks' Society, the Law Society, and the CPS.

[28] The procedure under the Bail Act 1976, s 7(5). See Part VII above.

[29] *R (on the application of DPP) v Havering Magistrates' Court* and *R (on the application of Mark McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805, para 39, *per* Latham LJ.

[30] In *Wildman v DPP* [2001] EWHC Admin 14, *The Times* 8 February 2001, Lord Woolf LCJ took the view that, following the *Havering Magistrates* case, it was not always necessary for justices to hear evidence before refusing bail or extending a custody time limit (paras [18]–[20]).

[31] *R (on the application of DPP) v Havering Magistrates' Court* and *R (on the application of Mark McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805, para 40.

> This material is likely to range from mere assertion … which is unlikely to have any probative effect, to documentary proof …. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment on, and answer, that material. If that material includes evidence from a witness who gives oral testimony, clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to. The ultimate obligation of the justice is to evaluate that material in the light of the serious potential consequences to the defendant, having regard to the matters to which I have referred, and the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion.[32]

11.27 In our view, if courts follow these guidelines in conducting bail hearings, Article 5(4) is unlikely to be violated simply because the court has not heard sworn evidence. There was nothing in any of the consultation responses to cast doubt on our provisional conclusion that ***it is not necessary to hear sworn evidence in the great majority of cases, but courts should, in particular cases, consider whether fairness requires the calling of evidence on oath for the determination of the application, as a failure to call such evidence may cause a particular decision to fall foul of Article 5(4).***

11.28 ***A court hearing bail proceedings should take account of the quality of the material presented. It may range from mere assertion to documentary proof. If the prosecution's material includes oral evidence, the defendant must be given an opportunity to cross-examine the witness. Likewise, the defendant should be permitted to give oral evidence if he or she wishes to do so.***

Disclosure

11.29 The aspect of "equality of arms" that seems most troublesome in the case of bail hearings in magistrates' courts is that of disclosure.[33] There is no statutory requirement to make disclosure for the purpose of such hearings. If bail is refused where disclosure has not been made, it may be argued that such a hearing is not sufficiently "adversarial" to satisfy Article 5(4).[34]

[32] *R (on the application of DPP) v Havering Magistrates' Court* and *R (on the application of Mark McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805, para 41, *per* Latham LJ.

[33] In *Lamy v Belgium* A 151 (1989), 11 EHRR 529, the ECtHR held that there was no "equality of arms", and that, therefore, the hearings were not sufficiently "adversarial" to satisfy Article 5(4), where the applicant was refused access to the investigation file, and his counsel was allowed access to it only during the 48 hours preceding each hearing. Crown counsel had been familiar with the whole file, while the applicant had been unable to challenge the reasons relied upon to justify a remand in custody.

[34] Article 5(4) gives the defendant a right *speedily* to challenge his or her detention before a court, with the benefit of proper disclosure and the other safeguards implicit in "equality

11.30 The scale of disclosure required is unlikely to be comparable with that required for trial. *Nikolova* suggests that the only documents which must be disclosed are those which the defence advocate needs to see for the purpose of effectively countering the prosecution's reasons for opposing bail.[35]

CONSULTATION RESPONSES RELATING TO DISCLOSURE

11.31 The Bar Council, the Criminal Bar Association and Liberty expressed concern about the extent of disclosure, and disagreed with the proposition that prosecutors would voluntarily disclose relevant material without legislative compulsion.

11.32 The CPS referred us to *ex parte Lee*,[36] in which the Court of Appeal specifically considered disclosure at a stage prior to committal, that is, before the statutory disclosure regime of the Criminal Procedure and Investigations Act 1996 bites. The court emphasised the continuing obligations on the prosecutor to make such disclosure as justice and fairness may require in the particular circumstances of the case. One example given was that previous convictions of a complainant or deceased should be disclosed if that could reasonably be expected to assist the defence when applying for bail.

OUR VIEWS

11.33 In the recent case of *Wildman,* Lord Woolf CJ stated that

> formal disclosure of the sort which is appropriate prior to the trial will not normally be necessary in regard to an application either for bail or for an extension of [custody] time limits. As long as the defendant's interests are properly protected, having regard to the issues which are before the justices, that will suffice.[37]

Newman J agreed that it was not necessary for the prosecution to disclose all of the evidence in its possession to provide the defence with equality of arms and to comply with the ECHR. He endorsed the statement of Kennedy LJ in *ex parte Lee* that a responsible prosecutor "should be asking himself what, if any, immediate disclosure justice and fairness required him to make in the particular circumstances of the case".[38]

11.34 ***In our view there is no need to change the law relating to disclosure.*** **Ex parte Lee** ***recognises an ongoing duty of disclosure from the time of arrest. It states the test to be applied, and applies it specifically to bail***

of arms". Thus, a failure to make disclosure at the first remand hearing would not, by itself, involve a breach of Article 5(4) if disclosure were made at the second or on appeal, provided that the second hearing was held "speedily".

35 See para 11.15 above.

36 *R v DPP, ex p Lee* [1999] Cr App R 304.

37 *Wildman v DPP* [2001] EWHC Admin 14, para [24].

38 *Ibid,* para [32].

applications. If its requirements, together with the Attorney General's guidelines to prosecutors,[39] are observed, Article 5(4) can be complied with.

Is there a requirement that the hearing be held in public?

11.35 We raised in the consultation paper the question whether bail hearings should be held in public. We drew attention to two ECtHR cases in which reviews of the legality of pre-trial detentions which took place in camera were found to be unsatisfactory.[40] The Convention does not *require* that the hearing be held in public. A public hearing would often not be in the interests of defendants. We suggested that the defendant's wishes for a public hearing may be *relevant* to whether the requirements of Article 5(4) had been complied with.

11.36 In each of these cases, access to the purported "hearing", which was described as having been held "in camera", was denied not only to the public, but even to the defendant and his or her representative. The ECtHR found that the proceedings were not compatible with Article 5(4) because they were not truly adversarial and did not ensure equality of arms between the parties. We cannot draw from this any inference that the ECtHR found a violation simply because the hearing was not held in public. The court neither mentioned this, nor did it cite Article 6 cases on the benefits of justice being seen to be done.[41] This suggests that a public hearing is not required.

11.37 Bail hearings in the magistrates' court always take place in open court. In the Crown Court and the High Court, however, bail hearings generally take place "in chambers"[42] (whether actually in the judge's room or in court). In the High

[39] The Attorney General's guidance on Disclosure of Information in Criminal Proceedings (November 2000) states, at para 34:

> Prosecutors must always be alive to the need, in the interests of justice and fairness in the particular circumstances of any case, to make disclosure of material after the commencement of proceedings but before the prosecutor's duty arises under the [CPIA 1996]. For instance, disclosure ought to be made of significant information that might affect a bail decision or that might enable the defence to contest the committal proceedings.

See also Points for Prosecutors (September 2000) p 22. Both documents are available at www.lslo.gov.uk.

[40] *Assenov v Bulgaria* 1998-VIII, 28 EHRR 652; *Nikolova v Bulgaria* 1999-II, 31 EHRR 64. In the latter (at para 47) the State accepted that, in light of the former, the relevant legislation applicable in Bulgaria at that time could not be regarded as being in conformity with the Convention.

[41] Article 6 (the right to a fair trial) expressly states that "Judgment shall be pronounced publicly" but that "the press and public may be excluded from all or part of the trial" in the pursuit of a number of legitimate aims specified in the article.

[42] Crown Court Rules 1982, r 27 states that the jurisdiction of the Crown Court in hearing bail applications "may be exercised by a judge of the Crown Court sitting in chambers". Bail hearings in the High Court are governed by the Civil Procedure Rules 1998. Order 79, rule 9 of Part 50 of the CPR states that applications to the High Court in respect of bail in any criminal proceedings must be made by claim form to a judge. Although the commentary in the "White Book" states that the application must be made to the judge in

Court in London and at other major centres the hearing is not normally open to the public unless the judge otherwise directs. Wherever bail hearings take place, the defendant's legal representative is entitled to be heard.

Consultation responses relating to the question of whether bail hearings need to be held in public

11.38 The Bar Council and the Criminal Bar Association's joint response, along with Liberty, commented that there was no reason for bail applications to be heard in private, but gave no examples of bail hearings being held in private against the wishes of the defendant. The CPS and the Law Society made the point that it was often in the interests of the defendant to have these hearings in private. Neither thought there was any evidence that bail hearings were being held in private contrary to the wishes of defendants.

11.39 NACRO pointed out that the holding of High Court bail applications in private means that there is little authority on the correct approach to be taken in bail proceedings. Lord Woolf had, in his 1991 report on the 1990 prison disturbances, acknowledged this as a problem and suggested that there might be occasions when High Court judges could usefully adjourn some decisions on bail applications into open court where guidance, in the form of a public judgment, would be beneficial.

Our views

11.40 This issue does not seem to pose a problem. ***Under the present arrangements, there seems to be no reason why, if the defendant wants the hearing to be in public, the hearing should be held in private against his or her wishes. The power exists for the court to hold it in public and we would have thought it inconceivable that any judge would refuse such a request by the defendant unless there was some other free-standing reason for it to be held in camera.***

CONCLUSION

11.41 Our provisional conclusion was that a defendant refused bail in England and Wales would be unlikely to have a valid complaint that he or she had no opportunity to challenge the decision in a court hearing which complied with Article 5(4). The responses we have received, particularly from practitioners, have confirmed us in this view, and **we make no recommendation on this issue.**

chambers (*Civil Procedure* (2001) Vol 1, sc 79.9.2), and this reflects long established practice, it may well be that this practice should be reconsidered in the light of Part 39 of the CPR, which states: "(1)The general rule is that a hearing is to be in public" and "(3) A hearing, or any part of it, may be in private … (g) if the court considers this to be necessary, in the interests of justice".

PART XII
REPEATED APPLICATIONS

12.1 Article 5(4) gives a detained person the right to challenge his or her detention in a court of law. In this part we consider the right to make *further* challenges which is implicit in Article 5(4), and whether English law provides enough opportunities for *repeated* bail applications to comply with that right.

THE REQUIREMENTS OF ARTICLE 5(4)

The right of periodic challenge

12.2 Where a *court* refuses bail, Article 5(4) does not give the defendant a right to challenge that decision immediately in another court,[1] but sometimes entitles the defendant to challenge the lawfulness of the detention *again* on a later occasion. The ECtHR has expressly so held in the case of persons detained under Article 5(1)(e).[2]

12.3 In *Bezicheri v Italy*[3] the Court extended this approach to detention under Article 5(1)(c). The applicant had been arrested in May 1983, and the first review of the lawfulness of the detention took place in June 1983. He made a second application for release from detention in July 1983. The State argued that the defendant's second application had been made too soon. The ECtHR disagreed:

> … the nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration …, because its raison d'être is essentially related to the requirements of an investigation which is to be conducted with expedition.[4]

When must repeated challenges be heard?

12.4 The ECtHR has not explicitly held that pre-trial detention must be open to periodic challenge under Article 5(4) even if the circumstances have not changed. Nevertheless, it has identified the possibility of the passage of time contributing to a change of circumstances as the reason for a right to challenge

[1] *De Wilde, Ooms, and Versyp v Belgium (No 1)* A 12 (1971), 1 EHRR 373.

[2] Article 5(1)(e) permits "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, or drug addicts or vagrants". In *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387, the applicant had been detained under Dutch legislation dealing with mentally ill persons. He complained that he had not been notified of the periodic renewals of court orders authorising his detention, nor been allowed to appear before the court or represented in the proceedings. The ECtHR held that this was a violation of Article 5(4).

[3] A 164 (1989), 12 EHRR 210.

[4] *Bezicheri v Italy* A 164 (1989), 12 EHRR 210, para 21. This ruling was applied in *Assenov v Bulgaria* 1998-VIII, 28 EHRR 652.

detention at periodic intervals.[5] It has often pointed out that the various risks justifying pre-trial detention may diminish over time.[6]

DOES ENGLISH LAW AND PRACTICE COMPLY WITH THESE REQUIREMENTS OF ARTICLE 5(4)?

12.5 Two questions arise. First, are bail hearings sufficiently *frequent*? Secondly, do such hearings afford an *effective* review of the lawfulness of detention?

Are bail hearings sufficiently frequent?

12.6 The court must consider the question of bail on the defendant's first appearance, whether or not the defendant applies for it. If he or she is remanded in custody, it must reconsider bail at each subsequent hearing which the defendant attends,[7] whether or not an application for bail is made. The rules on the intervals at which a defendant on remand must be brought before the court mean that the court must reconsider the question of bail within eight days of the first hearing, and at least every 28 days thereafter.[8] Might an interval of 28 days be too long to satisfy the requirement that after a "reasonable interval" a defendant is entitled to bring further court proceedings for determination of whether his or her detention is lawful?

12.7 In *Bezicheri v Italy*[9] the State failed to establish that a defendant's application for a reconsideration of a bail decision after only one month was made too soon. Apart from stating that "the nature of detention on remand calls for short intervals",[10] the ECtHR has not stated what interval will suffice.

12.8 Pre-trial detention in England and Wales is now subject to custody time limits.[11] Broadly speaking, the maximum period of custody in the magistrates' court is 70

[5] *Winterwerp v Netherlands* A 33 (1979), 2 EHRR 387.

[6] See, eg, *Neumeister v Austria* A8 (1968) 1 EHRR 91, para 10:

> The danger of flight necessarily decreases as the time spent in detention passes by, for the probability that the length of detention on remand will be deducted from the period of imprisonment which the person concerned may expect, if convicted, is likely to make the prospect seem less awesome to him and reduce his temptation to flee.

See also *IA v France* 1998-VII, paras 105, 109–111; *Muller v France (No 1)*1997-II, para 45.

[7] Bail Act 1976, Sched 1, Part IIA, para 1. The court need not consider the question of bail at hearings which the defendant does not attend. This is because the right to bail applies to any person who "appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence, or [who] applies to a court for bail in connection with the proceedings": Bail Act 1976, s 4(2).

[8] See MCA 1980, ss 128 and 128A (the latter was inserted by Criminal Justice Act 1988, s 155).

[9] A 164 (1989), 12 EHRR 210.

[10] *Ibid*, para 21.

[11] Prosecution of Offences (Custody Time Limits) Regulations (SI 1987 No 299).

days from the first court appearance to the start of summary trial or committal; and in the Crown Court 112 days, from committal to the start of the trial.[12] This gives an overall maximum of six months. Time limits can be extended in certain circumstances but, if no extension is granted, the expiry of a time limit gives the defendant an absolute right to bail.[13] This means that a defendant who does not succeed in obtaining bail is likely to be detained for a substantially shorter period than in some other countries which are parties to the Convention. Despite the temptation to do so, we do not regard this factor as in any way affecting the frequency with which a detained defendant is entitled to have the lawfulness of the detention reviewed, as provided for by Article 5(4).

Conclusion

12.9 In the consultation paper we provisionally concluded that reconsideration of bail at least every 28 days is compliant with Article 5(4). The respondents agreed with us. We therefore see no reason to doubt our provisional conclusion.

Does the court conduct an *effective* review of the lawfulness of detention?: repetition of arguments previously heard

12.10 Paragraph 2 of Part IIA of Schedule 1 to the Bail Act 1976[14] provides:

> At the first hearing after that at which the court decided not to grant the defendant bail he may support an application for bail with any argument as to fact or law that he desires (whether or not he has advanced that argument previously).

Paragraph 3 provides:

> At subsequent hearings the court need not hear arguments as to fact or law which it has heard previously.

12.11 These provisions, which were enacted in 1988, had their origins in justices' attempts to cope with the workload of repeated bail applications. When the Bail Act 1976 came into force, magistrates' courts could only remand an unconvicted person in custody for a maximum period of eight clear days,[15] with the result that

[12] Where the defendant is sent to the Crown Court for trial under s 51 of the Crime and Disorder Act 1998 (which provides for a person charged with an indictable-only offence to be sent for trial without committal proceedings), the maximum period of custody between the defendant being sent to the Crown Court for an offence and the start of the trial in relation to it is set at 182 days: Prosecution of Offences (Custody Time Limits) Regulations (SI 1987 No 299) reg 5(6B).

[13] Prosecution of Offences (Custody Time Limits) Regulations (SI 1987 No 299) reg 8(2)(b): Where the time limit has expired, s 4(1) of the Bail Act 1976 is read as though it gave the defendant a right to bail that could not be limited by the exceptions provided in Sched 1.

[14] Inserted by Criminal Justice Act 1988, s 154.

[15] Magistrates' Courts' Act 1952, s 105; now MCA 1980, s 128(6). Defendants had no pre-committal right of appeal to the Crown Court against a decision of a magistrates' court to refuse bail, and criminal legal aid was not available for applications to a judge in

many defendants applied for bail every week. In 1980, the Nottingham justices adopted a policy of refusing to hear bail applications after the second successive refusal of bail unless the defendant could point to relevant "new circumstances".[16]

12.12 In *R v Nottingham Justices, ex parte Davies*, the Divisional Court held this policy to be lawful. Donaldson LJ said:

> I accept that the fact that a bench of the same or a different constitution has decided on a previous occasion or occasions that one or more of the Schedule 1 exceptions applies and has accordingly remanded the accused in custody, does not absolve the Bench on each subsequent occasion from considering whether the accused is entitled to bail, whether or not an application is made.
>
> However, this does not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. Far from it. On those previous occasions, the court will have been under an obligation to grant bail unless it was satisfied that a Schedule 1 exception was made out. If it was so satisfied, it will have recorded the exceptions which in its judgment were applicable. This … is a finding by the court that Schedule 1 circumstances then existed and it is to be treated like every other finding of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. … It follows that on the next occasion when bail is considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered, Schedule 1 circumstances did indeed exist. Strictly speaking, they can and should only investigate whether that situation has changed since then.[17]

12.13 The Divisional Court said that the policy of the Nottingham justices needed to be qualified in one respect:

> The question is a little wider than "Has there been a change?". It is "Are there any new considerations which were not before the court when the accused was last remanded in custody?"[18]

chambers. Hence, in practice, defendants had no option other than to seek release by way of repeated bail applications to the magistrates' court. It remains the case that legal aid is not available for an application to a judge in chambers. However, defendants may now appeal to the Crown Court against a decision of the magistrates' court to refuse bail: Criminal Justice Act 1982, s 60.

16 The policy of allowing defendants to make two applications for release, despite the absence of any change of circumstances, was based on the consideration that the defence will often be unable to prepare the application properly in time for the first hearing.

17 *R v Nottingham Justices, ex p Davies* [1981] QB 38, 43–44. This decision was the subject of trenchant criticism by many commentators. See A Samuels, "Bail: Renewed Application" (1981) 131 NLJ 132; M Hayes, "Where Now the Right to Bail?" [1981] Crim LR 20; N Corre and D Wolchover, *Bail in Criminal Proceedings* (1999) para 5.4.5.

18 *R v Nottingham Justices, ex p Davies* [1981] QB 38, 44.

12.14 The scope of the rule in the *Nottingham Justices* case was clarified in *R v Barking Justices, ex parte Shankshaft.*[19] There had been a refusal of bail at a second hearing, at which the defendant submitted that there were new factors.[20] The justices decided that they could not look at anything except the fresh grounds and refused to consider the previous grounds.[21]

12.15 The Divisional Court held that the justices had misdirected themselves. Comyn J, giving judgment, said:

> You can only make a second application of any value or use to anybody if you take into account the whole circumstances, the old as well as the new. You cannot regard it as a half-shut, half-open door. That is not doing justice to the individual or justice in the eyes of the public. … In these matters one has got to look at the accumulation of facts. One has, of course, got to bear wholly in mind the facts of previous applications, how they were put and what the objections were at that particular time.[22]

12.16 The effect of the statutory provisions, alongside the *Shankshaft* judgment, is that on the third and subsequent bail applications, the court need not hear arguments that it has already heard if no new arguments are being put forward by the defendant in support of bail.[23] Where no new argument is put forward, Part IIA gives the court a discretion not to hear any arguments at all. If the defendant presents a new argument, however, the court must look at it and take account of all the relevant circumstances, old as well as new.

Our views

THE CONSULTATION PAPER

12.17 Our provisional view was that where, after a remand in custody of 28 days, the defendant makes a further application for bail, and the court refuses to hear arguments that were put forward at the previous hearing, the ECtHR might well find an infringement of the defendant's rights under Article 5(4). This would be particularly so if, as some have suggested, magistrates are reluctant to accept that concrete facts put forward by the defendant, such as a new job, sureties, a fixed

[19] (1983) 147 JP 399.

[20] These were in the form of suitable sureties and the fact of his mother's illness.

[21] They were so advised and so acted upon the basis of *R v Nottingham Justices, ex p Davies.* The court in *Shankshaft* explained what it understood the court to have meant in the *Nottingham Justices* case in relation to repeated applications for bail. No point was made about the fact that the constraints on repeated applications required by the policy of the Nottingham justices relate to any hearing *after* the second hearing, not the second hearing itself (which the facts of *Shankshaft* concerned). The Nottingham justices' policy accepted that a second full bail application should be permitted, as insufficient information may be available at the first application.

[22] (1983) 147 JP 399, 401–402.

[23] The court nevertheless remains obliged to consider whether the defendant should be granted bail according to the usual criteria.

address, a deterioration in health, dependants at home, or the completion of police inquiries (allegedly making witness interference less likely) amount to a change in circumstances to be considered.[24]

12.18 We suggested that where a defendant makes a further application for bail after 28 days of detention, a magistrates' court should hear the old arguments again, irrespective of whether the defendant wishes to advance any new arguments. We observed that magistrates were already free to do so: paragraph 3 of Part IIA only provides that the court *need* not hear arguments which it has previously heard, not that it *may* not.

12.19 Furthermore, if the passage of time is *itself* treated as a material change of circumstances on which a new argument can be based, the court must hear that new argument, and any other argument put forward, old or new. We expressed the view that, if this were correct, amending legislation would not be required as appropriate guidance to decision-takers would suffice.

CONSULTATION RESPONSES

12.20 The substantial majority of those who responded on this point agreed with our conclusion that the statutory provisions were capable of being read compatibly with the ECHR. Most were in favour of some form of guidance to the effect we suggested. One or two thought that legislation was appropriate, but most were content with a practice direction.

12.21 Some respondents appeared to think that we were suggesting that the mere lapse of time would have greater influence on bail decisions than would be likely. Some seemed to think that it would *necessarily* be regarded as a reason to grant bail. Others seemed to think that it involved acceptance that the reasons for refusing bail would *necessarily* reduce in potency with the passage of time. That was not the import of our suggestion. The passage of time *may* affect matters to such an extent that, after a period of time has elapsed, continued detention may no longer be necessary. Thus, the defendant should be entitled to ask a court to reconsider the need for continued detention, on the basis that the passage of time may have diminished the risks previously justifying it. It is clear from the decision in *Bezicheri v Italy* that the passage of one month *may* affect matters so as to give rise to this entitlement.

CONCLUSIONS

12.22 Having considered the consultation responses, we have modified our view. Although the passage of time *may* result in a change of circumstances on which an argument in favour of bail can be based, it will *not necessarily* do so in every case. If the lapse of 28 days *necessarily* constituted a new argument which had to

[24] J Burrow, "Bail – A Suitable Case for Treatment" (1982) 132 NLJ 409. The author does not suggest that on each and every occasion these examples have been put forward they have been refused, rather that they are illustrative of an unsympathetic view towards "changes".

be determined taking into consideration the previous applications and objections, a defendant could insist on a full re-hearing of bail arguments every 28 days even if no material change in circumstances had occurred. We believe that this would place a more onerous duty on the courts than the Convention actually demands.

12.23 We now consider that ***courts should be willing, at regular intervals of 28 days, to consider arguments that the passage of time constitutes, in the particular case before the court, a change in circumstances so as to require full argument. It may be, for example, that the time served on remand has reduced the risk of the defendant absconding. If the court finds that the passage of time does amount to a relevant changed circumstance, or that there are other circumstances which may be relevant to the need to detain the defendant, that have changed or come to notice since the last fully argued bail hearing, then a full bail application should follow in which all the arguments, old and new, could be put forward and taken into account.***

12.24 Where, after such a hearing,[25] the court further remands a defendant in custody, section 5(6A) of the Act imposes a duty to issue a certificate that the court has heard full argument on the application for bail.[26] Where such a certificate is issued, the court "shall state … the nature of the change of circumstances or the new considerations which caused it to hear a further fully argued bail application".[27] In appropriate cases, it would be legitimate for a court to record the change of circumstance as having been the passage of time since the last bail application.

Judges and magistrates hearing repeated bail applications

12.25 Two respondents[28] suggested that repeat applications should not be heard by the same magistrates or judge who heard one of the previous bail applications. We disagree. The magistrates' and judges' oaths of office and the case law require them to consider each application properly and not to regard themselves as bound by their previous decision.

CONCLUSION

12.26 The existing legislation is capable of being applied compatibly with the Convention. **We therefore make no recommendation for legislation.**

[25] One in which the court has heard full argument, being satisfied that there has been a change in circumstances or that new considerations have been placed before it.

[26] By virtue of the combined effect of s 81(1)(g) and (1J) of the Supreme Court Act 1981, a full argument certificate is a prerequisite of an application for bail to the Crown Court (if made before committal). There is the alternative, which does not require a certificate, of an application to the High Court, but legal aid does not cover such applications.

[27] Section 5(6B).

[28] Liberty and the Inner London Magistrates' Courts Service.

PART XIII
SUGGESTED GUIDANCE FOR BAIL DECISION-TAKERS

13.1 In producing this report, we hope that it may be of assistance to those providing training to decision-takers and their advisers, and that courts may find it useful to refer to it, at least until the issues discussed have become the subject of reported decisions in the higher courts. In summary we first set out our conclusions on the general principles applicable to the refusal of bail, and then give some guidance on how decision-takers might apply various provisions of the Bail Act, so as to comply with the ECHR.

ECHR PRINCIPLES APPLICABLE TO THE REFUSAL OF BAIL[1]

13.2 A defendant should be refused bail only where detention is *necessary* for a purpose which the ECtHR has recognised as legitimate in that detention may be compatible with the defendant's right to release under Article 5(3). Those recognised purposes are to avoid a real risk that, were the defendant released,

(1) he or she would

(a) fail to attend trial; or

(b) interfere with evidence or witnesses, or otherwise obstruct the course of justice; or

(c) commit an offence while on bail; or

(d) be at risk of harm against which he or she would be inadequately protected; or

(2) a disturbance to public order would result.

13.3 Detention will be necessary only if that risk could not be adequately addressed, so that detention would no longer be necessary, by the imposition of appropriate bail conditions.

13.4 The court refusing bail should give reasons for finding that detention is necessary. Those reasons should be closely related to the individual circumstances pertaining to the defendant, and be capable of supporting the court's conclusion.

13.5 An English court exercising its powers in a way which is compatible with the Convention rights should refuse bail only where it can be justified under both the Convention, as interpreted by the ECtHR, *and* domestic legislation.

[1] Discussed in Part II above.

APPLICATION OF THE EXCEPTIONS TO THE RIGHT TO BAIL IN ENGLISH LAW IN A WAY WHICH COMPLIES WITH THE ECHR

13.6 The exceptions in paragraph 2(a) and (c) and paragraph 7 of Part I[2] and paragraph 2 of Part II[3] of Schedule 1 to the Bail Act 1976 can be readily applied in a manner which is compatible with the Convention without any guidance from us being necessary or desirable.

13.7 The remaining exceptions provided for in Parts I and II of Schedule 1 to the Bail Act 1976 and in section 25 of the Criminal Justice and Public Order Act 1994 may be applied in a way which complies with the ECHR. We offer the following guidance as an aid to taking such decisions.

1. The risk of offending on bail[4]

13.8 Pre-trial detention for the purpose of preventing the defendant from committing an offence while on bail can be compatible with Article 5(1)(c) and (3) of the ECHR, provided it is a necessary and proportionate response to a *real risk* that, if released, the defendant would commit an offence while on bail. Previous convictions and other circumstances may be relevant, but the decision-taker must consider whether it may properly be inferred from them that there is a real risk that the defendant will commit an offence.

2. Defendant on bail at the time of the alleged offence[5]

13.9 A defendant should be detained under paragraph 2A only where the court is also relying on another paragraph of Part I of Schedule 1 to the Bail Act. A decision to withhold bail *solely* because the circumstances in paragraph 2A exist would not only infringe Article 5, but would also be unlawful under sections 3 and 6 of the HRA.

13.10 The fact that the defendant was on bail at the time of the alleged offence should not, therefore, be regarded as an independent ground, but as one of the considerations which the court should take into account when considering withholding bail because, for example, of a real risk that the defendant will commit an offence while on bail. Thus, courts should not refuse bail under paragraph 2A alone, but should do so only where such a decision may properly be based on one of the other grounds for refusal of bail, such as paragraph 2(b).

[2] These relate, in para 2, to the belief that a defendant will fail to surrender to custody or will interfere with witnesses or otherwise obstruct the course of justice; and in para 7, to where a case is adjourned for inquires or a report and it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody. (Part I applies where a defendant is accused or convicted of an imprisonable offence.)

[3] This relates to the belief that a defendant who has previously failed to surrender in accordance with obligations under a grant of bail will fail to surrender to custody. (Part II applies where a defendant is accused or convicted of a non-imprisonable offence).

[4] Bail Act 1976, Sched 1, Part I, para 2(b), discussed in Part III above.

[5] Bail Act 1976, Sched 1, Part I, para 2A, discussed in Part IV above.

3. Detention for the defendant's own protection[6]

13.11 A refusal of bail for the defendant's own protection, whether from harm by others or self-harm, *can* be compatible with the Convention where

- detention is *necessary* to address a *real risk* that, if granted bail, the defendant would suffer harm by others or self-harm, against which detention could provide protection, and
- there are exceptional circumstances in the nature of the alleged offence and/or the conditions or context in which it is alleged to have been committed.[7]

13.12 Given the absence of authority, we can presently see no reason why a decision of a court to order detention because of a risk of *self*-harm should not be compatible with the ECHR even where the circumstances giving rise to the risk are unconnected with the alleged offence, provided that the court is satisfied that there is a real risk of self-harm, and that a proper medical examination will take place rapidly so that the court may then consider exercising its powers of detention under the Mental Health Act 1983.

4. Detention because of a lack of information[8]

13.13 The refusal of bail by a court because it has not been practicable to obtain sufficient information for the taking of a full bail decision for want of time since the institution of proceedings against the defendant can be compatible with Article 5 provided that

- detention is for a short period, which is no longer than necessary to enable the required information to be obtained, and
- the lack of information is not due to a failure of the prosecution, the police, the court, or another state body to act with "special diligence".

Where these tests are met, the general principles applicable to the refusal of bail that we identified in paragraphs 13.2 – 13.5 above will not apply.

13.14 After that short period of time has passed, a lack of information that is not due to a failure of a state body to act with "special diligence" may be taken into account as a factor militating in favour of detention, in support of the existence of *another* Convention-compliant ground for detention.

[6] Bail Act 1976, Sched 1, Part I, para 3; Part II, para 3; discussed in Part V above.

[7] We base this requirement on the single ECtHR case of *IA v France* 1998-VII, which concerned the detention of a person at risk of harm from others rather than self-harm.

[8] Bail Act 1976, Sched 1, Part I, para 5, discussed in Part VI above.

5. Detention following arrest under section 7[9]

SECTION 7(5) HEARINGS

13.15 Paragraphs 6 of Part I and 5 of Part II of Schedule 1 to the Bail Act provide that a defendant arrested pursuant to section 7 need not be granted bail. The general words of these paragraphs should not be construed as overriding the effect of the limitations imposed by section 7(5) on when bail can be refused.

13.16 Thus, where a defendant, arrested under section 7(3), is brought before a justice of the peace under section 7(4) to be dealt with under section 7(5), paragraphs 6 of Part I and 5 of Part II of Schedule 1 should be read as subject to the provisions of section 7(5).

13.17 Although a literal reading of section 7(5) could lead to the conclusion that the mere fact that a condition has been breached could justify detention, that approach would not comply with the ECHR. Even where one of the threshold conditions for detention or the imposition of new conditions contained in section 7(5) is met, the defendant should be detained, or granted bail subject to additional conditions, only where it is necessary to do so for one of the purposes identified in paragraph 13.2 above.

13.18 A justice hearing section 7(5) proceedings is not required to hear oral evidence in every case, but should take account of the quality of the material presented. If the material includes oral evidence, the defendant must be given an opportunity to cross-examine. Likewise, a defendant should be permitted to give relevant oral evidence if he or she wishes to do so.

13.19 Article 5 does not require that the whole of the prosecution file be disclosed to the defence prior to such a hearing. It is sufficient if disclosure is provided of the material the defendant needs in order to enjoy "equality of arms" with the prosecution in relation to the issue to be decided by the court.

OTHER BAIL HEARINGS CONCERNING DEFENDANTS WHO HAVE BEEN ARRESTED UNDER SECTION 7

13.20 The courts should not refuse to grant a defendant bail *simply* because he or she has been arrested under section 7. These provisions should be applied so that bail is refused only where this is necessary for one of the purposes identified in paragraph 13.2 above. The circumstances leading to the defendant being arrested under section 7 may properly be taken into account as a possible reason for concluding that detention is necessary for such a purpose.

[9] Bail Act 1976, Sched 1, Part I, para 6; Part II, para 5; discussed in Part VII above. The Convention requirements relating to detention are discussed above in Part II, the imposition of bail conditions as opposed to granting unconditional bail is discussed in Part IX(B), and issues relating to hearing oral evidence are discussed in Part XI.

6. Section 25 of the Criminal Justice and Public Order Act 1994[10]

13.21 Section 25 *can* be interpreted compatibly with the Convention as meaning that, where the defendant would not, if released on bail, pose a real risk of committing a serious offence, this constitutes an "exceptional circumstance" so that bail may be granted. This construction achieves Parliament's purpose of ensuring that, when making bail decisions about defendants to whom section 25 applies, decision-takers focus on the risk the defendant may pose to the public by re-offending.

13.22 There may be other "exceptional circumstances" which may permit bail to be granted.

13.23 Even if "exceptional circumstances" do exist, bail may, nonetheless, be withheld on an ECHR-compatible ground if this is deemed to be necessary in the individual case.

Conditional bail

1. Conditional bail as an alternative to custody[11]

13.24 A court cannot detain a person pursuant to an aim which complies with the ECHR where there is another way to achieve that aim which will interfere with the defendant's liberty to a lesser extent. Thus, a defendant must be released, if need be subject to conditions, unless (i) that would create a risk of the kind which can, in principle, justify pre-trial detention, *and* (ii) that risk cannot, by imposing suitable bail conditions, be averted, or reduced to a level at which it would not justify detention.

2. Conditional bail as an alternative to unconditional bail[12]

13.25 A court should only impose bail conditions for a purpose which the ECtHR recognises as capable of justifying detention.[13]

13.26 A bail condition should be imposed only where, if the defendant were to break that condition or be reasonably thought likely to do so, it may be necessary to arrest the defendant in order to pursue the purpose for which the condition was imposed.

13.27 Decision-takers should state their reasons for imposing bail conditions and specify the purposes for which any conditions are imposed.

[10] Discussed in Part VIII above.

[11] Discussed in Part IX(A) above.

[12] Discussed in Part IX(B) above.

[13] Where an ancillary condition is imposed in support of a primary condition, provided that the purpose of the primary condition is one that the ECtHR will recognise as capable of justifying detention, and the ancillary condition aims to ensure that the main condition is effective, we believe that the ancillary condition should itself be regarded as having been imposed for a purpose which is permissible under the Convention.

13.28 Decision-takers should also be alert to ensure that any bail conditions they impose do not violate the defendant's other Convention rights, such as those protected by Articles 8–11.

Giving reasons for bail decisions[14]

13.29 It is of particular importance that magistrates' clerks make, and retain for the file, a note of the gist of the arguments for and against the grant of bail, and the oral reasons given by the bench for their decision.

13.30 Standard forms should be completed accurately and show that a decision has been taken in a way that complies with the Convention.[15]

Challenges to the legality of pre-trial detention

1. The right to challenge pre-trial detention[16]

13.31 The procedural safeguards required by the ECHR of a domestic court that makes decisions on the lawfulness of detention are satisfied by our domestic law and procedure. In particular:

(1) It is unlikely that Article 5(4) would be infringed simply because the defendant was not present at a bail hearing, provided that he or she was represented. Nevertheless, the court should not hear a bail application to a conclusion in the absence of a defendant where the defendant's presence is essential to fair proceedings. Indeed, we have been informed that magistrates treat defendants as entitled to be present.

(2) It is not necessary to hear **sworn evidence** in the great majority of cases. Courts should, in particular cases, consider whether fairness requires the calling of evidence on oath for the determination of the application, as a failure to call such evidence may cause a particular decision to fall foul of Article 5(4).

(3) A court hearing bail proceedings should take account of the quality of the material presented. If the material includes oral evidence, the defendant must be given an opportunity to cross-examine. Likewise, the defendant should be permitted to give relevant oral evidence if he or she wishes to do so.

(4) *Ex parte Lee*[17] recognises an ongoing duty of **disclosure** from the time of arrest. The Court of Appeal emphasised that at the stage before

[14] Discussed in Part X above.

[15] We have suggested that the content of standard bail decision forms should be reviewed to ensure that the decisions they assist are compatible with the ECHR as well as the Bail Act.

[16] Discussed in Part XI above.

[17] *R v DPP, ex p Lee* [1999] 1 WLR 1950.

committal[18] there are continuing obligations on the prosecutor to make such disclosure as justice and fairness may require in the particular circumstances of the case, that is, where it could reasonably be expected to assist the defence when applying for bail. If this requirement is observed, together with the Attorney General's guidelines to prosecutors, Article 5(4) can be complied with.

(5) The duty of disclosure does not require that the whole of the prosecution file be disclosed to the defence prior to such a hearing. It is sufficient if disclosure is provided of the material the defendant needs in order to enjoy "equality of arms" with the prosecution in relation to the matter to be decided by the court.

(6) If the defendant requests that the bail hearing be held **in public**, it should be held in public unless there is a good reason not to do so.

2. Repeated applications[19]

13.32 Article 5(4) gives a detained person the right, in certain cases, to make further court challenges to the legality of his or her detention despite having already made one or more such challenges. With the passage of time, the circumstances which once were considered by a court to justify detention may have changed.

13.33 Part IIA of Schedule 1 to the Bail Act 1976 is capable of being interpreted and applied compatibly with Article 5(4). In hearings to which that provision applies, courts should be willing, at intervals of 28 days, to consider arguments that the passage of time constitutes, in the particular case before the court, a change in circumstances relevant to the need to detain the defendant, so as to require the hearing of all the arguments on the question of bail. It may be, for example, that the time served on remand may have reduced the risk of the defendant absconding.

13.34 If the court finds that the passage of time does amount to a relevant change of circumstances then a full bail application should follow in which all the arguments, old and new, can be put forward and taken into account.

[18] That is, at a stage prior to that at which the statutory disclosure regime of the Criminal Procedure and Investigations Act 1996 bites.

[19] Discussed in Part XII above.

PART XIV
CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Although it has not been our remit in this project to carry out a systematic review of the law of bail, our work has led us to the view that the Bail Act 1976 is not happily drafted. Furthermore, although we have concluded that the legislation can be applied so that the Convention rights are not violated, we nevertheless believe that, given the importance of the law of bail to the liberty of the subject, it is desirable that the legislation spell out, accurately, the grounds upon which pre-trial detention may be justified and the factors which may be taken into account in determining whether those grounds have arisen, rather than depending, in a few respects, on section 3 of the HRA for an interpretation that complies with the Convention.

While we have concluded that there is no need for immediate legislation in order for bail decisions to be compatible with the Convention, we make the following recommendations for desirable changes to the *existing* legislation.

RECOMMENDATIONS

Defendant on bail at the time of the alleged offence

1. We recommend that the Bail Act 1976 be amended to make it plain that the fact that the defendant was on bail at the time of the alleged offence is not an independent ground for the refusal of bail, as paragraph 2A of Part I of Schedule 1 to the Bail Act may appear to suggest, but is *one* of the considerations that the court should take into account when considering withholding bail on the ground that there is a real risk that the defendant will commit an offence while on bail.

(paragraph 4.12)

Arrest under section 7

2. We recommend that

   (1) paragraph 6 of Part I of Schedule 1 to the Bail Act 1976 be repealed; and

   (2) paragraph 5 of Part II of Schedule 1 to the Bail Act 1976 be amended by adding a requirement that the court must be satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody, commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice.

(paragraph 7.35)

Bail conditions

3. We recommend that the Bail Act 1976 be amended to empower the police and the courts to impose such conditions as appear necessary for the defendant's

own protection, consonant with the exception to the right to bail at paragraph 3 of Part I of Schedule 1 to the Bail Act.[1]

(paragraph 9A.27)

(*Signed*) ROBERT CARNWATH, *Chairman*
HUGH BEALE
CHARLES HARPUM
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary*
23 May 2001

[1] It will be necessary for the police and the courts to interpret this power in the same way that they are required to interpret that exception.

APPENDIX A
EXTRACTS FROM THE BAIL ACT 1976

Meaning of "bail in criminal proceedings"

Section 1

(1) In this Act "bail in criminal proceedings" means –

(a) bail grantable in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or

(b) bail grantable in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.

(2) In this Act "bail" means bail grantable under the law (including common law) for the time being in force.

…

(6) Bail in criminal proceedings shall be granted (and in particular shall be granted unconditionally or conditionally) in accordance with this Act.

Other definitions

Section 2

(2) In this Act, unless the context otherwise requires –

…

"court" includes a judge of a court or a justice of the peace and, in the case of a specified court, includes a judge or (as the case may be) justice having powers to act in connection with proceedings before that court,

"offence" includes an alleged offence …

General provisions

Section 3

(1) A person granted bail in criminal proceedings shall be under a duty to surrender to custody, and that duty is enforceable in accordance with section 6 of this Act.

(2) No recognizance for his surrender to custody shall be taken from him.

(3) Except as provided by this section –

(a) no security for his surrender to custody shall be taken from him,

(b) he shall not be required to provide a surety or sureties for his surrender to custody, and

(c) no other requirement shall be imposed on him as a condition of bail.

(4) He may be required, before release on bail, to provide a surety or sureties to secure his surrender to custody.

(5) He may be required, before release on bail, to give security for his surrender to custody.

The security may be given by him or on his behalf.

(6) He may be required … to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that –

(a) he surrenders to custody,

(b) he does not commit an offence while on bail,

(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence,

(e) before the time appointed for him to surrender to custody, he attends an interview with an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990;

and, in any Act, "the normal powers to impose conditions of bail" means the powers to impose conditions under paragraph (a), (b) or (c) above.

(6ZA) Where he is required under subsection (6) above to reside in a bail hostel, he may also be required to comply with the rules of the hostel.

(6A) In the case of a person accused of murder the court granting bail shall, unless it considers that satisfactory reports on his mental condition have already been obtained, impose as conditions of bail –

(a) a requirement that the accused shall undergo examination by two medical practitioners for the purpose of enabling such reports to be prepared; and

(b) a requirement that he shall for that purpose attend such an institution or place as the court directs and comply with any other directions which may be given to him for that purpose by either of those practitioners.

(6B) Of the medical practitioners referred to in subsection (6A) above at least one shall be a practitioner approved for the purposes of section 12 of the Mental Health Act 1983.

…

(8) Where a court has granted bail in criminal proceedings that court or, where the court has committed a person on bail to the Crown Court for trial or to be sentenced or otherwise dealt with, that court or the Crown Court may on application –

(a) by or on behalf of the person to whom bail was granted, or

(b) by the prosecutor or a constable,

vary the conditions of bail or impose conditions in respect of bail which has been granted unconditionally.

(8A) Where a notice of transfer is given under a relevant transfer provision, subsection (8) above shall have effect in relation to a person in relation to whose case the notice is given as if he had been committed on bail.

(8B) Subsection (8) above applies where a court has sent a person on bail to the Crown Court for trial under section 51 of the Crime and Disorder

Act 1998 as it applies where a court has committed a person on bail to the Crown Court for trial.

(9) This section is subject to subsection 3 of section 11 of the Powers of Criminal Courts (Sentencing) Act 2000 (conditions of bail on remand for medical examination).

(10) This section is subject, in its application to bail granted by a constable, to section 3A of this Act.

(10) In subsection (8A) above "relevant transfer provision" means –

(a) section 4 of the Criminal Justice Act 1987, or

(b) section 53 of the Criminal Justice Act 1991.

(10A) *Where a custody time limit has expired this section shall have effect as if –*

(a) subsections (4) and (5) (sureties and security for his surrender to custody) were omitted;

(b) in subsection (6) (conditions of bail) for the words "before release on bail or later" there were substituted the words "after release on bail".[1]

Section 3A

(1) Section 3 of this Act applies, in relation to bail granted by a custody officer under Part IV of the Police and Criminal Evidence Act 1984 in cases where the normal powers to impose conditions of bail are available to him, subject to the following modifications.

(2) Subsection (6) does not authorise the imposition of a requirement to reside in a bail hostel or any requirement under paragraph (d) or (e).

(3) Subsections (6ZA), (6A) and (6B) shall be omitted.

(4) For subsection (8), substitute the following –

"(8) Where a custody officer has granted bail in criminal proceedings he or another custody officer serving at the same police station may, at the request of the person to whom it was granted, vary the conditions of bail; and in doing so he may impose conditions or more onerous conditions."

(5) Where a constable grants bail to a person no conditions shall be imposed under subsections (4), (5), (6) or (7) of section 3 of this Act unless it appears to the constable that it is necessary to do so for the purpose of preventing that person from –

(a) failing to surrender to custody, or

(b) committing an offence while on bail, or

(c) interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person.

(6) Subsection (5) above also applies on any request to a custody officer under subsection (8) of section 3 of this Act to vary the conditions of bail.

[1] In a case in which a custody time limit applies, section 3 has effect as if subsection (10A) were inserted at the end thereof: Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987 No 299) reg 8.

General right to bail of accused persons and others

Section 4

(1) A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.

(2) This section applies to a person who is accused of an offence when –

(a) he appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence, or

(b) he applies to a court for bail or for a variation of the conditions of bail in connection with the proceedings …

…

(5) Schedule 1 to this Act also has effect as respects conditions of bail for a person to whom this section applies.

(6) In Schedule 1 to this Act "the defendant" means a person to whom this section applies …

(7) This section is subject to section 41 of the Magistrates' Courts Act 1980 (restriction of bail by magistrates' court in cases of treason).

(8) This section is subject to section 25 of the Criminal Justice and Public Order Act 1994 (exclusion of bail in cases of homicide and rape).

(8A) *Where a custody time limit has expired this section shall have effect as if, in subsection (1), the words "except as provided in Schedule 1 to this Act" were omitted.*[2]

(9) In taking any decisions required by Part I or II of Schedule 1 to this Act, the considerations to which the court is to have regard include, so far as is relevant, any misuse of controlled drugs by the defendant ("controlled drugs" and "misuse" having the same meanings as in the Misuse of Drugs Act 1971).[3]

Supplementary provisions about decisions on bail

Section 5

(1) Subject to subsection (2) below, where –

(a) a court or constable grants bail in criminal proceedings, or

(b) a court withholds bail in criminal proceedings from a person to whom section 4 of this Act applies, or

(c) a court, officer of a court or constable appoints a time or place or a court or officer of a court appoints a different time or place for a person granted bail in criminal proceedings to surrender to custody, or

[2] In a case in which a custody time limit applies, section 4 has effect as if subsection (8A) were inserted: Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987 No 299) reg 8.

[3] Subsection (9) is inserted by the Criminal Justice and Court Services Act 2000, s 58. It comes into force on a day to be appointed: Criminal Justice and Court Services Act 2000, s 80(1).

(d) a court or constable varies any conditions of bail or imposes conditions in respect of bail in criminal proceedings,

that court, officer or constable shall make a record of the decision in the prescribed manner and containing the prescribed particulars and, if requested to do so by the person in relation to whom the decision was taken, shall cause him to be given a copy of the record of the decision as soon as practicable after the record is made.

(2) Where bail in criminal proceedings is granted by endorsing a warrant of arrest for bail the constable who releases on bail the person arrested shall make the record required by subsection (1) above instead of the judge or justice who issued the warrant.

(3) Where a magistrates' court or the Crown Court –

(a) withholds bail in criminal proceedings, or

(b) imposes conditions in granting bail in criminal proceedings, or

(c) varies any conditions of bail or imposes conditions in respect of bail in criminal proceedings,

and does so in relation to a person to whom section 4 of this Act applies, then the court shall, with a view to enabling him to consider making an application in the matter to another court, give reasons for withholding bail or for imposing or varying the conditions.

(4) A court which is by virtue of subsection (3) above required to give reasons for its decision shall include a note of those reasons in the record of its decision and shall (except in a case where, by virtue of subsection (5) below, this need not be done) give a copy of that note to the person in relation to whom the decision was taken.

…

(6A) Where in criminal proceedings –

(a) a magistrates' court remands a person in custody under section 11 of the Powers of Criminal Courts (Sentencing) Act 2000 (remand for medical examination) or any of the following provisions of the Magistrates' Courts Act 1980 –

(i) section 5 (adjournment of inquiry into offence);

(ii) section 10 (adjournment of trial); or

(iii) section 18 (initial procedure on information against adult for offence triable either way),

after hearing full argument on an application for bail from him; and

(b) either –

(i) it has not previously heard such argument on an application for bail from him in those proceedings; or

(ii) it has previously heard full argument from him on such an application but it is satisfied that there has been a change in his circumstances or that new considerations have been placed before it,

it shall be the duty of the court to issue a certificate in the prescribed form that they heard full argument on his application for bail before they refused the application.

(6B) Where the court issues a certificate under subsection (6A) above in a case to which paragraph (b)(ii) of that subsection applies, it shall state in the certificate the nature of the change of circumstances or the new considerations which caused it to hear a further fully argued bail application.

(6C) Where a court issues a certificate under subsection (6A) above it shall cause the person to whom it refuses bail to be given a copy of the certificate.

…

(11) This section is subject, in its application to bail granted by a constable, to section 5A of this Act.

Supplementary provisions in cases of police bail

Section 5A

(1) Section 5 of this Act applies, in relation to bail granted by a custody officer under Part IV of the Police and Criminal Evidence Act 1984 in cases where the normal powers to impose conditions of bail are available to him, subject to the following modifications.

(2) For subsection (3) substitute the following –

"(3) Where a custody officer, in relation to any person, –

(a) imposes conditions in granting bail in criminal proceedings, or

(b) varies any conditions of bail or imposes conditions in respect of bail in criminal proceedings,

the custody officer shall, with a view to enabling that person to consider requesting him or another custody officer, or making an application to a magistrates' court, to vary the conditions, give reasons for imposing or varying the conditions."

(3) For subsection (4) substitute the following –

"(4) A custody officer who is by virtue of subsection (3) above required to give reasons for his decision shall include a note of those reasons in the custody record and shall give a copy of that note to the person in relation to whom the decision was taken."

…

Reconsideration of decisions granting bail

Section 5B

(1) Where a magistrates' court has granted bail in criminal proceedings in connection with an offence, or proceedings for an offence, to which this section applies or a constable has granted bail in criminal proceedings in connection with proceedings for such an offence, that court or the appropriate court in relation to the constable may, on application by the prosecutor for the decision to be reconsidered, –

(a) vary the conditions of bail,

(b) impose conditions in respect of bail which has been granted unconditionally, or

(c) withhold bail.

(2) The offences to which this section applies are offences triable on indictment and offences triable either way.

(3) No application for the reconsideration of a decision under this section shall be made unless it is based on information which was not available to the court or constable when the decision was taken.

(4) Whether or not the person to whom the application relates appears before it, the magistrates' court shall take the decision in accordance with section 4(1) (and Schedule 1) of this Act.

(5) Where the decision of the court on a reconsideration under this section is to withhold bail from the person to whom it was originally granted the court shall –

(a) if that person is before the court, remand him in custody, and

(b) if that person is not before the court, order him to surrender himself forthwith into the custody of the court.

(6) Where a person surrenders himself into the custody of the court in compliance with an order under subsection (5) above, the court shall remand him in custody.

(7) A person who has been ordered to surrender to custody under subsection (5) above may be arrested without warrant by a constable if he fails without reasonable cause to surrender to custody in accordance with the order.

(8) A person arrested in pursuance of subsection (7) above shall be brought as soon as practicable, and in any event within 24 hours after his arrest, before a justice of the peace for the petty sessions area in which he was arrested and the justice shall remand him in custody.

In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken of Christmas Day, Good Friday or any Sunday.

…

Liability to arrest for absconding or breaking conditions of bail

Section 7

(1) If a person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court fails to surrender at the time appointed for him to do so the court may issue a warrant for his arrest.

(2) If a person who has been released on bail in criminal proceedings absents himself from the court at any time after he has surrendered into the custody of the court and before the court is ready to begin or to resume the hearing of the proceedings, the court may issue a warrant for his arrest; but no warrant shall be issued under this subsection where that person is absent in accordance with leave given to him by or on behalf of the court.

(3) A person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court may be arrested without warrant by a constable –

(a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;

(b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or

(c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.

(4) A person arrested in pursuance of subsection (3) above –

(a) shall, except where he was arrested within 24 hours of the time appointed for him to surrender to custody, be brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested; and

(b) in the said excepted case shall be brought before the court at which he was to have surrendered to custody.

In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken of Christmas Day, Good Friday or any Sunday.

(5) A justice of the peace before whom a person is brought under subsection (4) above may, subject to subsection (6) below, if of the opinion that that person –

(a) is not likely to surrender to custody, or

(b) has broken or is likely to break any condition of his bail,

remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions, but if not of that opinion shall grant him bail subject to the same conditions (if any) as were originally imposed.

…

(7) *Where a custody time limit has expired this section shall have effect as if, in subsection (3), paragraphs (a) and (c) were omitted.*[4]

[4] In a case in which a custody time limit applies, section 7 has effect as if subsection (7) were inserted at the end thereof: Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987 No 299) reg 8.

SCHEDULE 1

Persons entitled to bail: supplementary provisions

Part I: Defendants accused or convicted of imprisonable offences

Defendants to whom Part I applies

1. Where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment the following provisions of this Part of this Schedule apply.

Exceptions to right to bail

2. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would –

   (a) fail to surrender to custody, or

   (b) commit an offence while on bail, or

   (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

2A. The defendant need not be granted bail if –

   (a) the offence is an indictable offence or an offence triable either way; and

   (b) it appears to the court that he was on bail in criminal proceedings on the date of the offence.

3. The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.

4. The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court or of any authority acting under any of the Services Acts.

5. The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.

6. The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act.

Exception applicable only to defendant whose case is adjourned for inquiries or a report

7. Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.

Restriction of conditions of bail

8(1) Subject to sub-paragraph (3) below, where the defendant is granted bail, no conditions shall be imposed under subsections (4) to (7) (except subsection (6)(d) or (e)) of section 3 of this Act unless it appears to the court that it is necessary to do so for the purpose of preventing the

occurrence of any of the events mentioned in paragraph 2 of this Part of this Schedule …

(1A) No condition shall be imposed under section 3(6)(d) of this Act unless it appears to be necessary to do so for the purpose of enabling inquiries or a report to be made.

(2) Sub-paragraphs (1) and (1A) above also apply on any application to the court to vary the conditions of bail or to impose conditions in respect of bail which has been granted unconditionally.

(3) The restriction imposed by sub-paragraph (1A) above shall not apply to the conditions required to be imposed under section 3(6A) of this Act or operate to override the direction in section 11(3) of the Powers of Criminal Courts (Sentencing) Act 2000 to a magistrates' court to impose conditions of bail under section 3(6)(d) of this Act of the description specified in the said section 11(3) in the circumstances specified.

Decisions under paragraph 2

9. In taking the decisions required by paragraph 2 or 2A of this Part of this Schedule, the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say –

(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),

(b) the character, antecedents, associations and community ties of the defendant,

(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,

(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,

as well as to any others which appear to be relevant.

9A(1) If –

(a) the defendant is charged with an offence to which this paragraph applies; and

(b) representations are made as to any of the matters mentioned in paragraph 2 of this Part of this Schedule; and

(c) the court decides to grant him bail,

the court shall state the reasons for its decision and shall cause those reasons to be included in the record of the proceedings.

(2) The offences to which this paragraph applies are –

(a) murder;

(b) manslaughter;

(c) rape;

(d) attempted murder; and

(e) attempted rape.

Cases under section 128A of Magistrates' Courts Act 1980

9B. Where the court is considering exercising the power conferred by section 128A of the Magistrates' Courts Act 1980 (power to remand in custody for more than eight clear days), it shall have regard to the total length of time which the accused would spend in custody if it were to exercise the power.

Part II: Defendants accused or convicted of non-imprisonable offences

Defendants to whom Part II applies

1. Where the offence or every offence of which the defendant is accused or convicted in the proceedings is one which is not punishable with imprisonment the following provisions of this Part of this Schedule apply.

Exceptions to right to bail

2. The defendant need not be granted bail if –

   (a) it appears to the court that, having been previously granted bail in criminal proceedings, he has failed to surrender to custody in accordance with his obligations under the grant of bail; and

   (b) the court believes, in view of that failure, that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody.

3. The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.

4. The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court or of any authority acting under any of the Services Acts.

5. The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act.

Part IIA: Decisions where bail refused on previous hearing

1. If the court decides not to grant the defendant bail, it is the court's duty to consider, at each subsequent hearing while the defendant is a person to whom section 4 above applies and remains in custody, whether he ought to be granted bail.

2. At the first hearing after that at which the court decided not to grant the defendant bail he may support an application for bail with any argument as to fact or law that he desires (whether or not he has advanced that argument previously).

3. At subsequent hearings the court need not hear arguments as to fact or law which it has heard previously.

APPENDIX B
ARTICLES 5 & 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 5: **Right to liberty and security**

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so …

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) 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 ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6: **Right to a fair trial**

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of

juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

APPENDIX C
ORGANISATIONS AND INDIVIDUALS WHO COMMENTED ON CONSULTATION PAPER NO 157

Government departments and public bodies

Crown Office Policy Group

Crown Prosecution Service

Department of Trade and Industry

Foreign and Commonwealth Office

Home Office

Inner London Magistrates' Courts Service

Law Reform Commission of Hong Kong

Office of the Judge Advocate General

Police bodies

Association of Chief Police Officers

Metropolitan Police Service

Police Federation of England and Wales

Police Superintendents Association of England and Wales

Royal Ulster Constabulary

South Wales Police

Professional organisations

Advocates' Criminal Law Group (Scotland)

Criminal Bar Association

Justices' Clerks' Society

Law Society (Criminal Law Committee)

Law Society of Scotland

Magistrates' Association

North Eastern Circuit

Interest groups

Liberty

National Association for the Care and Resettlement of Offenders

Judges and judicial bodies

Lord Davidson

Mr Justice Johnson

The Northern Ireland judiciary

Practitioners

Justin S Barron (Clerk to the Justices, Swansea Magistrates' Court)

John Burrow (Goldsmith Chambers)

Jan Davies (Reading Solicitors' Chambers)

Academics

Society of Public Teachers of Law

Dr Peter Ayton and Mandeep Dhami (City University)

Neil Corre and David Wolchover (London Legal Lectures)

Professor David Feldman (University of Birmingham)

Dr Anthea Hucklesby (University of Hull)