1
THE RIGHT TO BAIL

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1.1 THE ORIGINS OF THE RIGHT TO BAIL

1.1.1 The early Norman period

The right to be bailed, Sir James Stephen observed, ‘is as old as the law
of England itself and is explicitly recognised by our earliest writers’ (*A History
HCL), vol. i, p. 233). He notes, for example, that Glanville recognised the right
‘in curt and general terms’ (*Tractatus de Legibus et Consuetudinibus Regni
Angliae*, xiv, c. 1). In early English criminal justice there was no preliminary
inquiry prior to the holding of the sheriff’s tourn or, in more serious cases, the
commission of oyer and terminer and general gaol delivery. Since there might
be long delays, even of years, before the king’s itinerant justices arrived to
undertake that commission it was important for defendants to be able to obtain
a provisional release from custody. In the early Norman period sheriffs asserted
a discretion of releasing on pledge to sureties anyone appealed of grave crime,
including even homicide, and discretionary release seems to have become the
norm. Imprisonment was costly and inconvenient, escape was easy, there were
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The general practice of release is described by Glanville, but he also refers to a prohibition on bail in cases of homicide, presumably introduced by some now unidentified ruling or ordinance: ‘in all pleas of felony, the accused is generally dismissed on pledge, except in a plea of homicide, where for the sake of striking terror it is otherwise decreed’ (*Tractatus*, cited above). There were also exceptions in the case of forest offences and imprisonment by special command of the king or his chief justiciar. The exceptions must have been introduced before 1190 (the year of Glanville’s death) but it is not known whether the homicide exception was introduced before or after 1179, the year in which, Radolph de Diceto tells us, Henry II decreed hanging as the punishment for homicide (*Opera Historica*, i, 434, Rolls series). It is not possible to say for certain therefore whether it was the introduction of the death penalty which caused bail to be forbidden in homicide cases. Moreover, Henry I had decreed hanging for some thefts without banning locally authorised bail in such cases. When hanging replaced mutilation for most major felonies during the late 12th and 13th centuries there was no commensurate prohibition of local bail.

1.1.2 Obtaining release by royal writ

Bail was certainly not unobtainable in the situations designated as ‘irreplevisable’, that is where the accused was not eligible for ‘replevin’, i.e. release on bail. Release could be secured by means of various types of writ issued in the King’s courts. Central records such as the *Rotuli litterarum clausarum*, the Close Rolls and the Calendar of Close Rolls, contain hundreds of instances in which the central office ordered the sheriff, constable or other local official, holding a man for homicide, to release him to the care of sureties or ‘mainpernors’. Feudal lords were always anxious to maintain their labour force and virtually anyone who could pay for a writ from Chancery would benefit. Moreover, the vagueness of
a law which gave sheriffs an almost limitless discretion over bail meant that even
where bail was plainly called for there was no certainty it would be granted and
royal writs became available to redress the problem of the unjust withholding of
bail by requiring sheriffs or other relevant officials to do their duty.

Most important of the several forms of royal writ issuing out of Chancery
were the writ de homine replegiando, the writ de manucaptione and the writ de odio et atiā. Under the procedure for all of them, if the first writ issued was
disobeyed, a second, called an ‘alias’, was issued and a fine could be levied for
delay. If the alias was disobeyed, a third, called a ‘pluries’, was issued and, simi-
larly, a fine for delay could be levied. The final remedy was an attachment by
which the recalcitrant officer was imprisoned.

Even a brief historical introduction to the subject of bail would be incomplete
without some account at least of the three writs. It has been observed, however,
that they could never have been of the first importance and must soon have fallen
into disuse (Stephen, HCL, i, pp. 242–3). The reason is probably that from the
earliest times the superior courts and the Lord Chancellor had available a simpler
and more straightforward means of achieving the same object, namely the writ
of habeas corpus, a procedure which is addressed elsewhere in the present work.

1.1.2.1 De homine replegiando
One of the first records for the purchase of this writ is located in the Pipe Roll
records for 1165–6 (the year of the Assize of Clarendon, which permitted arrest
on conjecture). The writ applied to cases in which a person was imprisoned
before trial for an offence bailable under 3 Edw. 1, c. 12 and to cases in which
a person was unlawfully detained by anyone not having legal authority to do so.
It was not available in homicide. The sheriff might respond to the writ that the
detained person had been ‘eloigned’ – carried off too far to be located – in which
event a further writ might require the sheriff to imprison the captor until he
produced the detained person.

1.1.2.2 De manucaptione
This writ, known as the writ of mainprise, was issued in cases in which a person
arrested on suspicion of felony had tendered ‘manucaptors’, or ‘mainpernors’,
who had been rejected. Although the terms ‘bail’ and ‘mainpris’ came to be used
interchangeably there were apparently technical differences described by Hale
(Pleas of the Crown, 2 vols, London 1736, ii, 140). Stephen found the differences
so described ‘very obscure’ (HCL, i, 241).

1.1.2.3 De odio et atiā
This writ was restricted to cases of homicide and, according to Stephen, had ‘an
odd history’ and ‘a singularly clumsy procedure’ (ibid.). The writ is described by
Bracton (De Legibus et Consuetudinis Angliae, 2 vols, 1250–6, ii, pp. 292–6) in
a passage which seems to provide for bail where the prosecutor was moved
by hatred or malice. Stephen suggests that the true issue to be examined was the evidence of the guilt of the accused and that the ‘odium et atya’ were mere legal figments by which the presence or absence of reasonable cause of suspicion was obscurely denoted (HCL, i, 241). If a man hated another, Stephen explained, because he had been seen committing a murder, his hatred would be no reason why he should not prosecute the criminal. If the prosecutor was unable to assign any cause for the prosecution, it would not be unnatural to say that he must hate the person imprisoned. If there was evidence, malice was immaterial. If there was no evidence, malice was inferred. Hence, the sufficiency of the evidence, being the real point, was inquired into under the pretence of inquiring into the malice. The effect of the writ, therefore, was to occasion a preliminary inquiry in cases of homicide, the result of which determined whether the accused should be admitted to bail or held in custody until he was finally tried. If malice was established he was admitted to bail on finding 12 sureties. It was unclear when the writ was abolished, but in any event it largely fell into disuse.

1.1.3 The Statute of Westminster I of 1275

The strict enforcement of the prohibition of local bail in cases of homicide, forest offences and imprisonment by royal command presupposes a degree of centralisation which was not reached until after the Statute of Westminster I of 1275 (3 Ed. I, c. 12). There are in the Assize Rolls of Yorkshire for 1218–19 some examples of bail being granted in homicide without reference to central government (Rolls of the Justices in Eyre, Being the Rolls of Pleas and Assizes for Yorkshire in 3 Henry III, London: Seldon Society Publications, 1937, vol. 56 (pleas 865, 871, 895, 918 and 967)). These cases appear to have been outright breaches of the rule against local bail in homicide, suggesting that some such practice as extortion must have been at work. But even in less extreme instances chicanery appears to have been commonplace. Although Bracton (d. 1268) advised that in exercising their discretion sheriffs ought to have regard to the gravity of the charge, the accused's character and the weight of the evidence (De Corona, p. 302), beyond this terse guidance the discretion was ill-defined and the general practice of release led to widespread abuses uncovered by the Hundred Inquest investigations. Measures aimed at ending these were eventually introduced by the Statute of Westminster I, an enactment which served as the main foundation of the law of bail for the next 550 years. The preamble recited that sheriffs and others had released on replevin those who were not replevisable and had kept in prison those who were replevisable ‘because they would gain of the one part and grieve the other’. Pointing out that apart from homicide, imprisonment by command of the King or his justices and forest offences, the law had not hitherto stated in which cases the accused was replevisable and in which not, the statute proceeded to furnish a list of cases, apparently in addition to the existing categories, in which the accused was not to be replevisable either by the ‘common writ or without writ’ and others in which prisoners might be
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released ‘by sufficient surety, whereof the sheriff will be answerable and that without giving ought of their goods’. Those offences (chief amongst which was homicide) which were not replevisable by the common writ or without writ could be made the subject of bail in the superior courts at Westminster, or by habeas corpus. Hawkins noted that the statute made no distinction between homicide of malice, misadventure or self-defence and that the justices of the peace who had power to bail a man arrested for a ‘light suspicion of homicide’ could not bail any person for manslaughter ‘or even excusable homicide’ if he was plainly guilty (Pleas of the Crown, ii, 95, 105).

The extended prohibition was to apply, inter alia, to the outlawed and those who had abjured the realm, to approvers who had confessed, known thieves accused by approvers, felonious arsonists, counterfeitors, excommunicants arrested on a bishop’s request and to those accused of manifest offences, of breaching the King’s prison or of treason touching the King himself. The statute permitted bail to those accused of larceny on indictment at the sheriffs’ tourn or court leet, or on light suspicion, or of petty larceny not exceeding 12d, if not previously convicted of larceny, or of accessory before or after a felony, or of misdemeanour (i.e. trespass not punishable with death or dismemberment), or on accusation by an approver who had died where the accused was not a common thief.

1.1.4 Developments through to the 16th century

Between 1275 and 1444 the function of the sheriffs in admitting prisoners to bail was gradually and largely transferred to the justices of the peace by a series of enabling statutes. The latter date marks the final statute regulating the sheriffs’ bail function (23 Hen. 6, c. 9) and required the sheriffs in certain cases to grant bail, in terms which Stephen suggested seem to imply that their refusal to do so had become a well-known abuse (HCL, i, 236). In 1330 the statute 4 Edw. 3, c. 1, enacted that persons indicted or arrested by the keepers of the peace should not be let to mainprise (bail) by a sheriff. In 1360 the statute 34 Edw. 3, c. 1, in very general terms gave the justices a power to grant bail. It seems that this must have been taken to apply only to prisoners indicted at the sessions, because the statute I Rich. 3, c. 3, of 1485 recited that many people had been daily arrested and imprisoned, some out of malice and sometimes on the basis of ‘light suspicion’ and empowered justices of the peace to admit such persons to bail as though they were indicted of record before the same justices in their sessions. In 1487, 3 Hen. 7, c. 3, recited that as a result of being admitted to bail by justices of the peace against due form of law many murderers and felons had escaped. It therefore enacted that bail could only be granted by a minimum of two justices, who were required at the next general sessions of the peace or next general gaol delivery to certify that they had done so. The statute also enacted that sheriffs and all other officials having the responsibility for detaining felony prisoners in gaol were to certify the names of all such prisoners who were in custody pending
the next gaol delivery. Of itself the requirement for two justices may have afforded little more than a rather limited safeguard against abuse. But the new provisions were probably effective in curtailing the opportunities which had previously allowed offenders to gain complete impunity as a result of there being nothing to warn the court of trial that a single justice had granted bail on little or no security. The new measures formed part of the rigorous administration of justice by which Henry VII grappled with the disorders arising from the Wars of the Roses (see Stephen, *HCL*, i, 237).

1.1.5 The Bail Statute of 1554

The regime introduced by the bail statute of 1554 (1 & 2 Philip and Mary, c. 13) was much more stringent. In cases of felony where the accused was to be given bail pending trial, it made compulsory the complex system of preliminary inquiry and record keeping which had been developing piecemeal over the previous century or two. A modified structure which the committal statute of 1554–5, 2 & 3 P and M, c. 10, made compulsory in all felony, whether bail or custody cases, was to become the fundamental model of pre-trial criminal procedure until the 19th century. (For the definitive study of the bail and committal statutes, see Langbein, J. H., *Prosecuting Crime in the Renaissance*, Cambridge, Massachusetts: Harvard University Press, 1974.) But the original main purpose of the bail statute was to tackle the problem of collusive releases which had recently arisen once again, possibly as a result of Wyatt’s rebellion and the attempt to put Lady Jane Grey on the throne. Reciting that ‘often times by sinister labour and means... the greatest and notablest offenders such as be not replevisable by the laws of the realm’ had been set at large, the statute explained how the two-justice requirement of 1487 was being evaded. One justice of the peace would grant bail in his own name and that of a companion justice without making that other justice party or privy to the case and then to ‘hide their affections’ would signify the cause of the accused’s arrest as mere suspicion of felony.

To curtail the abuse the statute laid down that in cases where the accused was bailed depositions were to be taken from the witnesses and transmitted to the court of trial. Fines were imposed for breach. London and other corporate towns and the county of Middlesex were exempted from the Act, for in the great towns where there were aldermen and other magistrates by charter, and a considerable population, the danger of collusion would be less than in the country. There was obviously no need for such precautions in cases in which the accused was held in custody, but in the following year the committal statute introduced measures applicable in all cases of felony which required the taking of depositions, examination of the prisoner and transmission of the dossier to the trial court. The statute also prohibited justices from bailing persons not eligible for local bail under the Statute of Westminster I.
1.1.6 ‘Open sessions’: the tradition of public hearings

The range of procedural conditions laid down in the bail statute were to apply to grants of bail ‘if it be not in open Sessions’. In other words, the conditions were unnecessary if the bail hearing was open to the public. This exemption was to become the basis of the time-honoured practice of conducting bail hearings in the magistrates’ court in public. The question whether the ECHR requires bail hearings to be heard in public is dealt with at para. 8.2.1.9 below. Bail applications in the Crown Court (apart from those made during a trial or at the end of a plea and directions hearing on written notice beforehand) and before a High Court judge in chambers (latterly ‘in private’ and now abolished by the CJA 2003) have traditionally been held in private (as to which see also para. 8.2.1.6 below).

1.1.7 The 17th century and onwards

The 17th and 18th centuries saw the enactment of numerous statutes regulating bail in relation to a wide variety of specific offences. However, as a matter of general principle the refusal or delay by any judge or magistrate to grant bail to any person entitled to be bailed constituted a violation of the Habeas Corpus Act 1679 and of the Bill of Rights 1688. According to Blackstone, writing in the 18th century, it was also a common law offence against the liberty of the subject (Commentaries, 297). However, it was held in the 19th century that the bail decision was a judicial one and not ministerial or administrative and therefore no action could lie against a magistrate without proof of malice for refusing to admit to bail a person charged with an offence: \textit{R v Badger} (1843) 4 QB 468; \textit{Linford v Fitzroy} (1849) 13 QB 247; \textit{Osborne v Gough} 3 B & P 551. In \textit{R v Rose} (1898) 78 LT 119, Lord Russell said ‘It cannot be too strongly impressed on the magistracy that bail is not to be withheld as a punishment’. Since this is a truism which needs no expressing, it can hardly be imagined that it would not be malicious for any magistrate or judge to deny bail out of such a motive.

The numerous bail provisions of the 17th and 18th centuries relating to specific offences were all repealed by s. 32 of the Criminal Law Act 1826 (7 Geo. 4, c. 64), a general measure which made new provisions on bail and brought the law of bail and preliminary procedure under a single umbrella. It placed the grant of bail on an entirely new footing and instead of requiring the decision to be determined by reference to the nature of the offence charged (effectively the test since 1275) made it contingent on the weight of the evidence. Section 1 provided that on an accusation of felony or suspicion of felony where the evidence was positive or credible such as raised, in the words of the section, a ‘strong presumption’ of guilt, the accused was to be detained in custody. If, however, it merely showed sufficient ground for judicial inquiry into the issue of guilt, the accused, on going before two justices, could be granted bail under s. 2. Later on,
the statute 5 & 6 Will. IV, c. 33, s. 3, broadened still further the progressive nature of the thinking behind the new statutory regime by enacting that bail was permitted even after a confession, a reflection of the mood of suspicion which the common law felt towards self-incrimination.

The 1826 statute was superseded by the Indictable Offences Act 1848 (11 & 12 Vict., c. 42) which remained in force until itself replaced by succeeding legislation in the 20th century. A single justice was permitted to act on matters of bail. Section 25 referred to the two standards in the Act of 1826 and provided that, even if the evidence only came up to the lower standard in the 1826 Act, the accused could still be committed to prison. However, s. 23 gave the committing justice or justices an unfettered discretion to grant bail or to withhold it (although the latter option was not expressly mentioned) in the case of any felony or of any common misdemeanour. In cases of libel, conspiracy to commit a number of specific misdemeanours listed in the Act, unlawful assembly, night poaching and seditious offences and in misdemeanours created by special acts, bail could not be refused. In cases of high treason bail was impermissible except by order of a Secretary of State or by the High Court. (This provision perpetuated the principle in 34 Geo. III, c. 54, which had prohibited any person imprisoned under a warrant signed by a Secretary of State on a charge of high treason from insisting upon being discharged under habeas corpus.) This 1848 Act contained a series of provisions (ss. 23 and 24) governing the granting of bail after committal, with sureties.

The independence of the courts in determining whether or not to grant bail has always been reflected in the principle under common law that, provided they act judicially, they enjoy a discretion to grant bail despite objection by the prosecution and to refuse bail even though the prosecution raise no objection. It was formerly said that the requirements of bail were merely to secure the attendance of the defendant at trial (R v Rose (1898) 78 LT 119). This is plainly no longer the case, since in R v Phillips (1947) 32 Cr App R 47 the likelihood that the offence might be repeated if bail were granted was acknowledged to be a vital consideration. However, although no longer the exclusive consideration in granting bail, securing attendance remains the primary concern and there is little doubt, therefore, that the discretion is to be exercised on the basis of criteria harking back to at least Bracton (see para. 1.1.3 above). These are:

(a) the nature of the accusation: see Re Barronet and Allain (1852) 1 E & B 1;

(b) the nature of the evidence in support of the accusation: see Re Robinson (1854) 23 LJQB 286; and

(c) the severity of the punishment on conviction: ibid.

The importance of these was reiterated in R v Phillips. The independence of the sureties and the question of whether they are to be indemnified by the accused are essential concerns: Herman v Jeuchner (1885) 15 QBD 561; Consolidated
1.1.8 Bail in murder: the duelling cases and other aspects

It has been seen that throughout the history of bail since the middle ages there has run a consistent thread of concern about granting bail to persons accused of homicide. The issue was highlighted in two cases four years after the 1848 Act which gave justices a complete discretion in all cases of felony regardless of the nature of the offence. Both arose out of duelling incidents involving expatriate French citizens. In Re Barronet and Allain (cited above) a writ of habeas corpus was sought to release the French seconds in a fatal duel. On behalf of the application it was submitted that the duel had been fair and although it involved murder, the sentence was unlikely to be enforced against two foreigners, ignorant of English law, who were refugees from a country where duelling was legal. Reference was made to Re Allen (1782) The Annual Register, Chronicle, 211, at p. 213, in which the applicant had killed a man in a duel and, so it was reported, had been bailed to stand trial. In rejecting the application Lord Campbell CJ observed that it was not clear that the report was accurate in stating that the accused had ‘surrendered’ himself at the Old Bailey; but that even if it was accurate, the justice of the peace who had bailed him had acted unlawfully. It is not clear why Lord Campbell made this assumption, since there was no reason to assume that the accused was not granted bail by order of a judge of the Queen’s Bench. In Re Barthelemy (1852) 1 E & B 8, the decision also involved two seconds in a duel between Frenchmen, but there had been no admissions of guilt as had been the case in Re Barronet. Reliance was placed on two duelling case rulings in favour of bail, which it appears were cited from newspaper reports. These were Re Gulliver (1843), in which the surgeon in attendance at a fatal duel was committed for trial on bail and the Earl of Cardigan’s case, in which the shooting was non-fatal and Lord Cardigan, despite having confessed to a magistrate, was bailed with his second, a commoner. Nevertheless, while conceding that the principle of bail in murder had never been denied, Lord Campbell rejected the application on the ground that there was clear evidence that a murder had been committed and a strong indication of guilt.

Even before the abolition of the death penalty for murder, the admission of defendants to bail on murder charges was not unknown. In 1938 a woman appeared on bail at Leeds Assizes for the murder of her mentally handicapped son, aged five, believing it to be her duty in the eyes of God (see ‘Some Notes on Bail’ (1938) 2 JCL 316). There had been no suggestion before the committing magistrate of mental disorder, but it was probably taken for granted that the accused would never go to the gallows. In creating the special category of non-capital
murder, the Homicide Act 1957 inevitably established a climate for admitting some defendants to bail in such cases and within a short time Thomas James Harding was bailed pending trial for non-capital murder at Liverpool Crown Court, where he was acquitted and discharged on 6 November 1957 (see Morris, T., and Blom-Cooper, L., *A Calendar of Murder*, London: Michael Joseph, 1964, p. 13). Following the abolition of capital punishment for murder by the Murder (Abolition of Death Penalty) Act 1965, it was not unexpected that some defendants accused of murder would be admitted to bail. In *R v Carr* it was reported that the defendant, charged with murder, was admitted to bail by the Liverpool stipendiary magistrate (*The Times*, 8 February 1966; see also *McLaren v HM Advocate* [1967] Crim LR 422, commentary). The prosecution had stated that the accused had been subjected to an unprovoked assault by his son and had stabbed him in the course of defending himself. In 1970, six youths appeared at Balham magistrates’ court charged with the murder of a ticket collector at Balham railway station ((1970) 34 JCL 218). Three were granted bail with sureties and at the subsequent remand hearing no evidence was offered against them. Of a total of 287 persons proceeded against for murder in England and Wales in 1969, as many as 24 were admitted to bail (*Criminal Statistics, England and Wales 1969*, Cmnd 4398, London: HMSO, 1970, Table Ia, p. 14). In recent years there have been reported in the popular press relatively so many murder trials in which defendants have been on bail that the practice may be regarded as commonplace.

1.2 THE STATUTORY GENERAL RIGHT TO BAIL

1.2.1 Enactment of the general right in section 4 of the Bail Act 1976

Two decades ago the general law on bail was addressed by Parliament in a dedicated statute, the BA 1976, the central feature of which, contained in s. 4, was to declare a general right to bail, usually cited as ‘the presumption in favour of bail’. This is sometimes regarded as a corollary to the presumption of innocence, although its historical roots are quite different. The report of the Home Office Working Party on bail procedures in magistrates’ courts recommended that there should be a presumption in favour of bail, that the onus should not be on the defendant to apply for bail but that the court should of its own volition consider on each occasion when it remands an accused whether the remand should be on bail or in custody (*Bail Procedures in Magistrates’ Courts, Report of the Home Office Working Party*, London: HMSO, 1974). The Working Party attempted to codify good practice and, as its recommendations were embodied in the BA 1976, the statute itself may be regarded as a codification of existing good practice. Some commentators have argued that it was unnecessary to enact a presumption in favour of bail because it was already implicit. Thus, Eric Crowther, a former metropolitan
stipendiary magistrate, observed:

Although I do remember one court in the 1960s where the chairman always used to say, ‘if the police say there will be no bail, there will be no bail’ (that court at least had the virtue of consistency), I would have thought that such an attitude had disappeared by the mid-1970s after a decade of compulsory training for justices (Crowther, E., Advocacy for the Advocate, 2nd edn., Harlow: Longman, 1990, p. 110).

Again, Michael Mott, a judge of the Crown Court, declared in a letter to the Criminal Law Review that the BA 1976 was ‘not a great seachange’ ([1989] Crim LR 849).

Although the authority of these commentators can hardly be denied, it must be stressed that the aim and achievement of the BA 1976 was to rationalise the bail decision by distinguishing the exceptions to the right to bail from the reasons for applying those exceptions. Although this may have been good practice before the Act it was not universally followed and was lacking in statutory authority. Section 18(5) of the CJA 1967 had laid down exceptions for refusing bail when dealing with offences punishable with not more than six months’ imprisonment, but otherwise the court had unlimited discretion. Bail would be refused for a number of reasons, such as the fact that the defendant was of no fixed abode, that he had previous convictions, that there were further police inquiries or that the alleged offence was serious.

1.2.2 Meaning of ‘bail in criminal proceedings’

Section 1(1) of the BA 1976 provides that the expression ‘bail in criminal proceedings’ means in the context of the Act:

(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.

The word ‘bail’ means bail grantable under the law (including common law) for the time being in force: s. 1(2). Section 1 does not apply to bail in or in connection with proceedings outside England and Wales (s. 1(3)), but it does apply (i) whether the offence was committed in England or Wales or elsewhere and (ii) whether it is an offence under the law of England and Wales, or of any other country or territory (s. 1(5)). It is provided that bail in criminal proceedings shall be granted (and in particular shall be granted unconditionally or conditionally) in accordance with the Act: s. 1(6).

Part 4 of the Anti-terrorism, Crime and Security Act 2001 (ss. 21–32) introduces provisions for the indefinite detention pending deportation or removal from the UK under the immigration-control provisions of the Immigration
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Act 1971 of any non-British citizen certified by the Home Secretary as suspected of involvement in international terrorism. Although the legislation is designed to deal with a threat which is plainly criminal persons liable to be detained under the measure obviously enjoy no right to bail. However, provision is made for their release on bail and the topic is covered at section 1.3 below.

1.2.3 Applicability of the general right in section 4

1.2.3.1 Circumstances in which section 4 is applicable
Section 4 defines the ambit of the applicability of the general right to bail. Subject to various exceptions it applies to the following categories of person:

(a) Unconvicted persons. It applies to any defendant who is accused of an offence and appears or is brought before a magistrates’ court or the Crown Court in the course of or in connection with proceedings for the offence (s. 4(2)(a)).

(b) Unconvicted persons applying for bail. It applies to any defendant accused of an offence who applies to the court for bail or for a variation of the conditions of bail in connection with the proceedings (s. 4(2)(b); ‘variation’ in relation to bail means the imposition of further conditions after bail is granted, or the variation or rescinding of conditions: s. 2(2)).

(c) Convicted persons in breach of community sentences. It applies to any person who, having been convicted of an offence, appears or is brought before a magistrates’ court to be dealt with under Part II of sch. 2 to the CJA 1991 for breach of a requirement of a probation, community service, combination or curfew order (s. 4(3), as amended by the CJA 1991, s. 100 and sch. 11, para. 21).

(d) Convicted persons remanded for reports. It applies to any person convicted of an offence whose case is adjourned by the court for the purpose of enabling reports to be made to assist the court in dealing with the offender for the offence (s. 4(4)).

1.2.3.2 Right to bail exists independently of application for bail
The right to bail applies to any defendant who is accused of an offence and appears or is brought before a magistrates’ court or the Crown Court in the course of or in connection with proceedings for the offence. Although there will be many occasions when the prosecution apply for a defendant to be remanded in custody and the defence make no application for bail, the defendant will nevertheless still enjoy the right to bail unless any of the statutory exceptions applies. It follows that even though no application for bail is made the court is still obliged to consider whether the right to bail applies in the particular case irrespective of the defence stance. In other words, the consent to a remand in custody is not equivalent to the resolution of a potential issue in litigation by consent between the parties which the court is bound to accept. In cases where the statutory right to bail does not apply and there is no application for bail, the court enjoys a discretion whether or not to grant bail.
1.2.3.3 *Meaning of ‘conviction’*

In the BA 1976, unless the context otherwise requires, the term ‘conviction’ includes:

(a) a finding of guilt;
(b) a finding that a person is not guilty by reason of insanity;
(c) a finding under s. 11(1) of the PCC(S)A 2000 (remand for medical examination) that the person in question did the act or made the omission charged; and
(d) a conviction of an offence for which an order is made placing the offender on probation or discharging the offender absolutely or conditionally,

and ‘convicted’ is construed accordingly: s. 2(1), as amended by the MCA 1980, sch. 7.

1.2.3.4 *Circumstances in which section 4 is inapplicable*

The right does not apply in the following cases:

(a) **Convicted persons.** It does not apply to defendants after conviction, except when remanded for reports: s. 4(2).

(b) **Fugitive offenders.** Originally, s. 4(1) did ‘not apply as respects . . . proceedings against a fugitive offender’. However, following the adoption of the framework decision on the European arrest warrant (see the Crime (International Co-operation) Act 2003), s. 198(4) and (5) of the Extradition Act 2003 extends the BA 1976 (with certain amendments) to extradition proceedings. The presumption in favour of bail now applies in such proceedings, but only to accusation cases and not to conviction cases. Section 198(7)–(11) applies the power of arrest pursuant to s. 7 of the BA 1976 to such cases and s. 198(12)–(14) applies Part I, sch. 1 to the BA 1976 to the bail decision regarding extradition proceedings. Section 200 amends the BAA 1993 so as to allow the requesting state to appeal against a judge’s decision to grant bail in extradition proceedings. Section 201 amends s. 23 of the CYPA 1969 and s. 98(l) of the CDA 1998 so that a child or young person in extradition proceedings who is not granted bail is remanded to local authority secure accommodation only if s. 201(4)–(7) applies, that is to say:

1. The offence for which extradition is sought would attract 14 years’ imprisonment in the UK.
2. The defendant has previously absconded from proceedings connected with the offence or from the extradition proceedings in question (whether in the UK or in the requesting state).
3. The court is of the opinion after considering all the options that only a remand to secure accommodation would be adequate to protect the public from serious harm from him or to prevent the commission by him of an imprisonable offence.
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(c) Treason. The section is subject to s. 41 of the MCA 1980, which provides that persons charged with treason may be granted bail only by a judge of the High Court or a Secretary of State: s. 4(7), as amended by the MCA 1980, sch. 7.

1.2.4 Meaning of ‘court’

1.2.4.1 The term defined in the Bail Act
The expression ‘court’ includes a judge of a court and 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: s. 2(2). In sch. 1, the term ‘court’ in the expression ‘sentence of the court’ includes a service court as defined in s. 12(1) of the Visiting Forces Act 1952: Part III, para. 4.

1.2.4.2 European Convention aspects
The right to bail bestowed by s. 4 on defendants appearing in ‘court’ raises the issue of whether the procedural aspects of bail applications in England and Wales comply with the ECHR. Article 5(4) states:

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 unlawful.

The reference here to ‘a court’ may be contrasted with the provision in art. 5(3) requiring prompt production of a person arrested in connection with an alleged offence before a judicial officer. Under English law, a person arrested for an alleged offence must be brought before a court, not just an officer with judicial power. In Neumeister v Austria (No 1) A 8 (1968) 1 EHRR 91, para. 24, the ECtHR held that the principle of ‘equality of arms’ inherent in the right to a fair trial conferred by art. 6(1) was not applicable to an examination of a request for provisional release and that art. 5(4) could not be invoked as an alternative source of that principle. Thus, it was held, the term ‘court’ implied only that the authority called upon to decide upon a request for release had to possess the judicial character of independence from the executive and the parties, not that it had to follow judicial procedures. This restrictive view was emphatically rejected in De Wilde, Ooms and Versyp v Belgium (No 1) (1971) 1 EHRR 373, in which it was held that the term ‘court’ in art. 5(4) did import various guarantees of the requirement of judicial procedure. The Law Commission suggest that the essential characteristics of the judicial procedure identified by the ECtHR as necessary to satisfy art. 5(4) include:

(i) a right of the defendant to participate in the hearing, if only through a legal representative; and

(ii) a requirement for the hearing to be adversarial, with the parties enjoying equality of arms, which is to say that defendants must be given an equal opportunity to present their case to the court and to respond to the prosecution arguments (LC/CP 157, para. 11.8; LC/Rep. 269, para. 11.7).
In LC/CP 157, para. 11.18, the Law Commission expressed the provisional view that English bail hearings were adversarial, at least in theory. The prosecution outlines its objections to bail and the defending advocate has the opportunity to answer them. But they pointed to Home Office Research suggesting that the outcome of bail hearings is frequently influenced by the police refusal of bail and the prosecution's objections and they cited academic opinion that bail hearings are not adversarial (e.g. Anthea Hucklesby, ‘Remand Decision Makers’ [1997] Crim LR 269). The Commission suggested that a counter argument may be that if prosecutors are doing their job properly they will not oppose bail without good reason and that it is hardly surprising that the majority of contested applications are rejected. The topic of the extent to which the defendant's participation in the bail hearing is required for Convention compliance is most conveniently dealt with under para. 1.2.3.4 above. As to equality of arms there appear to be two aspects to this: (a) whether any information to be relied upon must be given in the form of sworn evidence (a topic dealt with by the Law Commission in LC/Rep. 269 but not in LC/CP 157); and (b) the extent to which the prosecution must make disclosure of relevant information.

(a) The question of sworn evidence. The question whether the ECHR requires information to be given in a bail hearing on oath or affirmation (and be subject to cross-examination) arises in relation not only to cases in which information is sought to be relied upon by the prosecution, but also in relation to the question whether the defendant may insist on giving or calling sworn evidence (see LC/Rep. 269, para. 11.17). The Law Commission (ibid., para. 11.18) were unaware of any ECtHR decision on the issue of whether art. 5(4) requires the hearing of sworn evidence. Article 6(3)(d) expressly declares the 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’. However, as the Law Commission pointed out, the procedural safeguards required under art. 5(4) are not the same, nor as exacting, as those required under art. 6. Referring to the cases of Winterwerp v Netherlands [1979] 2 EHRR 387 and De Wilde, Ooms and Versyp v Belgium (No 1) (1971) 1 EHRR 373, as representing ‘the high watermark of the argument that the procedural requirements of art. 6 are to be in some way assimilated to consideration of issues under art. 5’, the Divisional Court in R (on the application of the DPP) v Havering Magistrates’ Court; R (on the application of McKeown) v Wirral Borough Magistrates’ Court [2001] 1 WLR 805, para. 35 (hereafter Havering Magistrates’ Court) said that neither of those decisions of the ECtHR did more...
The Law Commission noted that even under art. 6 the ECtHR had held that not every defence witness need be called and examined for the trial to be fair (LC/Rep. 269, para. 11.19, citing Engel v Netherlands (No 1) (1976) 1 EHRR 647). It is normally left to the competent national authorities to decide upon the relevance of proposed evidence (ibid., para. 91) although in exceptional circumstances the ECtHR might conclude that the failure to hear a witness was incompatible with art. 6 (Bricmont v Belgium (1989) 12 EHRR 217, para. 89). In the English courts sworn evidence is not considered invariably essential for the purpose of establishing facts on which a bail decision is based: In re Moles [1981] Crim LR 170; R v Mansfield Justices, ex parte Sharkey [1985] 1 QB 613 (sufficient for the facts to be related secondhand by a police officer); Havering Magistrates' Court [2001] 1 WLR 805. Indeed, although there may be some circumstances in which a court should be prepared to hear oral evidence, it is generally unnecessary under art. 5 to do so but the court is required to come to ‘an honest and rational opinion’ on the material presented before it and must bear in mind that defendants at this stage are at risk of losing their liberty while nevertheless presumed innocent (ibid., para. 39, per Latham LJ). The material before the court is likely to range from mere assertion, which is unlikely to have any probative effect, to documentary proof; if it includes oral evidence, defendants must be allowed to cross-examine; if defendants wish to give oral evidence they should be entitled to do so; and if hearsay is relied on by either side the court should take account of the fact that it has not been the subject of cross-examination (ibid., para. 41). Notwithstanding Havering was concerned with the emergency procedure under s. 7(5) of the BA 1976 (see para. 3.2.9 below) the decision appears to be applicable to normal bail applications (LC/Rep. 269, para. 11.26, citing Wildman v DPP [2001] EHWC Admin 14, The Times, 8 February 2001). Various consultees to the Law Commission (including the present writers) noted that evidence was seldom given on oath or liable to cross-examination and that bail applications could not therefore be said in practice to be adversarial (LC/Rep. 269, para. 11.23). However, the problems which are likely to arise if facts may only be established in bail hearings by way of admissible sworn evidence were cogently identified in 1974 by a Home Office working party investigating bail procedures in magistrates’ courts:

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 prosecution 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
A further shortcoming of English bail hearings identified by one academic consultee to the Law Commission was that the prosecution material is usually regarded as factually accurate, whereas defence assertions are seen as subjective and unverifiable (LC/Rep. 269, para. 11.23). By contrast, the Commission noted, this might reflect only that the prosecution case was typically based on matters of record (e.g. the antecedent history and the content of witness statements) whereas the defence position was aspirational.

(b) The question of disclosure. There is no statutory requirement for disclosure in magistrates’ court bail hearings and, as the Law Commission have observed (LC/CP 157, para. 11.19; LC/Rep. 269, para. 29), it is inadequate disclosure, potentially amounting to a violation of art. 5(4), which is the most troublesome aspect of ‘equality of arms’ in such hearings. In *Lamy v Belgium* (1989) 11 EHRR 529 it was held that there had been no ‘equality of arms’ and that therefore the hearings had not been sufficiently adversarial to satisfy art. 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. The government’s lawyer 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. In *Nikolova v Bulgaria*, 1999-II, 31 EHRR 64, para. 58, it was stressed that a court examining an appeal against detention must guarantee that the proceedings are adversarial and that equality of arms is not ensured if the defendant’s lawyer is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of the detention. The Law Commission suspected that although practice varies disclosure is not always made as a matter of course, particularly at the first hearing after the defendant’s arrest (LC/CP 157, para. 11.19). In its view a failure to make disclosure at the first remand hearing would not involve a breach of art. 5(4) if disclosure were made at the second, provided the second were held soon enough to be treated as ‘speedy’ (ibid., para. 11.20; LC/Rep. 269, para. 11.29, n. 34). Further, they stress that the scale of disclosure required is unlikely to be comparable with that required in relation to trial and they interpret *Nikolova* as suggesting 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 (LC/CP 157, para. 11.21; LC/Rep. 269, para. 11.30). In LC/CP 157, at para. 11.21, the Law Commission expressed the belief that most prosecutors would voluntarily make disclosure of documents relevant to the bail issue, other than where there was a need, for example, to protect witnesses, but the Bar Council, the Criminal Bar Association and Liberty disagreed, believing that they would not be willing to do so without legislative compulsion (LC/Rep. 269, para. 11.31). After publication of LC/CP 157 in November 1999, it was said in *R v DPP, ex parte Lee* [1999]...
2 Cr App R 304, CA, that at the pre-committal stage (that is prior to the stage at which the statutory scheme of disclosure under the CPIA 1996 comes into play) prosecutors must always be alive to the need to make advance disclosure of known material (either from their own consideration of the papers or because the defence have drawn attention to it) and which any responsible prosecutor recognises ought to be disclosed at an early stage. One of the examples given by the court was that of previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail. Ex parte Lee was approved in Wildman v DPP [2001] EWHC Admin 14 (relevant also in custody time-limit extension applications) and made the basis of guidelines included in the Attorney-General’s guidance to prosecutors, Disclosure of Information in Criminal Proceedings (November 2000, para. 34) and in Points for Prosecutors, September 2000, p. 22 (both of which documents were cited in LC/Rep. 269, para. 11.34 and are available at www.lso.gov.uk). In the opinion of the Law Commission (LC/Rep. 269, para. 11.34) the duty of disclosure recognised in Ex parte Lee in relation to bail applications (and reiterated in the Attorney-General’s guidelines to prosecutors) establishes a standard which complies with art. 5(4).

1.2.5 Presence of the accused in court

1.2.5.1 The basic provisions of the Bail Act
Section 4(2) of the BA 1976 enacts that the right to bail 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.

The disjunction in s. 4(2)(a) between a person who ‘appears’ before the court and one who is ‘brought’ before the court logically expresses the contrast between arriving there at liberty and arriving in custody. This is confirmed by the provision in the BA 1976 that where an enactment (whenever passed) which relates to bail in criminal proceedings refers to the person bailed appearing before a court it is to be construed unless the context otherwise requires as referring to the person surrendering into the custody of the court (s. 2(3); see para. 1.2.3.1 above).

1.2.5.2 Potential anomaly regarding unrepresented defendants whom the prison service have failed to produce on remand
Section 4(2)(a) might be supposed to provide that the statutory right to bail is contingent on presence at court, irrespective of whether the defendant actually applies for bail or not. Under s. 122(2) of the MCA 1980, a defendant who is represented by counsel or a solicitor but who is not produced before the court is deemed not to be absent and s. 4(2)(a) gives such a defendant the statutory right
to bail. The effect of this is that the court will be duty bound to consider the issue of bail whether a formal application for bail is made or not. Conversely, a defendant in custody who is unrepresented, who is not produced at court, for example, because of ‘operational’ difficulties in the prison service and who has not applied for bail in writing (thereby not invoking the right to bail by virtue of s. 4(2)(b)), might be supposed to enjoy no statutory right to bail under s. 4(2). (During the 1980s there was a persistent problem with defendants on remand not being produced at court as a result in particular of staffing shortages in the prison service.) Considered in isolation of other statutory measures, the practical effect in such a case would be that, through no fault of the absent defendant’s (except perhaps for insouciance or indigency), the court would not be bound to consider the question of bail of its own motion. This would place unrepresented absent defendants in a significantly worse position than their represented (absent) counterparts. Not only would they not have a lawyer to look after their interests and to make any application for bail (or other representations with regard to their liberty) which might be thought to be worth making, but precisely because defendants were unrepresented the court would be under no duty to review their detention. However, such an interpretation would be entirely to ignore the impact of ss. 128(3A) and 128A of the 1980 Act (see paras 7.1.4.6 and 7.1.4.9 below). The effect of the former provision is to allow up to two successive remands of a defendant in absentia provided (a) that the defendant so consented when last present before the court and (b) that a legal representative is acting in the case, whether actually present in court or not. Unless these conditions are met the accused may not be remanded in custody again. The effect of s. 128A is to permit remands in custody of up to 28 days. The defendant must be legally represented and must have an opportunity to make representations. The position, then, is that although under the literal terms of s. 4(2)(a) of the BA 1976 combined with s. 122(2) of the MCA 1980 an absent unrepresented accused appears to have no right to bail, the effect of ss. 128(3A) and 128A of the 1980 Act is that there is no power to order further incarceration in absentia unless the defendant is represented.

1.2.5.3 Right to apply for bail not contingent on presence

Under s. 4(2)(b) defendants enjoy a right to bail (subject of course to the scheduled exceptions) where they apply for bail. The existence, then, of the right to bail under s. 4(2)(b) depends on the opportunity to make an application. (It is important to stress that an application is not necessarily one supported by arguments. It may be no more than merely inviting the court to do that which by virtue of para. (b) of s. 4(2) it is obliged by the Act to do anyway, i.e. review the question of bail.) An absent defendant can apply for bail in writing or through legal representation. The contrast between the two limbs of s. 4(2) is a contrast between a right occasioned by presence and a right occasioned by an application. That very contrast suggests that an application for bail triggering the right to bail under s. 4(2)(b) can be made in the absence of the defendant either by written notice or by a legal
representative. In other words, defendants do not need to be physically present to become eligible for the right to bail by dint of making an application. In short, the right to apply does not presuppose the right to be present and this was confirmed in *Baxter v Chief Constable of the West Midlands, The Independent*, 15 June 1998, in which it was stated that there was no statutory provision which expressly required that an applicant for bail needed to be personally present in court at the hearing of a bail application and that in fact s. 122 of the MCA 1980 pointed to the contrary. On the other hand, the court noted, the normal practice was that the accused should appear in person. Moreover, the Law Commission were informed (LC/CP 157, para. 11.14; LC/Rep. 269, para. 11.14):

- that magistrates in general treat defendants as entitled to be present;
- that where defendants are so unruly that they cannot be brought into court magistrates will visit the cells to hear the application with the prosecution and advocates present;
- that magistrates would expect to be challenged by judicial review if they gave their decision in the defendant’s absence without the consent of the defendant.

1.2.5.4 *Crown Court and High Court*

The Law Commission suggested that Crown Court and High Court judges may also treat defendants applying for bail as entitled to be present and they invited information from practitioners on whether the courts are in practice willing to allow defendants to be present and to hear oral evidence from them where appropriate (LC/CP 157, para. 11.14). In fact, until the HRA 1998, applications for bail in the Crown Court, when not made in the context of a trial or on written notice at a plea and directions hearing, were traditionally and invariably taken in the absence of the defendant. Within days of the Act coming into force, the Crown Court at Blackfriars, London, permitted a defendant to be present at a bail application (*Law Society’s Gazette*, 5 October 2000) and, although for a time it seems that practice around the country varied, the former practice of hearing applications in the absence of the defendant appears to have prevailed, subject to the occasional use of video link (see para. 1.2.5.5 below).

1.2.5.5 *Video link*

Constructive attendance by means of a video link has now been enacted by s. 57 of the CDA 1998, which provides:

(1) In any proceedings for an offence, a court may, after hearing representations from the parties, direct that the accused shall be treated as present in the court for any particular hearing before the start of the trial, if, during that hearing –

(a) he is held in custody in a prison or other institution; and

(b) whether by means of a live television link or otherwise, he is able to see and hear the court and to be seen and heard by it.
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(2) A court shall not give a direction under subsection (1) above unless –

(a) it has been notified by the Secretary of State that facilities are available for enabling persons held in custody in the institution in which he is or is to be so held to see and hear the court and to be seen and heard by it; and

(b) the notice has not been withdrawn.

(3) If in a case where it has power to do so a magistrates’ court decides not to give a direction under subsection (1) above, it shall give its reasons for not doing so.

These provisions authorise the use of video links for preliminary hearings in the Crown Court (see para. 1.2.5.4 above) since the section refers to ‘a court’.

1.2.5.6 Requirement of represented defendant’s presence under the European Convention on Human Rights

The precise point of whether under the ECHR applicants are entitled in general to be present if represented does not seem to have been addressed by the ECtHR. In Neumeister v Austria (No I) (1968) 1 EHRR 91 and in De Wilde, Ooms and Versyp v Belgium (No I) (1971) 1 EHRR 373, it was held that art. 5(4) did not entitle the applicant to attend the hearing. However, in Winterwerp v Netherlands (1979) 2 EHRR 387, para. 60, it was held that art. 5(4) did give the applicant the right to participate and, while conceding that it did not require all the same guarantees as art. 6(1), the Court regarded the opportunity to be heard, ‘either in person or, where necessary, through some form of representation’ as essential (para. 60). This principle is now well-established, having been applied in a number of cases (e.g. Toth v Austria (1991) 14 EHRR 551; Kampanis v Greece (1995) 21 EHRR 43; Hussain v UK (1996) 22 EHRR 1; Assenov v Bulgaria 1998-VIII, p. 3264; Nikolova v Bulgaria (1999) 31 EHRR 64). Article 5(4) is not satisfied by a hearing at which the defendant is not legally represented. It may also not be satisfied unless the defendant is given the opportunity to attend and make submissions in person. In Winterwerp the ECtHR suggested that the substitution of the representative for the applicant himself was an exceptional measure which should be taken only ‘where necessary’, for example because a medical condition prevented the applicant from attending. Thus, in Assenov v Bulgaria, cited above, the conducting of the only hearing in camera in the absence of the applicant was held to be in violation of art. 5(4). However, art. 5(4) does not necessarily give the detained person a right to attend the hearing and make personal representations. In Sanchez-Reisse v Switzerland (1986) 9 EHRR 71, the proceedings were conducted exclusively with reference to documents for which the applicant required legal assistance and he claimed that he had been unable properly to participate in the proceedings because he should have been able to attend in person in order to check the actions of his lawyer, making any oral submissions if necessary. In the view of the ECtHR the application furnished no evidence that his legal knowledge was sufficient to enable him to do so. Although the Court accepted that the Swiss authorities had violated the principle of
equality of arms, and therefore the applicant’s art. 5(4) rights, by failing to permit the applicant to reply to the written opinion of the Swiss Foreign Ministry recommending extradition, there was no reason to believe that his presence could have convinced the Federal Court that he ought to be released. In the view of the Law Commission (LC/CP 157, para. 11.13; LC/Rep. 269, para. 11.9) the decision suggests that the failure to grant an oral hearing will violate art. 5(4) only in exceptional circumstances, as where some personal characteristic of the defendant is especially pertinent to the application. In *Grauzinis v Lithuania* (2000) 35 EHRR 144(7), CLW 02/26/20, the applicant had not been present at a hearing in which he was appealing against a decision made several weeks earlier and where the grounds for the remand in custody were varied. It was held that given what was at stake, the lapse of time since the original decision and the reassessment of the basis for a remand in custody, the applicant’s presence was required throughout the appellate hearing in order that he should be able to give satisfactory instructions to his counsel.

1.2.5.7 *Submissions to the Law Commission on Convention aspects*

Whilst Liberty submitted to the Law Commission that art. 5(4) guaranteed a right to be present, those who expressed the view that defendants should usually be present when their liberty was being considered included the Law Society, the Office of the Judge Advocate General, the Society of Public Teachers of Law (who stressed the concern of the ECtHR to avoid trial in absentia) and the CPS (who accepted that this was often not the case in the higher courts but asserted that it sufficed if the defendant was represented): LC/CP 157, paras. 11.11 and 11.12. However, others noted the countervailing considerations of expense and inconvenience of ferrying defendants to and from court for bail applications and the discomfort that some defendants might suffer (*ibid.*, para. 11.13), problems which some respondents believed might be avoided by the use of video links, providing the technology could accommodate lawyer–client confidentiality (*ibid.*).

1.2.6 *Homicide and rape charges where defendants have previous convictions for those offences*

1.2.6.1 *Background*

Ever since the practice evolved of granting accused persons bail pending trial there has been a concern lest those strongly suspected to be guilty of the most heinous crimes might escape justice if not retained in prison. Indeed, as we have seen, there was a time when certain offences such as murder were deemed by statute to be “irreplevisable”. Although the absolute prohibition of bail in such cases was long since abolished, nevertheless in recent times there has been a renewed emphasis on the importance of denying bail where the gravest crimes were charged, robustly expressed for example by Lord Hailsham, the Lord Chancellor, in an
address to the Magistrates’ Association in 1984 (see para. 1.4.1.5 below). Initially, this concern was given effect by s. 153 of the CJA 1988, which inserted in sch. 1, Part I, to the BA 1976 a new paragraph, 9A, providing that courts must state their reasons for granting bail in cases of murder, manslaughter, rape, attempted murder, or attempted rape, where representations had been made as to the exceptions to the right to bail. However, concerns continued to mount as a result of a number of high-profile cases, the most notorious perhaps of which was that of Winston Silcott, who was on bail for murder when he was charged with another murder, that of a police officer, Keith Blakelock, during the Broadwater Farm riot in 1985. Silcott was subsequently convicted of both offences, although he was later cleared of the second on appeal.

1.2.6.2 Original measure
The result was the enactment of s. 25 of the CJPOA 1994, part of a ‘package of measures’ intended to reduce the incidence of offending by people on bail, then estimated by the Government at 50,000 offences a year (HC Deb, vol. 239, col. 386, 10 March 1994). In its original form s. 5 provided that where a person in any proceedings was charged with or convicted of murder, attempted murder, manslaughter, rape or attempted rape, it was absolutely forbidden to grant bail if that person had been previously convicted by or before a court in any part of the UK of any of those offences or of culpable homicide (an offence under Scots law) and in the case of a previous conviction of manslaughter or of culpable homicide, if the person was then sentenced to detention under any of the relevant enactments as defined in s. 25(5). Opponents of s. 25 argued that it was unnecessary, because the police and courts could be relied upon to exercise their discretion properly and that it was impractical, because it made no allowance for the exceptional circumstances in which, despite the defendant’s record, bail might be justified (LC/CP 157, para. 9.4; LC/Rep. 269, para. 8.3). In the Lords, for example, Lord Ackner said: ‘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’ (HL Deb, vol. 556, col. 1234, 15 July 1994). There seems to have been no consideration of any possible conflict with the ECHR; rather such discussion of rights as there was took the form of querying whether defendants should have a right to bail at all (see LC/CP 157, para. 9.4 and LC/Rep. 269, para. 8.3, both citing e.g. Mr Robert MacLennan, a Liberal Democrat MP, who referred to bail as ‘a privilege that is too often abused’: HC Deb, vol. 235, col. 60, 11 January 1994; and Mr Robert Evans MP, who suggested that the 1976 Act, in creating a ‘topsy turvy presumption in favour of bail, . . . removed the good sense of the courts’: Hansard, Standing Committee B, col. 280, 25 January 1994). In the words of Mr Michael Howard, the Home Secretary, the measure marked ‘a fundamental shift in the criminal justice system against the criminal and in favour of protecting the public’ (HC Deb, vol. 235, col. 21, 11 January 1994).
1.2.6.3 Convention compliance of original version challenged

The Convention compliance of s. 25 in its original version was challenged before the ECtHR in Caballero v UK (App No 32819/96; original Commission decision sub nom CC v UK, 30 June 1998, [1999] Crim LR 228, following BH v UK App No 30307/96 (1998) 25 EHRR CD 136, Commission decision 1 December 1997; ECtHR judgment 8 February 2000, 30 EHRR 643). The Commission reiterated the contention that art. 5(3) forbade trial within a reasonable time to be used as an alternative to release pending trial (following Wemhoff v Germany (1968) 1 EHRR 55, para. 5) and upheld the complaint that the section removed from the remanding court any discretion in precluding an examination of 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 person’s liberty. The section denied bail to certain offenders simply because they fell within a particular category irrespective of whether deprivation of liberty was necessary in the particular case. This therefore constituted a violation of art. 5(3). When the Commission gave its opinion the Government had already decided to seek amendment of the section in anticipation of an adverse ruling, for as Home Office Minister Mike O’Brien stated in the Commons Committee stage on the Crime and Disorder Bill, ‘there is a question mark over the current construction’ of the section (Hansard, HC Standing Committee B, col. 441, 19 May 1998). Earlier, introducing the modifying measure as a Government amendment during the Third Reading of the Bill in the House of Lords, the Solicitor-General had stated:

The offences concerned here are very serious . . . [b]ut to remove the ability of the police and the courts to make [the decision as to bail or custody] is not in the interests of justice. It cannot be right to fetter the judicial discretion of the court in this way (HL Deb, vol. 588, cols. 239–40, 31 March 1998).

Subsequently, when the appeal came before the ECtHR the Government conceded that the original version had violated the applicant’s rights under art. 5(3) and the Court accepted that concession. The judgment has also contributed to the repeal of certain provisions of Scottish bail legislation which were similar in effect to s. 25 in its original format (see LC/Rep. 269, para. 8.6; see also Emmerson, B., ‘The Human Rights Bill: Its Effect on Criminal Proceedings (Part II)’, Archbold News, 9 April 1998).

1.2.6.4 Ameliorated version of section 25

Section 56 of the CDA 1998 ameliorates s. 25 by the removal of the absolute prohibition on granting bail, as originally enacted. Instead, it allows that bail may be granted in cases to which s. 25 relates, but 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.
1.2.6.5 *Doubts over the Convention compatibility of section 25 as amended*

There remained doubts as to whether the amendment to s. 25 was sufficient for Convention compatibility, since with no statutory definition of ‘exceptional circumstances’ it was unclear what would exceptionally justify granting bail and to single out a category of suspects might not pay ‘due regard to the presumption of innocence required by the Convention’ (Philip Leach, [1999] Crim LR 300, 304–5, cited in LC/CP 157, para. 9.9; LC/Rep. 269, para. 8.7). This view was lent some support by the judgment in *Nikolova v Bulgaria* (1999) 31 EHRR 64 in which the applicant had been charged with a ‘serious and wilful offence’ requiring, under Bulgarian legislation, her detention unless she could demonstrate ‘beyond doubt . . . that there did not exist even a hypothetical danger of absconding, re-offending, or obstructing justice’, the burden of discharging which was possible only in exceptional circumstances, such as immobilising illness. The Bulgarian court dismissed her appeal on the ground that she had submitted medical certificates relating only to her past state of health and disregarded as irrelevant the ‘concrete facts’ that she had not attempted to abscond or obstruct the investigation and that she had a family and a stable way of life. Emphasising that its task was not to inquire whether the relevant legislation could have been applied without violating the applicant’s rights but to ascertain whether her rights had in fact been violated, the ECtHR upheld her complaint under art. 5(4) that the decision had been ‘purely formal’ and a mere ‘rubber-stamping process’. (See also now *Ilijokov v Bulgaria* [2001] 7 Archbold News 1.) The Law Commission has pointed out that it cannot be assumed from the decision in *Nikolova* that any refusal under s. 25 would also be a violation of art. 5 (LC/CP 157, para. 9.13; LC/Rep. 269, para. 8.11). The ECtHR did not have to consider whether there is necessarily an infringement of art. 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.

1.2.6.6 *Reverse burden implicit in section 25 as amended*

The amended version of s. 25 gives a strong indication of the way in which the court’s discretion should be exercised, without preventing the exercise of that discretion altogether (LC/CP 157, para. 9.14; LC/Rep. 269, para. 8.12). While the Convention prohibits provisions which deprive the courts of their power to make the final decision, it does not prohibit the legislature from requiring the courts to have regard to particular criteria in making judicial decisions (*ibid.*). In considering the question whether s. 25 can be interpreted compatibly with the Convention, the Law Commission (LC/CP 157, paras. 9.15–9.19; LC/Rep. 269, paras. 8.12–8.16) gained assistance from examining the way in which the ECtHR and the House of Lords have 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 defences (see *Salabiaku v France* (1988) 13 EHRR 379; *Hoang v France* (1992)
16 EHRR 53; *R v DPP, ex parte Kebilene* [1999] 3 WLR 972). Thus, there is a distinction between an automatic or mandatory presumption of guilt resulting from the establishment of an essential element of the offence and a discretionary presumption. The former will be inconsistent with the presumption of innocence and therefore incompatible with art. 6(2) of the Convention. In the latter case the tribunal of fact may or may not rely on the presumption, depending on its view as to the weight of evidence.

1.2.6.7 *Exceptional circumstances*  
Crucial to the question whether or not s. 25 can be interpreted compatibly with the Convention is the meaning of ‘exceptional circumstances’ justifying the granting of bail. The Law Commission canvassed three possible approaches to the resolution of this issue (LC/CP 157, paras. 9.20–9.26; LC/Rep. 269, paras. 8.18–8.21):

1. ‘Exceptional circumstances’ might be construed very narrowly as applying only to the circumstances of the offences themselves (i.e. the prior offence and the one presently charged) which made the case so unusual as to eliminate virtually all risk of an offence on bail. This they rejected as incompatible with art. 5.

2. At the opposite extreme any circumstances which justified bail might be construed as themselves ‘exceptional’ but they considered that although this would not infringe art. 5 it would render the section redundant.

3. The court would be free to consider all relevant circumstances but would be required to give special weight to those circumstances which activated the section, so that bail might be granted only if, balancing the factors and having regard to that special weight, the facts were sufficiently ‘exceptional’ to justify bail, but might be refused where, but for s. 25, it would have been granted.

The Law Commission suggested that the third construction would be incompatible with art. 5 if it elevated the question whether the offence and the accused fell within a preordained disadvantaged category above the proper question, which was whether the facts of the individual case as a whole were such as to pose an unacceptable risk of re-offending if bail were granted. On the other hand, they suggested, art. 5 would not necessarily be breached merely because Parliament had identified certain factors to which the court was required to give special weight, provided the court was not precluded from taking all relevant considerations into account. If this interpretation would enable s. 25 to be given effect without violating the article then s. 3 of the HRA 1998 requires that it must be given that interpretation (LC/CP 157, para. 9.27). Although the second alternative of the two possible applications of the third construction would enable s. 25 to be applied compatibly with art. 5, there was a risk, in the provisional view of the Law Commission, that it might be misconstrued and applied in an incompatible way, a risk which could only be averted by amending legislation to clarify its intended
effect, or by the provision of guidance (LC/CP 157, paras. 9.27–9.30; LC/Rep. 269, paras. 8.20 and 8.21). Approximately two-thirds of their respondent bodies and individuals supported this view (LC/Rep. 269, para. 8.22) but in a joint submission the Bar Council and the Criminal Bar Association, advocating repeal of s. 25, suggested that, given that bail is, in any event, unlikely to be granted in all but a very small number of cases where the section applied, 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’ (ibid., para. 8.23). Among respondents advocating repeal on the ground that it imposed an unnecessary fetter on the discretion of decision-makers, the Magistrates’ Association stated that magistrates knew how to exercise their discretion properly (ibid., para. 8.24).

1.2.6.8 Feasibility of interpreting and applying section 25 compatibly with the Convention

In its final report the Law Commission maintained its view that s. 25 can be interpreted and applied compatibly with the ECHR, drawing additional analogous support from observations by Lord Woolf CJ in *Lambert, Ali and Jordan* [2001] 1 All ER 1014, a decision on the impact of art. 6 on reverse onus presumptions and from *R v Offen* [2001] 1 All ER 154, CA, on the question of compatibility with the ECHR of s. 2 of the C(S)A 1997 providing for automatic life sentences to be imposed on defendants convicted of two serious offences unless the court were of the opinion that there are ‘exceptional circumstances relating to either of the offences or to the offender which justify its not doing so’. They further cited *Kelly (Edward)* [2001] QB 198, 208, CA, an authority on the automatic life sentence provisions decided before the coming into force of the HRA 1998, in which Lord Bingham CJ stated that ‘exceptional’ was to be construed ‘as an ordinary, familiar English adjective and not as a term of art’ and that ‘[t]o 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’ (see LC/Rep. 269, para. 8.40). In the opinion of the Law Commission (ibid., para. 8.38):

*P*rovided s. 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.

In summary, the Law Commission stated (ibid., para. 8.46) that s. 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 s. 25 applies, decision-makers focus on the risk the defendant may pose to the public by re-offending. However, to paraphrase the text of the Law Commission’s report, the categories of exceptional circumstances were not limited to the risk of an offence on bail; even where such a risk exists there might be other ‘exceptional circumstances’ which would permit bail to be granted (ibid., para. 8.47, relying by analogy on Frost (Paul William), The Times, 5 January 2001, cited LC/Rep. 269, para. 8.44, n. 147). As to the risk of misconstruction which the Law Commission had contemplated in its Consultation Paper, in the Report they were satisfied that legislation was unnecessary because with adequate training and guidance bail decision-takers would be unlikely to experience serious difficulty in complying with their legal obligation to construe and apply s. 25 in a manner compatible with the Convention (ibid., para. 8.45). In R(O) v Harrow Crown Court [2003] 1 WLR 275, the Divisional Court applied the reasoning in R v Offen, cited above, when it held that s. 25 establishes a norm to the effect that those to whom it applies, if granted bail, are so likely to fail to surrender, commit an offence, interfere with witnesses or obstruct the course of justice that bail should not be granted. If the defendant does not create an unacceptable risk of that kind, he is an exception to the norm and should be granted bail. (The claimant’s petition for leave to appeal from the decision of the Divisional Court has now been granted: see [2004] 1 WLR 13, HL.)

1.3 EXCEPTIONS TO THE RIGHT TO BAIL IN SCHEDULE 1 TO THE BAIL ACT 1976

Section 4 of the BA 1976 enacts that bail must be granted by a court to a person accused of an offence, or remanded for inquiries or a report, or brought before the court for breach of a requirement of probation, community service, combination or curfew order, if none of the exceptions specified in sch. 1 applies.

1.3.1 Exceptions in the case of imprisonable offences: Part I of Schedule 1

The exceptions to the right to bail which are set out in Part I of sch. 1 are those which apply where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment. The question whether an offence is punishable by imprisonment is determined without regard to any enactment prohibiting or restricting imprisonment of young offenders or first offenders: BA 1976, sch. 1, Part III, para. 1.
1.3.1.1 Principal exceptions in the Bail Act 1976 as originally enacted: defendant will abscond, commit an offence on bail or obstruct justice
Schedule 1, Part I, para. 2, provides that in the case of any offence punishable with imprisonment bail need not be granted if the court is satisfied that there are substantial grounds for believing that if released on bail (whether subject to conditions or not) the defendant 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 the defendant or any other person.

1.3.1.2 Exception abolished by the Criminal Justice Act 2003: defendant already on bail
Section 26 of the CJPOA 1994 inserted in sch. 1, Part I, to the BA 1976 a new paragraph, para. 2A, which created an additional principal exception laying down that a defendant need not be granted bail if the offence was indictable or triable either way and it appeared to the court that the defendant was on bail in criminal proceedings on the date of the offence. The Law Commission demonstrated the potential Convention incompatibility of the exception and recommended its abolition. The original draft of the Criminal Justice Bill sought to implement the recommendation but a Government amendment (now enacted by s. 14 of the CJA 2003) introduced a presumption against bail in cases of alleged offending when the defendant was already on bail for a pre-existing criminal allegation (see para. 1.5.5 below).

1.3.1.3 Considerations in determining whether any of the principal exceptions applies
In determining whether any of the exceptions in paras. 2 and 2A applies, Part I, para. 9 provides that the court must have regard to such of the following considerations as appear to be relevant:

(a) The offence in question. The court must have regard to the nature and seriousness of the offence or default (and the probable method of dealing with it).

(b) Social background. The court must have regard to the character, antecedents, associations and community ties of the defendant.

(c) Past bail record. The court must have regard to the defendant’s record as respects the fulfilment of any obligations under previous grants of bail. References in sch. 1 to previous grants of bail in criminal proceedings include references to bail granted before the coming into force of the Act (Part III, para. 2).
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(d) **Strength of the evidence.** Except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence that the defendant committed the offence or defaulted.

(e) **Any other relevant considerations.** The court must also have regard to any other considerations which appear to be relevant.

‘Default’ means the default for which the defendant is to be dealt with (i.e. breach of a requirement of a probation, community service, combination or curfew order) under s. 101(2) of and sch. 13 to the CJA 1991, which replaced s. 6 or s. 16 of the PCCA 1973: BA 1976, sch. 1, Part III, para. 4. The 1991 Act enacts no express amendment to s. 6 and s. 16 of the 1973 Act but the editors of *Archbold: Criminal Pleading and Practice*, London: Sweet & Maxwell, 1999, contend, at para. 3–52, that this was presumably an oversight as similar references in s. 4(3) of the BA 1976 (see para. 1.2.3.1 above) were expressly dealt with. The editors submit that the provisions of the Interpretation Act 1978, s. 17(2)(a) cover the situation and that the references to the repealed provisions should be construed as references to Part II of sch. 2 to the CJA 1991.

1.3.1.4 **Subsidiary exceptions**

Schedule 1, Part I, paras. 3–7, provide for the following further exceptions to the right to bail in cases of an imprisonable offence:

(a) **Own protection.** Bail need not be granted if the court is satisfied that the defendant should be kept in custody for his or her own protection, or, in the case of children or young persons, for their own welfare (para. 3).

(b) **Serving prisoner.** Bail need not be granted if the defendant is in custody in pursuance of the sentence of a court or of any authority acting under any of the Service Acts (para. 4).

(c) **Insufficient information.** Bail need not be granted where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking a decision about bail through want of time since the proceedings were instituted (para. 5).

(d) **Arrest for failing to surrender to bail.** Where it appears to a court that having been released on bail in or in connection with proceedings for an offence a defendant aged 18 or over failed to surrender to custody, the defendant may not be granted bail unless the court is satisfied that there is no significant risk that, if released on bail (whether subject to conditions or not), the defendant would fail to surrender to custody (para. 6, as amended by CJA 2003, s. 15(1); see generally Chapter 4 below; for Parliamentary debate on what was originally introduced as new cl. 52, see HC Deb, vol. 405, col. 717, 19 May 2003).

(e) **Arrest for breach of a bail condition.** As originally enacted, para. 6 of sch. 1, Part I, provided that bail need not be granted if, having been released on bail in or in connection with the proceedings for the offence, the defendant had been arrested,
in pursuance of s. 7 of the Act, for having breached a condition of bail. This is not in the counterpart s. 12 of CJA 2003. This was plainly intended to remove potential concerns about incompatibility with the European Convention on account of its dependence on automatic reasoning (see generally Introduction, above).

(f) Adjournment for inquiries or report. Bail need not be granted where the defendant’s case is adjourned for inquiries or a report, if it appears to the court that it would be impracticable for these to be accomplished without keeping the defendant in custody (para. 7).

As to (b), a sentence does not include committal for default of payment of any sum of money, or for want of sufficient distress to satisfy any sum of money, or failure to do or abstain from doing anything required to be done or left undone: MCA 1980, s. 180. The Service Acts in question are the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957: BA 1976, sch. 1, Part III, para. 4. Reference should be made to the practice of granting ‘technical bail’ to defendants who are in custody on other matters, whether serving a sentence or on remand. This may be in order to allow for automatic release when any current sentence ends or the defendant is granted bail in relation to other pending matters, provided that there is no intrinsic objection to bail in the instant case. Thus, a remand on technical bail may avoid the problem of running into a custody time limit or the need to bring the defendant back to court for unnecessary interim remand hearings where there are practical difficulties in securing the attendance of prisoners (see LC/CP 157, para. 2.30). However, defendants must be wary of too readily agreeing to a remand on technical bail. If, ultimately, there is no conviction on the offences for which the defendant is in custody, but a conviction on the matter for which they are on technical bail, the period during which they will have been on technical bail (albeit in custody) will not automatically count towards their sentence (and can only be reflected through the sentencing process): see further section 1.7 below.

1.3.2 Exceptions in the case of non-imprisonable offences: Part II of Schedule 1

Schedule 1, Part II, paras. 1–5, provide that where the offence, or every offence, charged is not punishable with imprisonment, defendants need not be granted bail in the following circumstances:

(a) Previous failure to surrender. Bail need not be granted if it appears to the court that the defendant has previously failed to surrender to custody in accordance with obligations under the grant of bail and in view of that failure it is believed that if released on bail (whether subject to conditions or not) the defendant would fail to surrender (para. 2).

(b) Own protection. Bail need not be granted if the court is satisfied that the defendant should be kept in custody for his or her own protection, or, in the case of children or young persons, for their own welfare (para. 3).
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(c) Serving prisoner. Bail need not be granted if the defendant is in custody in pursuance of the sentence of a court or of any authority acting under any of the Service Acts (para. 4; see para. 1.3.1.4 above, exception (b)).

(d) Arrest for failing to surrender or for breach of a bail condition. Bail need not be granted if, having been released on bail in or in connection with the proceedings for the offence, the defendant has been arrested in pursuance of s. 7 of the Act (para. 5; see para. 1.3.1.4 (d) above and see generally Chapter 4 below).

1.3.3 Drug misuse relevant to whether any exceptions are to apply

Section 58 of the CJCSA 2000 inserts in s. 4 of the BA 1976 a new subsection, (9), which provides that in taking any decisions required by sch. 1, Part I or Part II, the considerations to which the court must have regard include, so far as relevant, any misuse of controlled drugs by the defendant. Section 4(9) further provides that the terms ‘controlled drugs’ and ‘misuse’ have the same meanings as in the Misuse of Drugs Act 1971.

1.3.4 Statutory restriction on eligibility for bail in cases of established drug misuse

1.3.4.1 Background

The White Paper, Justice for All, Cm. 5563, July 2002, para. 0.9, announced a proposal to ‘pilot in high crime areas a presumption of remand into custody if a suspect tests positive for Class A drugs at arrest but refuses to undergo treatment’. The proposal was duly enacted by s. 19 of the CJA 2003. The Notes for Guidance to the Act state, at paras. 155–7, that it creates a presumption that bail will not be granted to a person who is charged with an imprisonable offence and who tests positive for a specified Class A drug and refuses treatment, unless there are exceptional circumstances.

1.3.4.2 Applicability of statutory restrictions contingent on existence of assessment arrangements

The restrictions introduced by s. 19 apply where the court has been notified by the Home Secretary that arrangements for conducting a relevant assessment or, as the case may be, for providing relevant follow-up have been made for the petty sessions area where the person concerned would reside if granted bail and the notice has not been withdrawn: BA 1976, s. 3(6C), inserted by CJA 2003, s. 19(2). Section 19 came into force on 5 April 2004: Criminal Justice Act 2003 (Commencement No. 3 and Transitional Provisions) Order 2004 (SI 2004 No. 829).
1.3.4.3 *Agreement to a drug-misuse assessment following positive Class A test on arrest or conviction to be a required condition of court bail*

Where the arrangements set out in s. 3(6C) for assessment and follow-up are in place and where:

- the defendant is aged 18 or over;
- a sample taken from the defendant under s. 63B of PACE 1984 (testing for presence of Class A drugs) in connection with the offence, or under s. 145 of the CJA 2003 (drug testing after conviction of an offence but before sentence) has revealed the presence in the defendant’s body of a specified Class A drug;
- either the offence for which the defendant is facing proceedings is possession of any specified Class A drug contrary to s. 5(2) of the Misuse of Drugs Act 1971, or the court is satisfied that there are substantial grounds for believing that misuse by the defendant of any specified Class A drug caused or contributed to the offence or (even if it did not) that the offence was motivated wholly or partly by intended misuse of such drug;
- after analysis of the sample referred to above, the defendant has been offered a relevant assessment or, if a relevant assessment has been carried out, has been offered a relevant follow-up; and
- the defendant has agreed to undergo the relevant assessment or, as the case may be, to participate in the relevant follow-up,

the court, if it grants bail, must impose a condition of bail that the person both undergo the relevant assessment and participate in any relevant follow-up proposed or, if a relevant assessment has been carried out, that the person participate in the relevant follow-up: BA 1976, s. 3(6D), inserted by s. 19(2) of the CJA 2003. The restriction laid down in sch. 1, Part I, para. 8(1) on imposing conditions of bail 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 para. 2 of Part I of the schedule is amended to exclude from the paragraph the condition required by s. 3(6B) and (6C): s. 19(4).

1.3.4.4 *Relevant assessment*

The expression ‘relevant assessment’ means an assessment conducted by a suitably qualified person of whether the person is dependent upon or has a propensity to misuse any specified Class A drugs: BA 1976, s. 3(6E), inserted by s. 19(2) of the CJA 2003. The *Explanatory Notes* state that the ‘suitably qualified person’ will normally be an employee of a recognised drug service: para. 130.

1.3.4.5 *Relevant follow-up*

The expression ‘relevant follow-up’ means, in a case where the suitably qualified person who conducted the relevant assessment believes the person so assessed
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to have such a dependency or propensity, such further assessment and such assistance or treatment or both in connection with the dependency or propensity, as the person who conducted the relevant assessment (or conducts any later assessment) considers to be appropriate in the particular case: s. 3(6E), inserted by s. 19(2). The terms ‘Class A drug’ and ‘misuse’ have the meanings given in the Misuse of Drugs Act 1971: s. 3(6E), BA 1976, inserted by s. 19(2), CJA 2003. The term ‘specified’ in relation to a Class A drug has the same meaning as in Part 3 of the CJCSA 2000: s. 3(6E), inserted by s. 19(2).

1.3.4.6 No requirement for drug assessment may be imposed as a condition of bail by the police
The requirement for the defendant to undergo a drug assessment programme laid down in new subsections (6C)–(6E) of s. 3 of the BA 1976 does not apply to bail granted by the police: s. 19(3), CJA 2003, inserting in s. 3A(3) of the BA 1976 a reference to s. 3(6C)–(6D) as conditions inapplicable to police bail.

1.3.4.7 Presumption against bail in cases of imprisonable offences where defendant refuses assessment or follow-up
The nature of the presumption against bail is enacted by new para. 6A of sch. 1 to the BA 1976, inserted by s. 19(4) of the CJA 2003, which provides that subject to new para. 6C of the schedule a defendant who falls within new para. 6B may not be granted bail unless the court is satisfied that there is no significant risk of the commission of an offence while on bail; but this does not require the court, if so satisfied, to grant bail (disregarding other considerations). Although the provision does not literally refer to ‘exceptional circumstances’ in which bail may be granted despite the defendant’s rejection of assessment the latter formulation apparently expresses it. Paragraph 6B provides that a defendant falls within its terms if:

(a) he or she is aged 18 or over;

(b) a sample taken under s. 63B of PACE 1984 (testing for presence of Class A drugs) in connection with the offence or under s. 145 of the CJA 2003 (drug testing after conviction of an offence but before sentence) has revealed the presence in the body of a specified Class A drug;

(c) either the offence is possession of any specified Class A drug contrary to s. 5(2) of the Misuse of Drugs Act 1971, or the court is satisfied that there are substantial grounds for believing that misuse by the defendant of any specified Class A drug caused or contributed to the offence or (even if it did not) that the offence was motivated wholly or partly by intended misuse of such drug; and

(d) (i) a relevant assessment has been offered to the defendant but the defendant has refused it or (ii) the defendant has undergone a relevant assessment, and relevant follow-up has been proposed, but the defendant does not agree to participate in it.
The expressions ‘relevant assessment’ and ‘relevant follow-up’ have the meaning given by s. 3(6E) of the BA 1976 (see paras. 1.3.4.4 and 1.3.4.5 above): sch 1, Part I, para. 6B(3)(b), inserted by s. 19(2) of the CJA 2003. The terms ‘Class A drug’ and ‘misuse’ have the meanings given in the Misuse of Drugs Act 1971: BA 1976, s. 3(6E), sch. 1, Part I, para. 6B(3)(a), inserted by s. 19(4) of the CJA 2003. The term ‘specified’ in relation to a Class A drug has the same meaning as in Part 3 of the CJCSA 2000: sch. 1, Part I, para. 6B(3)(c), inserted by s. 19(4) of the CJA 2003. Paragraph 6C of sch. 1, Part I, inserted by s. 19(4) of the CJA 2003, provides that para. 6A does not apply unless: (a) the court has been notified by the Home Secretary that arrangements for conducting a relevant assessment or, as the case may be, providing relevant follow-up have been made for the petty sessions area in which the defendant would reside if granted bail; and (b) the notice has not been withdrawn. Section 19 came into force on 5 April 2004: Criminal Justice Act 2003 (Commencement No. 3 and Transitional Provisions) Order 2004, SI 2004 No. 829.

1.3.4.8 Pilot schemes implementing bail restrictions in cases of established drug misuse

Section 19 of the CJA 2003 was intended to be introduced initially from May 2004 in the following pilot courts: Manchester Magistrates’ Court, Manchester Crown Court (Crown Square), Nottingham Magistrates’ Court, Nottingham Crown Court, Salford Magistrates’ Court and Manchester Crown Court (Minshull Street). The provision can only be applied where defendants reside in the relevant petty sessional area. Where they are of no fixed abode, it is open to the court to deal with them as if they resided in the area where they were arrested, although individual courts may deal with persons of no fixed abode in accordance with their own local practice. A breach of conditions will occur where defendants fail to undergo an assessment or fail to participate in any proposed follow-up. Defendants will be deemed to have failed to undergo an assessment or participate in a follow-up in a number of circumstances. These include non-attendance, lateness, inappropriate behaviour and failure to comply with a treatment programme (Home Office Circular No. 22 of 2004).

1.4 ASPECTS OF THE STATUTORY CONSIDERATIONS FOR ASSESSING WHETHER TO INVOKE THE PRINCIPAL EXCEPTIONS

It is important to stress that the four statutory criteria (BA 1976, sch. 1, Part I, para. 9) for determining whether to invoke the principal exceptions to the right to bail may each be relevant to each of the exceptions. For example, the nature and seriousness of the offence may be relevant not only to the question whether
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the accused will abscond but also to the risk of the commission of offences on bail. An editorial in [1987] Crim LR 437 drew attention to the ‘disjunction between the considerations set out in paragraph 9 and the three “exceptions to the right to bail”’. It was suggested that ‘wayward decisions’ could be produced by such disjunction:

If the question which the court has to answer is, are there substantial grounds for believing that this defendant would commit an offence whilst on bail? the court needs to know about his criminal record, whether the evidence against him is strong, how frequently this type of defendant offends whilst on bail and any special evidence relating to this defendant. It is difficult to see how, strictly speaking, it is relevant to any of the three ‘exceptions to the right to bail’ to consider how the defendant might be dealt with if convicted. Perhaps it should be relevant. Perhaps the ‘exceptions’ are too restrictive. Or perhaps this ‘consideration’ leads courts to remand in custody where the offence appears serious, without focusing on the probability or otherwise of an offence being committed whilst he is on bail.

1.4.1 Nature and seriousness of the offence

1.4.1.1 Distinction between nature and seriousness
Nature and seriousness are arguably distinct and separate, but it is also important to distinguish between the nature of an offence as a class and that of a particular offence. Some offences defined by class may be inherently grave in their nature, for example, murder, while the gravity of other categories of offence, not necessarily grave in their nature, will be determined by the particular facts. An analogy is provided by PACE 1984, s. 116, which provides that certain arrestable offences are always serious, while others are serious if they lead to serious consequences. The nature of a particular offence, considered on its facts, will determine its gravity. In determining whether to grant or refuse bail, only the particular facts will be relevant. It is arguable, therefore, that the word ‘seriousness’ is superfluous. However, the nature of a particular offence will bear relevance in determining whether or not to grant bail in respects distinct from those of its gravity and so the use of the two terms in the Act is sensible.

1.4.1.2 Impact of gravity on likelihood of absconding
Objectively considered, there is an undoubted correlation between the gravity of the offence charged and the temptation to abscond. The more serious the offence, the longer the sentence is likely to be and therefore the greater the incentive to avoid attending court. This may be particularly compelling where the defendant is subject to a court order for which a conviction will constitute a breach. An outstanding suspended sentence may be regarded as an especially strong reason for believing that a person will fail to surrender. The graver the alleged offence the greater will be the likelihood that the defendant will avoid the risk of a lengthy sentence by absconding.
1.4.1.3 Nature of offence can influence absconding

It is not only offence gravity which will determine the absconding risk. That risk will also be influenced by the nature of the offence. For example, the prevalence of a given class of offence in a particular district may be influential in determining whether on principles of general deterrence a sentence is likely to be more severe than it might otherwise be if the offence were not particularly prevalent. Although the CJA 1991, s. 2(2)(a) (now PCC(S)A 2000, s. 79), appears to exclude deterrence as a sentencing principle, the Court of Appeal took a different view in R v Cunningham [1993] 1 WLR 183.

1.4.1.4 Nature and seriousness of the offence and commission of offences while on bail

Notwithstanding the editorial opinion expressed in the Criminal Law Review, cited above, it is submitted that the seriousness of the offence may well be relevant to the likelihood that the defendant if granted bail will commit an offence or offences while on bail. Someone facing the certainty of a long sentence may well be tempted to resort to crime in order to establish a nest egg for eventual release, or to provide for a spouse, children or other dependent relatives during the years of incarceration. The nature of the offence charged may well have a very significant bearing on this calculation. For example, if the offence charged bears all the hallmarks of a professional burglary, this may well suggest that the defendant is a professional burglar with little or no compunction about committing such offences while on bail. Together with a history of committing such offences and with the fact that the defendant is a family man, the nature of the instant offence, being one for which the detection rate is notoriously low, may well justify the supposition that the defendant will commit burglaries if released on bail. By way of contrast with professional burglary, a domestic murder, although very grave, is in its nature unlikely to pose any risk of repetition and if the risk of absconding is perceived as negligible it may well be considered safe to grant bail in such a case (see Bail Procedures in Magistrates' Courts, Report of the Home Office Working Party, London: HMSO, 1974, para. 57, and see Chatterton, C., Bail: Law and Practice, London: Butterworths, 1986, p. 46).

1.4.1.5 View that seriousness should not be conclusive

As a rule of thumb, the more serious the case the greater must be the hesitation to grant bail, especially where the evidence is strong or there are admissions. This was the view of Lord Hailsham, then Lord Chancellor, when, addressing the Magistrates' Association in 1984, he said:

I would be slow to grant bail in cases where the charge was murder, attempted murder, rape or attempted rape, or wounding, or other grave crimes. This list is not exhaustive . . . If the exceptions and restrictions provided by the Schedule to the Act were properly applied, only in exceptional cases would one expect to see bail granted to a person charged with murder, rape, wounding, or other grave crimes.
Section 25 of the CJPOA 1994 is an attempt to incorporate Lord Hailsham’s thinking into legislation. However, the seriousness of an offence should not be, and is not, treated as conclusive. The Home Office Working Party on bail procedures in magistrates’ courts, cited above, observed at para. 61 of their report that a defendant who was likely to receive a custodial sentence ought not necessarily to be refused bail and they did not accept as conclusive the argument that where a defendant was likely to receive a custodial sentence it was doing no kindness to allow a preliminary period of liberty. They pointed out that if the sentence was likely to be short the period on remand might exceed it and that the likely sentence ought to be considered more in relation to the risk of absconding than as a factor in its own right. They also pointed out (at para. 60) that although it was wrong to assume that where a custodial remand was followed by a non-custodial sentence bail should have been granted initially, it was clearly desirable that, where an eventual custodial sentence was unlikely, bail should be granted unless there were strong grounds for a remand in custody. In borderline cases, the Working Party suggested, the court might give the defendant the benefit of the doubt, if a non-custodial sentence seemed the likeliest outcome.

1.4.2 Strength of the evidence

Aligned with the previous consideration is the strength of the evidence. Section 48 of the CLA 1977 requires the prosecution to supply advance disclosure of its case to the defence so that, in either-way matters, all parties should at a comparatively early stage in the proceedings be in a position to have regard to this question when bail is considered. In any event, by the time of committal the defence and the court will know the strength of the case (see the Working Party’s report, cited above, para. 58). The strength of the evidence is important, because if it is strong the defendant is more likely to be convicted and therefore more likely to abscond. Conversely, if it is weak, it is unnecessary to refuse bail as the defendant will be unlikely to be convicted and will have little to fear by standing trial. It may be argued that it is unjust to refuse bail to a person who is unlikely to be convicted. Amongst the factors that the court will consider under this head are:

(a) Is it alleged that the defendant has made admissions?
(b) Is identification in issue?
(c) Was the defendant found in recent possession of stolen property?
(d) Is there scientific evidence linking the defendant with the offence?
(e) Was the defendant caught in the act of committing the offence or arrested as a result of inquiries?
(f) Are the witnesses reliable, or may they be reluctant or hostile?

(For the approach of the ECtHR in applying art. 5 of the ECHR to the strength of evidence as an exclusive reason for refusing bail, see para. 1.6.2.2 below.)
1.4.3 Character, antecedents, associations and community ties

The defendant's character, antecedents, associations and community ties are all clearly relevant to the bail decision.

1.4.3.1 Character

The reference to character means, essentially, whether or not the defendant has previous convictions and, if so, the range, variety, number and rate of offences. Previous convictions are relevant in general to the risk of absconding and that of the commission of offences on bail. The worse a defendant's record of convictions the more likely will the court be to impose a custodial sentence, or the longer an inevitable custodial sentence is likely to be. Convictions for offences of a similar nature to the one charged will be more significant than if the offences are different. Convictions for similar offences suggest persistence, which is likely to warrant a more severe penalty for the offence than might otherwise be the case and which is likely therefore to provide a greater temptation to abscond than otherwise, or else the commission of offences for the kind of reasons discussed above. Persistence also points to a risk of repetition while on bail. It has been suggested that it is inadvisable to grant bail to offenders with a bad criminal record: R v Gentry (1955) 39 Cr App R 195, CCA; R v Wharton [1955] Crim LR 565, CCA. This is a very general statement, although since any exercise in gauging the risk factors against the details of the allegation and the defendant's past record is an inexact science, there may be an understandable tendency by courts to err on the side of caution. It has been observed that a long string of petty offences does not automatically justify a remand in custody (see Chatterton, C., Bail: Law and Practice, London: Butterworths, 1986, p. 47, citing the Working Party report, para. 59).

1.4.3.2 Antecedents

The term ‘antecedents’ has a wide meaning and embraces offences taken into consideration and the whole of the defendant’s past history: R v Vallet [1951] 1 All ER 231.

1.4.3.3 Associations

A defendant who habitually consorts with known criminals may justifiably be supposed to make a living from crime and may continue to do so if granted bail. Evidence of association may be inferred from the facts of the offence or offences charged, or may derive from police intelligence based on a combination of hearsay and conjecture which for the purposes of trial would be plainly inadmissible, but which for the purposes of bail are conventionally taken into account.

1.4.3.4 Community ties

The issue of community ties involves the following questions: Does the defendant have a fixed address? If so, for how long has he or she had it? Is there a spouse
or other partner? Are there children? Does the defendant have employment? If so, what is the nature of the work and how long has the job been held? The rationale behind this is that the stronger a person’s community ties, in the form of home, family and employment, the less reason there is to abscond. This is not to say that these considerations must be followed like an actuarial formula. People with strong community ties do sometimes fail to surrender and unemployed and homeless people do answer to their bail. Indeed, a Home Office Circular, HO 155/1975, para. 24, issued on 8 October 1975 (which drew the attention of the courts to the Working Party report) advised courts not to give undue weight to the fact that the defendant was of no fixed abode. While acknowledging that this was a material consideration, the Working Party expressed the view that it was important that courts should ascertain the precise circumstances (report, cited above, para. 65). It is clearly important to establish whether the defendant is sleeping rough, staying with friends, residing in a hostel or in bed and breakfast accommodation, travelling around in a trailer or motor caravan, living in a fixed mobile home on a registered pitch at an official ‘caravan dwellers’ site, or lodging in digs or in a furnished bed-sit.

1.4.4 Previous bail history

Whether or not defendants have complied with obligations under any previous grant of bail will be an important factor in deciding whether there are substantial grounds for believing that they will fail to surrender to their bail. Where defendants have always answered to bail in the past, particularly if the charges have been serious, it may be argued that there are no substantial grounds for believing that they will abscond if granted bail in the present case. Conversely, where there has been a previous failure to surrender, this may furnish grounds for fearing (i.e. believing) that repetition will occur. On the other hand, the judgment is one of fine balance and the failure must be examined in the context of the overall history. Where the defendant has a history of having been on bail facing a succession of serious charges over a number of years in the past and has always complied to the letter with bail conditions, but has once or twice failed to surrender in relation to comparatively minor charges, it might be oppressive to deny bail on the basis of an assessment of the bail history, particularly where there is a reasonable explanation for those failures.

Apart from any past occasion when defendants may have been prosecuted under s. 6 of the BA 1976 for failing to surrender to bail, courts will generally have no means of judging from defendants’ records of conviction their history as regards compliance with obligations under previous grants of bail. Convictions under s. 6 are recorded, but beyond that criminal records rarely show whether in relation to a given past offence the defendant was on bail or in custody awaiting trial and independent records of this are rarely filed or preserved by the police – certainly not systematically. Moreover, no records of arrest under s. 7 for breaches of bail are
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systematically preserved, even in this computer age. The CPS, therefore, are rarely able to refute the proposition that in relation to a particular conviction the defendant was on bail and complied with its terms. Even a previous appearance on which the defendant was dealt with for a number of offences which plainly could not have been committed on the same occasion will not indicate that any of the offences must have been committed while the defendant was on bail for any of the other offences listed.

1.4.5 Any other relevant matters

Other matters which it has been suggested may be relevant include the mental stability of defendants and any indications that they are liable to cause harm or injury to themselves or others (see Chatterton, C., Bail: Law and Practice, London: Butterworths, 1986, p. 48), although these considerations are best dealt with in relation to sch. 1, Part II, para. 3 (own protection or welfare). See also para. 1.5.3 (last sentence) below.

1.5 APPLYING THE EXCEPTIONS TO BAIL

1.5.1 ‘Substantial grounds’ (original main exceptions – imprisonable offences)

After a great deal of Parliamentary discussion, the test adopted by the Act in the case of the main exceptions was ‘substantial grounds for believing’. It is insufficient that there is a likelihood of any of the exceptions applying, or that there are grounds, or even strong or reasonable grounds, for so believing. The belief must be substantial. It has already been noted that the bail decision is judicial and not ministerial or administrative: R v Badger (1843) 4 QB 468; Linford v Fitzroy (1849) 13 QB 247. On the other hand, as Lord Hailsham pointed out, ‘in granting or refusing bail you are bound to come to a decision on the basis of probabilities and not certainties. If you could only refuse bail on the basis of certainty, you could never refuse it at all’ (‘To bail or not to bail’, The Magistrate, February 1972). Lord Hailsham’s comment dates from before the BA 1976, but the effect of what he said was supported by the Divisional Court in Re Moles [1981] Crim LR 170. There it was held that strict rules of evidence were inherently inappropriate in a court deciding whether there were substantial grounds for believing something, such as a court considering an application under the BA 1976. This is one of the arguments against the application of the doctrine of res judicata to the bail decision, that the doctrine cannot apply to a prediction but only to a finding of fact. (The topic is further discussed in Chapter 5 below.). It is in keeping with the principle that the strict rules of evidence are inappropriate in the court’s making of a determination on bail that when objections to bail are raised by the prosecution they are generally made by way of representation. In R v Guest,
ex parte Metropolitan Police Commissioner [1961] 3 All ER 1118, Widgery J said that there was no overriding requirement that the prosecutor should adduce sworn evidence to support his application, nor was there an assumption that bail was to be granted in cases where sworn evidence connecting the accused with the offence was not given.

1.5.2 Failure to surrender

Many aspects of this exception have already been discussed in para. 1.4.1 above. It forms the subject of Chapter 4 below, where it is discussed in detail. The risk that the defendant will fail to surrender may be regarded as the most deeply rooted and historical reason for withholding bail. Indeed, until recent times it was still the only ground for refusing bail. In R v Rose (1898) 78 LT 119, Lord Russell said that ‘the requirements as to bail are merely to secure the attendance of the prisoner at his trial’ (see also Re Robinson (1854) 23 LJQB 286). In assessing the risk that a defendant may fail to surrender to bail the court must clearly balance against it all that would inevitably be involved in absconding. A defendant with extensive family ties, a good marriage, children at school, a house with a mortgage and substantial equity, would have to suffer enormous inconvenience in electing to take on a fugitive existence in order to achieve the short-term gain of avoiding the discomfort of a prison sentence. It is perhaps a reflection of the reality of this that the actual number of defendants who fail to surrender is in fact very small. In 1988, 5 per cent of those bailed from a police station failed to appear (Criminal Statistics, England and Wales, 1988, Cm 847, London: HMSO, 1989) and in 1991 7 per cent of defendants granted bail by the courts failed to appear (Criminal Statistics, England and Wales, 1991, Cm 2134, London: HMSO, 1992). In a study several years later no significant change in the position had taken place: 7 per cent of defendants bailed by police failed to attend their first court appearance and 9 per cent of those bailed by the court failed to attend at least one court hearing (Brown, D., Offending on Bail and Police Use of Conditional Bail, Home Office Research and Statistics Directorate, Research Findings No. 72, London: Home Office, 1998, p. 1).

Failure to surrender is the only exception to the right to bail to which all the considerations in the BA 1976, sch. 1, Part I, para. 9, appear to be relevant.

1.5.3 Commission of offences while on bail

1.5.3.1 History of the exception

The risk that the accused will commit an offence while on bail is an exception to the right to bail which is of comparatively recent origin. It is often referred to by the shorthand title ‘further offences’, an unfortunate misnomer which implies that the offence before the court is a proved offence rather than an offence charged or an alleged offence. It probably owes its origin to dicta by Lord Goddard CJ in
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a series of appeals in which he criticised courts for having given bail to defendants with bad records and in which he laid down the principle that bail should be withheld if the defendant were likely to commit ‘further offences’. In _R v Pegg_ [1955] Crim LR 308, Lord Goddard declared that it was ‘no kindness to the prisoner’ to grant bail to any person who had a bad criminal record and who ought to be denied ‘the opportunity of committing further offences’ while on bail (see also _R v Gentry_ (1955) 39 Cr App R 195, CCA; _R v Wharton_ [1955] Crim LR 565, CCA). The risk posed to the community when housebreakers were granted bail was adverted to in _R v Phillips_ (1947) 32 Cr App R 47, an appeal in fact presided over by Lord Goddard in which judgment was delivered by Atkinson J, who said (at p. 48):

Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it . . . To turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the Court, a very inadvisable step.

Eric Crowther remembers that ‘[a] Court of Criminal Appeal presided over long ago by Lord Goddard roundly condemned justices who had granted bail to a professional burglar pending his appearance at a higher court, thereby enabling him to commit many more burglaries so as to “set his family up” during the period that he anticipated being away’ (Crowther, E., _Advocacy for the Advocate_, 2nd edn., Harlow: Longman, 1990, p. 115). The case to which the author appears to have been referring was in fact a decision of the Divisional Court. This was _R v Whitehouse, sub nom HM Postmaster-General v Whitehouse_ (1951) 35 Cr App R 8, in which Lord Goddard CJ observed (at p. 11):

The [High] Court will exercise the power [to grant bail] with extreme care and will require to see what is the prisoner’s previous history of convictions, because, as we have pointed out in cases in the Court of Criminal Appeal, bail ought to be sparingly granted in cases where prisoners have long records of convictions, since it very often results, when such a person obtains bail, he commits offences while on bail, sometimes telling the Court afterwards that he did it so as to get money to enable him to be represented at Quarter Sessions, in other cases saying that he had to make some provision for his wife and children while he was in prison. We have pointed this out in the Court of Criminal Appeal on more than one occasion.

Lord Goddard may be regarded not only as the originator of the misnomer ‘further offences’, but also as the originator of the reason for remanding in custody on the basis that the defendant will commit an offence while on bail. The reason (but not the misnomer) first found statutory form in the CJA 1967, s. 18(5).

1.5.3.2 _Research and statistics_
It did not take long for this exception to assume a greater significance in the view of the courts than the more deeply-rooted exception of failure to surrender.
By 1978, the year in which the BA 1976 came into force, the Home Office Statistical Department found that ‘the commission of an offence’ was given as a reason for refusing bail in 63 per cent of the magistrates’ court cases it monitored, while the comparable figure for ‘failing to surrender’ was 51 per cent. In a study conducted by the Home Office the comparatively small proportion of 8 per cent of those granted bail were found to have committed at least one offence while on bail (*Estimates of Offending by Persons on Bail*, Home Office, London: HMSO, 1981). Furthermore, the study revealed that the figure for those granted bail in spite of police objections was as high as 25 per cent, showing that the police are relatively good at predicting who such persons might be. Different studies of the proportion of defendants who re-offend while on bail have produced different results, depending on the methodology used. The study ‘Re-offending on Bail in Avon and Somerset’ (Bristol: Avon and Somerset Constabulary, 1991) measured the number of defendants who were arrested for a further offence while on bail. A court survey showed the proportion to be 28 per cent, while CID and custody officer questionnaires showed the proportion to be 27 per cent and 12 per cent respectively. The study also found a correlation between further arrest and the following factors:

(a) *Age of defendant.* Defendants aged between 17 and 20 were twice as likely to commit an (alleged) offence on bail than those aged 26 and over.

(b) *Type of offence.* Defendants charged with vehicle-related crime and burglary were the most likely to be rearrested while on bail.

(c) *Number of previous convictions.*

A study entitled *Bail and Multiple Offending* (Newcastle: Northumbria Police, 1991) used data collected from custody records, detected crime records and court files. It reported that 23 per cent of arrests involved persons who were on bail when they were arrested, but the figures included persons who were subsequently acquitted. Studies which excluded acquittal produced lower figures. Ennis and Nichols found that 12 per cent of those granted bail by courts were convicted of offences committed while they were on bail (Ennis, J., and Nichols, T., *Offending on Bail*, Metropolitan Police Directorate of Management Services Report No. 1690, London: Metropolitan Police, 1991). Studies by Henderson and Nichols and by Morgan found the corresponding figure to be 10 per cent (Henderson, P., and Nichols, T., *Offending While on Bail*, Home Office Research Bulletin No. 32, London: Home Office, 1992; Morgan, P.M., *Offending While on Bail: A Survey of Recent Studies*, Home Office Research and Planning Unit Paper 65, London: Home Office, 1992).

More recent research has shown that 24 per cent of people on bail committed one or more offences while on bail (Brown, D., *Offending on Bail and Police Use of Conditional Bail*, Home Office Research and Statistics Directorate, Research Findings No. 72, London: Home Office, 1998, p. 1). The highest rates were among

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those on bail for vehicle-related crime (44 per cent) and theft by shoplifting (40 per cent). Juveniles are more than twice as likely as adults to commit an offence while on bail and they offend more persistently. Amongst the factors shown to be important in another more recent study (Morgan, P., and Henderson, P., Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project, Home Office Research Study 184, London: Home Office, 1998, p. 45) were the following:

- persons with no fixed abode (42 per cent offended on bail), although the number of such defendants in the sample was small (only 97 defendants or 4 per cent of the whole sample);
- those who waited more than six months before trial or sentence (32 per cent offended on bail);
- those charged with theft of cars or unauthorised taking (32 per cent), burglary (29 per cent) or robbery (23 per cent);
- those with at least one previous breach of bail (27 per cent), i.e. they had failed to appear at court in the past, had breached bail conditions in the past, or were on bail when charged with the current offence;
- those who had served a previous custodial sentence (28 per cent);
- those under 18 (29 per cent); and
- those who were unemployed or were not on the workforce (i.e. at school, retired, etc – 21 per cent).

The lowest rates of offending on bail were found for:

- persons who waited less than one month before trial or sentence (4 per cent);
- those who were employed (7 per cent); and
- those charged with sex offences (6 per cent), assault (7 per cent) or fraud (8 per cent).

1.5.3.3 Implications of detention to prevent offending on the presumption of innocence

Some commentators have seen the shift in emphasis from securing attendance to preventing offences as an inroad into traditional liberties and the presumption of innocence (see e.g. Zander, M., ‘Bail: A Reappraisal’ [1967] Crim LR 25; Vogler, ‘The Changing Nature of Bail’, LAG Bulletin, February 1983; Dworkin, R., Taking Rights Seriously, London: Duckworth, 1987). It is undoubtedly true that the requirement of ‘substantial grounds for belief’ is a far less rigid test than the strict rules which are applicable to the recognised form of ‘preventive detention’ in the nature of a term longer than that commensurate with the seriousness of the offence for violent and sexual offences (CJA 1991, s. 2(1)(b)). However, it is also arguable that the courts have an overriding duty to protect the public and that one of the aims of any penal system must be to prevent crime. Less ambitious than prevention as an aim of the criminal law, but also one more capable of realisation in
practice than prevention, is that of reducing the incidence of types of behaviour prohibited by the criminal law, an aim for which Nigel Walker coined the term ‘reductivism’ (*Sentencing in a Rational Society*, Harmondsworth: Penguin Books, 1969, ch. 1). The issue is of course whether reductivism should be obtained at the remand stage, or whether it should be reserved until after conviction. However, it is certainly arguable that an implied condition of every grant of bail is that the defendant shall be of good behaviour. In *R v Ellis, Independent (CS)*, 15 January 1990, the Court of Appeal held that where defendants have a history of committing offences while on bail, it was neither fair to the community in which they live nor to defendants themselves to go on releasing them on bail. The occasions on which bail should be granted in respect of an offence alleged to have been committed while the defendant was on bail for another offence should be very infrequent.

1.5.3.4 Relevant factors

In deciding whether the exception of an offence on bail applies, the relevant considerations will be the strength of the evidence, the defendant’s record under previous grants of bail and, most importantly, his character, antecedents, associations and community ties.

(a) Strength of the evidence. As regards the strength of the evidence, it is arguable that if the evidence is strong there is a greater likelihood that defendants will commit an offence while on bail. But courts will always have regard to the presumption of innocence and if evidence is weak defendants are less likely to be guilty and it follows that this must lessen the grounds for believing that they will commit an offence if given bail. It is sometimes argued that defendants who know they are likely to be convicted will have nothing to lose by committing an offence on bail. If the offence for which they are on bail is a serious one and they are facing a custodial sentence, it may be said that they have still less to lose by committing another offence.

(b) Previous record of complying with bail obligations. The previous record of defendants in fulfilling their obligations under grants of bail in the past will be relevant only to the extent that it is possible to show whether they have in fact previously committed offences while on bail. It will rarely be possible to give a positive answer to this question from an interpretation of the criminal record sheet and unless the police can point to some independent file entry dealing specifically with the point – information which is seldom available – the court may have to accept assertions by the defence advocate. It will, however, usually be possible to establish whether the defendant is on bail for some other alleged offence and this will clearly be relevant in assessing any risk of the commission of offences if bail is granted.

(c) Defendant’s criminal record. The question whether defendants have previous convictions will be relevant in two ways. Previous convictions may make a custodial sentence more likely or may increase the likely length of such
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a sentence and this may go to the issue of the risk of absconding. People with bad records may be more inclined to commit offences regardless of whether or not they are on bail; in other words, they may be less in awe of courts and less inhibited by proceedings which are pending. The court will want to ask various questions: For what sort of offence does the accused have previous convictions? How recent were they? Are there any significant gaps in the record?

(d) Community ties. Considerations of community ties in the form of employment, home and family are probably less relevant in this context than in the context of deciding whether there are substantial grounds for believing that defendants will fail to surrender. However, the court may conclude that persons of no fixed abode and with no community ties are under less pressure to obey the law as they have less to lose in the event of a conviction. Conversely, it could be argued that in cases of dishonesty a defendant with no family to support will have less motive to fend for them by crime before receiving an inevitable prison sentence. On the other hand, it is sometimes argued in relation to cases of dishonesty that an unemployed defendant who has no means of support other than the proceeds of crime is likely to commit an offence if granted bail. Where defendants are addicted to hard drugs and have no sufficient means of financing their dependence, the court may find that they are likely to commit offences of dishonesty – or even trafficking – in order to do so and at the very least that they will commit an offence of unlawful possession. Where the alleged offence involves violence, the court will have regard to any grudge or grievance the defendant may have against the complainant in deciding whether there is a risk of the commission of an offence if bail is granted. In the case of sexual offences, the court will have regard to the mental condition of defendants in deciding whether they are able to control themselves or whether the condition is such that they are likely to commit an offence on bail. In this context ‘character’ has a wider meaning than ‘previous convictions’.

1.5.3.5 Police power to detain arrested persons to prevent an offence
The counterpart in terms of statutory police powers of the exception to the right to bail under the BA 1976 where the defendant would commit an offence if released on bail is provided for by PACE 1984, s. 38(1)(a)(iii), permitting 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’ (see para. 6.3.1 below).

1.5.3.6 Approach of the jurisprudence of the European Court of Human Rights to the risk of an offence on bail
The question whether (and, if so, in what circumstances) it is permissible under the jurisprudence of the ECtHR to refuse bail on the ground that the accused may commit an offence if released on bail was considered by the Law Commission in LC/CP 157, Part V and LC/Rep. 269, Part III. Although in
Matznetter v Austria (1969) 1 EHRR 198, para. 9, the justification was held to apply ‘in the special circumstances of the case’ the Law Commission noted that this formulation was not repeated in later cases and they concluded that it did not add any independent qualification to the general principle that bail might be refused where there was a risk of the commission of an offence on bail (LC/CP 157, para. 5.2, note, and LC/Rep. 2169, para. 3.2, citing Clooth v Belgium (1991) 14 EHRR 198, paras. 38–40 and Muller v France (No 1) 1997-II, para. 44. In its consultation paper the Law Commission examined various requirements which, in its provisional view, the ECtHR cases appeared to lay down for a refusal of bail based on the risk of an offence on bail. In at least one respect the consultation process resulted in a revision of their opinion.

(a) Must the feared offence be serious? On their initial interpretation of the ECtHR cases the Law Commission assumed that the feared offence had to be serious (LC/CP 157, para. 5.3, citing Matznetter v Austria (1969) 1 EHRR 198; LC/Rep. 269, para. 3.2) and, while all of the decided cases involved offences at the upper end of the scale of seriousness, the requisite level of seriousness remained unclear (LC/CP 157, para. 5.4; LC/Rep. 269, para. 3.2, citing Matznetter v Austria; Clooth v Belgium (1991) 14 EHRR 198; Toth v Austria (1991) 14 EHRR 551). Conceding that it was unaware of any case in which this ground had been rejected because the feared offence was insufficiently serious, the Law Commission was prepared to assume that an offence which did not attract a custodial sentence would not be regarded as such but they considered it difficult to go beyond this (LC/CP 157, para. 5.4; LC/Rep. 269, para. 3.2). In contrast with their provisional analysis of the Strasbourg jurisprudence, the CPS and the Home Office in their submissions succinctly argued that the mere fact that the cases which had reached the ECtHR involved serious offences did not mean that only cases in which the feared offence was serious were capable of Convention compliance (LC/Rep. 269, para. 3.7). The point was also made that a requirement for the feared offence to be serious and likely to attract a custodial sentence might pose definitional problems for police custody officers and that out of an abundance of caution persons might be wrongly admitted to police bail (ibid., para. 3.8, citing representations by the Metropolitan Police, the Police Federation and two academics). Prompted by these responses the Law Commission reconsidered the ECtHR case law and, conceding that its provisional conclusion had been overstated, concluded that the feared offence did not need to ‘be of any specific level of seriousness’, nor that there had to be a likelihood of punishment by any particular type of sentence (LC/Rep. 269, para. 3.9). It should be observed that this is not quite the same thing as conceding that the feared offence is not necessarily required to be serious.

(b) Must the offences be similar? Although in the cases considered by the ECtHR the offence charged was similar in nature and gravity to that feared, the Law Commission thought that this did not mean that such similarity was essential
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given the presumption of innocence under art. 6(2) (LC/CP 157, paras. 5.11 and 5.13). However, there had in its view to be an appropriate connection between the offences and although this would usually be based on similarity in nature and gravity, the offences might be connected in other ways, as where the offences were aimed at a particular victim. (The example was suggested of a defendant who was obsessed with a particular person who, having been arrested for a comparatively minor act of criminal damage, indicates an intent to kill that person.) The CPS and Home Office concurred with this view, which the Law Commission reiterated in its final report (LC/Rep. 269, para. 3.7).

(c) **Danger must be plausible.** The danger of offending had to be ‘plausible’ (Clooth v Belgium (1991) 14 EHRR 717, para. 40), that is, in the view of the Law Commission, the reasons for concluding that the risk existed had to be adequately explained and the risk had to be a real one, although it did not have to be highly probable (LC/CP 157, para. 5.5; LC/Rep. 269, para. 3.2). The reason for this, it argued, was that if the feared offence had to be a serious one it could not also be necessary that there had to be a high degree of probability that it would be committed, a process of reasoning which, it must be observed, remains elusive.

(d) **Detention must be the appropriate measure.** Detention had to be the appropriate measure, that is it had to be necessary to avert the risk of the commission of the feared offence, where this could not be achieved by granting bail with suitable conditions (LC/CP 157, para. 5.6; LC/Rep. 269, para. 3.2).

(e) **Relevance of previous convictions.** The Law Commission observed (LC/CP 157, para. 5.7) that the requirements mentioned in (c) (plausibility) and (d) (similarity between offence charged and that feared) above had to be assessed according to the test in Clooth ’in the light of the circumstances of the case and in particular the past history and personality of the person concerned’ (14 EHRR 717, para. 40). Thus, a record of offences similar to that charged has been held by the ECtHR to be a very relevant factor in determining the existence of a risk of offences of that kind (see e.g. Toth v Austria (1991) 14 EHRR 551, paras. 69–70). In Clooth (para. 40) the Court held that the applicant’s two minor convictions were ‘not comparable, either in nature or in the degree of seriousness, to the charges preferred against him’, and so did not warrant detention in order to prevent ‘repetition’. In the view of the Law Commission this was not to be taken as indicating that comparable previous convictions are required to establish a real risk of offending on bail, but merely indicates that in that case the fear of ‘repetition’ was not supported by the defendant’s criminal record: LC/CP 157, para. 5.8. (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: LC/Rep. 269, para. 3.3, n. 10.) In Muller v France, 1997-II p. 374, para. 44, the Court said that a reference to antecedents cannot suffice to justify refusing release on the basis of the danger of reoffending. While this
might mean that there must be some further evidence apart from previous convictions for similar offences to establish the risk of reoffending the Law Commission thought that the Court did not intend to lay down any such rule since previous convictions might in some circumstances offer compelling evidence of a predisposition to commit offences on bail (LC/CP 157, para. 5.9).

No reasons were given for the statement (that a reference to antecedents cannot suffice to justify refusing release on the basis of the danger of reoffending), the Court having simply relied on a statement in Clooth (14 EHRR 717, para. 40) that the risk of reoffending was to be judged ‘in the light of the circumstances of the case and in particular the past history and personality of the person concerned’. In the view of the Law Commission, this did not imply that ‘past history’ could not in itself establish a risk of reoffending (LC/CP 157, para. 5.9). The deficiency of the national court’s refusal of bail in Muller was that they simply proceeded directly from the fact of the defendant’s record of previous similar convictions to the assumption that he would reoffend or abscond without considering whether in the circumstances his record justified that conclusion. The absence of a reasoning process offended against the principle that reasons must be concrete and not abstract or stereotyped (see para. 1.6.1.2 below).

(f) Article 5(3) and the Bail Act 1976 (and PACE 1984). As already noted, the provisional view of the Law Commission (LC/CP 157, para. 5.14) was that it could be legitimate under art. 5(3) to refuse bail on the ground that the defendant might otherwise commit an offence provided that (i) the feared offence was ‘serious’ and would be likely to attract a custodial sentence; (ii) there had demonstrably to be a risk of an offence; and (iii) detention had to be an appropriate measure. These conditions are not expressly stated in the BA 1976, which does not, for example, stipulate a need for the offence feared to be serious or to be connected with the offence charged. The Law Commission were satisfied that it was unnecessary to amend the BA 1976 to include such requirements since the HRA 1998 requires the courts to apply the Act, as far as possible, in compliance with the Convention (ibid., para. 5.16). Such compliance could, in its view, be achieved by means of guidance issued to magistrates and the police (ibid., para. 5.17). As already noted, in its final report the Law Commission concluded that the feared offence did not have to be of any specific level of seriousness. Accordingly, since neither BA 1976, sch. 1, Part I, para. 2(b) nor PACE, s. 38, require the feared offence to be serious, to that extent the statutes are Convention-compliant. Pre-trial detention for the purpose of preventing the committing of an offence on bail can be compatible with art. 5 provided that it is a necessary and proportionate response to a real risk of an offence on bail (LC/Rep. 269, para. 3.11). Previous convictions may be relevant, but the bail decision-taker must consider whether it may properly be inferred from them (or from any other relevant circumstances) that there is a real risk that the defendant will commit an offence if granted bail (ibid.).
1.5.4 Interfere with witnesses or otherwise obstruct the course of justice

The risk of interference with witnesses or other obstruction of the course of justice is an important exception to the right to bail because any system of justice must depend on witnesses being free from fear of intimidation or bribery and upon evidence being properly obtained. The most common manifestations of the behaviour contemplated by this exception are cases in which:

(a) the defendant has allegedly threatened witnesses;
(b) the defendant has allegedly made admissions that he intends to do so;
(c) the witnesses have a close relationship with the defendant, for example, in cases of domestic violence or incest;
(d) the witnesses are especially vulnerable, for example, where they live near the defendant, or are children or elderly people;
(e) it is believed that the defendant knows the location of inculpatory documentary evidence and would destroy it, or has hidden stolen property or the proceeds of crime and would dispose of it beyond hope of recovery;
(f) it is believed that the defendant will intimidate or bribe jurors;
(g) other suspects are still at large and may be warned by the defendant.

The exception will not apply merely because there are further police inquiries or there are other suspects who have yet to be apprehended. Although interfering with witnesses or otherwise obstructing the course of justice will almost always involve the commission of an offence, such as assault or perverting the course of justice, the exception nevertheless stands in its own right. In assessing the risk the relevant considerations will be the strength of the evidence, any history of interference with witnesses or obstructing justice which the defendant might have under previous grants of bail and general character and associations. It is commonly applied to a person who has previously been, or is alleged presently to be, engaged in organised crime, but it is also frequently applied to impulsive offenders who have close connections with a complainant. It may be instructive to quote the following opinion of the Home Office Working Party (Bail Procedures in Magistrates’ Courts, Report of the Working Party, London: HMSO, 1974, para. 69):

The possibility of the defendant interfering with witnesses arises less frequently and will usually be relevant only when the alleged offence is comparatively serious and there is some other indication, such as a past record of violence or threatening behaviour by the defendant. Where there is a substantial ground for fearing such interference, this seems to us to be a very strong reason for refusing bail. (emphasis supplied)

It is to be noted that s. 51 of the CJPOA 1994 creates new offences of doing anything intended to intimidate or harm a person who is assisting or has assisted in the investigation of an offence or who is, will be, or has been a witness or juror
in any criminal proceedings. Further, a new trial may be ordered where a person
has been acquitted of an offence and a person has been convicted of an adminis-
tration of justice offence involving interference with or intimidation of a juror or
a witness or potential witness: CPIA 1996, s. 54(1); see Corre, N., *A Practical

1.5.5 Defendant already on bail

1.5.5.1 *The Criminal Justice and Public Order Act 1994*

Section 26 of the CJPOA 1994 inserted a new paragraph, para. 2A, in sch. 1, Part I,
to the BA 1976. It provided that bail did not need to be granted in the case of an
indictable offence or an offence triable either way if it appeared to the court that
the defendant was on bail in criminal proceedings on the date of the offence. In
the Second Reading debate on the Bill which passed into law as the 1994 Act,
para. 2A was promoted on the basis of an estimate of 50,000 offences a year
committed by persons on bail (the then Home Secretary, the Rt Hon Michael
thinking was clearly predicated on an assumption that a defendant who had
committed an indictable (and therefore comparatively serious) offence while on
bail would be likely to do so again.

1.5.5.2 *Anomalous terms of the statutory provision*

The terms of the paragraph were anomalous in that the exception applied if it
appeared to the court that the defendant was on bail in criminal proceedings on
the *date* of the offence. Presumably, however, it was not intended that the appli-
cation of the exception should literally depend on the date of the offence.
Otherwise it might have meant that a person who came to court on bail, was
thereupon acquitted or sentenced non-custodially and was then arrested for an
offence allegedly committed after leaving court, could have been refused bail by
reason of being on bail on the date of the new matter.

1.5.5.3 *Research*

Research indicates that the main effects of s. 26 of the MOA 1994 have been:

(a) an increase in the use of conditional bail for those defendants who
    allegedly commit an offence while on bail (although this may be attributable to
    the police power to impose conditions which came into force at the same time);

(b) the proportion of defendants known to have committed an offence while
    on bail who were remanded in custody has only marginally increased since the
    implementation of s. 26. It has been pointed out that ‘section 26 has not changed
court remand decisions in those cases which already were deemed to be serious.
In addition, it may simply mean that courts were already using other exceptions,
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Section 26 has not had a measurable effect on the decision-making process of the court (Hucklesby and Marshall, cited above, p. 45). However, s. 26 has led to a greater likelihood of a remand in custody for persons charged with serious offences who have more than four previous convictions, have served a custodial sentence and have a bail history (Warren, J., *Monitoring the Effects of Section 26 of the Criminal Justice and Public Order Act 1994 in Bournemouth Magistrates’ Court*, final report to the Home Office, unpublished, London: Home Office, p. 15, summarised in Morgan and Henderson, cited above, p. 83; the authors of the present work have read the full report with the kind permission of the Home Office).

1.5.5.4 *Implications of the European Convention on Human Rights*

Referring to the assumption on which para. 2A appeared to have been based, that a defendant who had committed an indictable offence while on bail would be likely to do so again, the Law Commission, in its Consultation Paper, suggested that this rationale was open to three objections.

(a) *Incompatibility with presumption of innocence.* First of all, they argued, the presumption of innocence declared in art. 6(2) precludes an assumption that the defendant actually committed the offence charged (LC/CP 157, para. 6.3). However, in their Final Report they conceded that this concern was overstated in that the ECtHR had repeatedly stated that reasonable suspicion was a proper starting point for a decision, on relevant and sufficient grounds, to refuse bail (LC/Rep. 269, para. 4.3, n. 5).

(b) *Superfluity of the exception.* The Law Commission’s second and more important argument was that where there were substantial grounds for believing that the defendant would commit an offence the right to bail was excluded by BA 1976, sch. 1, Part I, para. 2(b) anyway and para. 2A would add nothing to it. Paragraph 2A, it was argued, was redundant unless the fact that the defendant was on bail at the time of the offence charged did not justify the belief that an offence would be committed if bail were granted, but in that case the paragraph would seem to serve no legitimate purpose. In creating a kind of presumption that a defendant charged with committing an indictable offence while on bail must have a propensity for committing such offences while on bail, para. 2A involved a mechanical form of reasoning which the ECtHR has consistently
rejected (LC/CP 157, para. 6.4; see para. 1.6.2.1 below). Detention could not be justified on the basis that a defendant fell into a category of persons who were in general deemed to have a propensity to behave in a particular way, but only on the basis of the particular circumstances of the individual defendant. The fact that the defendant was charged with committing a relatively serious offence while on bail might be a relevant factor in gauging the risk of an offence if bail were granted but could not furnish a ‘ground’ in itself for refusing bail.

(c) Exception did not create a presumption. The third argument discussed by the Law Commission (LC/CP 157, para. 6.5) was that para. 2A did not in fact go so far as to create a presumption because all it did was to exclude the right to bail otherwise conferred by s. 4. Having established that the defendant fell within the terms of para. 2A and that bail might on that account be refused, the court had then to consider whether to refuse it. In other words, para. 2A did not purport to be a ‘ground’ in its own right but only a ‘reason’ for finding that a genuine ground applied. In their responses to the Consultation Paper this argument was adopted by the DTI, the CPS and the Home Office who emphasised that para. 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 para. 9, a combination, they argued, which 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 (LC/Rep. 269, para. 4.5). The Law Commission found the argument unconvincing (ibid., para. 4.6). The fact that the court was not obliged to withhold bail, but enjoyed a discretion not to do so was not the point, in its view. 

Paragraph 2A elevated to the status of an independent ground that which could, in truth, only be a factor which the court ought to take into account as relevant to the question whether there were substantial grounds for believing that, if granted bail, the defendant would commit an offence. In the Consultation Paper the Law Commission had given a detailed refutation of this reasoning, elaborating on two possible objections (LC/CP 157, paras. 6.6–6.9). The first was that para. 2A required no assessment comparable to that laid down by para. 9 requiring regard to be had to all relevant considerations ‘in taking the decisions required by para. 2 or 2A’, including those it specified (e.g. nature and seriousness of the offence and the defendant’s character and antecedents). The considerations in para. 9 had no bearing on para. 2A but the Law Commission suggested that the reference to para. 2A in para. 9 might perhaps be construed to mean that account should be taken of all relevant considerations in determining not (as in the case of para. 2) whether para. 2A applied, but whether bail should be granted although it applied. Such an interpretation would be strained but not impossible.

The second objection was that even if para. 2A were construed in this way it was not clear what criteria the court would be expected to apply in making the decision. If the fact described in para. 2A (defendant already on bail) was not itself a ground for refusing bail, but only a reason for concluding that a ground existed, what might that ground be? One possibility was that it must be one of those
recognised by para. 2, which would mean that bail could be refused under para. 2A only if, having taken account of all relevant considerations as required by para. 9, it was found that there were substantial grounds for believing that if given bail the defendant would do one of the things mentioned in para. 2, for example, commit an offence. But this would mean that para. 2A was redundant. It could never justify a refusal of bail where para. 2 did not. The Law Commission concluded that where the right to bail is excluded by para. 2A alone, a refusal of bail would be very likely to violate the defendant’s art. 5 rights (LC/CP 157, para. 6.11). The fact that the defendant was on bail could not in itself be a ground for refusing bail and para. 2A was really a reason disguised as a ground (and would not be out of place in para. 9, which lists a number of factors to be considered in taking the decisions required by para. 2: see also LC/Rep. 269, para. 4.3). Construed as a reason rather than a ground it might be invoked compatibly with the Convention and if it could be construed in this way it had to be so construed: HRA 1998, s. 3. However, since the fact that the defendant was on bail at the time of the offence charged must be a relevant factor anyway in determining the risk of an offence if bail were granted para. 2A would be redundant and would have no separate effect, which, they stressed, was a questionable construction in itself (LC/CP 157, para. 6.12). In their Consultation Paper the Law Commission considered that ‘many courts’ had probably been applying para. 2A as a relevant factor rather than a ground (LC/CP 157, para. 6.11), a view which, in their Final Report, was transformed into a belief that this was the approach of the ‘vast majority of courts’, an assumption perhaps resulting from the judgment of the CPS, who believed that it was unlikely that bail would ever be refused on the basis of para. 2A alone (LC/Rep. 269, para. 4.8). There nevertheless remained a danger that the police and courts would invoke it as a ground and violate art. 5 (LC/CP 157, para. 6.13); indeed, as the Law Commission stated in its final report, it was:

inevitable . . . 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 (LC/Rep. 269, para. 4.8).

As it might be a trap for unwary courts (LC/CP 157, para. 6.9) the provisional and final recommendations were for the repeal of para. 2A and the addition instead of the fact that the defendant is already on bail to the list of considerations in para. 9 which ought to be taken into account in making a determination under para. 2.

1.5.5.5 Modification of the exception
As originally drafted the Criminal Justice Bill of 2002 repealed para. 2A precisely in accordance with the Law Commission’s recommendations. However,
in consequence of the ‘street crime initiative’ a Government amendment was introduced at the Commons Report stage which restored para. 2A but reworked the statutory text to introduce a presumption against bail in cases of arrest for an offence allegedly committed when the person was already on bail for an offence. The measure, brought into law by s. 14(1) of the CJA 2003, enacts that substituted para. 2A provides (in subparagraph (1)) that defendants who fall within the paragraph may not be granted bail unless the court is satisfied that there is no significant risk of their committing an offence while on bail (whether subject to conditions or not). Paragraph 2A(2) provides that a defendant falls within para. 2A if (a) aged 18 or over and (b) it appears to the court that the defendant was on bail in criminal proceedings on the date of the offence. The age qualification was retained in the face of Opposition concerns voiced in particular by Mr John Gummer (HC Deb, vol. 405, col. 720, 19 May 2003). The Government has expressed satisfaction that the measure is Convention-compliant (see the Solicitor-General, HC Deb, vol. 405, col. 719, 19 May 2003).

1.5.5.6 Court to give particular weight to the fact that the defendant was already on bail
Parliament declined to follow the Law Commission’s recommendation that it adopt the simple approach of adding the fact that the defendant was already on bail to the list of relevant considerations in para. 9. Instead s. 14(2) of the CJA 2003 inserts after para. 9 a new paragraph, para. 9AA, requiring the court, in deciding for the purposes of para. 2 of sch. 1, Part I, to the 1976 Act, whether it is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would commit an offence while on bail, to give particular weight to the fact that the defendant committed the offence while on bail: para. 9AA(2).

1.5.5.7 Restriction of special weight provision to cases where defendant is 18 or over and where ‘new’ offence or offence for which defendant is already on bail is imprisonable
For para. 9AA to apply, the defendant must be aged 18 or over and either the instant offence or the offence for which the defendant was on bail is punishable with imprisonment or both are so punishable: para. 9AA(1).

1.5.6 Own protection or welfare
The right to bail conferred by the BA 1976, s. 4, is excluded where courts are satisfied that defendants should be kept in custody for their own protection: sch. 1, Part I, para. 3 (imprisonable offences) and Part II, para. 3 (non-imprisonable offences). A custody officer may also refuse bail on this ground: PACE 1984, s. 38(1)(a)(vi). The need for defendants to be kept in custody for their own
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protection, or in the case of children or young persons, for their own welfare, will usually apply where:

(a) defendants need protection from themselves, for example, where they are mentally unstable, suicidal, alcoholic, or drug addicted;

(b) defendants are in need of protection from others, for example, where they are accused of an offence which has aroused public anger such as child abuse.

The Law Commission suggest that the 'own protection' ground for refusing bail may additionally be invoked where the defendant is at risk from criminal associates (LC/CP 157, para. 2.28). As to the position in (a), it should be noted that pre-trial medical reports are inappropriate unless there is doubt about a defendant's fitness to plead or unless there exists the possibility of an order under s. 37(3) of the MHA 1983 without conviction. As to (b), the need to protect the defendant from others, this is 'Montero's Aim' in imposing a criminal justice sanction (after the Spanish jurist who described it), the need to protect offenders and suspected offenders from unofficial retaliation (see Walker, N., Sentencing in a Rational Society, Harmondsworth: Penguin Books, 1969, ch. 1). There is a wider aim in the case of children or young persons since the exception then applies for their own welfare. This is in accordance with the principle laid down in the CYPA 1933, s. 44 of which provides:

Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings and for securing that proper provision is made for his education and training.

The legitimacy of protective pre-trial detention in terms of the ECHR was considered by the ECtHR in IA v France RJD, 1998-VII, p. 2951, para. 108, in which it was accepted that an accused person's safety might warrant detention 'for a time, at least'. However, on the particular facts the case for such detention had not been made out. The Lebanese applicant had been continuously detained for over five years on a charge of murdering his wife, supposedly because the judicial authorities feared he would be attacked by her Lebanese family, but the protective need had been relied on only intermittently and the only reason which had been given for fearing a revenge attack was a piquant reference to 'barbaric' Lebanese customs. In acknowledging the legitimacy of protective detention the Court made this conditional on the existence of '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'. As the Law Commission pointed out (LC/CP 157, para. 7.4; LC/Rep. 269, paras. 5.4 and 5.5), there was no further explanation of what for these purposes might qualify as an exceptional circumstance, although the words seem to suggest an emphasis on the offence rather than the offender. Thus, they would not embrace the risk of
self-harm. The Law Commission warned against undue reliance on one rather enigmatic comment, particularly where on the facts of the case the possibility of self-harm did not arise. In *Riera Blume v Spain* (App. No. 37680/97, 14 October 1999), which concerned a family’s detention of their relatives for ‘deprogramming’ after exposure to a religious sect, the ECtHR indicated that a risk of self-harm in the form of suicide would not justify ‘a major deprivation of liberty’, but, as the Law Commission noted (LC/Rep. 269, para. 5.9), the ruling does not rule out a fear of suicide as a reason which may justify some level of detention and anyway the facts of the case were unusual and the statement may not be generally applicable (LC/CP 157, para. 7.4; LC/Rep. 269, para. 5.9). As there was no clearly established Convention case law, amendment of the BA 1976 would, in the Law Commission’s view, be unhelpful (LC/CP 157, para. 7.5) and it provisionally concluded (ibid., para. 7.6) that a refusal of bail for the defendant’s own protection could be compatible with the Convention provided there are exceptional circumstances and perhaps only if these related to the nature of the offence and the conditions or context in which it was alleged to have been committed.

There was broad agreement among the Law Commission’s respondents that detention for the defendant’s own protection was capable of being Convention-compliant (LC/Rep. 269, para. 5.6). In the view of the Justices’ Clerks’ Society, the Law Society and the CPS the power, though resorted to infrequently, was available not only to protect from harm by others but also to protect the defendant from self-harm. However, some respondents doubted whether detention to protect the defendant from self-harm could ever be Convention-compatible. Whereas the Foreign and Commonwealth Office and the Home Office stated that the point had not been sufficiently tested in the ECtHR, ACPO saw no reason for the belief that such detentions might not be compatible, provided they were justified by a proper factual basis in each particular case.

The Law Commission’s final conclusion (LC/Rep. 269, para. 5.10) was that a refusal of bail for the defendant’s own protection, whether from harm by others or self-harm, could be compatible with the Convention where detention was 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 were exceptional circumstances in the nature of the alleged offence or the conditions or context in which it was alleged to have been committed, or both. In the absence of authority, the Law Commission could 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 Convention even where the circumstances giving rise to the risk were unconnected with the alleged offence, provided that the court was satisfied that there was a real risk of self-harm and that a proper medical examination would take place rapidly so that the court might then consider exercising its powers of detention under the MHA 1983 (LC/Rep. 269, para. 5.11).

Presumably denial of bail on the ground of own protection will be compatible, if risk cannot be avoided by a condition aimed to secure reduction of the risk.
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Section 11(1) of the CJA 2003 accordingly inserts in s. 3(6) of the BA 1976 after paragraph (c) a new subparagraph, (ca), empowering a court to impose requirements necessary for the person’s own protection, or, in the case of children or young persons, for their own welfare or in their own interests. Section 11(2) inserts a similar provision in s. 3A(5) of the 1976 Act relating to police bail granted by a custody officer.

1.5.7 Insufficient information

Applicable to imprisonable offences only is BA 1976, sch. 1, Part I, para. 5, which provides an exception to the right to bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions about bail required by the Act for want of time since the institution of proceedings. The provision enables the court to refuse to release a defendant where, through want of time since the proceedings were instituted, it has insufficient information to decide whether or not the other grounds for refusing bail exist. The exception usually applies only on the defendant’s first appearance in court on the morning after detention for inquiries under PACE 1984 have concluded. There may, for example, be doubt about the defendant’s identity, address or previous convictions. A further example suggested by the Law Commission might be detailed information relating to the seriousness of the offence where the police are liaising with other investigatory agencies and it is suspected that the offence is one of a series (LC/CP 157, para. 2.31). In practice, the power to refuse bail under this exception is not regarded as the making of a ‘bail decision’ so much as the deferring of a decision. The advantage of applying this exception from the defendant’s point of view is that it does not preclude a further application for bail since full argument cannot have been heard previously and the restriction on repeated applications does not apply: see R v Calder Justices, ex parte Kennedy (1992) 156 JP 716, in which it was held that a decision under para. 5 merely expressed the justices’ satisfaction that they were not in a position to make a proper bail decision and that it did not therefore restrict further applications (see also LC/Rep. 269, para. 6.2). It has been suggested that where a first-appearance application for bail is unsuccessful the defence should actually invite the court to specify the ground for refusal of bail as that of ‘insufficient information’ in order to keep their options open for a later application (see Chatterton, C., Bail: Law and Practice, London: Butterworths, 1986, p. 55). Renewed applications form the subject matter of Chapter 5 below.

In its Consultation Paper the Law Commission did not regard para. 5 as giving rise to any problems of compatibility with the ECHR and so did not give it detailed consideration (see LC/Rep. 269, para. 6.3). However, one respondent identified a risk of compatibility where para. 5 was relied upon to refuse bail because of a lack of information caused by prosecution incompetence or dilatoriness. As the Law Commission noted (LC/Rep. 269, para. 6.7), the ECHR
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has repeatedly stressed that, where a person has been detained, the national authorities must show ‘special diligence’ in the conduct of the investigation (Tomasi v France A 241-A (1992) 15 EHRR 1, para. 84; Herczegfalvy v Austria (1992) 15 EHRR 437, para. 71; Abdoella v Netherlands (1992) 20 EHRR 585, para. 24). This accords with the entitlement under art. 5(3) to ‘trial within a reasonable time’, as well as to the presumption of innocence enshrined in art. 6(2). 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, the Law Commission argued that 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 (LC/Rep. 269, para. 6.7). The case law on art. 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 and must provide an efficient judicial apparatus capable of reaching swift determinations of the lawfulness of detention (see LC/Rep. 269, para. 6.7, citing Bezicheri v Italy (1989) 12 EHRR 210, paras. 23–4 and E v Norway (1990) 17 EHRR 30, para. 66).

The language of para. 5 requires the court to be satisfied that it has not been practicable to obtain sufficient information for want of time since the start of proceedings and the Law Commission concluded (in unattributed agreement with the present work) that it would normally be used only on the first occasion that the defendant comes before the court. Importantly, Home Office Circular No. 155/1975, para. 21, stresses the desirability of imposing strict limits on the timetable for inquiries necessary to obtain sufficient information:

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 (cited in LC/CP 157, para. 2.31; LC/Rep. 269, para. 6.9).

Letellier v France (1991) 14 EHRR 83, para. 35 establishes the principle that 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. The Law Commission (LC/Rep. 269, para. 6.10) found it very difficult to see how para. 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.

Paragraph 5 applies to situations where ‘it has not been practicable to obtain sufficient information’. In the Law Commission’s view (LC/Rep. 269, para. 6.11) it would constitute a violation of art. 5 and a misconstruction of para. 5 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. However, as the Law Commission noted (LC/Rep. 269, para. 6.12) detention would be Convention-compatible 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 para. 5 at all. For example, on the basis of the information available, the court might conclude that detention was necessary because of a real risk that, if granted bail, the defendant would abscond, commit an offence, or interfere with witnesses or the course of justice.

Since in the view of the Law Commission (LC/Rep. 269, para. 6.17) it is entirely possible for the courts to apply para. 5 in a way which is Convention-compliant there was no need to amend it.

1.5.8 ‘Impracticable to prepare report or make inquiries’

The exception to the right to bail where it appears to the court to be impracticable to complete inquiries or prepare a report without keeping the defendant in custody is generally used as a last resort. The defendant will normally have failed to keep appointments or to cooperate in some other way. The requirement is that the preparation of reports or the making of inquiries must be impracticable, not merely difficult or inconvenient.

1.5.9 Non-imprisonable offences

The historical reason for refusing bail is preserved here, but with the proviso that the belief that the defendant will fail to surrender must be based on a previous failure to surrender. The belief need not be based on reasonable grounds. The provisions as to the defendant’s own protection or welfare, serving prisoners and following an arrest pursuant to the BA 1976, s. 7, also apply to non-imprisonable offences.

1.6 REQUIREMENT TO EXPLAIN AND RECORD BAIL DECISIONS

1.6.1 Obligation of the decision-taker to state reasons for refusing bail or imposing conditions on grant of bail

1.6.1.1 Fundamental principles involved

It is an essential element of a defendant’s right to bail that where an exception applies warranting suspension or limitation of that right the defendant should be
allowed to know the reasons. This is a clear application of the fundamental principle of open government in a fair and democratic society, that individuals should normally be informed of the reasons for official decisions affecting their lives – particularly where those decisions relate to the liberty of the subject. However, there is a further reason for the right to know why bail is refused. It is to enable the defendant to challenge the decision before a higher court, for without knowing the ostensible reasons the higher court can make no rational judgment on their validity.

1.6.1.2 Statutory duty of the court to give reasons
The right of the defendant to be informed of the reasons for refusal of bail is enshrined in the BA 1976, s. 5(3). The subsection provides that 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 the general right to bail applies, then the court must, with a view to enabling the defendant to consider making an application in the matter to another court, give reasons for withholding bail or for imposing or varying those conditions.

1.6.1.3 Statutory duty of police to give reasons for imposing conditions
The BA 1976 imposes no duty on the custody officer to give reasons for withholding bail. This is because PACE 1984 prohibits police detention without specific grounds and establishes a detailed regime for the recording of the relevant grounds (see Chapter 6 below). Where, however, a custody officer imposes conditions in granting bail to a person in criminal proceedings, or where the officer varies any conditions of bail or imposes conditions in respect of bail in criminal proceedings, the officer must give reasons for imposing or varying the conditions, with a view to enabling the person to consider requesting the officer or another custody officer to vary the conditions, or to enable the person to consider making an application to a magistrates’ court to vary the conditions: BA 1976, s. 5A(2). (Section 5A(1) provides that s. 5 of the Act applies, in relation to bail granted by a custody officer under Part IV of PACE 1984 in cases where the normal powers to impose conditions of bail are available to the officer but with the difference that s. 5(3) is substituted by the provision set out in s. 5A(2).)

1.6.2 Compliance with the European Human Rights Convention
The reasons which BA 1976, s. 5(3) requires the court to specify include those listed in sch. I, Part I, para. 9, and which may explain the particular ground for
refusing bail, i.e. the appropriate exception to the right to bail. The contrast in
the scheme of the BA 1976 between grounds and reasons may be compared with
the distinction between grounds for detaining a person and reasons for conclu-
sing that the ground is substantiated in a particular case which is crucial to the
ECtHR case law (see LC/CP 157, paras. 4.19 and 4.20; LC/Rep. 269, para. 10.2).
Reasons and the reasoning process at the national court level have taken on a
particular importance because the ECtHR generally approaches the question of
whether the detention complained of constitutes a violation of art. 5(3) by a
close analysis and assessment of the reasoning put forward by the national court
(ibid., paras. 4.3 and 4.4).

1.6.2.1 Required reasoning
There are at least three different requirements which the national court’s reasoning
must satisfy:

(a) Reasons must be concrete, not stereotypical The reasons put forward
supporting the grounds for a decision will be inadequate if they are abstract or
stereotyped, that is where the national court has failed to scrutinise the actual
facts of the case or to grapple with the actual circumstances of the defendant’s
detention (e.g. Clooth v Belgium (1991) 14 EHRR 717; Letellier v France (1991)
14 EHRR 83; Yagci and Sargin v Turkey (1995) 20 EHRR 505; IA v France, RJD,
1998-VII, 2951; Szeloch v Poland (2001) 37 EHRR 902(46)).

(b) Reasons must be continuously sustained by the facts of the case The
national court’s conclusion must be continuously sustained by the facts on which
the reasoning is based. The Law Commission noted the ‘surprising’ willingness
of the ECtHR to substitute its own assessment of the facts (LC/CP 157, para. 4.13,
citing Harris, D.J., O’Boyle, M. and Warbrick, C., Law of the European
Convention on Human Rights (London: Butterworths, 1995), p. 137, for the
opinion that there is little discernible ‘margin of appreciation’, and LC/Rep. 269,
para. 10.8; see Ringeisen v Austria A 13 (1971) 1 EHRR 455, where evidence was
held insufficient to justify the national court’s conclusion that the applicant
would collude with witnesses and commit offences). It will be insufficient where,
although the facts initially support the belief that, if released, the defendant
would abscond or commit an offence, after a time they cease to do so (LC/CP
157, para. 4.14 and LC/Rep. 269, para. 10.9, both citing e.g. Neumeister v Austria
(No 1) (1968) 1 EHRR 91, para. 10; Matzner v Austria (1969) 1 EHRR 198,
para. 11; Letellier v France (1991), cited above, para. 51; Clooth v Belgium (1991),
cited above, para. 43). Reliance on a particular ground has been held to be mis-
taken because it is only intermittently used as a justification, see e.g. IA v France,

(c) Defendant’s counter-arguments must be considered The reasons cited by
the national court must take account of any counter-arguments put forward
by the defendant and to the extent that they fail to do so they will be treated as
1.6.2.2 Automatic inferences forbidden

Complementing those criteria which national courts are required to consider, there are at least four inferences which the ECtHR has forbidden, holding that whilst relevant to the bail decision they would in themselves be insufficient to warrant the refusal of bail without proper attention being given to the particular facts in each individual case (see LC/CP 157, paras. 4.16 and 4.23; LC/Rep. 269, paras. 10.11 and 10.16). The four rules are as follows:

(a) Strength of evidence alone is inadequate
The strength of the evidence cannot in itself justify the inference of necessary detention and although the persistence of suspicion that the arrested person committed the offence is essential, after a certain period the domestic authorities must be able to show further factors justifying continued detention (*B v Austria* A 175 (1990), para. 42; *Matznetter v Austria* (1969), cited above, para. 12; *Letellier v France* (1991), cited above, para. 35; *Yargci and Sargin v Turkey* (1995), cited above; *Wemhoff v Germany* (1968) 1 EHRR 55, para. 12; and *Ringiesen v Austria (No 1)* (1971) 1 EHRR 455, paras. 103–4).

(b) Severity of sentence alone is inadequate
The severity of the likely sentence does not in itself justify the inference that the defendant will abscond. In *Neumeister v Austria (No 1)* (1968), cited above, para. 10, the ECtHR said:

Other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial.


(c) Possibility of escape from jurisdiction insufficient in itself
The fact that it is possible for the defendant to escape from the jurisdiction does not itself warrant the conclusion that this will happen (e.g. *Stögmuller v Austria* (1969) 1 EHRR 155).

(d) Criminal record and the risk of an offence on bail
The existence of a risk of an offence on bail cannot automatically be assumed from the fact that the defendant has a criminal record (*Muller v France*, cited above, para. 44).
To use what can only be one relevant consideration as the basis for an assumption that bail should be refused is an automatic inference of the kind which the ECtHR case law forbids. The reasons listed, insufficient in themselves to justify refusing bail, closely resemble the list of considerations in BA 1976, sch. 1, Part I, para. 9, which are, or may be, relevant to the bail decision (LC/Rep. 269, para. 10.16). Although the ECtHR acknowledges the potential relevance of para. 9-type reasons to the bail decision the existence of the list leaves open the possibility that a court might use the existence of a criminal record, for example, as the basis for an automatic inference that a defendant will offend if granted bail, and a violation, therefore, of art. 5(3) under ECtHR case law (LC/CP 157, para. 4.23; LC/Rep. 269, para. 10.16). Indeed, research findings suggest that, in practice, the inferences that the ECtHR has held to be impermissible are in fact relied upon by the courts as a basis for bail refusals (Hucklesby, A., ‘Remand Decision Makers’ [1997] Crim LR 269). In the view of the Law Commission, the proper approach for Convention compatibility requires that bail decisions:

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 . . . 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 process is followed, relevant considerations are not overlooked and the defendant understands why his or her arguments did not prevail . . . Nevertheless, [this] 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’ (LC/Rep. 69, paras. 10.12 to 10.14).

1.6.2.3 Administrative law principles

In English administrative law where there is an obligation to give reasons for a decision, the reasons must be ‘clear and adequate and deal with the substantial issues in the case’ (R v Immigration Appeal Tribunal, ex parte Jebunisha Kharvaleeb Patel [1996] Imm AR 161, 167, following Re Poyser and Mills' Arbitration [1964] 2 QB 467, 478, Westminster City Council v Great Portland Estates plc [1985] AC 661, 673 and Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153, 165). In the view of the Law Commission (LC/CP 157, para. 4.24; LC/Rep. 269, para. 10.17) there is no reason why this test should not apply to the duty to give reasons imposed by s. 5(3) and the standards thus expressed are likely to be regarded as coextensive with those required by the ECtHR.
1.6.2.4 Recommendation on training
The Law Commission recommended that magistrates and judges should be provided with guidance and training in the making of bail decisions in a Convention-compliant manner (LC/CP 157, para. 4.25).

1.6.3 Giving reasons for granting bail

1.6.3.1 Former duty to give reasons for granting bail in certain classes of serious crime
The converse of the need in certain cases for a court to state its reasons for refusing bail or imposing conditions on granting bail is that there are circumstances in which the public have a right to know the reasons why a court has granted bail. The 16th-century Statute of Bail is the first instance of this concern being expressed in an Act of Parliament. As described in the historical account at the beginning of the present chapter, the statute was enacted to prevent collusive release of felony prisoners and it sought to achieve this aim by obliging magistrates to record the depositions of witnesses in order to furnish a check on the strength of the case and on whether it was therefore safe to admit the accused to bail.

During the 1980s public anxiety was provoked by a number of high-profile cases in which defendants charged with a serious offence were released on bail only to commit a fresh offence of gravity while on bail. Parliament in consequence enacted s. 153 of the CJA 1988, which inserted in sch. 1, Part I to the BA 1976 a new paragraph, para. 9A, which provided that:

(a) where a person is charged with murder, manslaughter, rape, attempted murder, or attempted rape; and
(b) representations are made as to the exceptions to the right to bail; and
(c) the court decides to grant bail;

the court had to state the reasons for the decision. The CJPA 2001, s. 129(4), has now repealed para. 9A, consistent with a simultaneously enacted measure extending the principle to all cases in which bail is granted in spite of representations from the prosecution that it should not be granted (see para. 1.6.3.2 below).

1.6.3.2 General duty to give reasons for granting bail in the first instance where the prosecution have raised objections
Legislation has been enacted making generally applicable the principle embodied in the simultaneously repealed para. 9A of sch. 1, Part I. The CJPA 2001, s. 129(1), inserts in s. 5 of the BA 1976 new subsection (2A) requiring a magistrates’ court or the Crown Court to give reasons for granting bail to a person to whom s. 4 of the Act applies after hearing representations from the prosecutor in favour of withholding bail. The Law Commission (LC/Rep. 269, para. 10.15, note)
observed that 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. It would not pose any problems of Convention compatibility provided that courts did not allow themselves to be distracted from the fact that, under the BA 1976 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.

1.6.3.3 General duty to give reasons for granting bail in the first instance not to be applicable to police bail
The general duty of magistrates' courts and the Crown Court to give reasons for granting bail is contingent on the prosecution having raised objections. Clearly, therefore, it would hardly be consistent with this principle to require the giving of reasons where the police grant bail. Accordingly, s. 129(2) of the CJPA 2001 provides that the general duty to give reasons for granting bail in the first instance is not applicable to bail granted by the police. (It does this by inserting a new subsection (1A) in s. 5A enacting that subsection (2A) is omitted from s. 5 where the provisions of s. 5 apply to bail granted by the police.)

1.6.3.4 General duty to give reasons for granting bail on reconsideration by the court where the prosecution have raised objections
Where a magistrates' court has granted bail in criminal proceedings in connection with an offence which is triable on indictment or either way or proceedings for such an offence, or a constable has granted bail in criminal proceedings in connection with proceedings for such an offence and the prosecutor has applied to that court or the appropriate magistrates' court in a case of a decision by the constable, for the decision to be reconsidered, the court may vary the conditions of bail, impose conditions in respect of bail which has been granted unconditionally, or withhold bail (s. 5B(1) and (2); and see generally section 6.7 and para. 7.1.3.8 below). Section 129(3) of the CJPA 2001 enacts that new subsections (8A) and (8B) are inserted in s. 5B of the BA 1976, providing that where the court, on a reconsideration under s. 5B, refuses to withhold bail from a person to whom s. 4 and sch. 1 applies, then the court must give reasons.

1.6.4 Requirement to record bail decision and reasons
The right to be informed of the reasons for a decision to refuse bail or otherwise impose conditions for granting it, the duty to give those reasons and the duty to give reasons for granting bail in the special classes of serious case referred to in the last paragraph will have little effect without an obligation on the part of the court to record those reasons. Accordingly, the BA 1976 contains various provisions requiring such decisions to be recorded.
1.6.4.1 **Circumstances in which a bail decision must be recorded**

Section 5(1) of the BA 1976, as amended by the CJPOA 1994, s. 27(4) and sch. 3, para. 1, provides that in any of the following cases in which a bail decision is made the decision must be recorded:

(a) where a court or constable grants bail in criminal proceedings;

(b) where a court withholds bail in criminal proceedings from a person entitled to the general right to bail;

(c) where 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

(d) where a court or constable varies conditions or imposes conditions of bail in criminal proceedings.

1.6.4.2 **Copy of record to be given to person to whom bail decision relates on request**

Further, as soon as practicable after the decision has been recorded a copy of the record must be given to the person in relation to whom the bail decision was taken if that person so requests: BA 1976, s. 5(1).

1.6.4.3 **Requirement to record reasons for bail decision**

Where by virtue of s. 5(3) of the BA 1976 (see para. 1.6.1.2 above) a magistrates’ court or Crown Court is required in respect of a defendant entitled to the general right to bail to give reasons for withholding bail, imposing conditions for granting bail, or varying or imposing any conditions of bail, the court must include a note of those reasons in the record of its decision: s. 5(4).

1.6.4.4 **Note of reasons to be given to the defendant**

Where by virtue of s. 5(4) a note of the reasons for a bail decision is required to be included in the record of the court’s decision, then in the case of a decision in the magistrates’ court or in the case of an unrepresented defendant in the Crown Court, a copy of the note must be given to the defendant, but the Crown Court need not give a copy of the note of the reasons for its decision to defendants represented by counsel or a solicitor unless counsel or the solicitor so requests: s. 5(4) and (5).

1.6.4.5 **Reasons for granting bail, against prosecutor’s objections, to be recorded and announced**

Section 5(1) of the BA 1976 (see para. 1.6.4.1 above) lays down a requirement to record decisions granting bail. There is an obvious logical distinction between a duty to record a bail decision and a duty to record the reasons for that decision. Reference was made in para. 1.6.3.1 above to the provision of para. 9A of sch. 1,
Part 1, to the BA 1976 requiring the court to state the reasons for granting bail in cases of murder, manslaughter, rape, attempted murder, or attempted rape where representations are made as to the exceptions to the right to bail. Paragraph 9A further requires those reasons to be included in the record of the proceedings. As from a day to be appointed the CJPA 2001, s. 129(4), repeals para. 9A. However, in accordance with the scheme of extending the principle of giving reasons for granting bail in all cases, as from a day to be appointed s. 129(1) inserts new subsection (2B) in s. 5 of the BA 1976 providing that a magistrates’ court or the Crown Court which, by virtue of s. 5(2A), is required to give reasons for granting bail to a person to whom s. 4 of the Act applies after hearing representations from the prosecutor in favour of withholding bail, must include a note of those reasons in the record of its decision. Section 5(2B) further provides that, if requested to do so by the prosecutor, the court must cause the prosecutor to be given a copy of the record of the decision as soon as practicable after the record is made.

1.6.4.6 Reasons for granting bail upon prosecutor’s application for reconsideration

It was mentioned in para. 1.6.3.4 above that where by virtue of s. 5B of the BA 1976 a prosecutor has applied to a magistrates’ court for a reconsideration of bail granted by a constable or by a magistrates’ court and has raised objections against bail, the court may either impose or vary conditions or may refuse to withhold bail. Where bail is allowed following a hearing under s. 5B and by virtue of new subsections (8A) and (8B) inserted in s. 5B of the BA 1976 by s. 129(3) of the CJPA 2001, the court must give reasons, new subsection (8C), similarly inserted by s. 129(3), additionally provides that the court must include a note of those reasons in the record of its decision. It is further provided that, if requested to do so by the prosecutor, the court must cause the prosecutor to be given a copy of the record of the decision as soon as practicable after the record is made.

1.6.4.7 Standard form methods of recording and ‘tick boxes’

To provide documentary evidence of the basis of bail decisions courts use standard forms which vary in their precise configuration but in broad terms have a similar layout prescribed by the Magistrates’ Courts (Forms) Rules 1981, requiring two columns to be completed, the first relating to the exception to the right to bail which applies and the second the reason (see Stone’s Justices’ Manual (London: Butterworths, 2004), para. 9–856), but the courts are only required to make a record which contains the particulars set out in the form, not to use the form itself (MCR 1981, r. 90). In practice, courts use their own printed forms with the first column listing the possible grounds for refusing bail and the second listing the possible reasons for finding those grounds and requiring only the ticking of boxes to indicate both the grounds and the statutory reasons. (One such form, which was in use in the Inner London area, was reproduced in LC/CP 157,
Appendix E.) Thus, the reasons for refusing bail recorded by English courts are frequently perfunctory and are not explicitly based upon particular facts and factors (LC/Rep. 269, para. 10.15). In their final report the Law Commission argued (ibid., para. 10.19) that the main problem with ‘tick box’ bail decision forms was that they usually set out in the ‘grounds’ column a number of headings, such as that the offence charged was alleged to have been committed while the defendant was on bail, which were not Convention-compatible grounds for refusing bail. While the forms reflect the BA 1976 scheme, such matters could only be reasons capable of justifying detention on the ground that it is necessary for a Convention-compatible purpose. A form which included 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 lay magistrates into either making decisions which are not Convention-compatible, or giving reasons for them which fail to demonstrate that they have been arrived at in a Convention-compatible way (as to which, see para. 1.6.4.8 below). An additional problem is that there is no space on the standard form for recording that the defendant’s arguments have been considered (LC/CP 157, para. 4.21). A recommended model short form of announcement of the grounds and statutory reasons is given in Stone’s Justices’ Manual, para. 1–432, and although this combined with the use of standard forms does not preclude the giving of other reasons, the Law Commission found it difficult to avoid the conclusion that they were likely to encourage reliance on the statutory reasons alone (LC/CP 157, para. 4.20).

1.6.4.8 Recording duty and Convention compliance

English courts refusing bail or imposing or varying any conditions of bail will need to explain their decision in accordance with the rigorous standards of coherence and care imposed by the Convention case law. Without an adequate regime recording the reasoning process there can be no viable means of monitoring the basis of decision-making and the ECtHR has therefore proceeded on the basis that there is an ‘identity’ between the recording of reasons and the reasoning process (LC/CP 157, para. 4.11). The method adopted by the ECtHR in adjudicating on complaints under art. 5 assumes that the national court making the decision will properly record its decision-making process, because it is to that record that the court looks in determining whether the reasons advanced by the national court support the grounds on which detention is justified (LC/CP 157, para. 4.9). However, the failure to record reasons is not necessarily itself a violation of the Convention (LC/CP 157, para. 4.10); indeed, the decision in Van der Tang v Spain (1995) 22 EHRR 363, para. 60, suggests that there is no independent Convention duty on a national court to make an adequate record of its reasons (see LC/CP 157, para. 4.10 and LC/Rep. 269, para. 10.5). On the other hand, it will usually be difficult for a government to establish that the national court had sound reasons unless they are recorded in sufficient detail (ibid.). In practice, no
distinction is drawn between the decision-making process in the national court and the record of its decision, so that where, for example, the national court employs a ‘stereotypical’ form of words, the Court will interpret this as indicating a faulty decision-making process, not merely an inadequate record (LC/CP 157, para. 4.10). The important point is that the recording method must demonstrate an art. 5-compliant reasoning process. The scheme of s. 5(3) is capable of generating a record which can demonstrate such a reasoning process. However, in the opinion of the Law Commission reasons recorded simply by repeating the statutory wording on a standard form, in particular by ticking boxes, are likely to be considered abstract or stereotyped and since the quality of reasons given may be a pointer to the quality of the decision-making process any refusal of bail recorded on a standard form is in danger of violating art. 5 (LC/CP 157, para. 4.21). As the Law Commission observed, this conclusion holds good regardless of the actual quality of decision-making on bail applications in magistrates’ courts (ibid., para. 4.22). In fact quite apart from any Convention issue, reasons expressed solely by ticking boxes on a form would arguably fail the English administrative law requirement that where there is an obligation to give reasons for a decision the reasons must be ‘clear and adequate and deal with the substantial issues in the case’ (R v Immigration Appeal Tribunal, ex parte Jemunisha Kharvaleb Patel[1996] Imm AR 161, 167, cited in LC/CP 157, para. 4.24).

1.6.4.9 Recommendations for Convention-compliant practice on recording
In their Consultation Paper the Law Commission’s provisional recommendation was that magistrates and judges should be provided with guidance and training in the making and recording of bail decisions in a Convention-compliant manner and that forms are used in the magistrates’ courts which encourage compliant decision-making and recording (ibid., para. 4.25). Respondents were divided in their attitudes towards the use of forms with tick boxes (LC/Rep. 269, para. 10.21). Some respondents, notably the CPS, regarded such forms as a useful shorthand capable of guiding decision-makers through a complex statutory scheme. Whilst that body shared the concern that the use of pro forma documentation might, on its own, be insufficient evidence of proper reasoning and might lead to automatic or stereotyped decision-making, they stated that, in practice, clerks and prosecutors made full notes of the arguments put forward and the reasons given by the magistrates and they suggested preservation of the notes with the case file (ibid., para. 10.22). Reference was made to other forms, such as the custody record form used by the police in which there was provision for a short individual statement of reasons to be given (ibid., para. 10.21). Some respondents stated that decision-makers were only required to give their reasons, not to justify them and that in recording grounds and reasons the forms were adequate to satisfy this requirement (ibid.). Conversely, the Bar Council and the Criminal Bar Association jointly urged the abolition of tick-box forms as inimical to the requirement for a reasoned decision incorporating an analysis and conclusion
based on the strengths and weaknesses of the contending arguments (ibid., para. 10.23). The use of tick-boxes was argued by one respondent to distract from the proper issues (ibid.). However, the Law Commission accepted that the use of standard forms was a ‘boon to persons taking a large number of decisions in a short time, applying a complex statutory scheme’ (ibid., para. 10.24). A form drafted in accordance with the BA 1976, as interpreted by ECtHR case law, would lead the decision-maker through the scheme in a demonstrably methodical way and its appropriate use was an important discipline likely to facilitate lawful decisions (ibid., paras. 10.24 and 10.26). The content and structure of forms should be reviewed to check for Convention compliance (ibid., para. 10.31). On the other hand, a form could never be a substitute for a full note of the oral decision explicitly dealing with the facts of the individual case, not simply stating a recognised relevant consideration or circumstances without going further and explaining fully the need for detention (ibid., para. 10.24). Thus, the Law Commission recommended that as part of their initial and continuing training and guidance magistrates’ clerks should 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 (ibid., para. 10.31). There should be provision on forms for any other relevant considerations apart from the statutory grounds and reasons (ibid., para. 10.27). Further, next to each box in the second column there could be a reasonably large space for entering the reasons in favour of a particular ground and rejecting the counter-arguments (ibid.). The form could also include a note of the reasons why bail conditions, although considered as a possible alternative to custody, were believed to be inadequate (ibid.). The use of standard forms would also be beneficial for recording the grounds and reasons for attaching conditions to bail and it was suggested that same form could be used as for refusing bail (ibid.). It was pointed out that the standard form reproduced in the Consultation Paper provided a space for the recording of any conditions imposed, but not for the reasons for their imposition (ibid., note). It was suggested that in order to guide decision-makers a flow chart, modelled on the Magistrates’ Association sentencing guidelines, might accompany the form (ibid., para. 10.28). Finally, consideration could be given to the Crown Court and the High Court routinely tape-recording bail hearings (ibid., para. 10.31). On the other hand, it might be observed that it is at the magistrates’ court level that ambiguities in the decision-making process are most likely to arise.

1.7 TIME SPENT IN CUSTODY PRIOR TO SENTENCE

It is important to remember that as with any entrenched constitutional right, the right to bail under the BA 1976 is distinct from a ‘privilege’ accorded as a favour. The deprivation of bail for reasons of expedience or necessity is legitimately to
be regarded therefore as a ‘regrettable’ incursion on that constitutional right. In a fair and just society the loss of any right – even where demanded by expediency – must be compensated in some way. In this chapter on the right to bail it is appropriate, therefore, to include consideration of the mechanism by which the law makes restitution for the deprivation of that right. It does not do so by awarding financial compensation to the acquitted defendant. It does so by discounting any time served on remand against the sentence imposed.

At the time of going to press the provisions for discounting time served against a custodial sentence continue to be regulated by s. 67 of the CJA 1967, which provides for automatic reduction. Section 67 was originally to be replaced by a new regime introduced by s. 9 of the C(S)A 1997, under which the sentencing court was to be required to give directions for the crediting of periods of remand in custody but which allowed the court a discretion to make no direction. However, without ever being brought into effect s. 9 was replaced by s. 87 of the PCC(S)A 2000, which itself was replaced without actually being brought into force, by similar provisions contained in ss. 240–2 of the CJA 2003. (Section 67 of the 1967 Act had been repealed by s. 56(2) of the 1997 Act and sch. 6 thereto, which provisions were not subsequently repealed by either the PCC(S)A 2000 or the CJA 2003 and the presumed intention is that if and when the relevant provisions of the 2003 Act are brought into force, s. 56(2) and sch. 6 will be brought into force at the same time.) As s. 67 remains in force it is appropriate to set out its provisions.

1.7.1 The old regime (extant at date of publication)

1.7.1.1 General rule

Section 67(1) and (1A) of the CJA 1967 provide that the length of any sentence of imprisonment is reduced by any period during which the offender was:

(a) in police detention within the meaning of PACE 1984, or detained under s. 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989;

(b) in custody by reason only of having been committed to custody by order of a court in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose (i.e. on remand) or so committed in custody and having been concurrently detained otherwise than by order of a court; or

(c) in connection with the offence for which the sentence was passed, or remanded to local authority accommodation by virtue of an order under s. 23 of the CYPA 1969 in accommodation provided for the purpose of restricting liberty.

The effect of s. 67 of the CJA 1967 is that time spent in custody on remand is not deducted from a sentence of imprisonment or other custodial sentence if the offender is in custody in connection with other matters (for example, concurrently...
serving a sentence for an unrelated offence, or a term of imprisonment in default of payment of a fine). However, this exception does not apply, and the time in custody will discount, where the offender is simultaneously in custody otherwise than by order of a court (for example, where detained under the Immigration Act 1971).

1.7.1.2 Young persons

The reference to an offender being committed to custody by an order of a court includes a reference to the offender being remanded or committed to a remand centre or prison under s. 23 of the CYPA 1969 but does not include a reference to the offender being remanded or committed to local authority accommodation under s. 23 or 37 unless the young person was remanded or committed in accommodation provided for the purpose of restricting liberty (see para. 1.7.1.1 above).

In *R v Secretary of State for the Home Department, ex parte A*, *The Times*, 28 January 2000, it was stressed that time spent in local authority accommodation will only count towards sentence if the defendant is in secure accommodation and in local authority care without conditions. Special provision is made where a young offender is sentenced to a Detention and Training Order under s. 73 of the CDA 1998. Section 74(5) of the CDA 1998 provides that in determining the term of a Detention and Training Order for an offence, the court shall take account of any period for which the offender has been remanded in custody in connection with the offence, or any other offence the charge for which was founded on the same facts or evidence. It has been held that where, in determining the length of a Detention and Training Order, the sentencing court had overlooked the requirement to take account of any time during which the defendant has been remanded in custody in connection with the offence, effect would be given to it on appeal, but the reduction was not to be purely arithmetical: *R v Davis*, *The Times*, 20 December 2000; *R v Fieldhouse and Watts* [2000] Crim LR 1020. Section 74(6) provides that the reference to an offender being remanded in custody is a reference to the offender being:

(a) held in police detention;
(b) remanded in or committed to custody by an order of a court;
(c) remanded or committed to local authority accommodation under s. 23 of the CYPA 1969 and placed and kept in secure accommodation;
(d) remanded, admitted or removed to hospital under ss. 35, 36, 38, or 48 of the MHA 1983.

1.7.1.3 Counting deduction from the aggregate but double discounting prohibited

Where an offender is sentenced to a combination of individual sentences, whether consecutive or concurrent, time spent in custody in connection with any of the offences is deducted from the aggregate sentence, subject always to the rule
that time could never be counted more than once: R v Governor of Brockhill Prison, ex parte Evans; R v Onley Young Offender Institution, ex parte Reid [1997] 2 WLR 236. Where an offender has been remanded in custody in respect of two separate offences and is sentenced to imprisonment for one such offence, the sentence may be treated as reduced by the length of the remand period only once, even if the first sentence has been served by the time sentence is passed for the second offence (R v Secretary of State for the Home Department, ex parte Kitaya, The Times, 20 January 1998, DC). James Richardson has argued that the use of the word ‘only’ in s. 67(1)(b) of the CJA 1967 constitutes a significant restriction on the provision (Criminal Law Week, CLW 98/03/2). He contends that the key issue is not whether there are two or more separate offences, but whether there are two or more separate sets of proceedings:

If an offender appears before a magistrates’ court charged with two offences and he is remanded in custody, he would (in relation to each offence) be in custody ‘by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed’. In the normal course of events, both matters would be dealt with by the same court and any sentence passed would be automatically reduced by the period on remand. This would apply whether or not there was a conviction of both offences or of one only. In the unusual event of the offences being separated, with the offender being tried and sentenced for the first offence before trial of the second offence, sentence for the first offence would be reduced by operation of s. 67. If there were an acquittal at the first trial and a conviction at the second trial, it is submitted that any sentence imposed would similarly be reduced by operation of s. 67. If there were convictions at both trials, logic suggests that s. 67 applies to both sentences (the language of the section not having changed).

Richardson suggests that the court appears to have got round this conclusion, first by saying, in reliance on R v Governor of Brockhill Prison, ex parte Evans; R v Onley YOI, ex parte Reid, cited above, that there is an embargo on double-counting, and secondly by resorting to s. 41(2) of the CJA 1991. This provides that any period by which a sentence is reduced under s. 67 is to be treated as having been served as part of the sentence. The court therefore concluded that an offender was in custody not only as a result of the remand but also because he was serving the sentence imposed for the first offence. A prisoner whose release date has been delayed because it was wrongly determined by the application of what at the time was held to be the correct interpretation of the statutory provisions is entitled to damages for false imprisonment: R v Governor of Brockhill Prison, ex parte Evans (No. 2), sub nom Evans v Governor of Brockhill Prison, The Times, 6 July 1988. Time spent in custody on remand for certain offences while also serving a sentence of imprisonment does not count towards the serving of a sentence of imprisonment for those offences, even where the sentence for the earlier offence has already been reversed on appeal: R v Governor of Wandsworth Prison, ex parte Sorhaindo, The Times, 5 January 1999.
1.7.1.4 Extradited prisoners
Section 47 of the CJA 1991 allows a court dealing with an offender who has been extradited to order that part or the whole of the time spent in foreign custody should count towards sentence. In applying s. 47 it was stated by the Court of Appeal that it might not be appropriate to make allowance for time spent in custody while awaiting extradition where defendants had absconded abroad and had brought the situation entirely upon themselves: see e.g. *R v Scalise and Rachel* (1984) 7 Cr App R (S) 395; *R v Hanney, Independent*, 18 December 2000. In *R v Vincent* [1996] 2 Cr App R (S) 6, the Court of Appeal reduced the term of the sentence rather than exercise the power under s. 47. Where an offender was convicted and sentenced in absentia after absconding abroad and subsequently spent some time in custody abroad before being returned to the UK, it was held that the Court of Appeal ought to make some adjustment to an otherwise proper sentence: *R v De Simone* [2000] 4 Archbold News 3; *R v Lodde, The Times*, 8 March 2000.

1.7.1.5 Life sentences
In the case of an offender sentenced to life imprisonment with a period specified under s. 34 of the CJA 1991, any period spent in custody in relation to the offence for which the sentence was passed will count as part of the specified period. Neither this provision nor s. 47 (see para. 1.7.1.4 above) applies to an extradited prisoner who is sentenced to life imprisonment. In such a case the court may reduce the specified period by such amount as it considers appropriate: *R v Howard* [1996] 2 Cr App R (S) 273.

1.7.1.6 Suspended sentence
Where a suspended sentence is activated time is not deducted from any period spent in custody before the suspended sentence was passed: CJA 1967, s. 67(1). Accordingly, it has been held that where a suspended sentence is passed, the sentencing court should make allowance for time spent in custody on remand, as this time will not be deducted from the sentence if it is eventually activated: *R v Williams* (1989) 11 Cr App R (S) 152. Where an offender has been in custody on remand for a period which would be equivalent to the appropriate sentence, the sentencer should not pass a suspended sentence but should impose an immediate sentence; this will enable the offender to have the benefit of the time spent in custody so that it counts towards the sentence: *R v McCabe* (1988) 10 Cr App R (S) 134, followed in *R v Peppard* [1990] Crim LR 446 and *R v Helder* (1991) 13 Cr App R (S) 611, CA. These cases pre-date the implementation of s. 5 of the CJA 1991, which restricts the imposition of a suspended sentence to cases of ‘exceptional circumstances’.

1.7.1.7 Resentencing for original offence where community order is breached: no statutory entitlement to compensatory remission
Where under sch. 2, para. 8, to the CJA 1991 a custodial sentence is imposed for breach of a community sentence or an order for ‘conditional discharge’, time is not
deducted for any period spent in custody before the order was made: CJA 1967, s. 67(1) and (5). Compensatory reduction has been held to lie within the discretion of the sentencing tribunal: see e.g. R v McIntyre (1985) 7 Cr App R (S) 196; R v Mackenzie (1988) 10 Cr App R (S) 299; R v Macdonald (1988) 10 Cr App R (S) 458; R v Gyorgy (1989) 11 Cr App R (S) 1; R v Needham (1989) 11 Cr App R (S) 506; R v Wiltshire (1992) 13 Cr App R (S) 642; R v Henderson [1997] 2 Cr App R (S) 266; R v McCleod, unreported, 27 November 1998, CA 98/05728 W4; R v Armstrong [2002] 2 Cr App R (S) 396. However, it has been stated that in the ordinary way and in the generality of cases credit ought to be given consistently with the court’s general approach: McIntyre; Mackenzie (declining to interfere with the sentence); Macdonald; Gyorgy; Needham; Wiltshire (sentence reduced); Armstrong, all cited above. It would presumably otherwise be the case if there were aggravating features which made reduction inappropriate, e.g. Mackenzie. In McCleod, sentence was reduced by double the amount of time spent on remand where the judge stated in accordance with Practice Direction (Custodial Sentences: Explanations) [1998] 1 WLR 278 that any time spent in custody would count towards the sentence but failed to make any allowance for time spent in custody prior to the imposition of the community service order. Section 67(1) of the CJA 1967 refers only to community rehabilitation orders and community punishment orders and not to other community punishments, such as a curfew order. This is presumably an oversight by the draftsman, the effect of which is that time spent in custody prior to being sentenced to any other community punishment will count towards any future custodial ‘re-sentence’ for the same offence. Where the defendant is to be resentenced following breach of a community sentence, it is the defending advocate’s duty to inform the court of any time spent in custody before the original sentence, so that the court may make an appropriate allowance: R v Clark, The Times, 19 December 2000.

1.7.1.8 Remand in custody for breach will discount against subsequent custodial sentence

The effect of s. 67 of the CJA 1967 is that where an offender is in custody before being dealt with for breach of a probation order, community service order, or suspended sentence, time is deducted from any sentence of imprisonment imposed or ordered to be served subsequently.

1.7.1.9 Offences subsequently taken into consideration

In R v Towers (1987) 9 Cr App R (S) 333, CA, the appellant spent about 18 days in custody after being arrested for an offence which was subsequently taken into consideration. It was held that this time was not deductible from the sentence by virtue of s. 67, but ‘as an act of mercy . . . on the special facts’ of the case sentence was reduced by one month.

1.7.1.10 Time spent in the custody of the court during proceedings

In R v Governor of Kirkham Prison, ex parte Burke, unreported, 18 March 1994, DC, it was held that time spent by the defendant in the dock during committal
proceedings and trial did not count to be credited under s. 67(1A). In *The Home Office v Burgess*, unreported, CA (CD), 6 November 2000, CCRTI 2000/0262/B1, the defendant was granted bail during the course of his trial subject to conditions which included a requirement to surrender to custody at 9.30 a.m. and not to be released until thirty minutes after the end of the day’s hearing. It was held that once a defendant surrenders to the custody of the court, his further detention lies solely within the discretion and power of the judge (see *R v Central Criminal Court, ex parte Guney* [1996] AC 616). It follows that, at least while the court is sitting, the detention of the defendant in the custody of the court is not ‘by reason of having been committed to custody by an order of the court’.

1.7.1.11 *Time spent in bail hostel*

It is appropriate to make some allowance where defendants have been in a bail hostel subject to severe restrictions on their freedom, such as a 24-hour curfew: *R v Watson* [2000] 2 Cr App R (S) 301.

1.7.2 The new regime under the Criminal Justice Act 2003

1.7.2.1 *Requirement for court to direct discount for time served*

The CJA 2003 provides that where, having been remanded in custody in connection with an offence committed after the commencement of the new provisions or a related offence (that is to say, any other offence the charge for which was founded on the same facts or evidence), an offender is sentenced to imprisonment, the sentencing court must, subject to exceptions provided for in s. 240(4), direct that the number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served as part of the sentence: s. 240(1) and (3). It is immaterial for the purposes of crediting periods of remand in custody under the new provisions whether the offender has also been remanded in custody in connection with other offences or has also been detained in connection with other matters: s. 240(2). For the purposes of the application of the new rule to offences committed after its commencement it is provided that where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it shall be taken to have been committed on the last of those days: s. 240(8).

1.7.2.2 *Applicability to detention orders and extended sentences*

Section 240 applies to a determinate sentence of detention under the PCCA 2000, s. 91, and to extended sentences under the CJA 2003, s. 228.

1.7.2.3 *Consecutive and wholly or partly concurrent terms of imprisonment*

For the purposes of the general rule on court directions stated in para. 1.7.2 above, consecutive terms of imprisonment and terms which are wholly or partly concurrent are to be treated as a single term if the sentences were passed on the
same occasion or, where they were passed on different occasions, the person has not been released on licence under Chapter 6 of the Act at any time during the period beginning with the first and ending with the last of those occasions: s. 240(8).

1.7.2.4 Exception to the general rule as to court directions where a remand was concurrent with a sentence of imprisonment
The requirement in s. 240(3) for directions to be given that days spent on remand are to count as time served as part of the sentence does not apply if and to the extent that rules made by the Secretary of State so provide in the case of a remand in custody which is wholly or partly concurrent with a sentence of imprisonment: s. 240(4)(i).

1.7.2.5 Exception to the general rule as to court directions in the case of consecutive or wholly or partly concurrent sentences
The requirement in s. 240(3) for directions to be given that days spent on remand are to count as time served as part of the sentence does not apply if and to the extent that rules made by the Secretary of State so provide in the case of sentences of imprisonment for consecutive terms or for terms which are wholly or partly concurrent: s. 240(4)(ii).

1.7.2.6 Exception to the general rule on court directions as to discount where the court considers it just not to give a direction
The requirement in s. 240(3) for directions to be given that days spent on remand are to count as time served as part of the sentence does not apply if and to the extent that it is in the opinion of the court just in all the circumstances not to give a direction under that subsection: s. 240(4).

1.7.2.7 Meaning of remand in custody for the purposes of court direction
It is provided by s. 242 that for the purposes of s. 240, a remand in custody means:

(a) a remand in or committal to custody by order of the court;
(b) a remand or committal to local authority accommodation under s. 23 of the CYPA 1969 if the defendant is kept in secure accommodation or detained in a secure treatment centre pursuant to arrangements made under subsection (7A) of that section; or
(c) a remand, admission or removal to hospital under ss. 35, 36, 38 or 48 of the MHA 1983.

'Secure accommodation' has the same meaning as in ss. 23 of the CYPA 1969 (see generally section 11.1 below): CJA 2003, s. 242(2) and (3). In *R v Secretary of State for the Home Department, ex parte A, The Times*, 28 January 2000, it was stressed that time spent in local authority accommodation will only count...
towards sentence if the defendant is in secure accommodation and in local authority care without conditions.

1.7.2.8 Sentencer making a s. 240 direction must state in open court the number of discounted days or number of days not discounted, as the case may be

Where a direction is given under s. 240(3) for the discounting of days spent on remand the court must state in open court (a) the number of days for which the offender was remanded in custody and (b) the number of days in relation to which the direction is given: s. 240(5). Where the court does not give a direction under s. 240(3) for the discounting of days on remand, or gives a direction in relation to a number of days less than that for which the offender was remanded in custody, it shall state in open court that its decision is in accordance with rules made by the Secretary of State under s. 240(a) or that it is of the opinion mentioned in s. 240(4)(b) that it is just in all the circumstances not to give a direction and what the circumstances are: s. 240(6).

1.7.2.9 Exclusions from meaning of sentence of imprisonment for the purposes of s. 240 directions

For the purposes of s. 240 a sentence of imprisonment does not include:

(a) a committal in default of payment of any sum of money, other than one adjudged to be paid on conviction,
(b) for want of sufficient distress to satisfy any sum of money, or
(c) the failure to do or abstain from doing anything required to be done or left undone,

and references to sentencing an offender to imprisonment are to be read accordingly: ss. 242(1)(a) and 305. The reference in (a) to the payment of a sum of money other than one adjudged to be paid on conviction clearly includes such moneys as would be required to be paid upon the breach of a binding over or by a surety on the estreatment of a recognizance.

1.7.2.10 Prisoners extradited from abroad

Re-enacting (with some modification) s. 47 of the CJA 1991, s. 243 of the CJA 2003 ensures that in the case of a person tried for an offence after being extradited to the UK (as so defined in the section) days spent in custody awaiting extradition may subsequently be subtracted from any custodial sentence passed by the court. The section achieves this by providing that s. 240 has effect as if the days spent in custody awaiting extradition to the UK were days for which the defendant was remanded in custody in connection with the offence or any other offence the charge for which was founded on the same facts or evidence: s. 243(2). The authorities referred to at para. 1.7.1.4 above are relevant in applying these
replacement provisions. The power to refrain from deducting time spent awaiting extradition would seem to be provided by s. 240(4) of the CJA 2003.

1.7.2.11 **Suspended sentences**
For the purposes of s. 240 a suspended sentence is to be treated as a sentence of imprisonment when it takes effect (under sch. 10, para. 7(2)) and is to be treated as being imposed by the order under which it takes effect: s. 240(7). The effect of this, therefore, is to abolish the old rule in the CJA 1967, s. 67(1), under which, when a suspended sentence was activated, time was *not* deducted from any period spent in custody before the suspended sentence was passed. (To compensate, it had been held that where a suspended sentence was passed, the sentencing court should make allowance for time spent in custody on remand: see para. 1.7.1.6 above.)

1.7.2.12 **Effect of direction under s. 240 on release on licence**
In determining for the purpose of release on licence whether the person to whom a direction under s. 240 relates (a) has served or would (but for being released) have served a particular proportion of the sentence, or (b) has served a particular period, the number of days specified in the direction are to be treated as having been served as part of that sentence or period: s. 241(1).

1.7.2.13 **Effect of a s. 240 direction in the case of an intermittent custody order**
Section 183 of the CJA 2003 provides that when passing a sentence of imprisonment for a term of at least 28 weeks and not more than 51 weeks, a court may specify the number of days that the offender must serve in prison under the sentence before being released on licence for the remainder of the term and by order specify periods during which the offender is to be released temporarily on licence before serving that number of days in prison, and require any licence to be granted subject to conditions requiring the offender’s compliance during the licence periods with one or more requirements falling within s. 182(1) and specified in the order. The requirements in question are those which stipulate:

(a) a specified number of hours of unpaid work;
(b) a specified activity, in particular having a reparative purpose;
(c) a specified accredited programme for a systematic set of activities;
(d) a specified prohibited activity;
(e) a specified curfew;
(f) exclusion from a particular place or area for different periods or days;
(g) supervision by way of attendance at appointments with the responsible officer or person determined by the responsible officer for the purpose of promoting the offender’s rehabilitation; and
(h) where the offender is aged under 25, a specified number of hours of attendance at an attendance centre.
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In determining for the purposes of the intermittent custody provisions in s. 83 whether any period of a sentence to which an intermittent custody order relates is a licence period, the number of custodial days is to be taken to be reduced by the number of days specified in a s. 240 direction.

1.7.2.14 Allowance for time served on remand when making community orders

The old rule which prevents a custodial sentence imposed for breach of a community sentence from being reduced by the time served on remand before the community sentence was imposed is removed under the new regime. Now, in determining the restrictions on liberty to be imposed by a community order or youth community order (the new generic community sentences which, under s. 177 of the CJA 2003, replace community punishment orders and community rehabilitation orders) a court may have regard to any period for which the offender was remanded in custody in connection with the offence or any other offence the charge for which was founded on the same facts or evidence: CJA 2003, s. 149(1). Advocates appearing in sentencing hearings where a community order is likely will need to be aware of the time their client has spent in custody on remand and bring this to the attention of the court.

1.8 DEFERRED SENTENCE

Bail must not be imposed upon deferment of a sentence: R v Ross (1988) 86 Cr App R 337. Section 1(6) of the PCC(S)A 2000, as substituted by CJA 2003, s. 278 and sch. 23 (formerly s. 1(4)), provides that notwithstanding any enactment, a court which under the section defers passing sentence shall not on the same occasion remand the offender.

1.9 OFFENCE COMMITTED WHILE ON BAIL IS AN AGGRAVATING SENTENCING FACTOR

In determining the seriousness of an offence, the court is obliged to treat the fact that the offence was committed while on bail as an aggravating factor: s. 43(3) of the CJA 2003, re-enacting s. 151(2) of the PCC(S)A 2000. In R v Thackwray, The Times, 25 November 2003, it was held that the fact that an offence committed while the offender was on bail in respect of another matter was to be regarded as an aggravating feature notwithstanding that he was acquitted of the other matter. In commentary on the decision it was pointed out that the imperative language of the statute appears to leave no room for discretion: Criminal Law Week, CLW 03/43/8.

Specifically, the Act applies to any non-British citizen whose presence in the UK the Home Secretary reasonably believes poses a risk to national security and whom the Home Secretary reasonably suspects of being concerned in the commission, preparation or instigation of acts of international terrorism, or of membership of, or having links with, an international terrorist group (s. 21). The latter is a group subject to the control or influence of persons outside the UK and reasonably suspected by the Home Secretary of being concerned in the commission, preparation or instigation of acts of international terrorism. To be deemed to have links with an international terrorist group a person must support or assist it. In *A, X and Y and Others v Secretary of State for the Home Department* [2003] 1 All ER 816; [2002] EWCA Civ 1502 (25 October 2002), the Court of Appeal accepted assurances that the power to detain would only be used to detain persons believed to be connected to the threat posed by *Al Qa’eda* and its associated networks. On that basis the Court held that under the HRA 1998 the Government could invoke a public emergency threatening the life of the nation to derogate from its treaty obligation to uphold the protection against detention under art. 5 of the ECHR (derogation provided by the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001 No. 3644)).

The Explanatory Notes to the Act stress that it allows detention of persons under Part 4 ‘where their removal is not possible at the present time’. Thus the Act applies to persons choosing not to leave whose removal is prevented, whether temporarily or indefinitely, because of a point of law which wholly or partly relates to an international agreement (for example, where the person enjoys asylum status or where they may suffer treatment in their destination country which infringes art. 3 of the ECHR) or because of a practical consideration (such as
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problematic travel conditions). Under s. 25, appeal against certification lies to the Special Immigration Appeals Commission (SIAC), a tribunal established by the Special Immigration Appeals Commission Act 1997. The Commission is a superior court of record (ACSA 2001, s. 35) and hence is arguably not amenable to judicial review (see below). However, appeals are allowed to the Court of Appeal under s. 7 of the 1997 Act, although access lies only on a point of law (ACSA 2001, s. 27). Certification must be reviewed by SIAC of its own motion after six months and then every three months: s. 26. This conceives potentially prolonged detention under the Act, in effect ‘internment’, characterised by Walker as a ‘fair description—there is no criminal conviction and no intention to sustain one nor is there any prospect of any other legal processing which would end the need for detention’ (Blackstone's Guide, cited above, p. 224).

Provision is made under s. 24 for the release of detained persons on bail upon application to a member of SIAC. If bail is refused the suspect can appeal to a full hearing of the Commission, chaired by a High Court judge. The hearing process is partially in secret. Whenever any sensitive material is considered the suspect and the suspect’s legal representative will be excluded (see The Times, 20 December 2001). The proceedings by nature are non-criminal and by definition therefore the right to bail inherent in the BA 1976 does not apply.

The question whether the Court of Appeal enjoys jurisdiction to consider a determination in respect of bail made by the Commission was considered in G v Secretary of State for the Home Department, The Times, 15 March 2004 by a court comprising Lord Phillips of Worth Matravers MR, Pill and Laws LJJ. SIAC had dismissed G’s appeal against certification along with the appeals of nine other detained persons and all ten appealed to the Court of Appeal under s. 7 of the 1997 Act. Pending that appeal G applied to the Commission for bail under s. 24, contending that his mental and physical health had severely deteriorated as a consequence of his detention. The application was granted on stringent conditions and the Home Secretary then appealed to the Court of Appeal against the Commission’s decision. By a majority it was held that the Court had no jurisdiction to hear an appeal brought by the Home Secretary against the decision of SIAC to grant bail. The Court of Appeal was a creature of statute and had no jurisdiction other than that accorded by statute or that which was ancillary to such jurisdiction by necessary implication: Taylor v Lawrence [2003] QB 528. The only statutory provision which conferred jurisdiction on the Court of Appeal to entertain an appeal from a decision of the Commission was s. 7 of the 1997 Act. The question of whether the Commission had properly granted bail was not a question of law material to the Commission’s final determination of an appeal within s. 7. G’s application to the Commission for bail was subsequent to the Commission’s final determination of his unsuccessful appeal in respect of certification, against which he had appealed to the Court of Appeal. The grant of bail was not the final determination of an appeal within s. 7. There was no statutory right of appeal in relation to the grant of bail under s. 24 of the 2001 Act.

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Dissenting on the issue of jurisdiction, Pill LJ said that the issues of certification, detention and bail were so interwoven that a grant of bail contemporaneous with the dismissal of the appeal of a detained person against certification should be treated as part of the final determination involved. The dismissal of the appeal involved a finding that the criteria in s. 21(1) of the 2001 Act were satisfied and that indefinite detention under s. 23, subject to review under s. 26, was justified. It was a final determination. A grant of bail could so undermine that determination that to treat it other than as part of the final determination would be highly artificial. In context, the dismissal of the appeal could not be treated as a determination separate from a contemporaneous grant of bail.

Both parties accepted that the Court should, if possible, determine whether the Commission had jurisdiction to grant bail in circumstances where to do so was not ancillary to pending proceedings before the Commission. If the Commission did not have such jurisdiction, it was desirable that the Court should address the issue of whether the 2001 Act was compatible with the ECHR. In the view of the Court they could only deal with the issue of the Commission’s jurisdiction to grant bail if that were a matter that could be raised by judicial review. G’s submission was that judicial review would not lie in relation to that jurisdiction and the Court restored the application for further argument on the question.