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The Practice of Pre-trial Detention in England and Wales

RESEARCH REPORT

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The Practice of Pre-trial Detention in England and Wales

Research Report

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Executive summary

This study of pre-trial detention decision-making in England and Wales was carried out as part of a wider project conducted in 10 European Union jurisdictions led by the London and Brussels-based NGO Fair Trials. It was funded by the European Commission under its Criminal Justice Programme (Grant No. JUST/2013/JPEN/AG/4533). The fieldwork for the research was carried out between November 2014 and June 2015. In order to gather data we: distributed an on-line questionnaire which was completed by 141 defence lawyers; observed 68 pre-trial detention hearings in three magistrates' courts and one Crown Court over 17 days; examined 76 Crown Prosecution Service case files that included at least one pre-trial detention (bail) hearing; and interviewed five judges and magistrates, and five Crown prosecutors. Whilst the size of the research samples was constrained by the available time and resources, the information obtained from them provides some important insights into the way in which pre-trial detention is regulated and how that works in practice, and lays the foundation for a number of significant conclusions and recommendations.

The proportion of those in prison in England and Wales who have not been found guilty, or who have not been sentenced, is one of the lowest in Europe and, indeed, the world. At the same time, England and Wales has one of the highest per capita prison populations in Europe. As a result, in 2014 over 80,000 people spent some time in prison without having been sentenced for a criminal offence, and on any particular day almost 12,000 people are in prison awaiting trial or sentence. One of the objectives of this project was to establish whether and how it may be possible to reduce this number.

The key findings regarding pre-trial detention decision-making in England and Wales are as follows.

1. The decision-making process The way in which pre-trial detention is regulated in England and Wales, primarily by the Bail Act 1976, is largely (although not completely) compliant with international standards and has many positive attributes. A person charged with a criminal offence is produced promptly in court, and has a *prima facie* right to be released on bail. They can only be kept in custody if the court is satisfied that certain conditions are met, such as a well-grounded fear that they will commit offences, fail to turn up in court, or interfere with witnesses. The defendant is normally represented by a lawyer, and if they are remanded in custody at the first court hearing they have, as of right, up to two further opportunities to apply to be released. However, the courts devote little time to pre-trial detention hearings, caused in part by high case-loads and a lack of resources. The provision of relevant information to defence lawyers, and to a certain extent to the courts, is often limited and very dependent on case summaries provided by the police. As a result, decisions are made by the courts without full knowledge of the relevant facts. **See Chapter IV.**

2. The substance of pre-trial detention decisions The law on pre-trial detention has become very complex and it was not fully understood by all of the criminal justice personnel who have to implement it. Whilst the law requires judges and magistrates to fully explain to a defendant why bail is denied, with specific reference to the facts of the case and the circumstances of the defendant, this often does not happen in practice. This means that many defendants may not understand why they are being remanded in custody, and leads many defence lawyers to believe that the courts favour the prosecution. **See Chapter V.**

3. The use of alternatives to detention The courts make extensive use of conditional and unconditional bail, so that the majority of people facing a criminal charge are not locked up unless and until they are found guilty and given a custodial sentence. However, the use of alternatives to custody, in particular conditional bail, is limited by a lack of bail information schemes and facilities such as bail hostels. In addition, confidence in conditional bail is weakened by a lack of faith that conditions are adequately enforced. **See Chapter VI.**

4. Review of pre-trial detention Whilst the *prima facie* right to bail is respected in practice on the first occasion that a defendant appears in court, if the court remands them in custody the burden of persuading a subsequent court that they should be released often effectively shifts to the defendant. This is compounded by the fact that defendants who have been remanded in custody are not normally produced in person at review hearings in the Crown Court, which are routinely conducted in private. **See Chapter VII.**

5. Outcomes We found that nearly half of those people who are kept in custody at some stage before their trial or sentence were either found not guilty, or if found guilty, were given a non-custodial sentence. **See Chapter VIII.**

In the context of these findings we make the following recommendations.

- The law governing pre-trial detention should be codified and simplified so that all of those who have to implement it, or are affected by it, understand it and in order to ensure that it fully complies with all relevant ECHR standards. The training of judges, magistrates and prosecutors should be improved so that all are fully aware of both domestic legislation and the requirements of international human rights standards, especially ECtHR standards.

- The Bail Act 1976 and the Criminal Procedure Rules should be modified to ensure that the defence have full access to the information that they need, and have automatic access in accordance with the EU Directive on the Right to Information. Training for the police should be improved so that the summaries that they provide to the prosecution are fair and objective.

- The Bail Act 1976 should be amended to make it absolutely clear that the burden is always on the prosecution to persuade a court that bail should be withheld, both at the initial pre-trial detention hearing and at subsequent review hearings. The law should require review hearings to be conducted on a regular basis, and that decisions should be made having regard to all relevant factors and circumstances.

- The courts and the Crown Prosecution Service should be adequately funded so that they can devote sufficient time to their decisions regarding pre-trial detention, and training should specifically deal with the practical implications of the *prima facie* right to bail at second or subsequent hearings.

- The Criminal Procedure Rules should be amended to make it absolutely clear that courts must explain their decisions by reference to the specific facts of the case and to the representations made by the prosecutor and the defence lawyer. This should be reinforced by improving the training that magistrates are given, and consideration should be given to introducing a right for the defendant or their lawyer to apply to the court for a full explanation of the decision.

- Sufficient resources should be provided to ensure that bail information schemes are available in all magistrates' courts and at all hearings, and to establish and maintain a sufficient number of bail hostels in appropriate locations. In addition, the mechanisms for monitoring and enforcing bail conditions should be reviewed with a view to building confidence in their effectiveness.

A full list of recommendations is set out in **Chapter IX**.

Chapter I Introduction

1. Why the research project was undertaken

This report is one of 10 country reports published as part of the European Union (EU) funded research project, 'The Practice of Pre-trial Detention: Monitoring Alternatives and Judicial Decision-making'[1] that was conducted in 10 different EU Member States between 2014 and 2015.[2]

More than 100,000 people are detained without trial or sentence across the EU at any one time. While pre-trial detention has an important part to play in criminal proceedings, ensuring that certain defendants are brought to trial, it is being used excessively at huge cost both to national economies and to those who are unnecessarily detained. Unjustified and excessive pre-trial detention clearly breaches the right to liberty and conflicts with the right to be presumed innocent until proven guilty. It also potentially adversely affects the ability of those detained to fully enjoy their right to a fair trial, particularly because of the resulting limitations on their ability to secure access to a lawyer and to prepare their defence. Furthermore, poor prison conditions often threaten the health and well-being of those detained.[3] For these reasons, international human rights standards, including the European Convention on Human Rights (ECHR), require that pre-trial detention is used as an exceptional measure of last resort.

While there have been numerous studies of the legal framework governing pre-trial detention in EU Member States, research concerning the practice of pre-trial detention decision-making is limited. This lack of reliable evidence provided the motivation for this major project in which NGOs and academics from 10 EU Member States, co-ordinated by the NGO Fair Trials, researched pre-trial decision-making procedures. The objective of the project is to provide a unique evidence-base regarding what, in practice, is causing the over-use of pre-trial detention in many jurisdictions. In this research, decision-making procedures were examined in order to understand the motivations and incentives of the stakeholders involved (defence lawyers, judges, prosecutors and police officers). The findings will be widely disseminated amongst policy-makers and relevant stakeholders, with the aim of informing legal reforms and policies designed to reduce the use of unnecessary pre-trial detention across Member States of the EU.

The project also complements the current EU developments relating to procedural rights. Under the EU Procedural Rights Roadmap, adopted in 2009,[4] the EU institutions have examined the issues arising from the inadequate protection of procedural rights within the context of mutual recognition, such as the difficulties arising from the application of the European Arrest Warrant. Three Directives[5] have already been adopted, concerning the right to interpretation and translation,[6] the right to information,[7] and the right of access to a

[1] Grant reference no. JUST/2013/JPEN/AG/4533.
[2] England and Wales, Greece, Hungary, Ireland, Italy, Lithuania, Netherlands, Poland, Rumania and Spain.
[3] See, for example, the report by the rapporteur to the Council of Europe Committee on Legal Affairs and Human Rights, *Abuse of pre-trial detention in States Parties to the European Convention on Human Rights*, AS/Jur (2015) 16, available at http://website-pace.net/documents/10643/1264407/pre-trialajdoc1862015-E.pdf/37e1f8c6-ff22-4724-b71e-58106798bad5.
[4] *Roadmap with a View to Fostering Protection of Suspected and Accused Persons in Criminal Proceedings*, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120.
[5] EU legislation which requires Member States to adopt domestic provisions that give effect to the provisions of the Directive.
[6] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
[7] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

lawyer.[8] Three further measures are currently under negotiation – on legal aid, safeguards for children, and the presumption of innocence and the right to be present at trial.

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case-work, experience and input sought through its Legal Expert Advisory Panel (LEAP[9]), Fair Trials responded to the Green Paper in its report *Detained without trial*, arguing that EU legislation regarding pre-trial detention is necessary because fundamental rights are frequently violated. Subsequent LEAP meetings in Amsterdam, London, Paris, Poland, Greece and Lithuania held in 2012 and 2013 affirmed that problems with pre-trial detention decision-making processes contribute to the overuse of pre-trial detention, and highlighted the need for reliable evidence. No legislative action has yet been taken at the EU level with regard to strengthening the rights of defendants facing pre-trial detention, but the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, and one objective of this project is to provide research-based information which will contribute to that assessment.

2. Regional standards on pre-trial detention

The regional standards on pre-trial detention decision-making are principally governed by Article 5 of the ECHR. Article 5(1)(c) ECHR states that no-one shall be deprived of their liberty except, *inter alia*, 'for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'. Anyone deprived of their liberty under this exception 'shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees pending trial' (Article 5(3) ECHR). Further, Article 5(4) provides that a person who is arrested or detained is entitled to take proceedings by which the lawfulness of their arrest or detention is decided speedily by a court, which must order their release if the detention is not lawful. The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5 that should govern pre-trial decision-making and which would strengthen defence rights if applied accordingly.

2.1 Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought 'promptly'[10] or 'speedily'[11] before a judicial authority, and the 'scope for flexibility in interpreting and applying the notion of promptness is very limited'.[12] The trial must take place within a 'reasonable' time according to Article 5(3) ECHR, and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.[13] Whether this has happened must be determined by considering the individual facts of the case.[14] The ECtHR has found periods of pre-trial detention lasting between two and a half and five years to be excessive.[15]

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[8] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings.
[9] See http://www.fairtrials.org/fair-trials-defenders/legal-experts/.
[10] ECtHR 28 November 2000, *Rehbock v Slovenia*, No. 29462/95, para. 84.
[11] The limit of acceptable preliminary detention has not been defined by the ECtHR, however in ECtHR 29 November 1988, *Brogan and others v UK,* Nos. 11209/84, 11234/84, 11266/84, 11386/85, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).
[12] Ibid. para. 62.
[13] ECtHR 10 November 1969, *Stogmuller v Austria,* No. 1602/62, para. 5.
[14] ECtHR 16 December 2014, *Buzadj v. Moldova*, No. 23755/07, para. 3.
[15] ECtHR 1 August 2000. *PB v France*, No. 38781/97, para. 34.

According to the ECtHR, the court taking the pre-trial decision must have the authority to release the suspect[16] and be a body independent from the executive and both parties to the proceedings.[17] The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to effectively participate.[18]

2.2 Substance

The ECtHR has repeatedly emphasised the presumption in favour of release,[19] and clarified that the state bears the burden of proof of showing that a less intrusive alternative to detention would not serve the relevant purpose.[20] The detention decision must be sufficiently reasoned and should not use 'stereotyped'[21] forms of words. The arguments for and against pre-trial detention must not be 'general and abstract'.[22] The court must engage with the reasons for pre-trial detention and for dismissing any application for release.[23]

The ECtHR has also specified the lawful grounds for ordering pre-trial detention as being: (1) the risk that the accused will fail to appear for trial;[24] (2) the risk that the accused will spoil evidence or intimidate witnesses;[25] (3) the risk that the accused will commit further offences;[26] (4) the risk that the release will cause public disorder;[27] or (5) the need to protect the safety of a person under investigation in exceptional cases.[28] The fact that the accused has allegedly committed an offence is not, in itself, a sufficient reason for ordering pre-trial detention, no matter how serious the offence or how strong the evidence.[29] Pre-trial detention based on 'the need to preserve public order from the disturbance caused by the offence'[30] can only be legitimate if public order actually remains threatened. Pre-trial detention cannot be extended merely because the judge expects that a custodial sentence will be imposed.[31]

With regards to flight risk, the ECtHR has clarified that the lack of a fixed residence,[32] or the risk of a lengthy term of imprisonment if convicted, do not, in themselves, justify pre-trial detention.[33] The risk of re-offending can only justify pre-trial detention if there is actual evidence of a definite risk of re-offending.[34] The lack of employment or local family ties are not in themselves sufficient to justify detention.[35]

[16] ECtHR 21 February 1996, *Singh v UK,* No. 23389/94, para. 65.
[17] ECtHR 27 June 1968, *Neumeister v Austria,* No. 1936/63, para. 24.
[18] ECtHR 11 July 2002, *Göç v Turkey,* No 36590/97, para. 62.
[19] ECtHR 21 December 2010, *Michalko v. Slovakia*, No. 35377/05, para. 145.
[20] ECtHR 26 July 2001, *Ilijkov v Bulgaria,* No. 33977/96, para. 85.
[21] ECtHR 8 June 1995, *Yagci and Sargin v Turkey,* Nos. 16419/90, 16426/90, para. 52.
[22] ECtHR, 24 July 2003, *Smirnova v Russia*, Nos. 46133/99, 48183/99, para. 63.
[23] ECtHR 16 December 2014, *Buzadj v. Moldova*, No. 23755/07, para. 3.
[24] ECtHR, 24 July 2003, *Smirnova v Russia*, Nos. 46133/99, 48183/99, para. 59.
[25] Ibid.
[26] ECtHR 17 March 1997, *Muller v. France*, No. 21802/93, para. 44.
[27] ECtHR, 23 September 1988, *I.A. v. France*, No. 28213/95, para. 104.
[28] Ibid. para. 108.
[29] ECtHR 27 August 1992, *Tomasi v France,* No. 12850/87, para. 102.
[30] ECtHR, 23 September 1988, *I.A. v. France*, No. 28213/95, para. 104.
[31] ECtHR 21 December 2010, *Michalko v. Slovakia*, No. 35377/05, para. 149.
[32] ECtHR, 15 February 2005, *Sulaoja v Estonia,* No. 55939/00, para. 64.
[33] ECtHR 27 August 1992, *Tomasi v France,* No. 12850/87, para. 87.
[34] ECtHR 10 November 1969, *Matznetter v Austria,* No. 2178/64, concurring opinion of Judge Balladore Pallieri, para. 1.
[35] ECtHR, 15 February 2005, *Sulaoja v Estonia,* No. 55939/00, para. 64.

2.3 Alternatives to detention

The case-law of the ECtHR has strongly encouraged the use of pre-trial detention only as an exceptional measure. In *Ambruszkiewicz v Poland,* the Court stated that the

> 'detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances'.[36]

Furthermore, the ECtHR has emphasised the importance of 'proportionality' in decision-making, in that the authorities should consider less stringent alternatives before resorting to detention,[37] and the authorities must also consider whether the 'accused's continued detention is indispensable'.[38]

One such alternative is to release the suspect subject to supervision. States may not justify detention by reference to the non-national status of the defendant but must consider whether supervision measures would suffice to guarantee their attendance at trial.

2.4 Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,[39] which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.[40] A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.[41] This might require access to the case files,[42] which is also now governed by the EU Directive on the Right to Information, Article 7(1). The decision on continuing detention must be taken speedily, and reasons must be given for the need for continued detention.[43] Previous decisions should not simply be reproduced.[44]

When reviewing a pre-trial detention decision, the ECtHR requires that the court be mindful that a presumption in favour of release remains[45] and that continued detention 'can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention'.[46] The authorities remain under an on-going duty to consider whether alternative measures could be used.[47]

[36] ECtHR 4 May 2006, *Ambruszkiewicz v Poland*, No. 38797/03, para. 31.
[37] ECtHR 18 March 2008, *Ladent v Poland,* No. 11036/03, para. 55.
[38] Ibid, para. 79.
[39] ECtHR 18 June 1971, *De Wilde, Ooms and Versyp v Belgium,* Nos. 2832/66, 2835/66, 2899/66, para. 76.
[40] ECtHR 28 October 2003, *Rakevich v Russia,* No. 58973/00, para .43.
[41] ECtHR 11 July 2002, *Göç v Turkey,* No 36590/97, para. 62.
[42] ECtHR 19 October 2000, *Wloch v Poland,* No. 27785/95, para. 127.
[43] ECtHR 28 November 2000, *Rehbock v Slovenia*, No. 29462/95, para. 84.
[44] ECtHR 26 July 2001, *Ilijkov v Bulgaria,* No. 33977/96, para. 85.
[45] ECtHR 21 December 2010, *Michalko v. Slovakia*, No. 35377/05, para. 145.
[46] ECtHR 3 October 2006, *McKay v UK,* No. 543/03*,* para. 42.
[47] ECtHR 11 January 2011, *Darvas v Hungary,* No. 19574/07, para. 27.

2.5 Implementation

The evidence suggests that these standards are often not upheld by national governments. EU Member States have been found to be in violation of Article 5 ECHR in more than 400 cases since 2010. Notwithstanding any possible EU initiatives on pre-trial detention, the ultimate responsibility for ensuring that the rights to a fair trial and to liberty are respected and promoted lies with the Member States, which must ensure that at least the minimum standards developed by the ECtHR are complied with.

3. Pre-trial detention in England and Wales

The basic architecture of the law governing pre-trial detention has been in place in England and Wales since the Bail Act (BA) 1976 came into force. Importantly, it provided for a presumption in favour of bail for defendants in criminal proceedings, which can only be displaced - resulting in pre-trial detention (a remand in custody) - if certain, specified conditions are satisfied. Bail pending trial or sentence is thus the default position, and conditions can be attached to that bail only if they appear necessary to the court in order to secure defined objectives. Normally, before a decision is made, the accused must be given an opportunity to make representations and (subject to certain exceptions) he or she has a right to be present, and to legal representation. The court making the decision must make a record of its decision, and if the decision is to withhold bail or to impose conditions on bail, must give reasons for its decision. The reasons must be recorded, and the accused must be given a copy of the record. If bail is denied on the first occasion that the accused appears before a magistrates' court, then generally he or she may make a further application to a magistrates' court, and if bail is still denied, may make an application to the Crown Court.[48]

Whilst the structure of the legislation has remained the same in the four decades since enactment of the BA 1976, it has been amended on numerous occasions. In most cases the amendments have been driven by the desire to expand the circumstances in which bail can be denied, for example, where the accused was already on bail when the offence giving rise to the new proceedings was allegedly committed, or where the accused has allegedly committed further offences whilst on bail. On the other hand, amendments introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, were designed to restrict the use of remands in custody in cases involving an allegation of a summary-only offence.[49] Furthermore, whilst the Bail Act initially provided a comprehensive code governing pre-trial detention, this was ended by the Criminal Justice and Public Order Act 1994, s. 25, which limits the use of bail for accused charged with certain serious offences, and by the Coroners and Justice Act 2009, s. 115, which prevents magistrates' courts from granting bail in murder cases. The result, according to one leading criminal lawyer, is that a statute that was once of 'great clarity… has become confused and difficult to apply without error', and which is in urgent need of consolidation in order 'to restore the order that is critical to achieving the right balance on a case by case basis'.[50]

The Law Commission, in a report published in 2001, concluded that existing legislation on bail 'is capable of being applied compatibly with the Convention', but it identified some areas of the law in respect of which there should be legislative reform.[51] In particular, it recommended that the BA 1976, Sch. 1, Part I, para. 2A, should be amended to make it clear that the fact that the accused was on bail at the time of the alleged offence is not an

[48] The lower and higher criminal courts respectively. See Chapter III generally.

[49] A summary-only offence is one that may (subject to limited exceptions) only by tried in a magistrates' court.

[50] A. Edwards, 'Legal Aid, Sentencing and Punishment of Offenders Act 2012: The Financial, Procedural and Practical Implications' [2012] 8 *Criminal Law Review* 584, 588.

[51] Law Commission, *Bail and the Human Rights Act 1998*, LAW COM No.269, HC 7, 20 June 2001. Significantly, the report post-dated the introduction of the restrictions on bail introduced by the Criminal Justice and Public Order Act 1994, s. 25.

independent ground for refusing bail, but rather one consideration that the court should take into account into determining whether there is a real risk that the accused will commit an offence if granted bail.[52] This recommendation has not been implemented. The Commission was also concerned about the formulaic approach adopted by courts when giving reasons for withholding bail, and suggested that they 'should explicitly deal with the facts of the individual case, not simply state a recognised relevant consideration or a circumstance pertaining to the accused, without going further and explaining fully why it is necessary to detain the defendant'.[53] The Criminal Procedure Rules (CrimPR)[54] now require that the court announce the reasons for its decision[55] 'in terms the defendant can understand (with help, if necessary)'.[56] However, the CrimPR stop short of explicitly requiring that the reasons given deal with the facts of the individual case.

Whilst the law and practice regarding pre-trial detention in England and Wales may be compatible with the ECHR (subject, in particular, to the two factors identified above), there remain a number of concerns and challenges. Using the standard measure - the proportion of the prison population that is in pre-trial detention – England and Wales, at about 14 per cent,[57] has one of the lowest pre-trial detention populations in the European Union and, indeed, the world.[58] However, England and Wales has one of the highest per capita prison populations in the EU (148 per 100,000),[59] and thus the number of people in pre-trial detention at any one time is high in absolute terms (approx. 11,800).[60]

The large number of pre-trial detainees puts a lot of pressure on an already over-stretched prison estate. A report by Her Majesty's Inspectorate of Prisons in 2012 identified a range of serious problems, including: women and defendants from black and minority ethnic and foreign national backgrounds are over-represented in the remand prison population; remand prisoners enter custody with multiple and complex needs that are not adequately addressed; few remand prisoners know about the bail information officer at their establishment,[61] and half said that they had difficulties obtaining bail information; and remand prisoners are often held in poor physical conditions with few of the 'theoretical' privileges that go with their remand status.[62] The Howard League for Penal Reform has argued that a large number of defendants are needlessly remanded in custody. Using figures obtained from the Ministry of Justice through a Freedom of Information request, they showed that of the 72,877 people remanded in custody by magistrates' courts and the Crown Court in 2013, 32,257 (48%) were

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[52] At para. 4.12.
[53] At para. 10.24.
[54] The Criminal Procedure Rules are issued by the Criminal Procedure Rule Committee under the authority of the Courts Act 2003, s. 69.
[55] To withhold bail, or to impose or vary a bail condition, or to grant bail where this was opposed by the prosecutor.
[56] CrimPR, r. 19.2(5).
[57] 13.8% as at 31 March 2015. See Prison Population: 31 March 2015, Table 1.1 Prison population by type of custody, available via https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2014-and-annual.
[58] R. Walmsley, *World Pre-trial/Remand Imprisonment List (second edition)* (ICPS, London 2014), available via http://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=27.
[59] R. Walmsley, *World Prison Population List (tenth edition)* (ICPS, London 2013), available via http://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=27.
[60] 11,833 as at 31 March 2015. See Prison Population: 31 March 2015, Table 1.1 Prison population by type of custody, available via https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2014-and-annual.
[61] A bail information officer is an officer designated to assist remand prisoners in submitting applications to court for release on bail.
[62] HM Inspectorate of Prisons, *Remand prisoners: A thematic review* (HM Prison Inspectorate, London 2012).

either acquitted or did not receive a non-custodial sentence.[63] Taking magistrates' courts alone, the proportion was as high as 71%. The direct cost of this, using average periods spent on remand and the average cost of a prison place, amounts to £230 million for one year alone, but the Howard League argued that the true cost is likely to be significantly higher when other costs, such as social welfare benefits, and the costs of family break-up and loss of employment, are taken into account.[64]

These concerns about the use, cost and impact of pre-trial detention raise questions about how pre-trial detention decisions are made, what the relevant factors informing the decision-making process are, and whether it can be improved. Little or no research on pre-trial detention decision-making has been conducted since the turn of the century, but research conducted in the 1980s and 1990s identified the following issues.

- The use of pre-trial detention varied significantly between courts with a similar case mix, suggesting different 'court cultures'.
- Stipendiary magistrates (now District Judges) tend to grant bail less often than lay magistrates.
- A lack of adversarialism. Whilst prosecutors did not request a remand in custody in most cases, where they did so their application was opposed by defence lawyers in only about half of cases. Moreover, where defence lawyers were instructed to apply for bail contrary to their professional advice, they often used 'coded language' to convey this to the court.
- Bail was granted in less than one in three contested cases, partly because defence lawyers were regarded by magistrates as being less objective than Crown Prosecutors.
- Relatively little time was spent on considering the remand decision, the hearing taking five minutes or less in 86 per cent of cases, with 60 per cent of hearings lasting five minutes or less even where the prosecutor was seeking a remand in custody.
- Most information considered by courts when making a pre-trial detention decision came from the police, and an important factor in the court's decision regarding pre-trial detention was the police decision to bail or to keep an accused in custody following charge.
- The availability of bail information schemes was patchy.[65]

The current research is the first to examine the practice of pre-trial detention decision-making in England and Wales for more than a decade, and provides an up-to-date picture of that process. Although the number of cases examined for the research was relatively small, a number of sources of data were used, which enable conclusions to be drawn as to whether the findings of previous research are still valid. Most importantly, however, it is hoped that it will provide information that will enable the process to be improved, and ultimately to reduce the use made of unnecessary pre-trial detention.

[63] Howard League for Penal Reform, *Revealed: The wasted millions spent on needless remand*, Media release 18 August 2014, available at http://tinyurl.com/o2qs2fx.
[64] Ibid.
[65] The earlier research is summarised in A. Sanders, R. Young and M. Burton, *Criminal Justice* (Oxford University Press, Oxford 2011), pp. 526-530.

Chapter II Methodology

1. Introduction

The project was designed to develop an improved understanding of the process of judicial decision-making on pre-trial detention in 10 EU Member States. This research was carried out in 10 Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economic circumstances and, importantly, strongly varying usage of pre-trial detention in criminal proceedings (for example 12.7% of all detainees in Ireland have not been convicted[66] whereas in the Netherlands 39.9% of all prisoners have not been convicted).[67] The choice of participating countries allows for identifying good and bad practices, and for proposing reform at the national level, as well as for developing recommendations that would ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country will provide in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and will provide a comprehensive understanding of pan-EU pre-trial decision-making.

Five research elements were developed to gain insight into domestic decision-making processes, with the expectation that this would allow for: (a) analysing shortfalls within pre-trial detention decision-making, understanding the reasons for high pre-trial detention rates in some countries and low pre-trial detention rates in other countries; (b) assessing similarities and differences across the different jurisdictions; and (c) the development of substantial recommendations that can guide policy-makers in their reform efforts.

The five-stages of the research were as follows:

(1) Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms. Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to take account of specific local conditions – explored practice and motivations of pre-trial decision-making and captured the perceptions of the stakeholders in all participating countries.

(2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.

(3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures adopted in such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.

(4) Case file reviews, which enabled researchers to obtain an understanding of the full life of a pre-trial detention case, as opposed to the snapshots obtained through the hearing monitoring.

(5) Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

[66] http://www.prisonstudies.org/country/ireland-republic, data provided by International Centre for Prison Studies, 18 June 2015.

[67] http://www.prisonstudies.org/country/netherlands, data provided by International Centre for Prison Studies, 18 June 2015.

2. The Methodology in England and Wales

2.1 Introduction

The research in England and Wales was managed by Professor Ed Cape, who has more than two decades' experience of research in the field of criminal justice both in England and Wales, and internationally. He was assisted by Dr. Tom Smith, Senior Research Fellow, who has previously conducted research on the legal profession. The research was carried out in accordance with the research ethics policy of the University of the West of England, Bristol.[68] The research team adapted the research instruments referred to in the previous section to take into account law and practice in England and Wales, and conducted all of the fieldwork. The fieldwork was carried out between November 2014 and June 2015.

2.2 The defence practitioner survey

The defence practitioner survey was administered using SurveyMonkey, a commercial on-line survey tool. The principle advantage of using an on-line survey method was that it was easier to reach a large number of lawyers potentially producing a larger number of responses, than a survey administered by means of a more traditional method. Using an on-line tool meant, of course, that we had to use a means of distribution that would result in a large number of lawyers being aware of the survey. In this we were assisted by a number of organisations that agreed to distribute information about the survey, including Crimeline (which has a large number of subscribers to its Crimeline Complete service, and which has more than 12,000 followers on Twitter), the Law Society, the Criminal Law Solicitors' Association, the London Criminal Courts Solicitors' Association, the Justice Gap, and the Professional Development Unit at Cardiff Law School. These organisations used a variety of methods of distributing information about the survey. In addition, the research team distributed information about the survey using their own Twitter accounts.

The survey was launched on 5 November 2014, with a closing date of 14 December 2014. 141 surveys were submitted during that time. We made it clear at the beginning of the survey that it was voluntary, that we would not identify any respondent, and that respondents could contact us if they wished to change any of their responses or withdraw from participation in the survey (which none did). Most questionnaires were fully completed, although in a minority of responses not all questions were answered. The survey tool included both closed questions, and open questions which enabled narrative responses to be given, and most respondents did provide narrative responses. In order to verify that the respondents were criminal defence lawyers, and had provided genuine responses, we asked them to provide contact details and we contacted a random sample of 10 per cent of respondents in order to verify that they were lawyers.

[68] Details of the UWE research ethics policy can be found at http://www1.uwe.ac.uk/research/researchethics.aspx.

One consequence of using this survey method was that since any lawyer could complete the survey, it was not possible to administer it to a stratified sample of lawyers. However, as the following figures show, most respondents were specialised criminal defence lawyers who routinely represent defendants at pre-trial detention hearings, and who largely undertake legal aid work.

- 89.48 per cent undertook only or mainly (i.e., over 50%) criminal cases.
- 92.48 per cent had personally dealt with more than 50 criminal cases in the previous year.
- 57.25 per cent had acted in five or more pre-trial detention hearings in the previous month, with 29.01 per cent having acted in more than 10 pre-trial detention hearings in the previous month.
- 98.51 per cent had a case-load which was more than 50 per cent legally-aided, with 23.88% doing only legal aid cases.

2.3 Pre-trial detention hearing observations

Given the constraints on time and resources we decided to conduct observations of pre-trial detention hearings in four courts in one region of England: three magistrates' courts and one Crown Court. Since pre-trial detention hearings in magistrates' courts are conducted in public we could have carried out observations from the public gallery. However, we decided to seek permission from the Ministry of Justice for a number of reasons. First, it was not appropriate to seek to carry out observations covertly, and we believed that it was likely that on seeing a researcher regularly sitting in court, court staff would ask the researcher what they were doing. Second, obtaining permission to conduct observations would assist us by ensuring the co-operation of court staff, for example, by helping us to identify the courts in which pre-trial detention hearings were being conducted. In the event, we found court staff to be very helpful in facilitating our observations. Third, since the public are normally excluded from pre-trial detention hearings in the Crown Court, we required permission to attend these hearings. We started the process of obtaining permission from the Ministry of Justice in July 2014, and permission was granted on 24 November 2014.

Observations were carried out over a total of 17 days between 8 January and 18 March 2015. A total of 68 pre-trial detention hearings were observed, mostly involving one defendant, although in a small number of cases a hearing involved a number of co-defendants. Details of the observations conducted by reference to the court in which the observation was conducted are set out in Table 01.

Table 01
PTD hearing observations

Court number	**Type of court**	**Number of days on which observations conducted**	**Number of hearings (cases) observed**
01	Magistrates' court	5	27
02	Crown Court	5	9
03	Magistrates' court	3	4
04	Magistrates' court	4	28
Total		17	68

Courts 01 and 02 are located in a major city with a population in the region of 400,000. Court 03 is located in a small town of about 30,000 although it also serves the surrounding area.

Court 04 is in a mid-sized city of about 250,000 people. The importance of different cultural attitudes and practices in different areas is well-recognised in criminal justice research. We sought to carry out observations in a range of magistrates' courts serving different populations, and with varying case-loads. Most hearings we observed were presided over by lay magistrates, but a minority were presided over by a professional judge (District Judge (Magistrates' Court)). Most cases observed entailed the first court hearing following charge, although in a minority of cases we observed a second PTD hearing,[69] and occasionally we observed hearings where a defendant had been arrested for breach of bail or failure to surrender to custody.[70] We decided to observe PTD hearings in a Crown Court because they differ from those in magistrates' courts in a number of important respects: they are always presided over by a professional judge, they are frequently conducted in private and often without the defendant being present in court, they often concern more serious alleged offences, and they are not the first PTD hearing in a particular case.

References in the report to cases observed are in the following format: court number/date/case number. Cases are numbered consecutively, so that the first case observed on a particular date is 01, the second is 02, etc. Thus 01/230215/03 refers to the third case observed on 23 February 2015 in Court 01. Where a PTD hearing involved multiple defendants, each defendant was classed as a 'case' and assigned a consecutive number at the end of the format above. Thus, if case 01/230215/03 had three co-defendants, they would be numbered 01/230215/03/01, etc.

2.4 Case-file data

We initially considered examining court files, but as a result of information received from a number of sources, we concluded that they were unlikely to contain sufficient information for the purposes of the research. The other two potential sources of information were the files kept by criminal defence lawyers, and those maintained by the Crown Prosecution Service (CPS). The former would have entailed seeking permission to examine their files from a relatively large number of solicitors' firms. Solicitors' firms employ a wide range of information-storage systems, and we were also concerned that they would not contain sufficient information. We therefore decided to seek permission from the CPS which, for most cases, uses a computer-based case management system. We initially sought permission in August 2014, and this was forthcoming in October 2014 although the researchers had to undergo DRB (criminal records) checks and training to use the case management system before data collection could commence. We were granted permission to examine and obtain data from up to 100 closed files from one CPS area office which covered a region of England.

Data was extracted from 76 case files between 24 February and 5 March 2015. All files sampled were closed files, in order to ensure that the final case outcome was known, and were cases in which the first hearing had taken place at some time over the previous two years. We did not seek to control the sample by reference to variables such as the court, offence type, or level of seriousness. The primary criterion for selection of a case was that it involved at least one PTD hearing. A secondary criterion was that a case was likely to have involved some kind of contest regarding PTD since examining a large number of cases where the defendant had been granted unconditional bail would not have produced useful information given the purposes of the research. As a result, however, the case-file data is not a representative sample of all cases dealt with in criminal courts in the area covered by the CPS office. Table 02 gives an indication of some relevant variables in the case-file sample.

[69] For an explanation of the law governing second and subsequent applications see Chapter III section 3.3, and for the definition of 'review' for the purposes of the research, see Chapter VII section 1.
[70] For an explanation, see Chapter III.

Table 02
Case-file sample

Variable		Number	%
Adult/juvenile			
	Adult	67	88.16
	Juvenile	9	11.84
Ethnicity			
	White	53	69.74
	Non-white	4	5.26
	Not recorded	19	25.00
Classification of most serious offence charged			
	Indictable-only	10	13.16
	Either-way	33	43.42
	Summary-only	33	43.42
Number of counts (offences)			
	1	32	42.10
	2-3	23	30.26
	4-5	15	19.74
	>5	6	7.89

References in the report to case files are in the following format: identity of the researcher/date on which data collected/case number. Cases are numbered consecutively, so that the first file examined on a particular day is 001, the second is 002, etc. Thus ELC/240215/001 refers to the first case examined by Ed Cape on 24 February 2015. We deliberately avoided using a case numbering system by which a particular defendant could subsequently be identified.

2.5 Interviews

We sought to interview five prosecutors and five judges/magistrates according to the standard project interview schedule which was modified to take account of English and Welsh law and practice, and in order to enable us to ask questions about some issues that had arisen during the other fieldwork.

Permission to interview prosecutors was given by the CPS at the same time as permission was granted to examine case files. The prosecutors interviewed were selected by a CPS manager, and all signed a consent form which indicated that participation was voluntary, and that they would be given an opportunity to read, and amend, the interview transcript. The interviews were electronically recorded, and subsequently transcribed in full. Interviews were conducted on 26 and 27 March 2015, and lasted for between 46 to 75 minutes.

All prosecutors primarily appeared in the same urban court although most also had experience of appearing in other courts. The CPS employs a number of categories of prosecutor: Crown Prosecutors (at various levels of seniority), Crown Advocates (who principally appear in the Crown Court); and Associate Prosecutors. Crown Prosecutors and Crown Advocates are qualified as solicitors or barristers. Associate Prosecutors are not qualified as lawyers, but are subject to internal training requirements, and are designated by the Director of Public Prosecutions to appear in certain types of court hearings (including PTD hearings in magistrates' courts). Interviews were conducted with all three categories of prosecutor, as shown below. In addition, the CPS also instructs independent barristers to represent them, particularly in the Crown Court, but we did not interview any of these.

Reference number	Category of prosecutor
01	Senior Crown Prosecutor
02	Senior Crown Prosecutor
03	Associate Prosecutor
04	Crown Advocate
05	Associate Prosecutor

We also sought to interview five judges and magistrates according to the modified interview schedule. In order to do so, we were required to obtain permission from the Senior Presiding Judge as well as from the Ministry of Justice. We were notified on 16 April 2015 that the Senior Presiding Judge had granted permission, but subject to certain conditions. In particular, a number of the questions in the interview schedule could not be asked. The questions that we were not permitted to ask were:

> 11. What is your approach to the representations made by the prosecutor? And to the representations by the defence lawyer?
>
> 11A. We have observed differences in pre-trial detention hearings as between the Crown Court and magistrates' courts (for example, regarding whether the hearing is in public, and whether the defendant is produced). What is your view of the differences adopted?
>
> 11B. We have observed that judges/magistrates, when ordering pre-trial detention or conditional bail, normally refer to the legal grounds and reasons for the decision, but not how they relate to the facts of the particular case. What is your view of this approach?
>
> 16. What is your response to concerns raised about the excessive use of pre-trial detention?
>
> 17. Are you conscious of any pressures on you regarding your pre-trial detention decisions, e.g. from supervisors, any government organisation or institution, from the public or the media?
>
> 18. Are you aware of any adverse consequences for judges if they release a defendant who then subsequently commits an offence or does not turn up in court?
>
> 20. If you could make changes to the law or practice governing pre-trial detention, what change or changes would you like to see?

The judges and magistrates interviewed were selected by the research team. At the request of the research team, court administrators circulated an invitation to participate to judges and magistrates in their area, to which three responded directly. Two other interviewees were contacted via those who initially responded. All interviewees signed a consent form which indicated that participation was voluntary, and that they would be given an opportunity to read, and amend, the interview transcript. The interviews were electronically recorded, and subsequently transcribed in full. Interviews were conducted between 1 May and 8 June 2015, and lasted for between 50 to 65 minutes.

PTD hearings in magistrates' courts may be presided over by lay magistrates, normally sitting in a panel of three, or by a District Judge (Magistrates' Courts) normally sitting alone. The former are not legally qualified, but receive training, and they sit with a legally qualified legal adviser whose role is to advise magistrates on the law. District Judges are legally qualified, and have experience as a solicitor or barrister. PTD hearings in the Crown Court are normally presided over by Circuit Judges, who are also legally qualified and have experience as solicitors or, more frequently, barristers. Interviews were conducted with all three types of judicial officer, as shown below.

Reference number	**Type of judicial officer**
01	Lay magistrate
02	Lay magistrate
03	District Judge (Magistrates' Court)
04	Circuit Judge
05	Lay magistrate

2.6 Data analysis

Analysis of the data was carried out in accordance with the structured approach adopted for the project across the 10 countries in which the research was conducted. This was facilitated, in respect of the practitioner survey, by the survey tool used which automatically carried out a basic analysis of numerical data. The narrative data in the practitioner survey, together with that resulting from the PTD hearing observations and CPS case-files, and the transcribed interviews, was analysed manually largely according to themes set out in the project analysis structure. The numerical data resulting from the PTD hearing observations and case-files was analysed using a standard data analysis tool.[71]

[71] Note that the practitioner survey included closed questions, which enabled a numerical analysis to be carried out, and questions asking for a narrative response which, generally, did not. Since only a small number of interviews were conducted, we generally do not ascribe precise numbers to any particular response.

Chapter III The context of pre-trial detention decision-making

1. Introduction

The primary purpose of this chapter is to set out the legislative and procedural framework regarding pre-trial detention and the decision-making process. However, having regard to the fact that the research in England and Wales is part of a large study of pre-trial detention in a range of European countries, most of which have an inquisitorial procedural tradition, we start by providing a brief account of the national context and some of the most important features of the criminal justice system and process in England and Wales.

1.1 The national context

The United Kingdom (UK) consists of three jurisdictions; England and Wales, Scotland and Northern Ireland. The total population of the UK in mid-2014 was 64.6 million, with England and Wales having a population of 57.4 million, Scotland 5.3 million, and Northern Ireland 1.8 million.[72] The UK is governed by a bicameral Parliament, but some powers are devolved to the Scottish, Welsh and Northern Irish governments. The level of devolved power varies as between the jurisdictions but, broadly, whilst criminal justice is a devolved responsibility in Scotland and Northern Ireland, criminal justice in England and Wales is the responsibility of the UK government. The UK was a signatory to the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1950, which was (in effect) incorporated into UK domestic law by the Human Rights Act 1998. The UK has been a member of the European Union since 1972. The legal system of England and Wales has a common law, adversarial, tradition and is one of the oldest continuously operating legal systems in the world.

England and Wales has a long history of an independent judiciary, consisting of professional judges and lay magistrates. Judges primarily sit in the higher criminal court (the Crown Court), which generally deals with more serious and complex offences, but some preside over magistrates' courts.[73] Lay magistrates sit in the lower criminal courts (magistrates' courts), which generally deal with less serious offences.[74] There are two distinctive features of the judiciary in England and Wales compared with much of continental Europe. First, the professional judiciary are all qualified as lawyers, and have experience in legal practice prior to judicial appointment. Second, most cases (including most PTD hearings) are dealt with by lay magistrates who, although they receive training, are not qualified lawyers.

A person accused of a criminal offence and brought before a criminal court is known as a defendant unless and until they are convicted, when they are described as an offender. All criminal cases, regardless of seriousness, start in a magistrates' court and all defendants are asked to enter a plea – guilty or not guilty – to the alleged offence.[75] Offences fall into one of three categories: summary, either-way, or indictable-only. Summary offences are relatively minor offences, which either do not carry a custodial penalty, or which may be penalised by a custodial sentence of no more than six months, and are dealt with in magistrates' courts. Either-way offences are, generally, middle-ranking offences that may be

[72] Office for National Statistics (ONS), Overview of the UK Population, (June 2015): http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2014/sty---overview-of-the-uk-population.html.

[73] District Judges and Deputy (part-time) District Judges preside over hearings in some magistrates' courts.

[74] The maximum sentence in magistrates' courts is 6 months imprisonment (or a total of 12 months where a person is convicted of two or more either-way offences), although a defendant convicted of an either-way offence can be committed to the Crown Court for sentence.

[75] Defendants are asked to plead, or at least to indicate a plea, at an early stage of the criminal process. One important consequence of a guilty plea is that the court does not consider whether there is sufficient evidence of guilt to warrant a conviction.

dealt with either in a magistrates' court or the Crown Court. There is a complex system of determining in which court an either-way offence will be dealt with. Generally, a defendant who pleads guilty has no choice of venue, but if they plead not guilty (or give such an indication) they can choose which court they wish to be tried in unless the court decides that the case is suitable only to be dealt with in the Crown Court. Where a defendant pleads guilty to, or is convicted of, an either-way offence in a magistrates' court, the court may commit him or her to the Crown Court for sentence if it determines that its sentencing powers are insufficient. Indictable-only offences are serious offences that may only be dealt with by the Crown Court, although the first court appearance following charge is always in a magistrates' court.[76]

Responsibility for investigating crime rests primarily on the police, although there are a number of other state institutions that have investigative functions. The police share responsibility with the Crown Prosecution Service (CPS) for deciding whether a suspect should be charged with a criminal offence (that is, commence criminal proceedings against them),[77] and where a person is charged with an offence, the police decide whether to release them on bail or keep them in custody pending their first court appearance. The first court appearance is in a magistrates' court, normally presided over by a panel of three magistrates, but sometimes by a single District Judge. If the case is not completed at the first appearance, the court must adjourn the hearing (or, if it is an indictable-only case, transfer it to the Crown Court), and must decide whether the defendant should be remanded on bail or in custody during the period of the adjournment.

The defence and prosecution of defendants is generally undertaken by one of two types of lawyer – solicitors and barristers. Defence solicitors are normally employed by, or partners in, private law firms, whilst prosecution solicitors are employed by the CPS. Barristers are specialist advocates who are normally self-employed, practising from 'chambers', but some are employed as prosecutors by the CPS.

2. The law governing pre-trial detention

2.1 Introduction

In this section we deal with the law on pre-trial detention and bail. The decision-making process is dealt with in section 3 below. Pre-trial detention is governed by a number of statutes, primarily the BA 1976, and is also subject to a number of procedural rules set out in the CrimPR.

2.2 The prima facie right to bail

When adjourning a case before conviction, a magistrates' court must remand the defendant either on bail or in custody.[78] After conviction, a magistrates' court also has power to grant bail for the period of a remand for reports, for example, pre-sentence or medical reports.[79] Where a magistrates' court sends an accused to the Crown Court for trial or sentence, they

[76] See Magistrates' Courts Act (MCA) 1980, ss. 2, 17 and 19; Crime and Disorder Act 1998, s. 51; and Criminal Justice Act 2003, Sch. 3, See generally D. Ormerod (ed), *Blackstone's Criminal Practice 2015* (Oxford University Press, Oxford 2014), Part D.

[77] Generally, the police decide on charge in less serious cases, and the CPS in more serious cases. For a detailed explanation see D. Ormerod (ed), *Blackstone's Criminal Practice 2015* (Oxford University Press, Oxford, 2014), D2.2 – D2.13.

[78] MCA 1980, ss. 5(1), 10(1), 18(4) and 128(1).

[79] MCA 1980, s. 10(3) and Powers of Criminal Courts (Sentencing) Act 2000, s. 11. In the case of a convicted offender, if the case is adjourned for inquiries or reports, the offender need not be granted bail if it appears to the court that it would be impracticable to complete inquiries or make the report without keeping him/her in custody (BA 1976, sch. 1, part I, para. 7).

may do so either in custody or on bail.[80] The Crown Court has power to grant bail in a range of circumstances, including to an accused who has been sent for trial in the Crown Court, and to a person convicted in a magistrates' court who is appealing to the Crown Court against conviction and/or sentence.[81] In all of the above circumstances, the criteria for determining the bail/remand decision are governed by the BA 1976. The criteria differ depending upon whether the person is charged with an offence that is triable on indictment[82] and punishable with imprisonment, triable only summarily but imprisonable, or is not punishable with imprisonment. However, a rebuttable presumption of bail is enshrined in statute – an accused 'shall be granted bail' unless one or more of the exceptions set out below apply.[83] This presumptive right applies to an accused who appears before a Crown Court or a magistrates' court in the course of or in connection with proceedings for an offence, or applies to a court for bail or for a variation of bail conditions; a person who has been convicted of an offence and whose case is adjourned for reports before sentencing; and a person brought before the court for alleged breach of a community order (a form of non-custodial sentence).[84] In other words, the default position is that bail must be granted, but it may be denied (so that the person is kept in pre-trial detention) if one or more of the statutory exceptions to bail is satisfied. Note that a release on bail is a release on the condition that the person surrenders to custody (that is, attends court) on the relevant date(s). Failure to surrender to custody is a discrete offence, and a court may issue a warrant for the arrest of a person who fails to surrender to custody.[85] In addition a police officer has power to arrest without warrant a person who fails to surrender or who is in breach of conditions attached to bail.[86]

2.3 Offences triable on indictment and imprisonable

For offences that are triable on indictment[87] and are imprisonable, the defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether or not subject to conditions) would:

(a) fail to surrender to custody,
(b) commit an offence while on bail, or
(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to him/herself or any other person.[88]

In considering the above criteria, the court must have regard to the following factors, as well as to any others which appear to be relevant: the nature and seriousness of the offence and the probable method of dealing with the offender for it;[89] the character, antecedents (i.e., previous criminal convictions), associations and community ties of the accused; the accused's previous 'record' for answering to bail in the past; the strength of the evidence against the accused; and, if the court is satisfied that there are substantial grounds for believing that the

[80] Crime and Disorder Act 1998, s. 52(1).
[81] Senior Courts Act 1981, s. 81(1).
[82] i.e., an indictable-only or either-way offence.
[83] BA 1976, s. 4.
[84] BA 1976, s. 4(2)-(4).
[85] BA 1976, s. 6(1).
[86] BA 1976, ss. 6 and 7.
[87] i.e., an indictable-only or either-way offence.
[88] BA 1976, sch. 1, part 1, para 2.
[89] Subject to the Criminal Justice and Public Order Act 1994, s. 25 (see below), the seriousness of the alleged offence cannot be treated as a conclusive reason for refusing bail to an unconvicted person (*Hurnam v State of Mauritius* [2001] 1 WLR 857).

accused would commit an offence while on bail, the risk that they may engage in conduct likely to cause physical or mental injury to anyone else.[90]

Other grounds for withholding bail where a person is charged with an imprisonable, indictable offence include:

(a) where there are substantial grounds for believing that if granted bail the defendant would, or would be likely to, cause physical or mental injury to an associated person, or cause an associated person to fear physical or mental injury;[91]
(b) where it appears to the court that the defendant was on bail in criminal proceedings on the date of the (alleged) offence;
(c) when the court is satisfied that the defendant should be kept in custody for his or her own protection or, if a child or young person, for his or her own welfare;
(d) when the defendant is in custody in pursuance of a sentence;
(e) when the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking a bail decision for want of time since the commencement of proceedings; and
(f) if, having previously been released on bail in, or in connection with, the proceedings the defendant has been arrested under the BA 1976, s. 7 (failure to surrender to custody).[92]

2.4 Summary-only, imprisonable and non-imprisonable offences

For imprisonable summary-only offences and non-imprisonable offences, the exceptions to bail are generally more limited. Broadly speaking, bail cannot be denied on the grounds of fear of failure to surrender to custody or fear of further offences unless the defendant has previously failed to surrender or has been arrested under the BA 1976, s. 7. Therefore, for a court to deny bail on these grounds, there must be some past record of similar behaviour. However, bail can be denied for these types of offences where the court is satisfied that there are substantial grounds for believing that, if released on bail, the accused would commit an offence by engaging in conduct that would, or would be likely to, cause physical or mental injury to an associated person or cause such a person to fear physical or mental injury. In addition, bail may be denied for the person's own protection (or welfare if a child or juvenile), or if they are already serving a custodial sentence.[93]

2.5 Recent developments in bail law

The account of the exceptions to bail provided in sections 2.3 and 2.4 above include the amendments made to the BA 1976 by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. A significant change not mentioned in that account was the introduction of a 'real prospect' test in respect of both indictable and summary imprisonable offences. In both cases, if there is no real prospect that the defendant will be given a custodial sentence in the proceedings, then some of the exceptions to the right to bail do not apply, including the fear that the defendant will fail to surrender or will commit further offences.[94]

[90] BA 1976, sch. 1, para. 9.
[91] An 'associated person' is, broadly, a person who is or has been married to the accused, or is a relative (Family Law Act 1996, s. 62).
[92] BA 1976, sch. 1, paras. 2ZA – 6.
[93] For a full account of the exceptions to bail for summary-only imprisonable offences and imprisonable offences, see BA 1976, Sch. 1, Parts 1A and 2.
[94] See BA 1976, Sch. 1, Parts 1 and 1A.

2.6 Mandatory pre-trial detention

There are no circumstances in which a remand in custody is mandatory, but there are two significant limitations on the grant of bail in defined circumstances. First, a defendant charged with murder may only be granted bail by a Crown Court judge.[95] Second, a court cannot grant bail to an defendant charged with (or convicted of) murder, attempted murder, manslaughter (provided a custodial sentence was imposed), rape or attempted rape, or certain other sexual offences, if he or she has been convicted of any of these offences in the past, unless the court is of the opinion that there are exceptional circumstances which justify it.[96]

2.7 Non-custodial alternatives to detention

The BA 1976 sets out the circumstances in which non-custodial requirements can be imposed when granting bail. There are three types of requirement, which can be used either alone or in combination: a surety; a security; and conditions.

2.7.1 Surety

A surety is essentially a promise by a third party to forfeit a specified sum of money if the accused fails to surrender to custody. A surety can only be required to ensure that the accused surrenders to custody, and not for other purposes (e.g., not to commit further offences).[97] In considering a surety the court must have regard to: the financial resources of the proposed surety (i.e., can the surety pay the sum of money which s/he is promising to pay); the character of the proposed surety and whether s/he has any previous convictions; and the proximity (whether kinship, place of residence or otherwise) of the proposed surety to the person for whom s/he is to be surety.[98]

2.7.2 Security

An accused cannot stand surety for him/herself.[99] However, the accused can be required to give security for his or her surrender to custody. For example, he or she can be required to deposit with the court money or some other valuable item which will be liable to forfeiture if he or she fails to surrender to custody.[100] As with a surety, a security can only be required if there appears to be a risk that the accused will fail to surrender to custody.

2.7.3 Conditions

A person who is granted bail can be required to comply with 'such requirements as appear to the court necessary to secure that' the accused: surrenders to custody; does not commit an offence on bail; does not interfere with witnesses or otherwise obstruct the course of justice; makes him/herself available for the making of inquiries or a report to assist in sentencing; attends an interview with a legal representative (normally a solicitor); or for his or her own protection (or if a juvenile, for his or her own welfare or in his or her own interests).[101] No

[95] Coroners and Justice Act 2009, s. 115.
[96] Criminal Justice and Public Order Act 1994, s. 25. In addition, an accused aged 18 or over may not be granted bail, unless the court is of the opinion that there is no significant risk of his committing an offence while on bail, where there is drug test evidence that the accused has a specified Class A drug in his body, he is charged with or the court is satisfied that there are substantial grounds for believing that misuse of a specified Class A drug caused or contributed to the offence, and the accused does not agree to undergo an assessment or has undergone an assessment but does not agree to participate in any relevant follow-up which has been offered (BA 1976, sch. 1, part 1, paras. 6A to 6C).
[97] *R (Shea) v Winchester Crown Court* [2013] EWHC 1050 (Admin).
[98] BA 1976, s. 8
[99] BA 1976, ss. 3 and 5.
[100] BA 1976, s. 3(5).
[101] BA 1976, s. 3(6).

condition can be imposed unless it appears to the court that it is necessary to do so for the purpose of ensuring that the accused surrenders to custody, does not commit an offence on bail, does not interfere with witnesses or obstruct the course of justice, or for the accused's own protection (or if a juvenile, their own welfare).[102]

In considering whether to impose a condition the court is not obliged to have substantial grounds; it is sufficient that they perceive a real, rather than a fanciful, risk of the consequence concerned.[103] Thus a court has a wide discretion to impose conditions. Under the CrimPR, r. 19.5(4), where a prosecutor asks a court to impose a condition, he or she must specify the condition and explain what purpose it would serve. Conditions can be imposed where bail is granted to an accused charged with a non-imprisonable offence.[104] Breach of a bail condition is not a criminal offence, but the accused may be arrested and produced before a court, which may then remand them in custody (subject to the normal criteria for considering bail).[105]

2.8 Maximum length of pre-trial detention

Maximum time-limits on pre-trial detention depend upon the type of case, and the stage of proceedings.[106] They apply to juveniles in the same way as for adults. In the case of summary-only offences, the maximum period of custody between the accused's first court appearance and the start of a summary trial is 56 days. In the case of either-way offences, the maximum period of custody between the accused's first court appearance and the start of a summary trial, or the time when the court decides to send the accused to the Crown Court for trial, is 70 days.[107] In the case of indictable-only offences, the maximum period of custody between the accused's first court appearance and the time when the court decides to send the accused to the Crown Court for trial is 70 days. Where a case is sent for trial to the Crown Court, the maximum period of custody between the time when the accused is sent for trial and the start of the trial is 182 days (although a preparatory hearing is treated as the start of the trial). Therefore, the maximum period of custody between the accused's first court appearance and the start of a trial in the Crown Court is 252 days (i.e., 70 + 182), equivalent to 36 weeks.

At the expiry of a time limit, the accused must be granted bail (which may be subject to conditions), although this only applies up to the time that the accused enters a plea. However, at any time before expiry of a time limit, the court may extend it if satisfied that the prosecution has acted with due diligence and expedition and that there is good and sufficient cause for doing so.[108] There is no limit to the number of extensions, nor to the overall period of detention.

3. The decision-making process

3.1 Presentation of an arrested person before a judicial authority

Where a person is arrested, they must be taken to a police station as soon as is practicable, where they may be detained without charge for the purpose of investigating the suspected offence, including by interviewing the arrested person. The initial maximum period of detention without charge is 24 hours (normally) from the time of arrival at the police

[102] BA 1976, sch. 1, para. 8(1).
[103] *R v Mansfield Justices, ex p Sharkey* [1985] QB 613.
[104] *R v Bournemouth Magistrates' Court, ex p. Cross* (1989) 89 Cr App R 90.
[105] BA 1976, s. 7(3).
[106] Governed by the Prosecution of Offences (Custody Time Limits Regulations 1987 (SI 1987 No. 299).
[107] Although this is reduced to 56 days if before the expiry of 56 days the court decides to proceed to summary trial.
[108] Prosecution of Offences Act 1985, s. 22.

station.[109] Where a person is charged with a criminal offence, they must be released (normally on police bail) pending their first court appearance (subject to the exceptions regarding murder and repeat serious offences referred to above) unless the custody officer (a police officer of at least the rank of sergeant) is satisfied that certain conditions are satisfied (e.g., that the accused will fail to turn up in court, will commit further offences, or interfere with the investigation or the administration of justice).[110] If the accused is not released following charge, they are detained at the police station and must be produced at a magistrates' court as soon as is practicable, and normally no later than the first court sitting after s/he is charged.[111] In practice, this is normally the day after the day on which they are charged (or the afternoon of the same day if they are charged in the morning), although since courts do not normally sit on Sundays (and Good Friday and Christmas Day), if a person is charged on a Saturday afternoon they do not have to be produced in court until the Monday.

3.2 Legal representation at pre-trial detention hearings

A defendant or offender has a right to be represented by a lawyer at a pre-trial detention hearing, but there is no provision for mandatory representation, even in the case of juveniles. In a magistrates' court, the justices' legal adviser must normally assist unrepresented defendants.[112] A magistrates' court duty solicitor scheme is operated by the Legal Aid Agency through contracts with criminal defence solicitors. The duty solicitor is required to provide advice to any person who is in custody at a magistrates' court, and to provide representation in a bail application, provided that the accused has not been represented on a previous occasion in those proceedings. A defendant may apply for a representation order (i.e., legal aid), in respect of which there is a merits test and a means test administered by the Legal Aid Agency. Whilst the merits test does not include a criterion directly relevant to pre-trial detention hearings, one factor to be considered is whether the person would be likely to lose his or her liberty or livelihood or suffer serious damage to his or her reputation (although this is directed at the likely sentence rather than pre-trial detention). In practice, it is likely that most accused who are remanded in custody would satisfy the merits test. Defendants who are under the age of 18 years automatically satisfy the means test, as do those who are in receipt of certain state benefits (e.g., income support, income-based jobseeker's allowance).[113]

There is no statutory requirement on the prosecution to provide access to case materials or disclosure of relevant materials to the defence prior to a pre-trial detention hearing. The Police and Criminal Evidence Act (PACE) 1984, Code of Practice C, was amended to give effect to the EU Directive on the right to information,[114] as from 2 June 2014, imposing an obligation on the police to disclose documents and materials which are essential to challenging the lawfulness of the detainee's arrest and detention.[115] However, the Code only applies whilst a person is in police custody. It appears that the Ministry of Justice

[109] This can be extended to a total of 36 hours on the authority of a police superintendent (a senior police officer), and up to a maximum of 96 hours in total (i.e., from the time of the initial arrival at the police station) on the authority of a magistrates' court (Police and Criminal Evidence Act (PACE) 1984, Part IV). In the vast majority of cases, the suspect is charged and/or released within 24 hours.
[110] PACE 1984, s. 38.
[111] PACE 1984, s. 46.
[112] CrimPR, r. 19.3.
[113] Governed by regulations issued under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For an explanation, see *Criminal legal aid: means testing* issued by the Legal Aid Agency, available at https://www.gov.uk/guidance/criminal-legal-aid-means-testing.
[114] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[115] Code of Practice C, para. 3.4(b).

believes that no further action is necessary to implement the EU Directive Arts. 6(1) and 7(1) in respect of the court phase of the criminal process and, in particular, in respect of pre-trial detention hearings.[116]

3.3 Review of pre-trial detention

The presumption of bail in the BA 1976, s. 4(1), means that a court must consider bail at each and every hearing. However, after the second hearing at which pre-trial detention is considered a magistrates' court need not hear argument as to fact or law that it has previously heard.[117] The use of the term 'need not' means that the court has a discretion to hear such arguments, but in practice they are unlikely to give real consideration to the pre-trial detention decision unless satisfied that there are relevant matters which have not previously been considered. Thus a defendant can, in effect, make two applications for bail in a magistrates' court without having to show a change of circumstance. In most cases, given that magistrates' courts are normally presided over by lay magistrates, this will normally mean that different magistrates preside over the two hearings. However, there is no formal requirement that bail should be considered by different magistrates.

In a magistrates' court, unless an accused consents to being remanded in their absence, they must be produced in court within eight days of the hearing at which the decision to remand them in custody was made, at which time (as indicated above) they can make a second bail application. If they are again remanded in custody, they can apply to the Crown Court for bail, and the hearing must be held no later than the first business day after the day on which the accused served notice of the application (although the Court does have power to vary this).

4. The use of pre-trial detention in England and Wales

According to Ministry of Justice statistics, 80,341 defendants were remanded in custody at some stage in proceedings (excluding police custody) in 2014. 48,330 were untried and 32,011 were convicted but un-sentenced.[118] Based on Office for National Statistics (ONS) population estimates, these figures suggest that 140 people per 100,000 were remanded in custody in 2014. Both the overall number of people remanded in custody and the rate per 100,000 have been decreasing since 2009. The proportion of pre-trial detainees compared to

[116] The CrimPR were revised as from 5 October 2015, and Part 8 now sets out the initial details of the prosecution case that must be provided at, or no later than the beginning of the day of the first hearing. However, they do not explicitly require documents to be provided 'which are essential to challenging effectively… the lawfulness of the arrest or detention (EU Directive on the right to information, art. 7(1)). Additionally, it should be noted that the Attorney General's Guidelines on Disclosure make no reference to disclosure in respect of PTD hearings: see https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2013.

[117] BA 1976, Sch. 1, Part 2A(3).

[118] Prison Receptions (Annual) 2014 (https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2014-and-annual). There is likely to be an overlap between these figures; for example, some prisoners remanded before trial would later be remanded after conviction but before sentence. For a full explanation, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305750/oms-definitions-and-measurement.pdf. In August 2014, the Howard League for Penal Reform released figures obtained from the Ministry of Justice through a Freedom of Information request, stating that 72,877 defendants were remanded in custody at some stage in proceedings (excluding police custody) during 2013: 36,044 at Magistrates' Courts and 36,833 at Crown Courts (Howard League for Penal Reform, 'Revealed: The wasted millions spent on needless remand', August 18 2014: http://www.howardleague.org/needless-remand/). These figures presumably include convicted but unsentenced prisoners, although this is not made explicit. Again, there is also likely to be an overlap between these figures; some prisoners remanded in custody in a magistrates' court may also have been separately remanded in custody later in the process, for example, after their case was sent to the Crown Court and possibly after conviction but prior to sentence (if they are included in these figures).

convicted prisoners in the country varies because the occupancy level for English and Welsh prisons fluctuates from week-to-week. As such, providing a figure for a specific date gives a more accurate indication of prison occupancy than figures for the entire year. As of 31 March 2015, the total prison population was 85,664.[119] Of these, 72,036 (84.09%) had been sentenced and 11,833 (13.81%) were on remand pending trial or sentence. The number of prisoners remanded pending trial or sentence has been decreasing since 2009 (with a slight increase in 2014). In 2013/2014, 1,041,221 people were arrested,[120] and 80,341 defendants were remanded in custody at some stage in court proceedings in 2014.[121] The proportion of arrests leading to pre-trial detention was, according to these figures, 7.72%.[122]

In the 12 months ending March 2014, 1,467,400 people were accused of a criminal offence and proceeded against in magistrates' courts. Of those remanded in custody at some stage in proceedings, 13,300 were convicted in magistrates' courts and given a custodial sentence. During the same period, 104,000 people were proceeded against in the Crown Court. Of those remanded in custody at some stage in proceedings, 29,800 were convicted in the Crown Court and given a custodial sentence.[123] During the same period, of the defendants who were remanded in custody at some stage in proceedings in magistrates' courts, 6,500 were either acquitted or otherwise discharged.[124] The equivalent figure for the Crown Court was 4,400 defendants.[125] There is limited information on rates of re-offending and compliance with conditions of pre-trial release. In 2010, 142,537 offences were committed by defendants on bail (10.7% of all offences 'committed'). Of the 671,029 offenders who received at least one caution, reprimand, warning or conviction, 70,496 (10.5%) 'committed'

[119] Ministry of Justice, Prison Population Q1 2015: https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2014-and-annual

[120] Home Office, Police Powers and Procedures England and Wales year ending 31 March 2014 (https://www.gov.uk/government/publications/police-powers-and-procedures-england-and-wales-year-ending-31-march-2014/police-powers-and-procedures-england-and-wales-year-ending-31-march-2014).

[121] Prison Receptions (Annual) 2014 (https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2014-and-annual).

[122] Care should be taken with these figures, which should only be treated as indicative. It is unclear how many people are arrested each year for a number of reasons (for more on this, see A. Sanders, R. Young and M. Burton , *Criminal Justice* (Oxford University Press, Oxford 2011). Moreover, not all arrests lead to charge and subsequent court appearances. Of those proceeded against in the courts (either Magistrates' or Crown Courts), not all will have been arrested. A large proportion of those proceeded against receive a summons to attend court; for example, in 2009, 57% of those directed to appear at Magistrates' Courts were summonsed, 33% were arrested and bailed, and 10% were arrested and held in custody. Table 4A, 'Criminal Statistics: England and Wales 2009 Statistics Bulletin' (2010), Ministry of Justice: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217947/criminal-statistics-annual.pdf

[123] Table Q3a, 'Defendants proceeded against by court type, type of remand and outcome of proceedings, 12 months ending March 2014', *Court Proceedings Tables* (2014) Ministry of Justice: https://www.gov.uk/government/...data/.../court-proceedings-tables.xls. However, a proportion of these will have been subsequently discharged (primarily due to abandonment of prosecution by the CPS). In addition to the statistics set out above, according to figures obtained by the Howard League for Penal Reform through a Freedom of Information request, 36,044 people were remanded in custody by Magistrates Courts in 2013, 10,631 of whom went on to receive a custodial sentence (29.5%). 36,833 people were remanded in custody in the Crown Court in 2013, 26,989 of whom went on to receive a custodial sentence (73.3%). Overall, 72,877 people were remanded in custody, of which 37,620 received custodial sentences (51.6%) (Howard League, 'Revealed: The wasted millions spent on needless remand', note 118)

[124] Ibid. In England and Wales, a defendant is acquitted when the prosecution have not proven beyond reasonable doubt that the defendant committed the offence in question. This can cover both insufficient evidence of guilt and positive evidence of innocence. As referred to above, a proportion of defendants are not formally acquitted but are instead not proceeded against. Often, a case against a defendant will be dropped by the CPS due to insufficient evidence, lack of witness testimony, or other reasons.

[125] Ibid.

the offence(s) whilst on bail.[126] In the 12 months ending March 2014, 6.4 per cent of defendants granted bail in magistrates' courts subsequently failed to appear at their next appointed court hearing.[127]

Regarding the annual costs of pre-trial detention, the Howard League for Penal Reform has stated that:

> 'Over the 12 months ending June 2014 there have been approximately 11,594 people in prison on remand at any one time. As a prison place costs £37,000 per year on average, this means that almost £429 million per year is being spent on incarcerating remand prisoners alone.'[128]

It added:

> 'The cost to the prison system of the 70% of men and women who are remanded by Magistrates but do not go on to receive a custodial sentence is an estimated £165 million per year (based on 25,413 people each remanded for nine weeks on average, with a prison place costing £37,000 per year). The cost to the system of imprisoning those who are remanded by Crown Courts but do not go on to receive a custodial sentence is an estimated £65 million per year (based on 9,844 people remanded for nine weeks on average at a cost of £37,000 per year per prison place).'[129]

It should be noted that, in England and Wales, official data is not routinely published regarding:

- the proportion of cases in which the prosecution requests pre-trial detention;
- the proportion of prosecution requests for pre-trial detention that are successful;
- conditions that are attached to bail, and the number of cases in which they are breached;
- the proportion of pre-trial detainees who plead guilty;
- the duration of pre-trial detention; and
- the proportion of pre-trial detainees who are given a custodial sentence shorter than the length of pre-trial detention.

The collection and publication of such data is necessary to enable judgements to be made about whether pre-trial detention, and alternative measures, are used appropriately and proportionately, and whether decision-making is compliant with both domestic and international standards.

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[126] Crispin Blunt (Parliamentary Under-Secretary, Ministry of Justice), Hansard HC Deb, 11 July 2011, c80W: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110711/text/110711w0003.htm#11071148000354. It is unclear what is meant by 'offences committed'. For example, this could mean alleged but unproven offences, offences for which someone was charged and convicted, or both. In all likelihood, it means the latter. This would include guilty pleas and convictions after trial.

[127] Court Proceedings Tables 2014 (see note 123 above). Total number of people granted bail excludes those committed for trial at the Crown Court.

[128] Howard League, 'Revealed: The wasted millions spent on needless remand', note 118.

[129] Ibid.

Chapter IV The process of pre-trial detention decision-making

1. Introduction

This chapter examines the procedural aspects of pre-trial detention decision-making through analysis of the data collected in this research project. A fair and proper procedure that, in practice, complies with both national legal requirements and ECHR standards is fundamental in ensuring both a lawful process and one that is more likely to ensure that appropriate decisions are made regarding whether an accused should be detained in custody or granted bail pending trial or sentence. In principle, the law in England and Wales sets the bar high: the court must have *substantial grounds* for *believing* that if released on bail the accused would fail to surrender, commit an offence, or interfere with the course of justice.[130] With regard to defendants in respect of whom guilt has not been determined, the starting point must be the presumption of innocence. In that context, the decision whether to keep the person in custody or release them on bail is essentially a risk-assessment exercise: does the risk of releasing a defendant on bail, having regard to the nature and seriousness of the potential consequences if bail is breached, outweigh the inherent importance of the right to liberty (in the context of the presumption of innocence) and the need to avoid the adverse consequences that will follow from an unnecessary or inappropriate remand in custody. Convicted defendants have a prima facie right to bail if the court adjourns the case for reports before sentencing. In these circumstances the presumption of innocence is not a relevant consideration, but the decision nevertheless involves a risk assessment taking into account the likely sentence and whether the grant of bail is likely to frustrate the purpose of the adjournment.

International principles regarding pre-trial detention are set out in the ECHR, Article 5(3), which provides that a person arrested or detained in respect of a suspected crime must be brought promptly before a judge or other authorised judicial officer, and is entitled to be tried within a reasonable time or to release pending trial. It follows, at least at the first pre-trial detention hearing, that the accused has a right to be present. A fair and proper procedure requires that the accused, as well as the prosecution, has the opportunity to present to the court information that is relevant to the pre-trial detention decision, and to present arguments as to the appropriate disposal.[131] It also requires that the court approaches the evidence and arguments presented dispassionately and objectively (which is inherent in the requirement that the decision be made by a judge or other judicial officer), and that the decision regarding pre-trial detention is based on the law as it applies to the particular facts of the case.[132] The right of effective participation also means that the accused has a right to be informed of the decision made in terms that they can understand. Since pre-trial detention involves the denial of liberty, the accused must be brought before a judge 'promptly' or 'speedily', which gives little room for delay.[133] Where pre-trial detention is ordered, the trial must take place within a

[130] Although the threshold for withholding bail is not so high in relation to other exceptions to the right to bail (see Chapter III, section 2).

[131] The hearing must be oral and adversarial, and the accused must be given the opportunity to effectively participate (ECtHR 28 October 1998, *Assenov v Bulgaria*, No. 24760/94).

[132] The ECtHR has underlined the need for convincing and consistent justification for a decision to detain, and that the reasoning must be made *in concreto* (ECtHR 23 September 1998, *L.A. v France*, No. 28213/95; ECtHR 26 October 2000, *Kudla v Poland*, No. 30210/96). And see Chapter V, section 1.

[133] The ECtHR has not defined the parameters of 'promptly'. In ECtHR 29 November 1988, *Brogan and others v UK*, Nos. 11209/84, 11234/84, 11266/84, 11386/85, the court held that periods before production before a judge of 4 – 6 days breached Art. 5(3). See also, ECtHR 28 November 2000, *Rehback v Slovenia*, No. 29462/95.

reasonable time, which requires that the proceedings be conducted with special diligence having regard to the relevant circumstances of a particular case.[134]

2. Speed of process

2.1 Length of time before first hearing

The domestic legal provisions regarding detention of a suspect at the police station, and production before a court where they are charged with a criminal offence, are set out in Chapter III, section 3.1. The result is that the maximum period between arrest and the first appearance in court is normally five days, although since it is probable that the vast majority of those arrested and detained at a police station are detained without charge for no more than 12 hours, the period between arrest and first court appearance should usually be significantly less. These provisions almost certainly comply with the requirement of 'promptness' under the ECHR Article 5(3).[135]

As shown in Table 05, the case-file data indicated that in the majority of cases, the period between arrest and first appearance in court was no longer than two days, although in small number of cases the period was between three and four days. Although it was not always indicated on the file, it is likely that in the majority of cases where the period exceeded four days, the accused was either granted bail following charge (or was summonsed rather than charged), or was released on police bail without charge, meaning that they were not detained for most, or all, of the period before the first court appearance. Therefore, the data suggests that the time limits in the PACE 1984 are normally, if not always, complied with.

Table 05
Length of time between arrest and first court appearance
Case-file data

Number of days	**Number of cases**	**%**
1	27	42.19
2	11	17.19
3 – 4	4	6.25
5 – 9	1	1.56
10 - 19	2	3.12
20+	19	29.69
Total	64	100.00
Unknown (date of arrest not recorded, or not arrested)	12	
Overall total	76	

2.2 Length of pre-trial detention

Although not directly an aspect of pre-trial detention decision-making, we sought to obtain data on the length of time that defendants spent in pre-trial detention, as disclosed by the case-files that we examined. This provides some base-line data which can be used both to consider whether custody time limits are complied with, and also to enable comparisons to be made with length of pre-trial detention in other jurisdictions. Neither the ECHR nor case-law of the ECtHR establishes an absolute time-limit for pre-trial detention. The question of

[134] See ECtHR 27 June 1968, *Wemhoff v Germany*, No. 2122/64; ECtHR 10 November 1969, *Stogmuller v Austria*, No. 1602/62; ECtHR 16 December 2014, *Buzadji v Moldova*, No. 23755/07; and ECtHR 1 August 2000, *P.B. v France*, No. 38781/97.

[135] Note that where a person is arrested on suspicion of terrorism under the Terrorism Act 2000, they may be detained without to charge up to 14 days, but detention beyond 48 hours requires authorisation by a court.

whether the period of pre-trial detention is reasonable must be assessed by reference to the facts of a particular case,[136] although it has been suggested that compliance with Article 5(3) ECHR may be questionable if the period spent in pre-trial detention exceeds the length of the sentence ultimately imposed.[137] In England and Wales, the Prosecution of Offences Act 1985, and the Prosecution of Offences (Custody Time Limits) Regulations 1987[138] establish maximum periods for which an accused can be held in pre-trial detention before a plea is taken, the length of which depends upon the type of case and the stage of the proceedings. A court may extend the period of detention provided that it is satisfied that the prosecution has acted with due diligence and expedition, and that there is good and sufficient cause for doing so, and there is no limit on the number of extensions that can be granted.[139] However, Emmerson, Ashworth and Macdonald conclude that this regime complies with the requirements of the ECHR Art 5(3), and that the provision for extension of the time limit is also likely to be compliant provided that the court's discretion is exercised in accordance with the guidance given by Lord Bingham in *R v Manchester Crown Court ex p McDonald*.[140]

As Table 06 shows, in just over 40 per cent of cases pre-trial detention lasted for no longer than one month, and in just over two-thirds of cases, pre-trial detention lasted for no longer than three months. However, in nearly one-fifth of cases, pre-trial detention lasted for six months or more. It was not possible, from the data collected, to assess whether the periods spent in pre-trial detention were within the initial custody time limits. It is worth noting that the custody time limit applicable where a case is tried in the Crown Court is 252 days (36 weeks).[141] However, it must be remembered that the relevant end date for the purposes of calculating the custody time limit in a Crown Court case is the date that a plea of guilty is accepted or a jury is sworn in, and the data for time spent in PTD may include both the period of any trial and any period following conviction up to the date of sentence.

Table 06
Duration of pre-trial detention
Case-file data

Length of PTD	**Number**	**%**	**% (excluding cases where no PTD)**
No PTD	29	38.15	
1 day – 1 month	20	25.00	42.55
> 1 month – 3 months	12	15.79	25.53
>3 months – 6 Months	6	7.89	12.77
> 6 months – 1 year	8	11.84	17.02
1 year +	1	1.32	2.13
Total	76	100.00	100.00

2.3 Common reasons for lengthy pre-trial detention

It was not possible to determine common reasons for lengthy pre-trial detention from data in the case-files, although occasionally it was apparent in cases involving more than one

[136] ECtHR 26 October 2000, *Kudla v Poland*, No. 30210/96, para. 110, and see ECtHR 9 December 2014, *Geisterfer v Netherlands*, No. 15911/08.
[137] B. Emmerson, A. Ashworth and A. Macdonald, *Human Rights and Criminal Justice* (Sweet and Maxwell, London 2012), para. 8-138.
[138] S.I. No 1987/299.
[139] See further Chapter III, section 2.8.
[140] [1999] 1 WLR 841, and see Emmerson, Ashworth and Macdonald at para. 8.139.
[141] 70 days from the first court appearance to the date the case is sent to the Crown Court, plus 182 days from that date to the start of the trial.

defendant that an accused who had pleaded guilty spent time in pre-trial detention awaiting the outcome of a trial of a co-defendant (a reason that was also cited by a number of the respondents to the practitioner survey).

Defence lawyers were asked, in the practitioner survey, whether there were common reasons for lengthy pre-trial detention, and 75 per cent (82 of the 110 who responded to this question) said that there were. Asked to explain, two reasons were cited by the majority of respondents: problems with the Crown Prosecution Service and difficulties with the courts. With regard to the former, commonly cited problems were lack of timely disclosure and lack of timely preparation of cases. Typical comments were:

> 'Lack of disclosure from the Crown delaying trials.'
> 'CPS not meeting their disclosure obligations expeditiously and diligently and not responding to any defence communications so trial dates are non-effective.'
> 'CPS routinely do not get papers ready on time.'

This might be exacerbated in more serious, complex cases:

> 'Complicated cases with a large number of defendants can cause the case to be heard usually over a year after the first remand. [The] CPS invariably will not be able to provide disclosure, etc., within time periods as required by statute and despite Judge's directions.'

A minority of respondents attributed delay to the failure of the police to investigate properly or to supply the CPS with adequate information:

> 'Poor police investigations where CPS have to chase evidence for months to plug gaps or poor charging.'

Some respondents, whilst criticising the CPS, attributed their failings to lack of resources and/or poor organisation:

> 'CPS workload leading to late service of papers/lack of enquiries, etc.'
> 'CPS are poorly organised and don't deal with disclosure.'
> 'Because the pressures on the Crown Prosecution Service now mean that review and preparation of the case is unlikely to be done properly within the custody time limit; cases are withdrawn or compromised on the date of trial because they have not been considered prior to that date; this happens to defendants on bail as well but it is almost the rule for defendants in custody.'

Comments about the courts' role in prolonged pre-trial detention were mainly directed at a lack of resources, both in terms of their being insufficient courts or court time to deal with trials, and insufficient judges. Typical comments include:

> 'Lack of court time due to reduction in [court] sitting times.'
> 'The courts not being able to list trials until well towards the end of the custody time limits.'

> 'Not infrequently a trial, even a custody case, cannot go ahead because of lack of court time – double and even triple listing.'[142]

The other primary reason cited for lengthy pre-trial detention was delays caused by waiting for specialist evidence such as medical evidence, or for forensic tests to be carried out and evidence served, which were combined in the following response:

> 'Generally cases where forensic input is required, for example, analysing computer content for indecent child images, or firearms evidence. Police resources have been cut, [and] it can take weeks before this evidence is available. Obtaining expert medical evidence is another issue that can take time to resolve.'

As will be seen in the next section, the prosecutors interviewed said that their management system prioritises cases where the accused is in pre-trial detention because of the need to comply with custody time limits. However, one did indicate that as a result of limited resources, prioritising such cases had a knock-on effect on other cases:

> '[The fact that a case involves an accused who is in pre-trial detention is] only difficult in that with the resources that we've got at the moment, because we don't have staff numbers that would allow us to be very flexible, it does create pressure for people too, when they prioritise that as opposed to something that's say in court tomorrow that you have to put back because you have to give priority to somebody who's in custody.' (Prosecutor 05)

Generally, the judges and magistrates interviewed did not directly address the question regarding lengthy pre-trial detention, although one did say that in her court (a magistrates' court) trials were currently being listed for six months ahead 'so that could definitely be an issue with custody time limits' (Judicial Officer 05). A Crown Court judge interviewed accepted that serious, complex trials could result in lengthy pre-trial detention as a result of difficulties in finding court time, but also attributed delay to ensuring that the accused could have his or her lawyer of choice:

> 'The more serious cases will result in longer trials and longer trials are more difficult to list, but also [in] those more serious cases the availability of their counsel of choice is also a significant consideration and therefore the case may be put back to allow them to have the legal representation they particularly want.' (Judicial Officer 04)

2.4 Whether pre-trial detention has an impact on speed of the trial process

As noted in section 2.2 above, custody time limits apply to cases where the accused is remanded in custody. The prosecutors interviewed all agreed that the result is that priority is given to such cases over those where the accused is on bail. The custody time limit requirements are built into the case management system, so that cases are flagged up for regular review and warnings are given about imminent expiry of a custody time limit. As one prosecutor explained:

> '[In my region custody time limits are] monitored very heavily, it's policed very properly and we have gone from some custody time limit breaches to effectively none

[142] That refers to the practice of listing more than one case for the same court at the same time, probably with the expectation that in one or more of the cases, the defendant will change their plead to guilty at a late stage.

for quite a long time now. So it is far easier to have people on bail than it is to have them locked up.' (Prosecutor 04)

Another prosecutor provided an indication of how the system works:

> '[Y]ou know we are constantly reviewing the custody time limits, we do it a week after they have been in custody. There are custody time limit reviews on the cases. We obviously have to make those priority cases because someone's liberty has been taken away from them. We have to get the trial date and we have to be completely on the ball getting everything sorted before the trial date which is within the 56 days… at the Magistrates' Court, I can't even think when we have ever listed something outside the 56 days.' (Prosecutor 03)

The prosecutors were, of course, aware that they could apply for an extension of a custody time limit, but were also aware that they would have to persuade the court that they have acted with due diligence and expedition, and that there is good and sufficient cause. One prosecutor, having explained that applying for a remand in custody was 'making a rod for your own back' because of the custody time limits, went on to say:

> 'And if you don't get on with it very quickly, you make an even bigger rod for your back because you've got to show you've done due diligence and expedition in order to extend the custody time limit. And if you can't show that, and bearing in mind you have to show the Prosecution team has done that, which includes the police, then the Judge will not extend the custody time limit and the defendant will be released.' (Prosecutor 04)

And one of the judges interviewed indicated that applications to extend custody time limits (CTL) are subjected to careful scrutiny:

> 'If they're not having their trial within the custody time limits then there has to be an application to extend them and we're quite opposed to extending them, but in this court we generally don't go beyond the CTL, so that's not an issue.' (Judicial Officer 03)

Support for the idea that custody time limits are an effective mechanism for limiting the time that defendants spend in pre-trial detention came from some of the responses in the practitioner survey. Whilst many of the respondents were very critical of the CPS in terms of timely and effective case-preparation, and many also said that court directions are rarely complied with by the CPS or enforced by the courts, a common view (including of those who were critical more generally) was that custody time limits are effective, as the following comments show:

> 'CTLs seem to be the only safeguard.'
> 'Custody time limits appear to be the only remedy.'
> 'Custody time limits are the most effective, as the trial has to be heard in that time or an extension applied for, which is not always granted.'

However, 60 per cent of respondents in the practitioner survey[143] did not think that defendants kept in PTD were prosecuted more efficiently or speedily than those released on bail.

3. Participation by the defendant in pre-trial detention hearings

3.1 Introduction

In this section we deal with some basic aspects of participation in pre-trial detention hearings: whether the defendant is present; whether they have legal representation; and whether, if they do not speak or understand the language of the court, an interpreter is present. More detailed aspects of *effective* participation are dealt with in Chapter V.

3.2 Whether the defendant was present at the pre-trial detention hearing

Domestic law does not provide an absolute right for a defendant to be present at a pre-detention hearing.[144] The CrimPR provide that a decision regarding pre-trial detention cannot be made unless each party (which includes the defendant) is present or has had the opportunity to make representations. However, if the defendant is in custody, a hearing may proceed in his or her absence if, (a) s/he has waived their right to attend, or (b) s/he was present when bail was refused on a previous occasion and has been in custody continuously since then.[145] A pre-trial detention hearing may take place in public or in private.[146]

In the PTD hearing observations, the defendant was present in 63 (85%) of 74 cases observed. Most of the 11 (15%) cases in which the defendant was not present were PTD hearings in the Crown Court, most of which were reviews.[147] The case-file data showed that the defendant was recorded as being present at the first PTD hearing in 72 (94.74%) cases, and absent in only 3 (3.95%).[148] This indicates broad compliance both with ECHR standards and domestic law. It appeared to be standard practice in the Crown Court in which observations were conducted for the defendant not to be produced in court where they had previously been remanded in custody and were making a further application for bail, or where the court was considering an application for variation of bail conditions. As noted above, in relation to the former, this is permitted by the CrimPR. Although the prosecutors interviewed could offer no reason why Crown Court practice differed from that in magistrates' courts, there is case-law which has held that where the accused has legal representation, he or she has no right to be produced from prison for the purposes of a bail application.[149]

3.3 Whether a defence lawyer was present at pre-trial detention hearings

In the vast majority of observed PTD hearings, the defendant was represented by a lawyer; 72 (97.29%) out of 74 cases. In all of the magistrates' courts in which observations were

[143] 66 out of 110 who responded to this question.

[144] ECHR Art. 5(3) requires that the accused be 'brought promptly before a judge'. This implies that they should be produced in person, at least on the first occasion. However, it is unclear whether this also applies at any review hearing.

[145] CrimPR, r. 19.2(1).

[146] CrimPR, r. 19.2(2).

[147] Note that for the purposes of data collection a review hearing included further applications for bail in magistrates' courts or the Crown Court following an earlier remand in custody, hearings of applications by the prosecution or defence to vary bail conditions, and hearings following the arrest of a defendant for breach of bail conditions, failure to surrender to bail, and/or following arrest for further offences.

[148] In one of these cases, it was noted that the defendant refused to enter the courtroom. In one case the case file did not record whether the defendant was present. Note that the PTD decision made by reference to whether the defendant and/or their lawyer was present at the PTD hearing is dealt with in Chapter V.

[149] *R (Malik) v Central Criminal Court* [2007] 4 All ER 1141.

conducted a duty solicitor scheme was in operation so that in some cases the defendant was represented by a duty solicitor rather than an 'own' solicitor. In two-thirds of cases observed it was not possible to determine whether the defendant was represented by a duty or 'own' solicitor, but of the 25 cases where such a determination was possible, the defendant was represented by a duty solicitor in 18 (72%) cases. In the case-file data, a lawyer was recorded as appearing for the defendant at the first PTD hearing in 70 (92.10%) out of 76 cases. In three cases the record indicated that the lawyer was a duty solicitor, but in the other case files the status of the lawyer was not recorded. In most cases in both sets of data it was not possible to determine whether the lawyer was publicly or privately funded, but it is highly likely that in most cases the lawyer were funded through the legal aid scheme.

We also sought to discover, from the case-file data, whether a lawyer was present at all PTD hearings, the results of which are shown in Table 07.

Table 07
Whether a lawyer was present at all pre-trial detention hearings
Case-file data

Whether lawyer present	**Number**	**%**
Yes	52	68.42
No	11[150]	14.47
Unknown	13	17.11
Total	76	100.00

If the cases in which it was not known whether a defence lawyer was present at all PTD hearings are excluded, the proportion of cases where a lawyer was present at all hearings was 82.54 per cent.

3.4 Interpretation

With the exception of the Welsh language,[151] the right to interpretation in criminal proceedings is not provided for by statute or by the CrimPR. It should be noted that the EU Directive on the right to interpretation and translation, which imposes obligations on Member States to ensure that defendants who do not speak or understand the language are provided with interpretation at all stages of criminal proceedings (and with translation of essential documents), came into force on 27 October 2013.[152] Whilst amendments were made to the PACE 1984 Code of Practice C to give effect to the Directive, it appears that no statutory or other provisions were adopted in respect of the court stages of the criminal process. According to the Law Society, responsibility for arranging an interpreter for criminal court proceedings rests with the police or other prosecuting agency if a defendant appears in court within two days of charge, and otherwise rests with the court.[153] Court interpretation services are currently provided by Capita Translation Services under contract with the Ministry of Justice.

[150] In six of these cases, there was no record of a lawyer representing the defendant at the first PTD hearing, although in all of those cases the record showed that a defence lawyer was present at some of all of any subsequent PTD hearing.
[151] The Welsh Language Act 1993 provides that a party to criminal proceedings has a right to speak in Welsh.
[152] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, the transposition date of which was 27 October 2013. The UK government opted-in to this Directive.
[153] The Law Society, *Use of interpreters in criminal proceedings*, 14 January 2013, available at http://www.lawsociety.org.uk/support-services/advice/practice-notes/interpreters-in-criminal-cases/.

The number of defendants who did not speak or understand the language of the court was relatively low in both the PTD hearings observed and in the case-file data. In observed hearings, 4 (5%) defendants came into this category and an interpreter was present at all of these hearings. In the case-file data, 8 (10.53%) defendants were recorded as not speaking or understanding the language, but in none of the cases was it recorded whether an interpreter attended (although the fact that it was recorded that the defendant did not speak or understand the language may imply that, indeed, an interpreter was present).[154] In the four observed hearings that involved an interpreter, the researcher recorded the quality of the interpretation as being sufficient, but it must be stressed that neither researcher has the ability to make an expert judgement.

4. Fairness of the process

4.1 Introduction

The general ECHR standards governing pre-trial detention hearings are set out in section 1. above. The CrimPR require that a prosecutor must provide the court with all the information in the prosecutor's possession which is material to the decision to be made by the court. Where the prosecutor opposes bail he or she must specify each exception to the prima facie right to bail on which they rely and any consideration that the prosecutor thinks relevant. If the prosecutor seeks conditional bail, he or she must specify each proposed condition and explain the purpose of each condition.[155] The CrimPR also include supplementary obligations in respect of certain bail conditions.[156] With regard to participation by the defendant in the PTD hearing, as noted in section 3.2 above the CrimPR provide that a court must not make a decision unless each party (including the defendant) is present or has had the opportunity to make representations. It has been held that the accused or their lawyer must be given 'a fair opportunity to make submissions'.[157] Where an application for bail is made by a defendant who is not present and is in custody, the court must be satisfied that he or she has waived the right to attend, unless the defendant was present when the court withheld bail on a previous occasion and they have been in custody continuously since then.[158]

One matter which we explored to a limited extent, and which was apparent from our observations of PTD hearings, was that whilst hearings in magistrates' courts were always in public, in the Crown Court the public was normally excluded. The prosecutors interviewed could not offer a rationale for this, and we were not permitted to ask members of the judiciary why this was the case, and what the consequences or implications might be.[159] It has been held that whilst there should be a 'fundamental presumption in favour of open justice', a judge may depart from that principle if it is justified.[160] It was suggested by the Divisional Court that it may be in the interests of the accused for the hearing to be in private where, for example, the prosecution wish to give detailed reasons for fearing that the defendant may not surrender if granted bail, or where the prosecution need to give details of damaging prosecution evidence. Arguably, such reasons would also be applicable to pre-trial detention hearings in magistrates' courts, but in any event the Divisional Court appeared to condone the routine listing of Crown Court PTD hearings in private, putting the onus on the accused to request an open hearing if they so wish. We did not observe any case where the defence made such an application.

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[154] Since otherwise it might be expected that the file would have indicated how the situations was dealt with.
[155] r. 19.5.
[156] r. 19.11 – 19.15.
[157] *R (R) v Snaresbrook Crown Court* [2011] EWHC 3569 (Admin).
[158] r. 19.2. See note 144 above as to whether this is in compliance with ECHR standards.
[159] See Chapter II, section 2.5.
[160] *R (Malik) v Central Criminal Court* [2007] 4 All ER 1141, [33] – [40].

In this section we consider a number of practical aspects of a fair process, including the time available to both prosecution and defence for preparing for PTD hearings, the time taken for PTD hearings, the information or evidence available to the court in making a decision, and the perceptions of defence lawyers as to the fairness of the process. We also examine the relationship between defence representations and PTD hearing outcomes.

4.2 Prosecution applications

4.2.1 Rate of prosecution requests for pre-trial detention

The prosecutor was recorded as making an application in 47 (63.51%) of the 74 PTD hearings observed, and the nature of those applications is set out in Table 08 below. The prosecutor was recorded as not making an application[161] in 27 (36.49%) of the 74 hearings observed. However, in 16 of those cases, the outcome of the hearing was that the defendant was granted unconditional bail, and in 13 of those 16 cases the defence also did not make an application. Since it follows from the prima facie right to bail that a release on bail is the default position, it is likely that in those 16 cases the prosecutor took the view that there was no need to explicitly 'apply' for unconditional bail, and that in most of these cases the defence lawyer also understood that given that the prosecutor was not applying for either pre-trial detention or conditional bail, this would be the court's decision.

Table 08
Prosecution applications
PTD hearing observation data

Prosecution application	**Number**	**%**
Unconditional bail	12	25.53
Conditional bail	9	19.15
Pre-trial detention	26	55.32
Total	47	100.00

Table 09 shows the effect that adding the 16 cases in which the prosecutor did not explicitly apply for unconditional bail, but implicitly did so by not making an application, has on the figures given in Table 08.

Table 09
Prosecution applications (explicit and implicit applications)
PTD hearing observation data

Prosecution application	**Number**	**%**
Unconditional bail	28	37.84
Conditional bail	9	12.16
Pre-trial detention	26	35.13
No application	11	14.87
Total	74	100.00

The prosecution application was often not recorded in the case files examined. Of the 76 files reviewed, the prosecution application was not recorded in 46 of them. Of the 30 cases files where the prosecution application was recorded, in 6 (20%) cases the application was for conditional bail, and in 24 cases (80%) the prosecutor applied for pre-trial detention. No case

[161] That is, the prosecutor neither applied for pre-trial detention nor for a release on bail.

file recorded an application for unconditional bail, although it is likely that this was the case in some cases where the application was not recorded.

The applications by prosecutors were generally remarkably short. Of the 47 observed hearings where the prosecution application was clear, 44 lasted for five minutes or less, and three took between six and 10 minutes. In no case did we observe a prosecution application that took more than 10 minutes. The average time for prosecution applications was 2.5 minutes, and the average time taken in the 26 cases in which the prosecutor applied for pre-trial detention was 3.5 minutes.

One factor which is relevant to the length of prosecution applications is the information that they put before the court and whether they call witnesses to give evidence, for example, the police officer in charge of the investigation.[162] Whilst the CrimPR require a prosecutor to provide the court with all *material* information in the prosecutor's possession, this does not require them to adduce *evidence*, either documentary evidence or oral evidence given by a witness. Under English and Welsh law, whilst both prosecution and defence can adduce evidence, there is no requirement for them to do so.[163] The courts have rejected the need for formal evidence and procedures in PTD hearings, even in cases where the accused is alleged to have breached bail conditions, although proper account must be taken of the quality of the material upon which the court is asked to adjudicate and the accused must be given the opportunity to comment upon it.[164] We observed prosecutors to routinely provide the court with information taken from the police file supplied to the prosecutor, and to hand in a list of the defendant's previous convictions. In no case that we observed did the prosecutor adduce documentary evidence or call a witness to give oral evidence.

4.2.2 Time and information available to prosecutors

Given the fact that prosecutors spent very little time making applications, we were interested to find out from them whether they believed that they had sufficient information, and time, to prepare for PTD hearings, and they were asked about this in interview.

The prosecutors interviewed all worked in a busy city court, in which there was a dedicated 'remands' court (which was not the case in the less busy magistrates' courts observed). They described a process by which they would arrive at court at between 7.30am and 8.00am, and read the files of those cases which would be in the remand court that day:

> 'So it gives you an hour, an hour and a half to look at those files before you are wanted in court at half past nine, dishing out papers and discussing matters with defence solicitors'. (Prosecutor 01)

Prosecutors reported that on some days they had a very large number of cases to deal with, up to 35 cases, but more typically they dealt with between 15 and 20 cases. Often, the number would be added to during the day, for example, where a person had been charged in the morning and produced in court in the afternoon or had been arrested on a bail warrant. One prosecutor (Prosecutor 03) referred to what had happened the day prior to the interview: at the beginning of day she had 13 cases, which was 'probably about average… on a Wednesday', but this had increased to 22 by the end of the day.

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[162] It should be noted that in magistrates' courts, lay magistrates do not have access to the case file or police package, and what they know of the case depends upon what information is given to them by the prosecution or defence. In the Crown Court, it appeared that judges were often familiar with a case, sometimes having dealt with the case at an earlier stage of the process.

[163] *Re Moles* [1981] Crim LR 170, and *R v Mansfield Justices, ex p. Sharkey* [1985] QB 613.

[164] *R (DPP) v Havering Magistrates' Court* [2001] 3 All ER 997. It was held that the ECHR Art. 6 has no direct relevance, and that the procedure was compatible with Art. 5.

Prosecutors said that during the day they could often use time when magistrates were out of the courtroom considering their decision in order to do further preparation on up-coming cases. As Prosecutor 03 explained:

> 'It is very difficult, but it's a sort of juggling act and we have to let the court staff know what we are ready on and not be pushed into dealing with something that we … haven't prepared properly because it is someone's liberty [at stake] if you are making an application for remand in custody. .. A lot of down time in court is spent reading new files that are coming in or files that you haven't got round to.

However, this was less true in courts presided over by a District Judge, who tended to deal with cases more quickly, and without retiring to make a decision. Depending on the court, the prosecutor may also be assisted in making enquiries by a police liaison officer and/or by a member of the probation service. So the overall impression, for prosecutors working in a busy city court, was that they had high case-loads, and thus had little time to dedicate to any particular case. In the less busy magistrates' courts that we observed, the prosecutors dealt with mixed lists which included cases where there was no issue regarding pre-trial detention.

With regard to information, the prosecutors said in the interviews that they were supplied (usually at the beginning of their working day) with a 'police package' normally consisting of: a charge sheet; a police summary of the case; confidential information providing background information on the defendant and/or the complainant; the most important available witness statements; in some cases, a form indicating police concerns about bail; and a list of previous convictions of the defendant (and sometimes of the complainant/witnesses). The package may also contain information about the police attitude to bail/remand in custody, and in some cases a Crown prosecutor (not the prosecutor dealing with the case in court) will previously have given charging advice which may also include their view about the appropriate application to be made. Some of the prosecutors interviewed said that care had to be taken with the police summary, since it is sometimes, or 'often' (Prosecutor 04) inaccurate. The prosecutors also indicated that, where necessary, they would seek to supplement the information contained in the package by trying to contact the officer dealing with the case (although we were told that they were often off duty by the time the case was dealt with in court), by contacting the probation or bail information service (for example, with regard to the availability of a bail hostel place), or by interrogating the CPS case management system (for example, to obtain details of previous offences, or of other criminal proceedings).

Prosecutors said that a duplicate package, minus the confidential information, was also made available to defence lawyers at the beginning of the court day.[165]

4.2.3 Prosecution applications and the outcome of the PTD hearing

For the PTD hearings that we observed, we examined the decision made by the court and compared it to the application made by the prosecution. This shows whether or not the courts routinely acceded to the applications made by prosecutors which, in turn, provides some indication of the extent to which the courts are willing and able to take objective decisions, taking into account representations made by both the prosecution and the defence. Table 10 shows, in respect of those cases in the PTD hearings observed where the prosecution application was clear, the decision made by the court at the first PTD hearing.

[165] Note that there is no provision for the retention of 'confidential information' in the EU Directive on the right to information.

Table 10
Whether prosecution application granted
PTD hearing observation data

Application by prosecutor			**Whether application granted**			
	Number	**%**	**Yes**	**%**[166]	**No**	**%**
Pre-trial detention	26	35.13	19	73.08	7	26.92
Conditional bail	9	12.16	9	100.00	0	0.0
Unconditional bail	12	16.22	10	83.33	2	16.67
Unknown/unclear	27	36.49				
Total	74	100.00	38	80.85	9	19.15

We can see from this table that the courts frequently, although not always, granted the PTD application made by the prosecutor. Whilst all applications for conditional bail were granted by the court, just over one quarter of applications for pre-trial detention were not successful. In the case-file data, of the 24 cases in which it was recorded that the prosecutor sought pre-trial detention, the application was granted in 17 cases (70.83%). Taking the two data-sets together, just under three-quarters of prosecution applications for a defendant to be remanded in custody were successful.

4.3 Defence representations

We saw in section 3.3 above that nearly all defendants in the observed PTD hearings were represented by a solicitor, and from the case-file data that most defendants were represented at all PTD hearings. In this section we consider whether defence lawyers have sufficient time, information and resources to prepare for PTD hearings, and whether they are able to effectively participate, and we also examine the relationship between representations made by defence lawyers and the outcomes of the PTD hearings.

4.3.1 Preparation by defence lawyers

In the observed PTD hearings we sought to obtain data on whether the defence lawyer had met with their client before the hearing, but unfortunately in most cases (54 of 74 cases, i.e., 73%) we were not able to determine this. The case-file data was even less productive in this respect; there is normally no reason why a Crown prosecutor would know this, and no reason for them to record it. Similarly, the files did not normally include a record of the date on which the defence lawyer was first appointed. In the defence practitioner survey, we asked a series of questions which were concerned with preparation by defence lawyers which are set out, together with responses, in Tables 11 to 14.[167]

[166] % for 'Yes' and 'No' is a % of those cases where the application is known, i.e., 47.

[167] Note that whilst 141 responses to the practitioner survey were received, respondents did not necessarily answer all questions, so the total number for each question is the total number of responses to that question.

Table 11
On average, how long in advance of a first PTD hearing are you notified of it? Practitioner survey

Length of prior notification	**Number**	**%**
0-2 hours	38	37.25
2-6 hours	15	14.71
6-12 hours	19	18.63
12-24 hours	20	19.61
24+ hours	10	9.80
Total	102	100.00

The variable responses reflect the fact that the period of notification depends on a range of factors including, in particular, whether the lawyer or a member of their firm acted for the defendant at the police station. If they did so then, depending on the time of charge, the lawyer may know of the PTD hearing well in advance (and before the prosecutor). On the other hand, a court duty solicitor may have very little notice, although we observed that they were often able to arrange with the court usher not to call a case on until they have had time to prepare for it. The range of possibilities was summed up by one of the lawyers who responded to the survey in the following way:

> 'It all depends. If the client was represented at the police station the day before, then the solicitor will know usually that the defendant will be in court in the morning. But if not, then it will depend on the staff at court letting the solicitor know. If the defendant is arrested on a warrant or for breach of bail then there will be a notification from the Criminal Defence Service by phone or fax, but they will give you very short notice and occasionally direct you to the wrong court!'

Table 12
On average, how long is the defence lawyer given to prepare for the initial PTD hearing? Practitioner survey

Preparation time	**Number**	**%**
Less than 10 minutes	9	7.63
30 minutes or less	57	48.31
1 hour or less	29	24.58
More than 1 hour	23	19.49
Total	118	100.00

This question was also a difficult one for respondents to answer, since preparation time appears to depend upon a number of factors including the practice of particular courts, whether the court is busy, whether the solicitor has a high case-load, and whether there is difficulty accessing their client in the court cells. The following responses indicate the range of possibilities:

> 'As long as necessary, court will wait until defence say [they are] ready (generally).'
> 'To be fair, we have as much time as needed as the court is usually very busy, but pressure of our own case-load means we work quickly and need little time.'
> 'Depending on the case-load of the court, usually other cases can be dealt with whilst the court is waiting on the custody matters. If there are no other matters the court can deal with, then defence solicitors can have as little as a few minutes before a case is called, even if the prosecution only arrive a few minutes before 10.00am and it is at that point that papers are provided.'

A number of respondents indicated that where a defendant appears by way of a video-link, this imposes a time constraint since this has to be time-tabled, and video-link time is limited.

A related, but different, question is how long lawyers take to prepare for PTD hearings. This question was not directly asked in the practitioner survey and in any event would entail the same problem of ascribing an average. Perhaps not surprisingly, many responses indicated that the lawyer would take as long as they need. As one lawyer responded, 'I do not generally allow myself to be "given" time. I take the time I need to do what I want to do properly'. Another stated that they would generally not take more than 30 minutes unless the client was particularly vulnerable, whilst a third indicted that a simple case might take 10 minutes, including hearing time, whereas a more complex case might take 'well over an hour'.

It was noted in section 4.2.2 above that the prosecutors indicated that in the magistrates' court in which they practiced, the 'police package' was made available to defence lawyers at the beginning of the day. Disclosure for the purposes of pre-trial detention hearings is not regulated by legislation, nor by the CrimPR, and it is not known whether the procedure described by the prosecutors applies nationally. Defence lawyers were asked about disclosure of information in the practitioner survey, and their response are set out in Tables 13 and 14.

Table 13
Does the defence lawyer have access to relevant case materials in advance of the PTD hearing?
Practitioner survey

Are case materials provided in advance?	**Number**	**%**
Yes	73	69.52
No	32	30.48
Total	105	100.00

Table 14
If yes, is sufficient access provided to the extent necessary to effectively challenge the legality of the detention?
Practitioner survey

Is the disclosure sufficient?	**Number**	**%**
Not at all	20	18.02
Somewhat	86	77.48
Absolutely	5	4.50
Total	111	100.00

Whilst over two-thirds of respondents indicated that they do have access to relevant case materials in advance of the PTD hearing, and the majority said that what they were provided with is absolutely or somewhat sufficient, the narrative responses indicate widely different practices, both between courts and depending upon when a defendant is brought to court, and a significant level of dissatisfaction. For example, one respondent to the practitioiner survey commented that whilst case materials are provided in most courts, in one particular court the papers often arrive only after the defendant is brought to court, and there is often only a copy for the prosecutor. Court hearings on Saturdays appear to be particularly problematic, with case materials often not available.

However, the main concerns expressed concerned the timing of access to case materials, and the content. As noted above the prosecutors interviewed said that a copy of the 'police package' was made available to defence lawyers about two hours before the court day commenced. These comments concerned one particular court, and it appears from the responses to the practitioner survey that this is not a universal practice, or at least, many defence lawyers do not experience it in the courts in which they practice. With regard to timing, a common response was that the case materials are only made available shortly before the hearing. Some said that they could only have access to them 30 minutes to one hour before the hearing, that they often arrive late, and that they often arrive after the defendant. As one respondent indicated, if the papers arrive after the defendant this can lead to tensions between the lawyer and their client because many clients just want to get 'called on' as quickly as possible whereas the lawyer would like to see the papers before making a bail application. Even if the case materials are available, 'there is little opportunity to discuss any objections with a prosecutor prior to the hearing'.

Many of the respondents expressed dissatisfaction about the information that is included in the case materials, describing it as 'minimal' or 'very brief'. The summary of the case, which is normally written by the police officer dealing with the case, is often brief and sometimes unreliable (a concern that was echoed by one of the prosecutors interviewed),[168] and witness statements may be omitted from the file. Often, important documents such as the charge sheet, or list of previous convictions, are missing (or out of date). These concerns were summed up by one respondent as follows:

> 'We are usually given a very brief summary of the prosecution evidence by the OIC [officer in charge of a case]. Very rarely do we have any statements nor, in a lot of cases, do we get a charge sheet. As a firm, we have found that we have to fight to get a PNC print [Police National Computer print-out of previous convictions], or even a charge sheet sometimes.'

[168] See section 4.2.2 above.

4.3.2 Ability of defence to effectively participate in PTD hearings

It was noted in section 4.1 above that the CrimPR provide that a defendant must be given the opportunity to make submissions in respect of the PTD decision, either personally or by their lawyer. All of the lawyers in the practitioner survey who answered the question agreed that they are able to make submissions in PTD hearings.[169] In the PTD hearings observed, it was standard practice for the defence lawyer to be given the opportunity to address the court, and in all cases where the defence lawyer did not address the court, they were given the opportunity to do so. As with prosecution applications, defence representations were remarkably short. Of the 36 cases in the PTD hearing observation sample in which the defence lawyer made submissions, two-thirds lasted for less than five minutes, one fifth lasted for between six and 10 minutes, and only two lasted for more than 10 minutes. The average time taken was two minutes. In those cases where the prosecutor applied for pre-trial detention and the defence lawyer made an application (19 cases), the average length of the defence submission was 5.63 minutes; longer than the average length of prosecution applications for a remand in custody, but still very brief. In only one case did the lawyer request more time, and this application was granted. In no case observed did the defence lawyer request more information or evidence from the prosecutor. In a minority of observed Crown Court hearings the judge gave a very strong indication at the outset of the hearing as to the matters on which he wished to be addressed, and it was evident that this did affect the representations made by the defence lawyer. However, we also observed a similar impact on representations made by the prosecutor to the extent that in one case the prosecutor said almost nothing.

Effective participation is further considered below, where we look at perceptions regarding the relative influence of prosecutors and defence lawyers on the PTD decision.

4.3.3 Relationship between defence representations and PTD hearing outcomes

One measure of effective participation by the defence is whether the representations made by the defence lawyer have an impact on the PTD decision. We saw in section 4.2.3 above that in the observed sample, all prosecutor's applications for conditional bail were granted, and about three quarter of applications for a remand in custody were acceded to by the court.

In the case-file data the submissions made by defence lawyers were relatively rarely recorded, so it is not possible using this data to examine the relationship between defence submissions and PTD hearing outcomes. In the PTD hearing observations, the defence lawyer was observed to make representations regarding the PTD decision in 36 (out of 74) cases. In four of these cases, the defence lawyer agreed with the prosecution application for pre-trial detention. Reasons given for this included: for the defendant's own protection; to keep the defendant away from drugs; and for reports to be prepared. One way of examining the PTD hearing observation data is to look at the submissions made by the defence lawyer in those cases where the court ordered pre-trial detention.

[169] 115 respondents answered this question.

Table 15
Submissions made by defence lawyer where PTD ordered
PTD hearing observation data

Defence lawyer's submissions	**Number**	**%**
Conditional bail	10	35.71
Unconditional bail	1	3.57
No submissions	10	35.71
Unknown or unclear	7	25.00
Total	28	100.00

The fact that in one third of cases where PTD was ordered, the defence lawyer made an application for conditional bail suggests that those lawyers were aware that their client was at risk of bail being denied, and were seeking to persuade the court that the relevant risks could be adequately dealt with by appropriate conditions.

An explanation for why a defence lawyer may not make an application for bail, in circumstances where it is almost certain that the court will grant unconditional bail, is offered in section 4.2.1 above. One reason why a defence lawyer may not make an application for bail at the first court hearing in circumstances where a remand in custody is likely was provided to the researcher by a lawyer who was waiting for her case to be called on in Court 03. She explained that, whilst she disagreed with the approach, some lawyers do not make a bail application at the first hearing where a court is likely to be inclined to order pre-trial detention, preferring to 'save' the application for the next hearing, by which time they may be able to make a stronger application. Whilst this strategy means that only one application may be made in the magistrates' court (unless there is a relevant change of circumstances), when the application is made the defendant does not suffer the potential disadvantage of the court knowing that a previous application for bail has failed. A similar consideration may have informed the decision by a defence lawyer, in one case observed, not to make a bail application when informed by the prosecutor that they would appeal if bail was granted; the defence lawyer would, instead, make an application in the Crown Court.[170] The belief that bail applications are less likely to succeed if a previous application has failed, even if not a 'full' application, was also suggested by a number of respondents in the practitioner survey. As one wrote, 'I suspect the magistrates are prejudiced against granting bail once the defendant has been refused bail at the first hearing'.[171]

In the Crown Court PTD hearings observed, the defence lawyer sometimes did not make a submission where the judge made it clear that he[172] was not willing to entertain an application in the absence of certain information, for example, how strong the prosecution evidence was and/or what the pleas would be.[173] In another case in the same court, the defence lawyer agreed with the prosecutor that the application for bail should be adjourned whilst investigations were conducted as to the address and surety offered by the defendant. The judge indicated that the matter should be dealt with sooner rather than later since the liberty of the defendant was at stake, and adjourned the case to the following day.[174]

These examples suggest that a nuanced approach is necessary when looking at data that suggests, on the face of it, that by not making an application for bail a lawyer is not acting adversarially or is not acting in the best interests of their client.

[170] Related to the researcher by the prosecutor in 03/160215/2.
[171] This concern may well be justified. See Chapter VII, section 4.1.
[172] The judges were male in all of the observed Crown Court PTD hearings.
[173] For example, in 02/210115/1.
[174] 02/190215/1.

4.4 Relationships and perceptions

In this section we examine the relationships between defence lawyers and prosecutors in respect of PTD hearings, and perceptions of the respective influence of prosecutors and defence lawyers on the courts' decisions, and of fairness of the process more generally.

4.4.1 Relationships between defence lawyers and prosecutors

In the PTD hearings observed the overall assessment of the researchers was that prosecutors and defence lawyers related to each other in a professional and cordial manner. Many, if not most, appeared to know each other, and in the case of barristers in the Crown Court, may even have been from the same chambers. Defence lawyers would often approach the prosecutor for information, and prosecutors were observed to provide it or to allow defence lawyers to look at information on their laptops or in their files. This picture of cordiality and professionalism was endorsed in the interviews with prosecutors, and to some extent by comments made by the respondents in the practitioner survey. However, a minority of respondents in the practitioner survey did report problems in their relationships with prosecutors, including that some prosecutors refuse requests to look at their electronic files, or to provide information about previous convictions of relevant prosecution witnesses, or to provide other information that may assist the defence.

4.4.2 Relative influence of prosecutors and defence lawyers

It was noted in section 4.2.3 above that prosecutors are normally successful in their applications, although not in about one quarter of cases where they apply for a remand in custody. We were interested to discover how prosecutors and defence lawyers viewed their respective influence on PTD decisions and included this question in the questionnaire and interviews respectively. Unfortunately, as noted in Chapter II, section 4, we were not permitted to explore this issue in our interviews with judges and magistrates.

Prosecutors interviewed generally appeared to believe that judges and magistrates have confidence in them and that they would not apply for a remand in custody unless there were substantial grounds for doing so. One prosecutor did express some reservations, which is reflected in the following exchange with the researcher:

> Prosecutor: Well you'd like to think that they respected what you had to say and take into consideration what you have told them, I think on the whole they do …
> Researcher: It sounds like sometimes they don't or you feel they don't?
> Prosecutor: Well it's not that they don't, but I think that some magistrates maybe don't fully appreciate… all of what you're telling them and they generally don't like to remand people because they don't like being nasty people.' (Prosecutor 05)

This prosecutor went on to say that sympathy for the defendant resulted in some magistrates, in some cases, placing more weight on what the defence have to say. However, this appeared to be a minority view.

The responses of defence lawyers in the practitioner survey were in marked contrast to the attitudes of the prosecutors interviewed. Nearly half of those who responded to this question[175] felt that prosecution and defence submissions were not treated equally and that the prosecution was favoured. Typical responses were that 'more weight is given to representations by the prosecutor', 'the police/prosecution are believed without having to produce evidence', 'the prosecution case is taken at its highest', and 'the bench often ignore the defence'. Such views were often expressed in strong terms, such as 'There is always a

[175] 54 out of 115 responses (46.96%).

bias towards the Crown', and one wrote, 'Bias always for pros [the prosecution] and I say that as a former prosecutor'. Other respondents indicated that it depends on the tribunal, some suggesting that whilst judges are fair-minded, magistrates are prosecution-minded, or that legal advisers exert undue influence on lay magistrates. Some also suggested that they felt at a disadvantage where the hearing is conducted by way of a video-link, because 'it is more difficult to be persuasive over a television link'. A couple of respondents made the point that describing the hearing as a 'bail application' suggests a reversal of the legal position. As one respondent wrote:

> 'I feel that all too often the hearing is seen as a bail application rather than an application by the prosecution for a remand in custody. The language gives the game away. Lay benches seem to need an awful lot of convincing that defendants do have a right to bail in most cases.'

However, the other half of respondents were more sanguine about the way in which prosecution and defence submissions are regarded by the court. Some suggested that whilst generally they are treated fairly, it could depend on the nature of the case, or the composition of a particular bench. A typical response of this kind was the following:

> 'It depends on the individual magistrates, but in general I feel that submissions are treated equally.'

In our court observations, we found significant differences in the use of pre-trial detention as between different magistrates' courts, but we found no difference as between lay magistrates and District Judges although the latter were more likely to impose conditional, rather unconditional, bail. However, we were not able to control by reference to case seriousness or other variables likely to affect the pre-trial detention decision.

5. Conclusions

Broadly, the processes by which PTD decisions are made are compliant with ECHR standards. Defendants who are kept in custody following charge are promptly produced before a court, the defendant is normally present at the first PTD hearing and is normally represented by a lawyer, and the defendant or his/her lawyer has an opportunity to make representations to the court regarding the decision whether they should be detained or released pending trial or sentence. Where bail is denied, the trial normally takes place within a relatively short period of time, aided by the system of custody time-limits, and although our case-file data showed that a significant minority of defendants are held in pre-trial detention for longer than six months before trial or sentence, this is almost certainly within the broad parameters established by the ECtHR.

Previous research has shown PTD hearings to be very summary affairs: bail hearing were often uncontested, they normally took up very little time, prosecution applications were normally granted, and the courts largely relied on information supplied by the police and offered to them by prosecutors without evidence being adduced.[176] This research suggests that most of these findings are still largely true. Most PTD hearings were uncontested, although it is likely that more than one-third (and possibly significantly more than one-third)

[176] See, for example, A. Hucklesby, 'Bail or Jail? The Practical Operation of the Bail Act 1976' (1996) 23 *Journal of Law and Society* 213; A. Hucklesby, 'Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' Courts', (1997) 36 *Howard Journal of Criminal Justice* 129; A. Hucklesby, 'Remand Decision Makers', [1997] *Criminal Law Review* 269; and M. Zander, 'Operation of the Bail Act in London Magistrates' Courts' (1979) 129 *New Law Journal* 108.

involved unconditional bail. In those cases in which the prosecutor did apply for conditional bail or the withholding of bail, their applications were normally successful, although about one-quarter of the latter applications were not. The courts still rely on information supplied to them (mostly) by prosecutors, rather than on evidence, and heavy reliance is place on information supplied by the police, despite some reservations about whether their case-summaries were accurate or reliable. The reliance on what, in evidential terms, is mostly hearsay may explain why both prosecution and defence representations are remarkably short, even where there is some kind of contest between them.

Another important factor in the brevity of PTD hearings appears to be the case-load pressures together with, in the case of defence lawyers, difficulties in accessing relevant case materials. With regard to the first, prosecutors in busy courts may have to deal with up to 35 cases in a court day, and even the average case-load of between 15 and 20 cases places a premium on speed rather than thoroughness, both in terms of preparation and court time. It appears that disclosure of relevant information to defence lawyers remains unregulated by law, and defence lawyers reported that information is often provided tardily, and is often minimal or incomplete. The EU Directive on the right to information requires that accused persons are provided with information about the criminal act they are accused of having committed (Art. 6(1)), and with all documents that are essential to challenging effectively the lawfulness of the arrest or detention (Art. 7(1)). Such information should be made available automatically, and should not be dependent upon the accused making a request for such information and documents. It appears that these provisions have not been given legal effect in England and Wales.

Whilst prosecutors generally thought that judges and magistrates have confidence in them and in the representations they make, about half of defence lawyers believe that the courts place more weight on prosecution submissions. The vast majority of defence lawyers who responded to the survey said that they thought the courts often or sometimes apply non-statutory criteria in making PTD decisions although, despite this, the majority thought that those decisions were fair and substantiated. This may suggest that it is the process rather than the outcomes that concerns defence lawyers, and that attention therefore needs to be paid to rectifying the unsatisfactory position regarding disclosure in advance of hearings and, perhaps to the reasoning provided by judges and magistrates, issues that are dealt with in Chapter V.

Chapter V Substance of pre-trial detention decision-making

1. Introduction

This chapter focuses on the substance of PTD decision-making, the decisions that are made and the reasons why they are made. When considering whether a defendant should be detained prior to trial, or whether an offender should be detained prior to sentence, it is important that all parties concerned are clear about the reasons behind any application or an order for detention. This is one of the requirements that are necessary in order to guard against arbitrary detention. Thus a court must justify its decision in terms that can be readily understood. Available statistics show the number of defendants who are remanded in custody or granted bail, but do not disclose the reasons for such decisions. As explained in Chapter III, defendants have a prima facie right to bail, a rebuttable presumption of bail. To overturn this presumption and order detention, judges and magistrates must be convinced by the prosecutor that one or more of the exceptions to bail set out in the Bail Act 1976 are established. In giving reasons for withholding bail, domestic law provides that judges and magistrates must meet certain standards, which were laid down in *R (Rojas) v Snaresbrook Crown Court*[177] (and which are discussed in section 5 below). The ECtHR has also outlined standards that must be adhered to in order to ensure compliance with the ECHR. The prosecution must demonstrate why a defendant cannot be released pending trial, and the court must give reasons for its decision regarding detention and must not use identical or a 'stereotyped' forms of words.[178] The arguments for and against PTD must not be 'general and abstract',[179] and in providing its reasoning the court must engage with the reasons for ordering detention and for dismissing any application for release.[180]

These standards raise several issues which are examined in this chapter, including the reasons why prosecutors request and judges order pre-trial detention, the relationship (if any) between demographic factors and pre-trial detention orders, the process of reasoning such decisions, and the influence of human rights standards on pre-trial detention decision-making.

2. Prosecutors' grounds for requesting pre-trial detention

In this section, we will examine the most common grounds which prosecutors identified for requesting pre-trial detention. This will primarily focus on relevant responses in the interviews, covering the primary reasons prosecutors apply for remands in custody, characteristics of defendants and types of offences which prosecutors consider important in this context, and the outcomes of the hearings we monitored.

2.1 Why prosecutors request pre-trial detention

The prosecutors interviewed were asked what their primary reasons are for seeking a remand in custody, and were also asked about their perceptions of how judges and magistrates receive their representations. The prosecutors placed great emphasis on the importance of the legislative framework of the Bail Act 1976 and the more recent amendments made by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. Their answers gave the impression that strict adherence to this framework was essential to a successful application to remand a defendant in custody. As one prosecutor said:

[177] [2011] EWHC 3569 (Admin).
[178] ECtHR 26 July 2001, *Ilijkov v Bulgaria,* No. 33977/96, 26 July 2001, para 85; ECtHR 8 June 1995, *Yagci and Sargin v Turkey,* Nos. 16419/90, 16426/90.
[179] ECtHR 24 July 2003, *Smirnova v Russia*, Nos. 46133/99, 48183/99.
[180] ECtHR 16 December 2014, *Buzadj v Moldovia*, No. 23755/07, para 31.

> '[W]e basically follow the Bail Act… so it will be fear of further offences, fear of failing to surrender and then the reasons being the fact that they committed offences whilst on bail, previous failing to surrender, their list of previous convictions, likely method of disposal, the nature and seriousness of the allegation and, occasionally, for their own protection… Those are the most used [for] remand.' (Prosecutor 03)

Another commented:

> 'I have to relate [applications] to the Bail Act which is what I am relying on to remand people in custody… all the time you're pointing [the court] in the direction of those provisions of the Act.' (Prosecutor 01)

The importance of pursuing the grounds outlined in the Bail Act, and the futility of an application which did not, was emphasised by another prosecutor:

> '[T]here is no point seeking a remand in custody unless you are going to effectively prove to the Judge that there are substantial grounds to believe that the person… will either fail to surrender, commit further offences on bail or offend on bail, or interfere with the witness… or justice.' (Prosecutor 04)

This prosecutor felt confident that 'Judges up and down this country… aren't going to remand anybody in custody unless there [are] substantial grounds for showing that'. Prosecutor 03 echoed these sentiments, saying: 'You have to have those grounds and reasons to apply and if you don't, you don't apply'.

Whilst the prosecutors generally regarded the legislative framework in positive terms, one felt that the framework was 'very rigid', and could prohibit an application for detention in circumstances where it was felt to be merited:

> '[S]ometimes I find [it] frustrating… because you can get some really quite nasty offences where you do have substantial grounds [but which do not fit within the statutory grounds]' (Prosecutor 03).

In addition to the statutory grounds for justifying the withholding of bail, the prosecutors referred to several factors which they regarded as important. All of the prosecutors referred to the significance of previous convictions. As one prosecutor said:

> '[I]f you feel that there are fears that there would be further offences… committed against a particular person or a particular place because of previous behaviour towards them… you would apply for remand in custody.' (Prosecutor 05)

The record (or 'list') of previous convictions was regarded as providing particularly important information. One prosecutor described it as 'absolutely vital in terms of remand applications' and gave this example:

> '[I]f he has previous convictions for domestic violence then [the police will] highlight those so that we are aware that there's a history of domestic abuse by the defendant on either that partner or a previous partner.' (Prosecutor 03)

She concluded that this 'would assist in… consolidating the grounds and reasons for the remand application'. Importantly, the 'list' also indicates whether such offences had been committed on bail. This was particularly significant because of the amendments to the legislative framework brought in by the LASPO 2012. As one prosecutor explained

> '[S]ince LASPO came in, we're really quite limited on the grounds that we can apply under… [F]or summary and imprisonable offences we can only apply really if that offence has been committed whilst on bail… we can't use fear of further offences unless it's been committed whilst on bail.' (Prosecutor 03)

Therefore, the previous offending history, and whether the defendant had committed offences whilst on bail, as disclosed by the 'list', is very important because it can determine whether a prosecutor will apply for a remand in custody or not.

Prosecutors also said that when deciding whether to apply for a remand in custody, they would be 'looking at the seriousness of the offence' (Prosecutor 02) and 'the facts of the case and the nature and seriousness of it' (Prosecutor 05). They also highlighted the relevance of the likely method of disposal, that is, the likely sentence:

> '[Y]ou also have to consider whether there is a real prospect of custody and… I think what that brings in is proportionality.' (Prosecutor 02)

Another prosecutor suggested that in considering an application to remand in custody, he would assess 'the strength of the evidence… which is going to be part, obviously an important part… of my decision making' (Prosecutor 01).

Some of the prosecutors also referred to external pressure to request a remand in custody, in particular from the police. One commented:

> '[T]here is pressure from the police, but thankfully myself and the lawyers I know… will not give in to pressure by the police. They may allow the argument to go on and say… "Okay, we'll think about it." But the result really is, no.' (Prosecutor 04)

Another seemed to agree that the desires of the police did not determine the nature of an application, although could influence it:

> '[The police preference is] something I take into account but ultimately I'll apply the Bail Act… I'll take everything into account but it is not read [a foregone conclusion that] just because the police have kept him in, I'll apply for remand in custody.' (Prosecutor 01)

2.2 The significance of specific characteristics of defendants

Prosecutors were asked if there were specific characteristics of defendants which would make them more likely to apply for a remand in custody. One indicated that 'there's nothing about the defendant that's going to change your mind; it's going to be the offence and his previous history really' (Prosecutor 01). However, the other prosecutors interviewed identified some characteristics that might be influential on their application. Drug use was mentioned by one prosecutor, who said:

> '[C]learly if they're committing offences to fund a drug habit… it's quite relevant information to put before the court as well.' (Prosecutor 03)

Homelessness, or 'no fixed address' (NFA), was another characteristic which was raised. One prosecutor commented:

> 'Depending on the case, [not having a fixed address] will lead to concerns at least in relation to… believing that the defendant will fail to surrender… that is a factor that you will take into account.' (Prosecutor 02)

Another agreed with this, suggesting that '[NFA is] obviously going to make failing to surrender at court more of a likelihood so that… could have an impact on the view on bail.' (Prosecutor 01).

These comments raise the issue of compatibility with ECtHR standards. In *Sulaoja v Estonia*, the court determined that a lack of fixed residence did not justify imposing PTD.[181] However, the prosecutors quoted above appeared to be suggesting that NFA is one 'factor' to be taken into account rather than the determinative reason for a PTD request. The relationship between lack of a fixed address and the likelihood of failing to surrender is a difficult issue in practice, which was clearly a source of concern for judges and magistrates (see section 5 below).

Finally, nationality was a characteristic mentioned by two prosecutors. This was recognised as a particularly sensitive subject by one, who stated that:

> 'I have been criticised by defence counsel for these characteristics… [but] they are characteristics… that everybody talks about but you can't be seen to be doing it in a public domain because it seems to be suddenly wrong… the fact that [a defendant is] a foreigner… [makes] me careful before I even consider agreeing to conditional or unconditional bail' (Prosecutor 04)

He explained his concerns:

> '[A] foreigner comes over here, maybe from the EU, maybe from outside of the EU and they are alleged to have committed a crime. My first reaction really is, if this man is bailed, he will be straight out of the country.' (Prosecutor 04)

If this occurred, it would result in 'a defendantless prosecution'. He concluded that a trial would 'go ahead in his absence but you won't see him again' and this would result in 'massive breakdown in community relations'.

It should be noted that the ECtHR decided in *Wemhoff v Germany* that there is an obligation on authorities to consider alternatives to detention where there is a flight risk.[182] An obvious alternative in the scenario described by the prosecutor quoted above would be for the prosecutor to seek the surrender of the defendant's passport as a condition of bail.

2.3 The significance of the alleged offence(s)

Prosecutors were asked if there were particular types of offences which would affect their decision whether seek pre-trial detention. Clearly, the seriousness of the offence was an important concern:

> '[T]he more serious the offence the more likely there are grounds and reasons to apply for remand in custody. You are talking about more dangerous offenders, so rape cases, possession with intent to supply drugs…' (Prosecutor 03)

[181] ECtHR 15 February 2005, *Sulaoja v Estonia*, No. 55939/00, para. 64.
[182] ECtHR 27 June 1968, *Wemhoff v Germany*, No. 2122/64.

This prosecutor argued that 'because of the nature of the allegations, there's a greater risk of… further offences', making the link between a ground for withholding bail and one of the statutory factors. As a general rule, one prosecutor said, 'the more serious the offence, the more justifiable [and] the more proportionate it is to oppose bail' (Prosecutor 02).

Some of the prosecutors also made a link between offence type and previous convictions. As one explained:

> '[I]f he's in for an offence of violence, what's his list like for violence? If it's a theft, how many thefts has he got? [I]f it's DV, domestic violence, is there a history of domestic violence, be it assaulting… criminal damage or public order.' (Prosecutor 01)

In this sense, the seriousness of the offence needs to be placed in the context of the previous offending behaviour of the defendant. The prosecutors identified both general categories of offence and specific offences that were relevant in considering whether to apply for a remand in custody:

> '[Y]ou're looking at violence, you're looking at serious sexual offences, and gang, major Public Order Act offences' (Prosecutor 02)

Domestic violence was a problematic category of offence that several prosecutors referred to. One highlighted the divergence between offence type and seriousness in this particular category:

> '[Y]ou've got the domestic violence cases… where most of the charges are assault by beating but again those are cases that could have a serious risk of fear of further offences or fear of interference with witnesses.' (Prosecutor 03)

Whilst 'assault by beating' is a summary offence and would not in itself be considered serious, the context in which it has allegedly occurred (domestic violence) is. From the perspective of the prosecutors, this might justify an application to remand in custody despite the fact that the offence is technically not 'serious', suggesting that 'the seriousness of the offence won't necessarily be a reason to seek a remand in custody' (Prosecutor 04).

3. Information available to pre-trial detention decision-makers

3.1 Introduction

In this section we examine the information that is made available to judges and magistrates in pre-trial detention hearings. First, we examine what information is provided to the court by the prosecutor and the defence lawyer. Second, we consider how defence lawyers, prosecutors and judges/magistrates perceive the provision of information and whether it is sufficient.

3.2 Information provided to the court

Generally, in the PTD hearings observed, the standard approach of the prosecutor was to outline the alleged facts of the case, provide detail of any previous convictions or past breaches of bail conditions, and to highlight any relevant personal circumstances (such as drug or alcohol problems, medical or mental health issues, or residential status). Occasionally, the prosecutor and/or the defence lawyer would provide information on the evidence they intended to present at trial (for example, witnesses they would call, forensic evidence, CCTV footage, etc.).

PTD hearings were almost all conducted entirely orally. In the PTD hearings observed, the prosecutor made submissions regarding PTD in 63.51 per cent of cases, of which 97.87 per cent were fully oral and only one was mostly or entirely written. We observed only one case in which the prosecutor provided 'evidence' to support their application (DNA evidence and a police interview transcript). In the case files, the prosecutor was recorded as having made a submission in 73.68 per cent of cases, all of which were fully oral. No file included a record of any evidence being submitted by the prosecutor.

With regard to defence lawyers, they were observed to make submissions regarding PTD in 48.65 per cent of monitored hearings. Those submissions were fully oral in most cases (34 of 36 cases, 94.44%), although in two the submissions were mostly or entirely written (both review cases). Defence submissions were frequently not recorded in the case-files, but of those 12 cases in which they were, they were all fully oral. In only two of the observed cases did the defence lawyer call a witness in support of their submissions; one being a potential surety, and the other being a person who was willing to offer an address for the defendant to stay at. The case-files disclosed only one case in which the defence lawyer offered 'evidence', which consisted of e-mails indicating that the complainant had contacted the defendant, not the other way around.[183]

3.3 Attitudes to the provision of information and evidence

We saw in Chapter IV, section 4, that defence lawyers were unanimous in agreeing that they are able to make submissions at PTD hearings, although many were sceptical about the weight placed on them by the court. They were not specifically asked about their ability to call witnesses or to adduce other evidence. Prosecutors were asked in what circumstances, if any, they would call witnesses to give evidence at a pre-trial detention hearing. Generally, their response was that this is something that they do not do other than, perhaps, at a breach of bail hearing. One prosecutor said he they had 'never called a witness in relation to… pre-trial detention' (Prosecutor 02), while another commented, 'I've never heard of it really' (Prosecutor 03). In general, the prosecutors thought that judges and judges rely upon them to provide a summary of the evidence. As one prosecutor put it:

> 'The Crown say what their case is and… why, and the Defence will say it is not a strong case and explain their reasons. But it is done on, my experience it's done on submissions from each side.' (Prosecutor 01)

The impression given was not that prosecutors could not present witness evidence, but that it is simply not normally necessary. One prosecutor explained:

> '[I]t used to be that the Crown's case was taken at its highest, and so I suppose the thought of bringing in a witness would never have occurred to the prosecutor'. (Prosecutor 02)

The only exception to this approach concerned hearings where there is a contested breach of bail, although even then it was suggested that it was relatively rare for witnesses to be called. A prosecutor provided an example of when they might call a witness in such circumstances:

> 'In breach of bail hearings where somebody has been arrested for… contacting somebody when they shouldn't have been contacting them, if the witness is available and its necessary then we would see if they were able to come in. I think I've done that on one occasion where the original case was… domestic violence and he had

[183] See also Chapter IV, sections 4.2.2 and 4.3.1.

> appeared at the end of her road and was gesticulating towards her, but he completely denied being in the area so we felt it necessary that she come in.' (Prosecutor 05)

Opinions were mixed about whether prosecutors would like to call witnesses more generally. One said:

> 'I would have liked to have… the complainant in court in relation to contested bail hearings… but we're not going to ask the court to adjourn… you just get on with it, but it might have strengthened the Crown's position on a few occasions that I can think of.' (Prosecutor 02)

However, another was opposed, for fear that the remand hearing would usurp the function of the trial:

> 'I personally wouldn't want to have a hearing [of the] evidence on the issues for trial which could eventually have an impact on the trial itself'. (Prosecutor 01)

Judges were not asked directly about the information presented to them at PTD hearings, but several commented upon it. As with the prosecutors, they said it is rare for witnesses to be called. One magistrate indicated that he relied on the lawyers' submissions, suggesting that 'you take them at their word at that stage of the game' (Judicial Officer 01). Another commented:

> 'Sometimes if the defence want to make representations about where the defendant could go, they might bring in somebody, [a] relative, who will say I'll have them to stay.' (Judicial Officer 05)

The calling of a witness for this purpose was observed in the PTD hearing observations (see section 3.2 above).

The calling of witnesses regarding the investigation and/or strength of the evidence appeared to be a common practice at one time, but is now a rare occurrence:

> 'Very occasionally I'll hear from the police officer in the case which is the old fashioned way of doing it. If an investigation is developing and the witness statements haven't yet been taken then interrogation of the officer is extremely useful to gauge the likely strength of the case.' (Judicial Officer 04)

This judge considered attendance of the police officer to be helpful, commenting:

> 'I come from a very old fashioned generation. I remember that practice and I see no harm in it as long as it's approached properly. It's not definitive of what the evidence will be, it's an indication.' (Judicial Officer 04)

Concern was expressed that this change of practice is symptomatic of a more general change in the way that PTD hearings are conducted. As one magistrate said:

> 'The actual quality of the evidence that's before the court is not as good as what it used to be. It seems that everything is rushed… the preparation and the papers… that come through the courts is appalling… it's not helping us make our final decision as to what we should do with the defendant.' (Judicial Officer 02)

4. Outcomes of the first pre-trial detention hearing

4.1 Introduction

In this section, we consider the outcomes of the first pre-trial detention hearings (that is, excluding reviews), the relationship between offence seriousness and PTD hearing outcome, and the relationship between demographic variables relating to defendants and those outcomes.

4.2. Outcomes of first PTD hearings

In Tables 16 and 17 we set out the decisions made at first PTD hearings, at the PTD hearings observed, and from the case-file data.

Table 16
Decision at first PTD hearing
PTD Hearing Observations

Decision	**Number**	**%**
Detention	20	35.09
Unconditional bail	26	45.61
Conditional bail	11	19.30
Total	57	100.00

Table 17
Decision at first PTD hearing
PTD Case File Review data

Decision	**Number**	**%**
Detention	30	39.47
Unconditional bail	7	9.21
Conditional bail	39	51.32
Total	76	100.00

These tables show a similar rate of detention (remands in custody) in both data-sets. There is, however, a marked difference in the decisions to grant bail. In the hearings observed, unconditional bail was granted in 45.61 per cent of cases, whereas the rate in the case-file data was only 9.21 per cent. This variance is likely explained by the method used to select the case-file sample. Case files were selected on the basis that there was likely to have been some form of contest regarding the PTD decision, and cases where unconditional bail is granted are unlikely to be contested.[184] Nevertheless, it is apparent from both sets of data that the court withholds bail from the defendant in more than one-third of cases and, conversely, that bail is granted, conditional or unconditional, in a majority of cases.

4.3 Outcomes by reference to seriousness of offence

Tables 18 and 19 set out the data on the decision made at the first PTD hearing by reference to the seriousness of the alleged offence. Table 19 excludes the decisions made at review hearings.

[184] See Chapter II, section 2.4.

Table 18
Outcome of first pre-trial detention hearing, by offence seriousness
Case-file review data

Decision	Indictable-only		Either-way		Summary-only	
	Number	**%**	**Number**	**%**	**Number**	**%**
Pre-trial detention	8	80.00	15	45.45	7	21.21
Conditional bail	1	10.00	15	45.45	23	69.70
Unconditional bail	1	10.00	3	9.09	3	9.09
Total	10	100.00	33	100.00	33	100.00

Table 19
Outcome of first pre-trial hearing, by offence seriousness
PTD hearing observation data[185]

Decision	Indictable-only		Either-way		Summary-only	
	Number	**%**	**Number**	**%**	**Number**	**%**
Pre-trial detention	5	41.67	17	47.22	2	13.33
Conditional bail	1	8.33	7	19.44	5	33.33
Unconditional bail	6[186]	50.00	12	33.33	8	53.33
Total	12	100.00	36	100.00	15	100.00

From both the case-file data and the PTD hearing monitoring data, it is clear that pre-trial detention was not generally ordered for summary offences, although it was in a significant minority of cases. For defendants charged with indictable-only offences, the case-file data shows that a large majority were remanded in custody (80%), whilst the hearing observation data does not (41.67%). However, across both data-sets only a small number of indictable offences were encountered; either-way offences were more common. From the case-file data, an equal number of defendants were detained and given conditional bail (45.45%). The hearing observation data shows that nearly half of defendants charged with either-way offences were remanded in custody, whilst 52.77 per cent were released on bail.[187]

4.4 Outcomes by reference to demographic variables

Tables 20 to 23 show outcomes at the first PTD hearing by reference to a range of demographic variables, taken from either the PTD hearing observation data or the case-file review data, depending on which disclosed the most information. These figures must be approached cautiously because, with the exception of Table 20, the relevant information was often either not available or not recorded, so there is a high number of 'unknowns', and it was not possible to take into account other relevant variables.

[185] Note that this table excludes cases observed in the Crown Court since these did not involve the first pre-trial detention hearing. It also excludes two observed cases in magistrates' courts, 1 which did not concern a criminal offence (domestic violence protection notice), and 1 in which the offence was unknown.
[186] Note that 5 of these involved allegations of conspiracy to supply cannabis.
[187] These tables are also set out in Chapter VI, section 3.1, where the focus is on the use of alternative measures.

Table 20
Outcome at first PTD hearing, by whether adult/juvenile
Case-file review data

Decision at first PTD hearing	**Adult**		**Juvenile**	
	Number	**%**	**Number**	**%**
PTD	28	41.79	2	22.22
Bail	39	58.21	7	77.78
Total	67	100.00	9	100.00

A clear correlation can be seen regarding juveniles, with the majority being bailed at the first hearing. This reflects the more restrictive approach taken to the detention of juveniles prior to trial, although we have not controlled by reference to case seriousness. A majority of adults were also bailed, although nearly twice the proportion of adults were detained compared to juveniles. The majority of adults and juveniles were either convicted after a trial or pleaded guilty.[188] This may suggest that detention prior to trial does not necessarily impact on the likelihood of conviction, since juveniles were detained at such a low rate. However, the validity of any such conclusion is limited by the small numbers recorded.

Table 21
Outcome of first PTD hearing, by whether UK national
PTD hearing observation data

Decision	**UK national**		**Non-UK national**		**Unknown**	
	Number	**%**	**Number**	**%**	**Number**	**%**
PTD	20	35.09	2	40.00	7	58.33
Bail	37	64.91	3	60.00	5	41.67
Total	57	100.00	5	100.00	12	100.00

Similar proportions of UK and non-UK nationals were detained, suggesting that nationality does not necessarily impact on the likelihood of detention. However, the validity of this conclusion is, of course, limited by the small number of hearings observed which involved non-UK nationals.

Table 22
Outcome of first PTD hearing, by ethnicity
PTD hearing observations data

Decision	**White**		**Non-white**		**Unknown**	
	Number	**%**	**Number**	**%**	**Number**	**%**
PTD	21	33.87	5	83.33	3	50.00
Bail	41	66.13	1	16.67	3	50.00
Total	62	100.00	6	100.00	6	100.00

The data in Table 22 suggests that non-white defendants were more likely to be remanded in custody than white defendants. However, defendants identified as non-white were more likely than the whole cohort to be charged with more serious offences (% for whole cohort in brackets): indictable-only 33.33% (16%); either-way 66.67% (65%); summary-only 0.00% (19%). In the case-file data, ethnicity was not recorded in the majority of cases, but of the four defendants identified as non-white all were remanded in custody at the first PTD hearing (compared to an overall detention rate of 39.47%). Three were charged, and convicted

[188] See Chapter VIII, section 2.1.

following trial, of burglary (dwelling), rape, and wounding with intent respectively. The fourth was charged with assault by beating, and the prosecution offered no evidence when the complainant failed to appear to give evidence.

Table 23
Outcome of first PTD hearing, by whether defendant was a drug-user
Case file review data

Decision	**Drug user**		**Unknown**	
	Number	%	Number	%
PTD	8	66.67	22	34.75
Conditional bail	3	25.00	36	56.25
Unconditional	1	8.33	6	9.37
Total	12	100.00	64	100.00

Whether the defendant was classified as a drug-user was determined by whether this was recorded on the case file. A non-entry does not mean that the defendant was not a drug user, but it may be inferred that if the defendant was a drug-user the prosecutor did not identify drug-use as a significant issue in terms of the PTD hearing. This data suggests that drug users were more likely to be remanded in custody. This correlates with some of the comments made by judges and prosecutors regarding the problem of drug addiction and further offending (see section 2.2 above). Defendants identified as drug-users were more likely than the whole cohort to be charged with more serious offences (% for whole cohort in brackets): indictable-only 16.67% (13.16%); either-way 58.33% (43.42%); summary-only 25.00% (43.42%).

5. Grounds and reasons for pre-trial detention decisions

5.1 Introduction

In this section we examine various aspects of the decision-making process and the ways in which decisions are announced and justified. First we look at the process by which decisions are made. Second, we examine the extent to which the decisions made were conveyed, in particular, to defendants. Finally, we consider the perceptions of, in particular, judges and magistrates about the most important factors influencing their decisions.

As explained in section 1 above, the announcement of and reasons for PTD decisions, particularly decisions to withhold bail, are governed by both domestic law and ECtHR jurisprudence. In *R (Rojas) v Snaresbrook Crown* Court,[189] the Court held (at [21]) that reasons for withholding bail must 'extend to a minimum reasonable level of adequacy, and had to identify the ground or grounds upon which the court was satisfied that bail should now be refused, and with a minimum level of adequacy identify the case specific reasons for being so satisfied'. The CrimPR, rule 19.2(5), requires that 'the court must announce in terms the defendant can understand (with help, if necessary) its reasons for… withholding bail, or imposing or varying a bail condition [or] granting bail, where the prosecutor opposed the grant'. Under rule 19.4(2), 'the court officer must serve notice of a decision about bail on… the defendant (but, in the Crown Court, only where the defendant's legal representative asks for such a notice, or where the defendant has no legal representative)'.[190] However, the CrimPR do not require that the reasons given deal with the facts of the case (see Chapter I, section 3). Finally, in its report on bail and human rights the Law Commission, addressing the issue of standard forms of reasoning, argued:

[189] [2011] EWHC 3569 (Admin).
[190] We were unable to examine these notices and they were not stored on the CPS case management system.

> ‘The reasons which a court gives for denying bail should explicitly deal with the facts of the individual case, not simply state a recognised relevant consideration or a circumstance pertaining to the accused, without going further and explaining fully why it is necessary to detain the defendant.’[191]

5.2 The process of decision-making

In the PTD hearings observed, lay magistrates regularly retired to consider their decision, often taking a significant amount of time in doing so. The judges observed never did so, and tended to assess and elucidate their reasoning in open court. The differing approaches are explained in the following two comments, the first by a lay magistrate and the second by a judge.

> ‘[W]ith three of us, I think any kind of conversation would probably be audible so I think really we need to be able to go out… that takes a bit of time but I think we need to do that really.’ (Judicial officer 05)

> ‘I don’t wish to be arrogant… I've got over thirty years’ experience of defendants and taking these decisions. I don’t need to retire, I know the law, there may be a gap somewhere but the basic principles of the decision in relation to bail are so entrenched.’ (Judicial officer 04)

The magistrate cited said that she found this process of decision-making beneficial:

> ‘[Y]ou get less rigid about your ideas because you're constantly being challenged in your decision-making by people coming from very different backgrounds… I think that's quite healthy.’ (Judicial officer 05)

Another magistrate made it clear that,

> ‘[O]ur decision is never made unless we are happy with making that decision… if one of the magistrates said “Oh, I wish I’d asked the question on so and so”… we go back in and we ask those questions.’ (Judicial officer 02)

One of the prosecutors interviewed explain the differing approaches of lay magistrates and professional judges in the following way:

> ‘Magistrates would retire, District Judges clearly not… to consider the decision and for generally… a reasonable amount of time. Some cases… it is just obvious that they are going to be remanded in custody... and they probably don't take as long. (Prosecutor 03)

5.3 Grounds and reasons for PTD announced

In both the PTD hearings observed and the case files reviewed, the most common basis for a decision to remand in custody was the ‘likelihood of offending on bail’. Detention was ordered in 28 of the hearings observed, and this ground was used to justify the decision in 17 (61%) of those hearings. In the 30 case-files where bail was withheld, this ground was used to justify the decision in 15 (50%) of them.[192] This particular ground was normally accompanied by at least one other. However, ‘likelihood of offending on bail’ was by far the most

[191] Law Commission, *Bail and the Human Rights Act 1998* (see note 51 above), para. 10.24, p. 90.

[192] Note that a ground or reason was not necessarily provided or recorded for each PTD order, but in some cases more than one ground was recorded.

frequently identified ground for detention in both the observed hearings and the reviewed case files, with the next most common ground being 'fear of failure to surrender' (cited in 6 observed hearings and 9 case files). The case-file review statistics are set out in Table 24.

Table 24
Grounds for imposing pre-trial detention
Case-file review data

Grounds	**Number**	**%**
Fear of failure to surrender	9	26.47
Likelihood of offending on bail	15	44.12
Interference with witnesses/investigation	2	5.88
Other	8	23.53
Total number of grounds	34	100.00

In the PTD hearings observed we recorded whether the grounds for withholding bail were announced and, if they were, whether they were announced in a formalistic way or in a way which included reference to the specific facts of the case. This is shown in Table 25.

Table 25
Decisions to impose pre-trial detention, by grounds and reasons
PTD hearing observation data

Grounds for PTD	**Number**	**%**
Grounds/reasons announced	23	82.14
Grounds/reasons not announced	5[193]	17.86
Total	28	100.00
Formalistic reasoning	14	60.87
Specific reasoning	8	34.78
No reasons given	1	4.35
Total	23	100.00

It can be seen from Table 25 that in almost two-thirds of hearings where the grounds for withholding bail were given, the reasoning provided was formalistic. This would normally take the form of a brief statement of the grounds for the decision, for example, 'remanded in custody due to fear of further offences'. The statement normally reflected or was identical to the language used to describe the grounds for detention set out in the Bail Act 1976. However, on several occasions the reasoning provided briefly referred to relevant factors, such as 'the nature and seriousness of the offence', 'the likely sentence', 'severe drug dependency' and 'character'.

In only just over one-third of hearings in which bail was withheld was the reasoning for the decision specific, providing an extended explanation of the grounds for the decision by reference to the details of the case or the defendant in question. Of those cases, explicit reference to the submissions of the parties was made in five hearings, with reference to the submissions of both the prosecutor and defence lawyer in two cases, and to only the

[193] Note that two cases involved bail review hearings in the Crown Court. In one case the judge said that he was not willing to change the remand status quo until it was clear what the pleas were to be. In the second, the judge adjourned the case to the following day to enable the police to check the address and sureties offered.

submissions made by the prosecutor in three cases. Of the eight cases observed in which specific reasoning was provided, six were presided over by either a Circuit or District Judge, whilst only two of these decisions were made by lay magistrates. This suggests that judges engage in more substantive reasoning than magistrates. It was noted in section 5.2 above that the lay magistrates observed routinely retired to consider their decisions, often taking a significant amount of time in doing so. We were not able to observe these discussions, but it might be suggested that whilst the magistrates, having gone out to discuss the case, were fully aware of the reasons for their decision, they did not understand the importance of explaining those reasons when announcing their decision.

Thus in the majority of cases observed where pre-trial detention was ordered, the grounds and reasons announced did not comply with the requirements as elucidated in the *Snaresbrook Crown Court* decision nor, arguably, with the requirements of the CrimPR, and certainly not with the ECHR standards. There seemed to be a lack of engagement with the reasoning process, the announcement of the decision to remand in custody normally being brief and 'without going further and explaining fully why it is necessary to detain the defendant'.[194]

5.4 Judicial perceptions of factors influencing their decisions

Judges and magistrates were asked about their primary considerations when deciding whether to order pre-trial detention. The major factors identified by them were risk, evidence, and the defendant's record.

As with the prosecutors interviewed, the legislative framework governing bail and detention was regarded as central by the judges and magistrates interviewed. As one magistrate commented:

> '[W]e are very bound by the Bail Act and [it] is quite prescriptive, particularly since LASPO came in, in terms of when we can remand in custody and when we can't'. (Judicial Officer 05)

Applying the legislative provisions was regarded as largely an exercise in risk assessment. One judge stated that deciding whether to order pre-trial detention was 'all based on risk', primarily 'the risk that is posed to other people and the risk of further offending'. However, she also suggested that the risk of unfair detention is also a consideration:

> 'I'm exercising caution concerning the risk … and I'm exercising caution concerning depriving anyone of their liberty when they're unconvicted.' (Judicial Officer 03)

A magistrate echoed this, stating that detention would only be justified 'if the risks are so great that they outweigh any conditions that we can put on' (Judicial Officer 05), suggesting that a balancing exercise is undertaken. One judge outlined his primary considerations in assessing such risks:

> 'I have three primary concerns; firstly, the strength of the evidence… Second in terms of priorities perhaps is a question of vulnerability of witnesses particularly in the family or domestic setting, and then thirdly, the defendant's previous record in respect of both previous convictions and honouring obligations to bail or comply with orders of the court.' (Judicial Officer 04)

[194] Law Commission, *Bail and the Human Rights Act 1998* (see note 51 above), para. 10.24, p. 90.

With regard to the first of these, he pointed out that 'strength of the evidence on its own isn't a ground for withholding bail, but [in] a particularly weak… or a marginal case it's of great importance'. The reason for this was that 'weak and flimsy evidence may be such as to undermine perhaps the exceptions to the right to bail'. From this perspective, whilst the strength of the evidence against a defendant should not be considered in relation to guilt or innocence at this stage, it may be a factor which can either bolster or weaken an application to remand in custody.

Several judges and magistrates agreed that the previous record of a defendant is important. Judicial Officer 04 explained that he considered 'past behaviour as being… [a] mostly reliable indicator of future risk'. With regard to previous offences, he suggested that 'those lightly convicted, unless the index offence is now of enormous seriousness… [are] much better candidates for bail'. Another emphasised the importance of the defendant's bail record:

> 'If they've been given the opportunity before and they've just not complied, then that negates their chance for bail.' (Judicial Officer 02)

However, whilst the previous record of a defendant is important, it is not determinative:

> '[J]ust because of his antecedents… doesn't necessarily mean to say that you can't still grant him bail'. (Judicial Officer 01)

The reasons identified by the judges and magistrates for withholding bail closed related to the reasons given by prosecutors for applying for a remand in custody. A typical response, given by a District Judge was as follows:

> '[T]here are a couple of features which perhaps take priority over others… the first is the safety of the witness or witnesses… and the second main reason is to stop further offences being committed.' (Judicial Officer 03)

This was echoed by the other judge interviewed: '[i]t's the likelihood of repetition is the fear… but equally the risks to victims, witnesses and the public from all those offences' (Judicial Officer 04). Similar comments were made by the magistrates interviewed.

Therefore, the three primary grounds for withholding bail specified by the judges and magistrates are the 'likelihood of committing further offences', 'risk of interference with witnesses' and 'failure to surrender to the court'; which, of course, are the primary exceptions to bail provided for in the Bail Act 1976. The welfare of the defendant was also mentioned as a reason for remanding in custody. As one magistrate said, 'For people's own protection perhaps, sometimes we remand in custody' (Judicial Officer 05). Another magistrate expanded on this, stating:

> 'You have to look at their support. Say for argument's sake you've got a 19/20 year old who's never had any support since he was five years of age, and he still hasn't got any support… perhaps you start the support by saying right, you're going to be remanded in custody, this is going to stabilise you, then we look at where we're going to go from there.' (Judicial Officer 02)[195]

[195] Whilst the BA 1976 permits the withholding of bail in respect of a juvenile defendant 'for his own welfare', withholding bail from an adult defendant for his or own protection is directed at protection of the defendant from others, eg., as where the alleged offence has caused anger in the local community.

The judges and magistrates were asked in the interviews if, in addition to the factors already referred (such as a defendant's list of previous convictions or previous bail record) there were any specific characteristics of defendants which would make them more likely withhold bail. All of the interviewees identified a history of drug-abuse as a relevant factor. In some circumstances, there is limited discretion, although one of the magistrates mis-stated the effect of the law in this regard:[196]

> 'Where people have been tested positive for drugs and then refuse to take part in any drug intervention packages, we're not allowed to give bail in those circumstances.' (Judicial Officer 05)

However, in cases where there is a choice, a defendant's drug use was regarded as presenting a risk in terms of release on bail:

> 'If they want a trial, then we're obviously going to go off for some weeks or months… and that's when I have to rack my brains to see if there's a way we can keep them out… sometimes there isn't because they're just going to keep on [offending]. They don't care about dying, so they certainly don't care about offending… to get their next fix. (Judicial Officer 03)

All of the judges and magistrates interviewed referred to homelessness as a significant issue, although all were keen to point out that it does not necessarily mean that bail will be denied. Sometimes it can be dealt with by innovative bail conditions:

> 'We would have to be a bit more innovative about our bail conditions if we've got a fear that somebody is not going to turn up to court.' (Judicial officer 05)

However, as the Circuit Judge said, this may not be enough:

> 'It is a problem because where… there are concerns in relation to any of the exceptions to the right to bail, it's very often impossible to meet those where a defendant has no fixed address' (Judicial Officer 04)

This was echoed by one of the magistrates, who said that homelessness 'can force your hand':

> '[O]n occasions… there's no other way round it. And you think to yourself "well the only way I'm going to make sure that this person comes back to court… is to remand them in custody".' (Judicial Officer 02)

Thus the key issues in cases where the defendant is homeless are maintaining contact with them and ensuring that they return to court. If conditions can be 'innovative' enough to overcome concerns about these factors, which clearly relate to fear of failure to surrender, then homelessness would not prevent bail from being granted. [197]

[196] See note 96 above.
[197] See further the discussion at section 2.2 above.

The judges and magistrates also raised mental health as a characteristic of relevance. One magistrate said:

> '[I]t's something that concerns me and a lot of my colleagues, remanding in custody people with mental health issues [primarily because] they're going to be very vulnerable in custody.' (Judicial Officer 05)

As with homeless defendants, those interviewed thought that in some cases the fact of mental illness left them with very little choice:

> '[D]efendants suffering mental illness should not be in jail but there is a growing number who are said not to be treatable and although they have a significant mental illness or mental impairment they constitute a danger and have to be confined to prison.' (Judicial Officer 04)

Other relevant factors mentioned included age (juveniles are less likely to be remanded in custody), and lack of legal representation.

The judges and magistrates were also asked if there are particular types of offences which are more likely to lead to a decision to remand in custody. Case seriousness was not, in itself regarded as a determining factor although decisions regarding defendants accused of serious offences would be looked at closely, particularly with regard to the fear that they may abscond:

> 'Obviously with the more serious offence the greater concern you have about the individual returning… but it's not a killer, again it's down to the individual's circumstances' (Judicial Officer 01)

In terms of types of offence, sexual offences and those involving violence were of particular concern.

> '[T]he one that I'm probably most anxious to get addressed before he's released on bail are those of violence… I've got to be confident that the complainant is safe.' (Judicial Officer 03)

> '[N]on-dangerous and non-violent and non-sexual offences… pre-trial detention must be considered to be very rare… [V]iolence, particularly domestic violence, and more so repeat violence; drug trafficking, particularly class A controlled drugs… dwelling house burglary, particularly repeat offenders of course, and then sexual offences which involve an element of violence [are much more likely to result in a remand in custody].' (Judicial Officer 04)

In fact it was suggested that in magistrates' courts certain serious offences are unlikely to result in bail being granted. As one magistrate said:

> '[In the case of] rape or very serious indictable only offences… [t]he presumption is… that we don't give bail unless there are exceptions' (Judicial Officer 05).

This might suggest a 'working rule' that in magistrates' courts very serious offences are unlikely to result in bail being granted, although the same magistrate commented that 'there are loads of grey areas'.

Domestic violence was raised, in common with the prosecutors interviewed, as an offence type that generates particular concerns. As the Circuit Judge stated:

> '[D]omestic violence is a principal concern… in relation to pre-trial detention because that compromises an overwhelming majority of cases where a witness will be suborned or persuaded not to give evidence.' (Judicial Officer 04)

As prosecutors also recognised, however, most cases involving domestic violence are charged as summary-only offences, and this raises the issue of proportionality. Nevertheless, in such cases, protection of the complainant may, in effect, be given priority:

> '[I]f you've got a person who has a propensity for commercial burglary… as against a person who… lives with somebody and has beaten them up senseless, then I think there is a difference… to protect a property is different to protecting an individual.' (Judicial officer 02)

6. Pre-trial detention and human rights

6.1 Introduction

As we have seen, the ECtHR has established a number of standards regarding pre-trial detention, and we were interested to find out what training the various participants in the study had received in this respect, and what influence they felt the ECHR has on PTD decision-making.

6.2 Training for judges and prosecutors

Both judges and prosecutors were asked whether they had received training on regional and international human rights standards. Broadly, their responses indicated that whilst training on the ECHR had been carried out when the Human Rights Act 1998 was enacted, there had been little since then. The following responses are typical:

> 'When the Human Rights Act came out… we did have a big training course up at the University. It was Circuit led but all the practitioners went and so I went as a practitioner'. (Judicial Officer 03)

> '[I]t was very new then and we were all finding our feet I think as to how relevant it was and how important it was in particular cases'. (Judicial Officer 05)

> 'Not specific [training on the ECHR] but obviously everything that we do, all the training that we receive, has that in mind'. (Prosecutor 05)

The Crown Court judge indicated that he had received '[n]one whatsoever', and he continued:

> 'I keep a watch on the decisions of the court… the framework of human rights of jurisprudence is that which I learned in practice… but it's very rarely addressed directly now. Training is deficient in that regard… I'm not sure it needs to be extensive training but… it would do well to have examples of bail regimes in other member states… whether they've offended against Human Rights Act principles' (Judicial Officer 04)

6.2 The impact of the ECHR on practice

In both the pre-trial detention hearings monitored and the case files reviewed, the most common basis for a decision to remand in custody was the 'likelihood of offending on bail'. This ground was used to justify the decision in 60.71 per cent of PTD hearings observed and in half of case files. Other grounds announced, either in addition or on their own, included the 'likelihood of offending on bail', the 'fear of failure to surrender', and 'interference with witnesses'.[198] However, in some cases the decision to remand in custody was justified by the 'nature and seriousness of offences', 'likely sentence', 'previous convictions', 'weak community ties and severe drug dependency', 'multiple flouting of conditions', 'defendant's own protection', and 'character'. On occasions, in announcing their decisions, judges and magistrates did not clarify whether these justifications represented the formal 'grounds' for detention, the reasons for finding those grounds satisfied, or were simply general comments. Clearly, some of these justifications present compliance problems, both in terms of domestic law and in respect of ECHR standards – particularly where offence seriousness or likely sentence were indicated to be the grounds for withholding bail. This confusion between grounds and factors was adversely commented upon by a number of the respondents to the practitioner survey.

Judges and magistrates were asked to what extent the jurisprudence of ECtHR, and other regional and international human rights standards, informed their detention decision-making. Generally, they were of the opinion that these have little direct impact on pre-trial detention hearings since they believe that domestic law adequately regulates proceedings and reflect such standards. One judge said, 'I can't say that I have ever seen a case from Europe about bail' (Judicial Officer 03), whilst another felt that 'European Court of Human Rights considerations are quite rare' (Judicial Officer 04). One magistrate suggested that '[the defendant's] right to liberty… is your guiding factor when you're looking at bail or no bail' (Judicial Officer 01), whilst another highlighted Articles 5 and 6 of the European Convention as relevant, stating that they 'would obviously be taken into consideration' (Judicial Officer 05). However, they also stated that Human Rights standards 'wouldn't be explicitly separately stated' (Judicial Officer 05) because '[i]t's more or less written into... our own law' (Judicial Officer 01).

The Crown Court judge did identify one of the unusual occasions when human rights standards might be directly relied upon:

> '[W]ithin the jurisprudence there are instances where a too closely confined curfew amounts to detention and is not appropriate in the equivalent of a bail case.' (Judicial Officer 04)

However, he continued:

> 'The considerations of necessity and proportionality and fair trial guarantees I think are sufficiently catered for in domestic law so as not to require frequent reference back to European jurisprudence.' (Judicial Officer 04)

This sentiment was echoed by another judge, who said:

> 'Our statutes here are absolutely crystal clear and they are absolutely fair and… I don't feel as though I need to have regard to any extra territorial authority.' (Judicial Officer 03)

[198] See section 5.3 above.

Prosecutors were asked the same question about the influence of the ECHR and other human rights standards, and they held similar opinions to the judges and magistrates. One prosecutor summarised the consensus view: '"Human rights" is not frequently quoted in a remand or bail application' (Prosecutor 01). Another said that prosecutors 'take notice of it' but that 'it's rather a secondary thought':

> 'Mainly because it's not binding and because if the defendant shouldn't be locked up… I don't need the ECHR to tell me that' (Prosecutor 04)

Indeed, it seemed that domestic regulation and guidance on prosecution decision-making in this regard was considered sufficiently comprehensive because human rights standards are 'sort of enshrined in the guidance that we've got to follow' (Prosecutor 05). However, one prosecutor did suggest that:

> '[S]ometimes judges here will refer to the ECHR. I had a case recently… where the defence relied upon the ECHR and the judge referred to it… But it's rare'. (Prosecutor 04)

He also provided a more detailed hypothetical example of where Human Rights standards might have an impact:

> 'There are occasions when a defendant would be… looked at liberally under the ECHR. Indecent images or photographs is an example because of course, you have a right to a private life. So what you do in your home, providing it doesn't hurt anybody else, should not be subject to the scrutiny of watching eyes outside. But it's a qualified right for the protection of public health, morals and preventative crime. So if you're thinking… well, this man is alleged to have committed child abuse and has got indecent images as well… we should be locking him up because there's a likelihood of committing further offences here… But the ECHR would say, this is qualified right, you should be very careful about locking somebody up before trial.' (Prosecutor 04)

It may be concluded that whilst ECtHR jurisprudence provides a context or background for pre-trial detention decisions, direct impact is limited. This reflects the notion that whilst human rights standards are not a primary concern, they do provide an informative context for decision-making. It would seem, from both the responses of judges and prosecutors, that the standards are perceived as being interwoven into domestic regulation of pre-trial detention and thus recourse to the ECHR or to ECtHR jurisprudence is generally unnecessary.

7. Attitudes towards pre-trial detention

7.1 Introduction

We wanted to explore with judges, magistrates, prosecutors and lawyers whether they thought that the law and practice regarding pre-trial detention is satisfactory, and whether they could identify ways in which it might be reformed.

7.2 Perceptions of fairness of the PTD decision-making process

The prosecutors interviewed all thought that the law and practice regarding PTD generally works well, that the legal criteria for withholding bail are appropriate, and that appropriate decisions are made, especially in terms of decisions to remand defendants in custody.

Overall, they thought that the system works as well as it could do. A number of them referred to the changes made by the LASPO 2012, which introduced restrictions on remands in custody in respect of summary-only, imprisonable offences, in positive terms. We sought to test their views by asking whether they would like to see any changes in the law or practice. None were able to think of any changes that they would like to see. One did suggest that it would be 'helpful' if domestic violence and anti-social behaviour could be dealt with 'outside of the bail system', but could not suggest how this might work (Prosecutor 04).

As we saw in Chapter IV, section 4.4.2, many defence lawyers were extremely critical of how PTD decision-making works in practice, believing that representations made by prosecutors are favoured over those made by defence lawyers. When asked whether judges and magistrates apply non-statutory criteria when making pre-trial detention decisions, 96 per cent of those who responded to the question answered 'Yes' (60.00%) or 'Sometimes' (35.65%), with only 4.35 per cent answering 'No'.[199] However, the question whether judges and magistrates make fair and substantiated assessments of, for example, the likelihood of absconding, tampering with evidence or committing further offences, prompted a quite different response. Although a significant minority (29.46%) said that they 'rarely' do so, 70.54 per cent thought that they 'always' (2.68%) or 'often' (67.86%) do so.[200] One possible explanation for this apparent contradiction is that many of the respondents were concerned that courts, and especially lay magistrates, confuse the grounds for withholding bail with the factors that may be taken into account when considering those grounds.[201] As one respondent put it:

> 'Lay magistrates will often be heard to say that bail is refused because of the seriousness of the offence, instead of refusing bail [on the ground] that the defendant will fail to surrender.'

In fact, a common response was that courts put too much emphasis on the seriousness of the alleged offence and, to a lesser extent, on the likelihood of a custodial sentence, which are factors to be taken into account, but not grounds for withholding bail. Nevertheless, despite the confusion between grounds and factors, the decisions themselves were regarded as being fair. Of course, the respondents were being asked to make a broad assessment, and a number of respondents indicated that they found it a difficult question to answer because it depends – on whether the decision is made by lay magistrates or a District Judge, on the particular composition of a bench of lay magistrates, on the particular facts of the case, and on a range of other factors. A commonly expressed view was that whilst District Judges understand the law and 'are better able to make objective assessments', lay magistrates are often confused about the law, 'err on the side of caution' by withholding bail, take a 'broad brush' approach, accept the prosecution version of the facts without question, place too much emphasis on the seriousness of the alleged offence, and are overly influenced by their legal adviser.[202]

[199] 115 respondents answered this question. 69 answered 'Yes', 41 answered 'Sometimes', and 5 answered 'No'.
[200] 112 answered this question. 33 answered 'rarely', 76 answered 'often', and 3 answered 'always'.
[201] See Chapter III, section 2.2.
[202] See Chapter II, section 2.5.

7.3 Problems with and reform of pre-trial detention

As explained in Chapter II, section 5, we were not permitted to directly ask judges and magistrates about their attitudes to PTD, but some raised the issue without being prompted. One magistrate commented:

> 'They're asking the judiciary to do a job… we have the tools to do that job… [but] nobody's supplied the foundation on which to build the building… it's falling down every time… we've got to come away from just remanding people for the sake of remanding because we haven't got the facilities.' (Judicial Officer 02)

In essence, his view was that the judiciary have adequate legal powers but not the resources to use pre-trial detention and alternative measures effectively. The judges and magistrates identified a number of problems, and proposed changes or reforms that might address them. One magistrate asserted that '[domestic violence] is a particular problem' (Judicial Officer 02). His concern was reflected in a range of narrative comments and the prevalence of domestic violence related offences in the PTD hearing observations and case file review data. The same magistrate referred to the police power to issue Domestic Violence Prevention Notices (DVPN)[203] and suggested there were significant problems with them:

> 'I don't know what they've tried to do with the [DVPNs]… it appears that they brought that in to protect the aggrieved, and to prevent a defendant being remanded in custody… The unfortunate thing is that it's all very well giving these notices out, but you've got to police those notices…the facilities to police those notices are not really there.' (Judicial Officer 02)

Police resources and availability were also raised in relation to the use of alternatives to custody, particularly the condition to report to a police station:

> 'One of the conditions that we could place on people is… to report to a police station at certain times of the day every day of the week… But what you've got now is… a situation… that every month almost we're losing a police station… we're ending up with three hubs, which are okay… for having a central area… The unfortunate thing is that you've lost this ability to be able to bail a person to report to a police station, because those police stations either aren't there or they're only open between the hours of 9 and 5… [w]hich in a lot of cases is not the time that you want a person to report… [a]nd perhaps that has in turn made the situation where some people have been remanded in custody that perhaps didn't really need to be remanded in custody, but there's no other option available because these restrictions can't be imposed.' (Judicial Officer 02)

As such, the external factors of centralisation and reduction in the number of police stations and limited opening times mean that a potentially effective alternative to custody has little practical use. Therefore, judges are more likely to resort to more draconian measures such as electronic tagging or custody.

[203] For further information on Domestic Violence Protection Notices and Orders see the Home Office publication *Domestic Violence Protection Orders*, available at https://www.gov.uk/government/publications/domestic-violence-protection-orders.

Geography and location were flagged up as issues by other interviewed judges. Judicial Officer 03 argued that, for defendants, 'distance from [the] court centre and solicitor would have an impact'. Judicial Officer 04 raised the problematic relationship between bail hostels (which were a recurrent theme) and drug use:

> 'There are significant drawbacks to bail hostels… The main problems are drug dealers congregate fairly close to them… it's the easy availability of drugs within a few yards of a hostel… the target audience or the market for controlled drugs will largely be those who are confined in bail hostels… there is a perfect geographical enclave and you very often get targeting amongst drug dealers, they will hang around just out of sight close to bail hostels.'

In his view, granting bail to a defendant on condition that they reside at a bail hostel could in fact have an adverse effect on their drug problems, which is exacerbated by the fact that 'there's very little availability of [drink and drug related orders]'.

A limited number of suggestions were made for reform by the judges and magistrates interviewed, although one, that there should be a power to impose a bail condition that the defendant meet with their lawyer, is already provided for in the Bail Act 1976.[204] Bail hostels were, unsurprisingly, identified as an area requiring reform:

> 'I think perhaps it needs a review as to what they're actually doing about hostels… for every court there should be a bail hostel room or more available, even if they're not used by that court they should be available… there aren't enough rooms in the prisons, so you've got to find an alternative.' (Judicial Officer 02)

The prosecutors interviewed generally thought that the existing system is just about as good as it can be. The following comments were typical:

> '[T]he guidelines that we've got are generally pretty good and I think we really have to… satisfy the courts that there are substantial grounds to believe that they will commit further offences and fail to surrender'. (Prosecutor 03)

> '[W]e have to explain what we are doing to the Judge and why we want someone remanded, you are… justifying what you are doing… the public can see it happening. I think it works quite well, really'. (Prosecutor 04)

One of the prosecutors even suggested that 'our European partners might want to consider [how we do it in England and Wales]' (Prosecutor 04).

Some of the prosecutors did feel that the amendments to the Bail Act 1976 introduced by the LASPO 2012[205] had placed restrictions on their ability to seek remands in custody. One said:

> 'I think we are more limited now because of the new guidelines on… who we can apply to remand. Which sometimes I find frustrating' (Prosecutor 03)

The LASPO 2012 had 'created additional hurdles' (Prosecutor 02), and was designed to 'reduce the number of people being remanded in custody because of the prison population.'

[204] MA 1980. s. 3(6)(e).
[205] See Chapter III, section 2.5.

(Prosecutor 05). However, one felt that this was positive, arguing 'I understand the reasons why, and I think LASPO's got it right' (Prosecutor 02).

Most prosecutors rejected the suggestion that pre-trial detention is used excessively and is too costly. Again, reference was made to the changes introduced by the LASPO 2012 in this context:

> 'I don't think there is… excessive use because we had LASPO introduced within the last couple of years and that makes it very hard to remand in custody' (Prosecutor 05)

In fact one argued that defendants are more likely to be released inappropriately than to be detained inappropriately:

> 'I don't think people are remanded [inappropriately] generally, there's always going to be the odd example but generally people aren't… it is looked at very carefully… before their liberty is taken away. I would say, generally, more people get bail who should be locked up than the other way around.' (Prosecutor 01)

One group of pre-trial detainees who might arguably have been detained inappropriately are those who subsequently receive a non-custodial sentence or who are acquitted. In respect of this category of defendants, one prosecutor commented:

> '[I]t's (i.e., a remand in custody] not a punishment in itself… what we're doing is trying to protect people and if those defendants don't ultimately receive a custodial sentence… I don't think that you can criticise the pre-trial detention decision.' (Prosecutor 02)

The idea that the cost of PTD is a relevant factor was strongly rejected by one prosecutor who said:

> 'You can't say people should not be locked up because we'll save money. Wholly inappropriate and wrong.' (Prosecutor 04)

He went to explain:

> '[Y]ou get locked up at the original stages because… you are either going to go on and offend… or you are not likely to come to court because you are not in a fit state to remember to come to court… for those reasons locking people up at that stage outweighs saving the money.' (Prosecutor 04)

However, he made clear that this was not an endorsement of using a remand in custody as a first resort:

> '[A]t the same time… if you know that there are ways of dealing with these people outside of a remand in custody… then that should be looked at.' (Prosecutor 04)

As for proposals for reform, the main concern was that of how cases involving domestic violence are dealt with at the pre-trial stage. However, the suggestions for reform were centred mostly on speeding up the process so that trials take place without delay, or even 'the next day'. This would '[reduce the] number of complainants and witnesses that we lose' (Prosecutor 02). One prosecutor did propose that domestic violence cases be dealt with

'outside of the bail system' (Prosecutor 04), but could not suggest how this might work in practice.

Other proposals concerned reducing the period between first appearance and trial, and separating cases that are subject to custody time limits and those that are not, although it was recognised that these would require more resources.

Finally, one prosecutor made a significant point about harmonisation of standards across the EU:

> 'I think one of the big factors that needs careful consideration is what you'd do if you were on the end of a European arrest warrant. You shouldn't be able to just say… Spain is issuing a European arrest warrant for […] in England. We'll bring him back to Spain and now we'll lock him up because he's not Spanish, because he might go back to England… There has to be a presumption that you are not a flight risk… if the European Union is going to work as a family rather than working as lots of individual States.' (Prosecutor 04)

8. Conclusions

This chapter has considered a wide range of issues concerning the substance of PTD decision-making. The prosecutors interviewed suggested that their decisions regarding whether to apply for a remand in custody are closely informed by the grounds and relevant factors set out in the Bail Act 1976, and that it would be futile to make an application that was not so informed. The judges and magistrates also indicated that their decisions are bound by the same provisions. That they should say this is not, of course, surprising.

The proportion of defendants who were remanded in custody ranged between 35 per cent and 40 per cent between the two sets of data, but both disclose that in a majority of cases the defendant was released on bail (although the mix between conditional and unconditional bail differed as between the two data-sets). Whilst the grounds for withholding bail were primarily fear of further offences, fear of absconding and fear of interference of witnesses, the most common ground by far was the first of these. In terms of factors taken into account in respect of those grounds, the most important appeared to be the defendant's offending history (including whether this included similar offences, and breach of bail). Seriousness of the alleged offence was an important factor, but not necessarily determinative since it had to be placed in a broader context. In terms of characteristics of defendants that may affect the PTD decision, important factors were drug addiction, homelessness and mental illness, and in respect of all three appropriate facilities were felt often to be unavailable.

In making their decisions, judges and magistrates are normally reliant on the information supplied to them by both parties but, in particular, prosecutors. Apart from the list of previous convictions, this information normally took the form of representations made rather than 'evidence', and witnesses are rarely called to give evidence either by the prosecution or the defence. In this respect there appears to have been a change of practice in that in the past the police officer dealing with a case was more often called to provide information to the court.

Generally, the reasoning provided for a decision to remand a defendant in custody was limited, especially in those cases dealt with by lay magistrates, and the evidence suggests that the relevant ECHR standards regarding justification for PTD decisions, and arguably the requirements of the CrimPR and domestic case-law, are routinely breached. Furthermore, the data suggests that there is sometimes a lack of clarity or confusion about the relationship between grounds for withholding bail and factors that may be taken into account in determining whether those grounds apply.

Whilst judges and prosecutors said that they received training on human rights standards applicable to pre-trial detention when the Human Rights Act 1998 was enacted, it appears that little further training has been provided. The common view was that ECHR standards have little direct impact on PTD decision-making, but that the law in England and Wales incorporates them in any event. Overall, it was felt by the prosecutors interviewed, and to a certain extent by judges and magistrates (although this was limited by our ability to directly question them about this), that the current law and procedures governing PTD are satisfactory, although a variety of concerns were expressed about case-loads, the quality of information available at PTD hearings, and some of the alternatives to custody. Cases involving domestic violence were regarded as particularly problematic.

Chapter VI Alternatives to pre-trial detention

1. Introduction

In this chapter we examine alternatives to pre-trial detention, often described in the European context as 'alternative measures'. Little information is available about the use of alternative measures, that is, bail in England and Wales although concerns are periodically expressed about either its over-use or under-use. This lack of information is important since if the use of pre-trial detention is to be reduced, it is necessary to know more about how the alternatives to detention work in practice. In light of this deficit, we set out to explore how decisions are made to release defendants on bail, the prevalence of release on bail, and the use made of bail conditions. We were also interested in the efficacy of alternative measures, which we sought to explore by examining the extent to which defendants who were granted bail failed to turn up in court, and how often bail conditions were breached. Finally, we sought the opinions of the key professionals involved, defence lawyers, prosecutors and members of the judiciary, on alternative measures.

Article 5 of the ECHR does not explicitly refer to alternative measures, but Article 5(3) does provide that release pending trial 'may be conditioned by guarantees to appear at trial'. Under the interpretation given to Article 5(3) by the ECtHR, judicial authorities do not have a choice between either bringing an accused to trial within a reasonable time or granting them provisional release.[206] Given the presumption of innocence, a defendant must be released once his or her continued detention is no longer reasonable by reference to the grounds that are regarded as acceptable as justifying detention.[207] Thus prior to trial the court must carefully consider whether alternative measures to detention are appropriate,[208] and if it is decided that they are not appropriate must explain why this is the case.[209] As a result, a court must always consider whether release, whether or not subject to 'guarantees', is an appropriate alternative to detention having regard to the particular facts of the case. The ECHR leaves signatory states with a wide degree of discretion as to the nature of the guarantees and the circumstances in which they may be imposed, provided that they do not frustrate the general obligation to release a person pending trial, for example, by imposing conditions that cannot be complied with.

In England and Wales the fact that a defendant has a prima facie right to bail means that bail is the default position. A defendant must be granted bail pending trial unless the legal grounds for withholding bail are satisfied.[210] A person who is granted bail is under a duty to surrender to the court, and they commit an offence if they fail, without reasonable cause, to do so. Where a bailed defendant fails to surrender on the due date, the court may issue an arrest warrant, but they may be arrested without a warrant by a police officer who has reasonable grounds for believing that they are not likely to surrender. In contrast to many other jurisdictions, a court cannot generally require the defendant to lodge money with the court as a condition for release on bail.[211]

The courts have 'exceptionally wide' powers to impose conditions on bail.[212] Some permissible conditions are specified in statute, such as the power to require a surety or

[206] ECtHR 3 October 2006, *McKay v UK*, No. 543/03; and see Chapter V, section 1.
[207] ECtHR 3 October 2006, *McKay v UK*, No. 543/03, and ECtHR 6 February 2007, *Garyki v Poland*, No. 14348/02.
[208] ECtHR 27 June 1968, *Wemhoff v Germany*, No. 2122/64.
[209] ECtHR 8 June 1995, *Yagci and Sargin v Turkey*, No. 16419/90.
[210] See Chapter III, section 2.2.
[211] See further Chapter III, sections 2.2 and 2.7.
[212] B. Emmerson, A. Ashworth and A. Macdonald, *Human Rights and Criminal Justice* (Sweet and Maxwell, London 2012), para. 8-87.

security to secure surrender to bail,[213] and electronic monitoring[214] and, in the case of a person charged with murder, a requirement to undergo medical examination.[215] However, the legislation is expressed in permissive terms so that a court may impose almost any condition provided that it appears to the court to be necessary for a statutory purpose.[216] For example, a defendant may be made subject to a condition not to drive,[217] or to present themselves at the door of their home in order to demonstrate that they are abiding by a curfew condition.[218] The statutory purposes are to secure that the defendant: surrenders to custody; does not commit an offence while on bail; does not interfere with witnesses or otherwise obstruct the course of justice; makes him or herself available for the purpose of enabling inquiries or a report to be made to assist the court in sentencing; and to attend an interview with a lawyer. In addition, conditions may be imposed for the defendant's own protection (or if a child, their own welfare).[219] Failure to comply with a condition is not a criminal offence, but a person released on conditional bail may be arrested without a warrant by a police officer who has reasonable grounds for believing that they have broken, or are likely to break, any condition imposed.[220]

In principle, the provisions regarding bail and bail conditions comply with the requirements of the ECHR. However, a particular condition, or combination of conditions, could amount to a breach of the right to private life (Art. 8), the right to freedom of expression (Art. 10), or the right to freedom of assembly and association (Art. 11).[221]

2. Prosecution and defence applications

2.1 Prosecution applications

Both the PTD hearing observations and the case-file reviews produced some data on the extent to which prosecutors sought unconditional or conditional bail rather than detention. We saw in Chapter IV (Table 10) that in the 74 PTD hearings observed, the prosecutor applied for bail in 21 (28.38%) cases, 9 (12.16%) of which were for conditional bail and 12 (16.22%) for unconditional bail. All applications for conditional bail were granted, and 10 out of the 12 applications for unconditional bail (83.33%), were granted by the court.[222] In the nine cases in which the prosecutor applied for conditional bail, one condition was sought in two cases, two conditions were sought in five cases, four conditions were sought in one case, and in one case the prosecutor did not specify the conditions sought. The conditions most frequently sought by prosecutors were a stay away from location condition (5 cases), and a stay away from a person condition (4 cases). Other conditions requested were: electronic monitoring (1); curfew (1); reporting at police station (2); and residence at a particular location (3).[223]

The case-file data disclosed that of the 76 files examined, only 30 contained a record of the application made by the prosecutor. Of these 30 files, six showed that the prosecutor

[213] BA 1976, s. 3(4).
[214] BA 1976, s. 3(6ZAA).
[215] BA 1976, s. 3(6A).
[216] BA 1976, sch. 1, para. 8(1).
[217] *R v Kwame* (1974) 60 Cr App R 65.
[218] *R (CPS) v Chorley Justices* [2002] EWHC 2162 Admin.
[219] BA 1976, s. 3(6).
[220] BA 1976, s. 7(3). In addition, where a defendant was released on bail with one or more sureties, they may be arrested if a surety notifies a police officer in writing that the defendant is unlikely to surrender and that for that reason they wish to be relieved of their obligations as a surety (s. 7(3)).
[221] See the examples given in B. Emmerson, A. Ashworth and A. Macdonald, *Human Rights and Criminal Justice* (Sweet and Maxwell, London 2012), paras. 8-88 – 8-90.
[222] Note the explanation in Chapter IV, section 4.2.1 regarding cases where the prosecutor did not explicitly apply for unconditional bail but where it was nevertheless granted.
[223] Note that the number of conditions requested exceeds the number of cases in which the prosecutor applied for conditional bail since in some cases they requested more than one condition.

applied for conditional bail, and 24 showed that the prosecutor applied for PTD. None recorded that the prosecutor sought unconditional bail. It is likely that in the 46 files in which the application was not recorded, some involved applications for bail[224] but, of course, that number is unknown.

2.2 Defence applications

It was noted in Chapter IV, section 4.1, that the defendant or his or her lawyer must be given the opportunity to make representations at a PTD hearing. In the case-file data, the submissions made by defence lawyers were rarely recorded,[225] although they did occasionally record that the defence lawyer had sought to persuade the court to grant conditional bail.

In the 74 PTD hearings observed, the defence made submissions in 36 (48.65%) cases, and in 38 (51.35%) cases they did not. Of the 36 cases in which an application was made by the defence lawyer, only three were for unconditional bail (but see below), and in 23 cases the defence lawyer sought to persuade the court to grant bail with conditions.[226] Table 26 shows the cases in which the defence lawyer made an application for conditional bail by reference to the application made by the prosecution.

Table 26
Prosecution application where defence applied for conditional bail
PTD hearing observations

Prosecution application	**Number**	**%**
Unconditional bail	0	0.00
Conditional bail	5	21.74
Pre-trial detention	14	60.87
No application	4	17.39
Total	23	100.00

Table 26 shows that in the majority of cases where the defence sought to persuade the court to grant conditional bail, this was in response to a prosecution application for a remand in custody.[227] Evidently, and understandably, a logical response to a prosecution application for bail to be withheld is for the defence to seek to persuade the court that the relevant fears relied upon by the prosecution can be satisfactorily dealt with by the imposition of appropriate conditions. In about one-fifth of cases where the defence applied for conditional bail, the prosecution had also made such an application. This may occur where the defence agree to conditional bail, but wish to argue for different conditions. Alternatively, it may be explained by a fear, on the part of the defence, that the court may not follow the application made by the prosecution.

The fact that the defence lawyer did not make an application in 38 cases does not necessarily indicate a lack of adversarialism on the part of defence lawyers. In 11 of the 12 cases in which the prosecutor applied for unconditional bail the defence lawyer did not make

[224] Or were cases in which the prosecutor was content for unconditional bail to be granted. See Chapter IV, section 4.2.1.
[225] In only 12 (15.79%) out of 76 files examined were the defence submissions recorded, and in 9 (11.84%) cases it was recorded that the defence did not make submissions.
[226] Note that of the remaining 10 cases, the defence applied for a remand in custody for the defendants' own protection in 2 cases, and for pre-sentence reports to be prepared in another 2 case, and in 4 cases the defence application was unclear. 1 case concerned an application for a bail variation, and in 1 case there was a joint application by the prosecution and defence to adjourn.
[227] Note that in addition, the defence sought unconditional bail in one case where the prosecution applied for a remand in custody, and in two cases where either the prosecution did not make an application or the application was unclear.

an application. Similarly, the defence lawyer did not make an application in 13 out of the 16 cases where the prosecutor did not make an application but in which the court granted unconditional bail.[228] The fact that the defence lawyer did not make an application in these cases is to be expected since there would be little point in doing so since there was little chance that the defendant would not be granted unconditional bail. If, despite the absence of a prosecution application, the court was considering a disposal other than unconditional bail, almost certainly it would have given both the prosecutor and the defence lawyer the opportunity to address them. In the nine cases in which the prosecutor applied for conditional bail, the defence lawyer did not make an application in five of them. It is likely in these cases that the defence was content with the conditions applied for, and in two of the five cases the lawyer explicitly indicated agreement with the prosecutor's application.[229] Thus in 29 out of the 38 cases in which the defence did not make an application, there were understandable reasons why this was the case.

3. The decision to grant alternative measures

3.1 The prevalence of alternative measures

Both the PTD hearing observations and the CPS case files disclosed data regarding the decisions to grant alternative measures compared to decisions to remand the defendant in custody. In establishing the decision made at the first PTD hearing it is necessary to exclude data from the Crown Court hearing observations since they did not involve the initial PTD hearing. Almost all magistrates' court hearings observed entailed the initial PTD determination. The results are shown in Table 27.

Table 27
Decision at the first PTD hearing (excluding Crown Court observations)
PTD hearing observations

Decision at first PTD hearing	**Number**	**%**
Pre-trial detention	24	36.92
Conditional bail	14	21.54
Unconditional bail	27	41.54
Total	65	100.00

Thus in the magistrates' court hearings observed, the initial decision in just over one-third of cases was that the defendant be remanded in custody. The remaining two-thirds involved a release on bail, with about two-thirds of those being a release on unconditional bail, and one-third being a release on conditional bail.

The case-file data is not directly comparable since, as explained in Chapter II, we examined files that were more likely to involve some kind of contest, and thus they were less likely to involve a decision to release the defendant on unconditional bail. The decisions made at the first PTD hearing in the case-file sample are shown in Table 28.

[228] See Chapter IV, section 4.2.1.
[229] A third case involved an application for variation of bail conditions, and the defence had set out their application in writing.

Table 28
Decision at the first PTD hearing
Case-file data

Decision at first PTD hearing	**Number**	**%**
Pre-trial detention	30	39.47
Conditional bail	39	51.32
Unconditional bail	7	9.21
Total	76	100.00

The case-file data discloses a broadly similar rate of PTD and alternative measures at the initial hearing as the PTD hearing observation data. In respect of alternative measures, much greater use was made of conditional, as opposed to unconditional bail, but this is to be expected given the way in which the sample was selected.

Overall, the two sets of data show that the courts made frequent use of alternative measures, with about two-thirds of the initial PTD decisions being that the defendant be released on bail. In terms of the use of conditional, rather than unconditional, bail the PTD hearing observation data is the more reliable of the two data-sets although, of course, the sample size is relatively small and only relates to three magistrates' courts in one region of the jurisdiction. Normally, the decision to release a defendant on bail was in accordance with the application made by the prosecutor. Of the 21 cases observed where the prosecutor made a submission that the defendant be released on bail, that submission was followed in 19 of them, and all applications for conditional bail were granted (although not necessarily in precisely the same terms as the prosecution application).[230]

An important question in relation to alternative measures is whether their use is confined to cases where defendants are accused of less serious offences. Under the BA 1976 the seriousness of the alleged offence is not a ground for withholding bail, but is a factor that should be taken into account, for example, in determining whether there is a risk that the defendant will fail to surrender to custody. We saw in Chapters IV and V that many defence lawyers believe that lay magistrates, in particular, often rely on the seriousness of the alleged offence as if it were a ground, in itself, for withholding bail. Tables 29 and 30 show, from the PTD hearing observations data and the case-file data respectively, the outcome of the first PTD hearing by reference to the mode of trial category of the alleged offence.[231]

[230] And see the discussion in Chapter IV, section 4.2.1 concerning those cases where the defendant was released on unconditional bail where the prosecutor did not make an application.
[231] The mode of trial category is not a precise measure of offence seriousness since, for example, a minor theft comes within the triable either-way category whereas an assault carried out in the context of ongoing domestic violence is a summary-only offence. Nevertheless, the mode of trial categories are often used as a proxy for offence seriousness.

Table 29
Outcome of pre-trial detention hearing, by offence seriousness
PTD hearing observations[232]

Outcome of first PTD hearing	**Indictable-only**		**Either-way**		**Summary-only**	
	Number	**%**	**Number**	**%**	**Number**	**%**
Pre-trial detention	5	41.67	17	47.22	2	13.33
Conditional bail	1	8.33	7	19.44	5	33.33
Unconditional bail	6[233]	50.00	12	33.33	8	53.33
Total	12	100.00	36	100.00	15	100.00

Table 30
Outcome of first pre-trial detention hearing, by offence seriousness
Case-file review data

Outcome of first PTD hearing	**Indictable-only**		**Either-way**		**Summary-only**	
	Number	**%**	**Number**	**%**	**Number**	**%**
Pre-trial detention	8	80.00	15	45.45	7	21.21
Conditional bail	1	10.00	15	45.45	23	69.70
Unconditional bail	1	10.00	3	9.09	3	9.09
Total	10	100.00	33	100.00	33	100.00

Both sets of data need to be approached cautiously. The PTD observation data indicates that half of defendants accused of an indictable-only offence were granted unconditional bail, but these figures were significantly affected by one, multi-handed case. As noted above, the case files selected for examination were those where there was likely to be some degree of contest between the prosecution and defence. Nevertheless, they show that whilst offence seriousness was closely correlated with a decision to withhold bail, the fact that a defendant was alleged to have committed a serious offence did not necessarily prevent them from being released on bail. Furthermore, the data shows that alternative measures to custody are used across the seriousness range, and suggest that decisions to impose conditional, as opposed to unconditional, bail are affected by factors other than case seriousness.

3.2 The types and prevalence of conditions imposed

Of the 14 cases observed in magistrates' courts in which conditional bail was imposed at the first PTD hearing, one, two and three conditions were imposed in each of four cases. In one case five conditions were imposed, and in one case the decision was unclear in this respect. Taking all hearings observed into account, the prevalence of different types of conditions is shown in Table 31.

[232] Note that this table excludes cases observed in the Crown Court since these did not involve the first pre-trial detention hearing. It also excludes two observed cases in magistrates' courts, 1 which did not concern a criminal offence (domestic violence protection notice), and 1 in which the offence was unknown.
[233] Note that 5 of these involved conspiracy to supply cannabis.

Table 31
Types of conditions imposed
PTD hearing data

Type of condition	**Number of cases in which condition imposed**[234]	**% of cases in which a particular condition was imposed**[235]
Electronic monitoring	5	26.32
Security/surety	1	5.26
Curfew	5	26.32
Reporting to police station	3	15.79
Stay away from person	10	52.63
Stay away from location(s)	9	47.37
Reside at specified address	11	57.89

Thus, the most frequently imposed conditions in the PTD hearing sample were those preventing the defendant from having contact with one or more persons, and from going to one or more specified locations, and a requirement that the defendant reside at a particular address. Where a curfew was imposed, this was always accompanied by electronic monitoring.

In the case-file data, there were 39 cases (out of 76) in which conditional bail was imposed at the PTD hearing. Table 32 shows the number of conditions imposed.

Table 32
Number of conditions imposed at the first PTD hearing
Case-file data

Number of conditions imposed	**Number of cases**	**%**
1	9	23.08
2	16	41.03
3	7	17.95
4	3	7.69
5+	3	7.69
Not recorded	1	2.56
Total	39	100.00

The prevalence of different types of conditions imposed is shown in Table 33.

[234] Note that the number of cases in which a particular condition was imposed exceeds the total number of cases in which a condition was imposed because in some case more than one condition was imposed.
[235] The number of cases in which conditional bail was imposed, taking into account both magistrates' court and Crown Court hearings observed, was 19. The percentages do not add up to 100 because in many cases more than one condition was imposed.

Table 33
Types of conditions imposed
Case file data

Type of condition	**Number of cases in which condition imposed**[236]	**% of cases in which a particular condition was imposed**[237]
Electronic monitoring	5	12.82
Surety/security	0	0.00
Curfew	5	12.82
Reporting to police station	6	15.38
Stay away from person	30	76.92
Stay away from location(s)	26	66.67
Reside at specified address	13	33.33
Other	5	12.82

As in the PTD hearing observation sample, the most prevalent conditions were those preventing the defendant from having contact with one or more persons, from going to one or more specified locations, and that the defendant reside at a particular address; although more use was made of the first two, and less use of the latter condition. Again, where a curfew was imposed, this was accompanied by electronic monitoring.

Taking both sets of data together, they suggest that a range of conditions are routinely imposed, and that often a combination of different conditions is attached to bail. Curfews are routinely accompanied by an electronic monitoring condition.

3.4 Information available to the court regarding conditions

In principle, it is for the prosecutor or defence lawyer to provide information to the court regarding potential bail conditions. Many of the conditions routinely used principally relate to the nature and circumstances of the alleged offence, or to the circumstances and offending and/or bail history of the defendant, the relevance of which is often evident without the need for a specialist bail information service. For example, the timing of the alleged offence, perhaps coupled with information about the offending history of the defendant, might suggest the relevance of a curfew. Where the defendant is accused of a 'domestic violence' offence, it may be self-evident that consideration should be given to whether conditions to stay away from a person and/or location, coupled with a condition of residence, will be appropriate and sufficient.

Whilst most decisions that we observed being taken regarding bail conditions appeared to be relatively routine, we did see some cases where the judge or magistrate was willing to approach the issue in a way that was particularly sensitive to the particular facts of the case, even though they were primarily reliant on information provided by the prosecutor or defence lawyer. In one case, for example, a defendant accused of a serious offence of wounding with intent was applying for bail in the Crown Court, having previously been remanded in custody. The court heard that the complainant had initiated contact with the defendant, had visited him in prison, and had written a letter to the effect that she wanted the defendant to be involved in the upbringing of their child. It was submitted that the defendant should be granted bail subject to a condition that the defendant did not contact the

[236] Note that the number of cases in which a particular condition was imposed exceeds the total number of cases in which a condition was imposed because in some case more than one condition was imposed.
[237] The number of cases in which conditional bail was imposed was 39. The percentages do not add up to 100 because in many cases more than one condition was imposed.

complainant. The judge, however, suggested that this was likely to be breached if the complainant contacted the defendant, and granted bail on the condition that the defendant must not initiate contact the complainant, but that he could have contact with her if she made the first contact.[238]

In cases where there was, or was likely to be, an issue about where the defendant could or should live if granted bail, the routine process was for the defence to propose an address, which the prosecutor (and ultimately the court) considered in terms of whether it was suitable both in terms of the nature of the accommodation (for example, whether it was offered by a parent of the defendant, or by an associate of the defendant about whom the police had concerns) and its location (for example, whether it was sufficiently far away from where the complainant lived). The prosecutor, in considering the address offered, might ask the police to check it before agreeing to support bail with such a condition. A number of the prosecutors interviewed said that they valued the assistance provided by a police liaison officer who, in the court in which they practiced, was present and available to find out relevant information for them.[239]

A number of the prosecutors interviewed said that they valued the service provided by the probation or bail information staff, based in some (but not all) courts, who could provide information, in particular, about bail hostels. Two of them were particularly positive about the service they could provide. As one prosecutor explained,

> 'a probation officer… comes to see us first thing in the morning as well, and if its apparent that the defendant doesn't have an alternative address of his own then we can ask the probation to see if there would be a suitable hostel and then a hostel may or may not be available for a variety of reasons.' (Prosecutor 05)

However, concern was expressed by a number of the prosecutors that there were insufficient bail hostels in their area, particularly for female defendants. As one prosecutor said:

> 'It always takes quite a long time to get a bail package together when the Probation Service are dealing with it. It does take time.' (Prosecutor 03)

The lack of bail hostels was also raised by respondents to the practitioner survey. Many of them suggested that a number of alternatives to custody were under-used, and a lack of bail hostels was frequently cited in this respect.[240] Some of the judges and magistrates interviewed also identified a lack of bail hostel provision as a problem. For example, one judge explained that in domestic violence cases, a condition of residence at a bail hostel may be suitable, but that the hostel would have to be located some distance from the complainant in order for it to be acceptable. Arranging a place in such a hostel could take time, and she said that sometimes she has to remand a defendant in custody until a suitable bail hostel could be found: 'it would be nice if there were more' (Judicial officer 03). However, a number of judges/magistrates did express concerns about placing defendants with drug problems in bail hostels because they feared that they are targeted by drug dealers.

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[238] 02/190215/2. It should be noted that this case had been the subject of extensive delay which, in part, was attributed to the prosecution, and that the judge said that in view of the information about the contact made by the complainant he was 'struggling' to find that there were substantial grounds for fearing that the defendant would interfere with witnesses.

[239] Although one of them expressed concern that the liaison service was to be withdrawn.

[240] 47 (44.33%) of the 106 lawyers who responded to this question said that there were alternatives that were under-used, and many of them cited bail hostels.

Many defence lawyers also referred to the 'patchy' availability of services such as bail information services, and those provided for defendants with drugs or mental health problems. A common response was that they are available in some courts but not others, or that they are available on some days but not every day. One of the judges interviewed was particularly positive about the mental health referral and assessment service (CARS) which was available in her court.

> '[The service is] invaluable because you would be amazed at the number of mentally unwell people we get brought in and first, sometimes we might just think well he's really troublesome, why is he so troublesome because people can just be abusive, but if CARS have got hold of their details beforehand I can have the tip-off that… these are the symptoms he's likely to be exhibiting, this is his background, this is what we can do for him. They're absolutely brilliant.' (Judicial officer 03)

However, as that judge recognised, such services are only available at big court centres.

4. The impact of alternative measures

We were unable to assess, from the data, whether a release on bail affected the length of proceedings although, as noted in Chapter IV, section 2.4, whilst defence lawyers were generally sceptical that cases in which the defendant was remanded in custody were prosecuted more efficiently or speedily, many appeared to accept that custody time limits are effective in ensuing the timely progress of cases. The prosecutors interviewed were acutely aware of the need to comply with custody time limits, and as one prosecutor accepted, the attention paid to custody cases probably has an adverse effect on the speed with which other cases are dealt with.

Another aspect of the impact of alternative measures is the extent to which bail is effective, in the sense that a defendant released on bail turns up in court on the due date, does not breach conditions imposed, and/or does not commit offences whilst on bail. National statistics show that in the 12 months ending in March 2014, 6.2 per cent of defendants granted bail in magistrates' courts failed to appear at the next appointed hearing.[241] Statistics are not routinely available on the number of cases in which defendants released on conditional bail breach one or more of those conditions.

We have limited data on this from the examination of case-files. Out of the 46 cases in which bail was granted (either conditional or unconditional bail) we recorded that bail was breached in at least one of the ways referred to in the previous paragraph in 19 cases (41.30%). However, we are not able to differentiate between the three types of breach identified.

5. Attitudes to and confidence in alternative measures

The significant use of conditional bail suggests a high degree of confidence that in many cases it is both sufficient and proportionate, including in those cases where the alleged offence is relatively serious. Many of the defence lawyers, when asked whether in their experience, judges and magistrates have confidence in alternative measures, said that it depends very much on the particular judge or magistrates concerned. Whilst case seriousness, and the offending and bail histories of defendant, are important factors, it '[d]epends on the make-up of the bench'. Some magistrates and judges are very 'risk averse' or 'case hardened', and will tend to adopt the 'safe option', whereas others are willing to

[241] Table Q3a Defendants (1) proceeded against by court type, type of remand and outcome of proceedings, 12 months ending March 2014, Ministry of Justice.

consider alternatives to custody, especially if they are presented with a 'reasonable package of conditions'.

One of the respondents to the practitioner survey, who was also a Deputy (part-time) District Judge (DDJ) did express some doubts about the effectiveness of bail conditions in some circumstances:

> '[A]s a DDJ I am not confident that bail conditions are monitored effectively. For most offences, [this is] not too much of an issue, but an unstable defendant charged with public order plus knife might be remanded if [I] had no confidence he would be closely monitored.'

Concerns about lack of compliance with and monitoring of bail conditions were also expressed by a number of the prosecutors interviewed. Whilst broadly they appeared to have confidence in bail conditions, that depended very much on the type of condition and also the circumstances of the defendant. With regard to the former, there was general agreement that electronic monitoring of curfews is effective, and that breaches will be 'picked up on', although one of the judges interviewed felt that breaches were not reported sufficiently quickly (Judicial officer 04). However, there were mixed views about the effectiveness of conditions such as residence at a particular address, no contact with the complainant or other potential witnesses, or reporting at police stations. Some felt, or 'hoped', that they are effective whereas others were more sceptical. As one prosecutor said:

> 'It depends… if there's a curfew and they're electronically monitored, then that is generally always picked up because it's there in black and white. As far as contact, going to prohibited areas, [is concerned] it all depends on whether anybody picks up on it really, whether it's reported, or [whether] the defendant is seen by the police who are aware that he has those conditions.' (Prosecutor 05)

With regard to whether defendants are likely to comply with conditions, it was felt that many do stick to them, although some defendants do not understand the conditions that have been imposed on them, 'so there might be a couple of hiccups along the way' (Prosecutor 05). However, two particular categories of defendant were identified as being particularly prone to breaching any type of condition that might be imposed: drug addicts, and those accused of domestic violence. One of the prosecutors identified the dilemma in relation to drug addicts who steal to fund their habit in the following way:

> 'I think in terms of prolific offenders that are committing offences to fund a drug habit… apart from the mandatory bail condition to co-operate with the Criminal Justice Intervention Team, I really don't feel that there's any condition that is going to prevent them from committing further offences… [but] it's very difficult for [magistrates] to remand someone in custody for a shop theft… because it isn't that serious an offence.' (Prosecutor 03)[242]

[242] Criminal Justice Intervention Teams (CJIT) are part of the Drugs Intervention Programme (DIP) which is focused on reducing drug related crime. More information is available at http://www.impactpathways.org.uk/Criminal-Justice-Intervention-Team/Pathway-Services/.

Similarly, it was felt that some defendants accused of domestic violence offences are unlikely to comply with them:

> 'On many occasions, because of the nature of who they are, these people… will not remotely listen to the condition. Because their nature is to go back and then start attacking the woman.' (Prosecutor 04)

The judges and magistrates interviewed were generally well-aware of the limited relevance of surety and security conditions. One judge said that they could be useful in the case of 'economic crimes', but the general view was summed up by the following magistrate:

> 'Well we don't use surety or security very frequently, in fact I can't remember the last time we've used that… I don't think many defendants have any means so that would be a bit pointless really.' (Judicial officer 05)

Overall, the impression conveyed by the prosecutors and judicial officers interviewed was that whilst conditional bail can be an effective alternative to a remand in custody, some conditions are difficult to monitor or enforce, and their suitability in any particular case depends both on the nature of the alleged offence and the circumstances of the particular defendant. However, in the case of less serious alleged offences in particular, the need for proportionality often dictates that a defendant should at least be given the chance to demonstrate that they are willing to comply with them.

6. Conclusions

The law on alternative measures is compliant with ECHR standards, although the extensive discretion given to judges and magistrates to attach conditions to bail risks breach of a defendant's rights under the ECHR, Articles 8, 10 and 11 in individual cases. To a certain extent this is mitigated by the fact that a defendant can apply for variation or removal of conditions, and the lack of challenge to bail conditions on human rights grounds[243] suggests that there is little cause for concern in this respect.

Both national statistics and the data obtained in this research demonstrate that extensive use is made of alternative measures, with about two-thirds of cases in both data-sets involving the grant of bail. The use of unconditional and conditional bail varied as between the observed cases and those in the case-files examined, but this may be explained by the way in which the latter sample was selected. Both sets of data show that the granting of bail is not confined to minor cases, and that whilst the seriousness of the alleged offence is clearly a significant factor it is not necessarily determinative. A person accused of a serious crime may, nevertheless, be granted bail (including unconditional bail), but conversely bail may be withheld from a defendant accused of a relatively minor offence. The latter often involved an allegation of domestic violence, and often bail was denied only after bail had been granted and subsequently breached. However, whilst extensive use was made of bail conditions, confidence in their effectiveness was not universal amongst respondents, with particular concern being expressed about monitoring and enforcement.

Bail conditions involving the deposit or potential forfeit of money or other valuable item (i.e., surety or security) were rarely used in the cases examined, and the judges and magistrates interviewed said that such conditions are normally inappropriate, partly because most defendants are not wealthy. A range of conditions was used, and they were almost all of a kind that defendants were capable of complying with. However, where a defendant could

[243] As evidenced by the few number of reported cases in the High Court.

not offer an appropriate address at which to reside, the normal approach was to remand them in custody whilst appropriate accommodation was sought. Finding an appropriate address could be problematic, and there was some degree of consensus (subject to some reservations) that whilst bail hostels can be appropriate, they are not available in sufficient numbers and in appropriate locations, especially for female defendants.

A major concern, cited by many of the respondents, was that bail information schemes, and bail support facilities, are not sufficiently available, that they operate in only some courts, and that they are not necessarily available on all days that courts sit.

Chapter VII Reviews of pre-trial detention decisions

1. Introduction

In this chapter we examine some of the processes by which PTD decisions are reviewed, particularly decisions to withhold bail. For the purposes of the research, we defined 'reviews' widely to include: a second or subsequent bail application where the initial decision was to remand the defendant in custody; reconsideration of bail where a defendant has been arrested for breach of bail conditions, or failure to surrender to custody, or for committing offences whilst on bail; and applications by the prosecution or defence for variation or removal of bail conditions.

The jurisprudence of the ECtHR suggests that pre-trial detention must be subject to regular review,[244] and that all stakeholders (the defendant, judicial authority, or prosecutor) must be able to initiate a review of detention.[245] Review of detention must take the form of an adversarial oral hearing in which the principle of equality of arms is respected. Further, the decision on detention must be taken speedily, and reasons must be given for the need for continued detention;[246] previous decisions should not simply be reproduced.[247] The threshold for justifying detention is, in effect, raised the longer detention lasts, and the gravity of the charge cannot, in itself, justify a long period of detention.[248] Continued detention can only be justified if the public interest, based on specific grounds, genuinely outweighs the presumption of innocence and the right to liberty.[249]

Domestic law governing review of pre-trial detention decisions is primarily contained in the BA 1976 and the Magistrates' Court Act 1980. Defendants do not have a formal right to review of a pre-trial detention decision, but they have multiple opportunities to apply for release from custody. The law is summarised in Chapter III, section 3.3. Broadly, a defendant has up to two opportunities to apply for bail in a magistrates' court, and a right to apply to the Crown Court thereafter. Once a defendant has exhausted these opportunities, although the court must consider the issue of bail at each hearing prior to conviction, the defendant only has the right to make a further application for bail if there has been a material change of circumstance. If a defendant is granted conditional bail, they may apply for variation or removal of those conditions. The prosecution may appeal to the Crown Court where bail is granted to a defendant by a magistrates' court, provided that the offence is imprisonable and the prosecution had made representations that bail should not be granted. The prosecution may also, in limited circumstances, apply for the grant of bail by a magistrates' court to be reviewed. If a defendant is arrested for failure to surrender to custody, or for breach of bail conditions, a court may (but does not have to) remand the defendant in custody if the breach is proved.

2. Speed of reviews

We were able to gather some data on the timing of reviews from our examination of case files, but not from the PTD hearing observations. Of the 76 case files examined, 59 (77.63%) involved at least one review. There was a total of 95 reviews across the entire data-set. This is set out in Table 34.

[244] ECtHR 18 June 1971, *De Wilde, Ooms and Versyp v Belgium,* Nos. 2832/66, 2835/66, 2899/66, para. 76.
[245] ECtHR 28 October 2003, *Rakevich v Russia,* No. 58973/00, para. 43.
[246] ECtHR 28 November 2000, *Rehbock v Slovenia*, No. 29462/95, para. 84.
[247] ECtHR 8 June 1995, *Yagci and Sargin v Turkey,* Nos. 16419/90, 16426/90.
[248] ECtHR 23 September 1998, *I.A. v France*, No. 28213/95.
[249] ECtHR 26 October 2000, *Kudla v Poland*, No. 30210/96.

Table 34
Number of reviews of pre-trial detention decisions
PTD Case File Review data

Number of reviews	**Number of cases**	**%**
0	17	22.37[250]
1	35	46.05
2	12	15.79
3+	12	15.79
Total	76	100.00

Whilst the dates of both the first hearing and subsequent reviews were recorded, there are substantial difficulties in interpreting this data. Where a defendant pleads guilty and is detained whilst a pre-sentence report is prepared, the initial maximum period of remand in a magistrates' court is three weeks, although they can be remanded in custody again when they next appear in court. Where a defendant enters no plea or pleads not guilty and is remanded in custody at their first appearance, they can be remanded in custody for eight days, although the defendant may consent to an extended remand (of up to 28 days). When they next appear, they can again be remanded in custody for up to 28 days which, subject to the relevant custody time limit, can be renewed at subsequent court appearances (see Chapter III, section 2.8). The duration of detention after the first review (the second bail application) is dependent upon when and if they make an application to the Crown Court (or an application based on a change of circumstances). Generally, this information was not recorded in the case files.

As a result of these complexities it was not possible to usefully analyse the data on periods of time between the first court hearing and subsequent reviews. However, it is worth noting that none of the defence lawyers who responded to the practitioner survey, and none of the judges and magistrates interviewed, referred to any issues with the speed with which reviews take place. There was no indication that defendants who were remanded in custody at their first appearance were not produced within 8 days (as required by MCA 1980, s.128(6)), or that the subsequent 28 day limits for adjournments were breached.

Defence practitioners were asked some questions about the regularity of review. They were first asked whether, in practice, the necessity for continued pre-trial detention was periodically reviewed by judges or magistrates. Of the 108 respondents to this question, 63 (58.33%) said it was not, whilst 45 (41.67%) said that it was. Practitioners were then asked if such reviews were regular enough to take account of changed circumstances or other factors. Of the 106 responses to this question, 71 (66.98%) indicated that reviews were not regular enough, with 35 (33.02%) believing that they were. This data suggests that a majority had a fairly negative opinion of the review process in this regard. One practitioner suggested that 'there should be at least one further automatic right to a bail application without the reliance on a change of circumstances'. Another said:

> 'Re. appeal, cases sent to the Crown Court are increasingly being moved, thus the bail app[lication] … is delayed; this is increasingly happening.'

Another respondent identified time as a problem, stating that '[a]ppeals are also hampered by delays in processing legal aid applications'. This suggests that delays are an obstacle to effectively enforcing a defendant's right to have a decision to remand them in custody reviewed by a higher court. This is troubling since the right to make an application to the

[250] The percentages are of all cases (i.e., 76). In the 7 cases where unconditional bail was granted, there were 'reviews' in 2 of them where the defendants failed to surrender to bail.

Crown Court is designed to ensure speedy review of a magistrates' court decision by a professional judge, and to minimise inappropriate detention.

3. Defence Participation

3.1 Presence of defendant and video-conferencing

In the PTD hearing observations, 17 reviews of detention were observed.[251] The accused was present in nine of these. The eight hearings in which the accused was absent were all conducted in the Crown Court, where the defendant is not routinely produced for such hearings. As such, this was not an unexpected finding, but does raise general issues regarding obstacles to defence participation (see Chapter IV, section 3.2). A defence lawyer was present at all of the reviews that were observed. The case-file data on the presence of the defendant, and of a defence lawyer, is set out in Table 35.

Table 35
Presence of accused at reviews of pre-trial detention
Case-file review data

Whether accused present	**Number**	%
Yes	64	67.37
No	11	11.58
Unknown	20	21.05[252]
Total	95	100.00

As Table 35 discloses, the accused was present in the majority of reviews conducted, suggesting that they generally had adequate access. As noted above, the defendant is not routinely produced for reviews in the Crown Court (although he or she may appear by video-link), and this may explain why the defendant was not present at some hearings. Additionally, a single defendant might account for multiple absences. In one case (TPAS/040315/004), the defendant did not appear in two of the three reviews that took place.

Whilst the judges and magistrates interviewed were not asked about video-linked hearings, two of them raised the issue themselves and both were critical of the effectiveness of such hearings. One said:

> 'I don't find a difference, but I can see the defendant might feel disadvantaged… who he sees [in court] is dictated… by the camera. He's either on us if we're talking or it's on his defence solicitor when they're talking. If I was a defendant I'd quite like to see the magistrates' expressions as my case is being put forward and that's not available to them. So I feel that they're slightly disadvantaged, yes.' (Judicial Officer 05)

The Crown Court judge agreed:

> 'I can say no more other than it's the human psychology and the dynamic of a situation; explaining something to someone over a video-link is not satisfactory when it's a crucial, time-limited thing as to taking a decision.' (Judicial Officer 04)

Both suggested that the use of this technology may have an adverse impact on the ability of the defendant to effectively engage in the hearings, or the ability of their lawyer to effectively represent them. As Judicial Officer 05 said in relation to the latter:

[251] Note the definition of 'reviews' for the purposes of the research in section 1 above.
[252] Percentages here and below are of the number of reviews, i.e., 95.

> ‘When it was first brought in I think they [defence lawyers] found it quite difficult and they weren't happy about it. My feeling… is they've accepted it and they are able to take instructions as easily or nearly as easily as they used to be able to… I haven't heard them complaining about that… [but] I’m not 100 per cent sure… how they feel about it ‘.

The Crown Court judge interviewed was more forthright in his criticism of video-link technology as creating a barrier to effective defence participation:

> ‘We simply see it and we can analyse it from the number of cases which we are able to resolve and both defendants and counsel ask us to list the case so that they can meet face to face… to resolve things properly we feel we need defendants produced before the court.’ (Judicial Officer 04)

However, he also argued that it could make the work of decision-making more difficult, not as a result of a lack of participation by the defendant, but due to over-zealous representation by their lawyer:

> ‘I would not find it useful for the purposes of decision-making to have the defendant on a video-link because that would simply lead to what I would call “showboating”; submissions designed to make the defendant feel better and for lawyers to establish their relationship of trust and confidence with him or her. That is for them in the confines of their private consultation, I don’t need that in my court.’ (Judicial Officer 04)

The judge suggested that video-link technology does sometimes have a place, for example, for instructions to be taken, but ultimately he felt that the technology had been adopted because ‘it saves money; [but] whether it does justice is a very different matter’.

Defence practitioners were asked whether the defendant was always present at PTD hearings, and of the 120 who responded to the question, 92 (76.67%) said that they were not. They specified a number of reasons for this, the most frequent being that at a ‘review of [an] initial decision [the] defendant is usually on video-link’. Some of the respondents were critical, arguing that there were ‘often problems’ with it. One suggested that it was used ‘to save the expense of bringing [the defendant] to court’, whilst two described video-links as ‘incompetent’. Another said:

> ‘I find that magistrates can be relied upon to apply the Bail Act correctly but are less likely to do so when addressed over the video-link. There is no doubt in my mind that the video-link negates effective advocacy.’

3.2 Presence and effective participation of defence lawyers

A defence lawyer was present in the majority of reviews conducted, as is demonstrated by Table 36.

Table 36
Presence of defence lawyer at reviews of pre-trial detention
Case-file review data

Whether defence lawyer present	**Number**	**%**
Yes	74	77.89
No	5	5.26
Unknown	16	16.84
Total	95	100.00

Where no defence lawyer was present, one case might account for multiple absences. For example, in TPAS/040315/005, the defendant was unrepresented at his initial hearing and at three review hearings. Additionally, the case files often did not record such information at all, explaining the significant number of 'unknown' entries.

Of the 95 reviews recorded from the case-file data, 38 (40.00%) were initiated by the defence, 33 (34.74%) by the prosecution, and 5 (5.26%) by judges. In 19 (20.00%) reviews, it was unknown who initiated the proceedings. These figures suggest routine compliance with the ECHR standards which provide that all stakeholders must be able to initiate a review.[253] Indeed, this data suggests that defence access to review is relatively good since more were initiated by the defence than by the prosecution. Those reviews initiated by prosecutors generally related to defendants who had breached their bail conditions, had failed to surrender to custody, or who had allegedly committed further offences, whereas reviews initiated by the defence included those who were applying for bail following a prior remand in custody and those who were applying to vary their bail conditions.

Defence practitioners were asked if, in practice, there are obstacles to making bail applications, or to appealing against decisions to remand in custody. Of the 119 respondents to the question, 64 (53.78%) said that there are obstacles. The narrative responses provided some explanations. Most related to obstacles to making bail applications generally, but many of these problems – primarily lack of time and resources, lack of disclosure, and difficulties in finding suitable addresses – are arguably applicable to review as well. One respondent highlighted a different practical barrier for those remanded in custody:

> '[W]ith the restrictions on legal aid, appeals or second bail applications can be problematic as the defendant may not be able to provide evidence of his financial situation due to being in custody!'

Therefore, a defendant may not be able to adequately prepare for a review hearing not only because they are in custody but because their incarceration prevents them from securing a lawyer who might prepare for a review on their behalf.

4. Standard of scrutiny in reviews

4.1 The approach to reviews

We sought to examine whether the standard of scrutiny or decision-making at reviews differed from that at the initial PTD hearing. PTD hearing observation and case-file data provided only limited information. In the PTD hearings observed, the nature of the submissions made by the prosecution and defence were similar to those made at the initial pre-trial detention hearings. The major difference noted was in respect of defence submissions, which generally focused more on changes in circumstances for the defendant

[253] ECtHR 28 October 2003, *Rakevich v Russia,* No. 58973/00, para. 43.

since the initial pre-trial detention decision. The nature of the change was generally not specified, but two examples observed were the need to change address and a request to vary conditions due to an altered relationship with the complainant. As with the initial PTD hearings observed, no evidence was offered or witnesses called to support submissions, although occasionally letters written by, or information about contact made by, the complainant was tendered.

The case files provided little information about prosecution and defence submissions at review. Generally, the reviews recorded in the case files concerned applications to vary bail conditions, or reconsideration of bail following breach by the defendant. Arguments would normally follow the same pattern as those presented at initial pre-trial detention hearings (for example, fear of further offences is established due to breach of bail conditions). There was no record of the prosecution or defence offering evidence or calling witnesses to support submissions.

Judges and magistrates were asked during the interviews what considerations they take into account at a review hearing. One District Judge described a review as 'a complete rehearing, completely afresh with new eyes'. If a defendant's first application for release was unsuccessful then it was 'essential' that they got 'a second bite of the cherry' (Judicial Officer 03). This reflects the statutory framework which entitles a defendant to make a second application for bail if they are remanded in custody at the first hearing. One magistrate said of this:

> 'I think [it] is the way forward… it gives the defendant the opportunity to have another chance, and maybe he could prove himself or she could prove herself… it's a very good system.' (Judicial Officer 02)

This comment is interesting because whilst it is clearly positive about the framework, it suggests that at a second application the 'burden' of persuading the court that bail should be granted shifts to the defendant. This sits awkwardly with the prima facie right to bail which continues to apply at the review stage. This lends weight to the impression gained from various data collected that, despite the presumption, securing release from detention at the second application is more difficult and that there is a burden on the defence rather than on the prosecution. Indeed, one magistrate said:

> '[I]t would be unusual without a change of circumstances for us to review a decision made.' (Judicial Officer 05)

Again, this suggests that there is a presumption that the prosecution's case for detention at the first appearance will remain valid unless the defence can adduce some evidence, or present some new argument, to contradict this. This was made more explicit by the Crown Court judge:

> '[W]e tend to adhere to previous decisions unless there's very compelling reasons to the contrary.' (Judicial Officer 04)

This suggests that in practice that there is a presumption that the previous decision was correct. As the same judge put it:

> '[W]e tend to adopt *res judicata*… we don't tend to alter each other's decisions. Finality of decision making is considered to be particularly important unless there is a very, very significant change of circumstance which would amount to perhaps losing an address or further offending. So it's rare to review anything other than the magistrates first instance decision.'

These comments appear to suggest that magistrates, whilst endorsing the right to a second application, approach them on the basis that the burden is on the defendant to establish why bail should be granted. If this accurately reflects their practice, it would amount to a violation of both domestic and ECtHR law. The Crown Court judge indicated that although he would not feel bound by the decision in the magistrates' court, the burden would effectively shift to the defendant where the prior decision had been made by a Crown Court judge. Such an approach risks non-compliance with the decision of the ECtHR in *Yagci and Sargin v Turkey*, in which it was held that previous decisions should not be reproduced.[254]

The judges and magistrates interviewed were asked what considerations, apart from who bears the burden of persuasion, they took into account when carrying out a review of an existing remand in custody. The Crown Court judge outlined his primary concerns as follows:

> 'The nature of the offence, whether it's violent, frightening, sexual or dangerous principally. Next, the strength of the evidence, then the defendant's record, all directed towards typically the considerations under schedule one of the Bail Act… that tends to be my order of priorities, the nature of the offence then the strength of the evidence then their record.' (Judicial Officer 04)

However, one of the magistrates interviewed summarised his major consideration at review as being a 'change of circumstances basically' (Judicial officer 01); a similar approach to that expressed by the magistrate quoted earlier (Judicial Officer 05), and in accordance with the perceptions of many defence practitioners as to the approach taken by magistrates (see below).

A particular factor referred to by many of the judges and magistrates was whether there had been a change in respect of accommodation. One judge suggested that 'a better address, an address out of the area or, if it was a young offender, a return to live with their parents' would be good reasons to consider a release from PTD (Judicial Officer 04). A magistrate described the kind of circumstances where such a change could be crucial:

> 'The fact that they could be moved away from the area and thus preventing either contact with the aggrieved or say… you've got a domestic violence situation where the only place they could have been moved to would have been… down the road, which is not sufficient.' (Judicial Officer 02)

This suggests that a change in address which reduces the chances of interference with witnesses or further offences (particularly in domestic violence cases), or the fear of failure to surrender (particularly for defendants with no fixed abode), could be vital in a review of detention. In short, the change in circumstance would negate the exceptions to bail which caused the defendant to be remanded in custody at the prior hearing.

[254] ECtHR 8 June 1995, Nos. 16419/90, 16426/90.

Defence lawyers were asked in the practitioner survey whether, at any review hearing, the judges or magistrates give adequate consideration to the relevant factors (for example, a change of circumstances). Of the 109 respondents to this question, 65 (59.63%) said adequate consideration was 'rarely' given to relevant factors, whilst 35 (32.11%) said that adequate consideration was 'sometimes' or 'often' given to relevant factors. This indicates that a majority of the defence practitioners asked had a fairly negative opinion of the review process. Most indicated that in their view the review of custodial remand decisions by judges and magistrates was inadequate, both in terms of regularity and quality. Although lawyers were not asked to provide narrative responses to this particular question, some provided additional comments at the end of the survey, some of which related to review. One suggested that 'there should be at least one further automatic right to a bail application without the reliance on a change of circumstances'. Another was critical of the review process generally, saying:

> '[T]he failure to properly review a remand decision on an ongoing basis is a major concern… the courts tend to rubber stamp earlier decisions. The whole issue of needing a change of circumstances for a third bail application is rigidly applied, often negatively for the defence.'

This lends weight to some of the conclusions drawn from the interviews with judges and magistrates. The same practitioner provided an example to support their argument:

> 'In September this year, a client is charged and [remanded in custody] for breach of a non-molestation order. His partner invited him to the address, [and] the police attended the address because her mother called them. Client's partner had applied to the court for discharge of the order, which was granted three weeks before his trial, yet no court would bail him. He was acquitted at trial. The only winner was me.'

He suggested that part of the problem was that '[i]t is too easy to get a [remand in custody] when the court is not required to set out its reasons in real detail'. This provides some confirmation of the findings, set out in Chapter V, section 5.3, that many PTD decisions lack the level of reasoning required. One practitioner suggested an approach that could be adopted for the review process:

> '[Pre-trial detention decisions] should be reviewed every 21 days by a judge on paper, but with a party able to request an oral hearing. [The defendant] should be produced unless he waives this in writing… each party should produce a chronology – drafted by a solicitor or counsel, not an admin[istrative] officer or the police – setting out progress since the last hearing, why any direction has not been complied with and what needs to be done now in order to be trial-ready. This should be served at least 24 hours in advance of the hearing by all parties. The judge should be empowered to grant bail on conditions or unconditionally where satisfied the Crown has not acted with due diligence or expedition in preparing matters. The same test and body of case law on Custody Time Limits would assist here.'

The practitioner in fact offered to assist with this, stating:

> 'I'd be prepared to do a draft rule. I'm also a deputy [district judge] and a former prosecutor, plus I've trained police officers so I have an idea of everyone's position.'

4.2 The provision of new information at review hearings

The approach to the provision of information to the court at review hearings was the same as for the initial PTD hearings (see Chapter V, section 3). In the limited number of review hearings observed, no evidence was adduced, and reliance was placed on assertions made by the prosecutor or defence lawyer. Occasionally, an advocate referred to a letter received from, or communication with, a complainant or to contact made with the defendant by the complainant, but we did not observe evidence of such communications being produced. In the cases we observed where the defendant had been arrested for breach of bail conditions, in most cases the breach was admitted without the need for the production of evidence or witnesses. No case file disclosed that evidence was requested or submitted, although it may be that information was provided to the court, for example, about an address that was available to the defendant.

5. Judicial reasoning in reviews

The PTD hearing monitoring data showed that some form of reasoning for the decision made was provided in 8 out of 17 (47.06%) reviews. In only one case was explicit reference made to the arguments of the parties (the defence) in providing reasoning for the decision. In one hearing (02/190215/2), the judge made a particularly interesting comment in providing reasons for his decision. The defendant had previously been remanded in custody; at review, the judge released him on bail, saying that he was 'struggling to find substantial grounds for the fear defendant would interfere with witnesses'. This suggests that a presumption of release represented the starting point for the judge and that this needed to be overcome by good reasons in order to justify further detention.

Due to the limited nature of recording, very little information was available in the case-file data about the arguments advanced by the defence and the reasoning of judges in reviews, or to what extent judges relied on evidence provided or submissions made by the parties in making review decisions. As such, no valid conclusions can be drawn in this regard. One case of note was TPAS/030315/001, in which the judge justified the renewal of detention on the basis that '[n]either defence advocate can think of a good reason why their client should be out of custody'. In contrast to the case referred to in the previous paragraph, this suggests a reversal of the burden, but reflects the approach of the judge referred to in section 4.1 above. Again, such an approach is contrary to both domestic law and ECtHR jurisprudence. It demonstrates the potential for variation in approach and shows the interesting relationship between the submissions of parties and the reasoning of judges.

Judges and magistrates were not asked directly about reasoning. However, they did comment on the influence of the previous PTD decision on the review court. This is particularly important in light of the comments highlighted in section 4 above, which suggested that judges and magistrates are not inclined to overturn the decisions of a previous court. The District judge interviewed said:

> '[T]he previous tribunal… might have been particularly worried about something and I might take a different view and if I [do]… then I'll put a condition in place and bail him. In the same way, I might be really worried about something and seven days later the Magistrates for some reason are not bothered and will let him out.' (Judicial Officer 03)

This comment suggests that judges considering a review are flexible and could easily adopt a difference approach to the previous court, although it should be noted that this judge would normally be reviewing an earlier decision made by lay magistrates (or may have her decisions subsequently reviewed by lay magistrates). The Crown Court judge provided another perspective on magistrates' decisions:

> 'Magistrates often are very generous in respect of their bail decisions, in the majority of magistrates' bail decisions I wouldn't take the same decision in the case… [they] are easily influenced by protestations that defendants will behave well whilst on bail, yet experience of a man with a frequent list of previous convictions shows that those assurances tend to be hollow.' (Judicial Officer 04)[255]

On its face, these comments suggest that on review a court can and will overturn the decision of a previous tribunal (particularly a decision made by lay magistrates). However, a District Judge could not overturn a previous decision to grant bail (unless the defendant had breached bail, or allegedly committed further offences), and a Crown Court judge could only reverse a decision to grant bail made by a magistrates' court on an appeal by the prosecution against the grant of bail (in addition to the circumstances described in respect of a District Judge).[256]

6. Conclusions

The law provides that defendants have a maximum of two opportunities to seek review of a decision to remand them in custody without showing a change of circumstances, and they also have the right to seek variation or removal of bail conditions. After the first review, the speed with which reviews are conducted is generally within the control of defendants since they can initiate review hearings. Generally, none of the respondents expressed concern about the speed with which reviews are conducted, although some defence lawyers said that there may be practical obstacles especially relating to legal aid. Some also expressed concern about the regularity of reviews where a defendant is remanded in custody, and one in particular proposed a scheme whereby a 'paper hearing' would be conducted every 21 days, with a right of the defendant to request an oral hearing. In fact the majority of defence lawyers who responded to the practitioner survey expressed fairly negative views about the review process generally.

Whilst a defence lawyer was normally present at reviews that we observed, the defendants themselves were normally not present at review hearings conducted in the Crown Court. As noted in section 4.1 above, defendants do not have an unfettered right to attend bail hearings in the Crown Court. Defendants appear by way of video-link in some cases, and there was a level of dissatisfaction about how this works, and the impact it has on the defendant.

The nature of the submissions made by the prosecution were similar to those made at initial PTD hearings, with defence submissions focussing more on changes in circumstances since the initial PTD decision. As in initial PTD hearings, it was rare for witnesses to be called or for other evidence to be adduced. Likewise, the level of reasoning provided at review suffered from the same deficiencies as identified in respect of initial PTD hearings.

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[255] Note that our observations of pre-trial detention hearings suggested that lay magistrates ordered pre-trial detention at the same rate as District Judges, although they were more inclined to grant unconditional, rather than conditional, bail than District Judges.

[256] The circumstances in which the prosecution can appeal against the grant of bail are limited. See Chapter VII, section 1.

Of significant concern, echoing that expressed by many defence lawyers, was the approach which some of the judges and magistrates interviewed said they take to making decisions at review hearings. It was also suggested by some of the magistrates that at a second PTD hearing, following the first at which the defendant was remanded in custody, the defendant was, in effect, required to establish why bail should be granted which, as suggested earlier, would amount to a violation of both domestic law and ECtHR jurisprudence. The Crown Court judge interviewed said that whilst he was quite prepared to overturn a decision to remand in custody make by a magistrates' court, he did feel himself bound to follow an earlier decision made by another Crown court judge unless there was a good reason for not doing so. Since the prima facie right to bail applies at all hearings prior to conviction, it should always be for the prosecution to establish that the grounds for withholding bail are satisfied.

Chapter VIII Outcomes

1. Introduction

In this chapter we examine the outcomes of cases, in particular by reference to whether the defendant had been remanded in custody at some point before the final outcome was determined. If a defendant who is kept in pre-trial detention is subsequently acquitted, or the case is discontinued, or the defendant is convicted but is given a non-custodial sentence, it could be argued that their detention was unnecessary and/or was inappropriate. Similarly, if such a person is convicted but receives a custodial sentence that is shorter than the period that they spent in pre-trial detention then it at least raises questions about whether the period spent in pre-trial detention should have been shorter. The Howard League, for example, has argued that the courts waste millions of pounds annually by withholding bail from tens of thousands of people who do not subsequently receive a custodial sentence.[257]

The fact that a defendant subjected to pre-trial detention is subsequently acquitted, has the case against them dropped, or does not receive a custodial sentence, does not necessarily mean that their detention pre-trial was unnecessary or inappropriate. It may be, for example, that a defendant with a record of offending on bail was accused of a serious offence, and is acquitted against the weight of the evidence, or the case is discontinued because a witness changed their story or refused to give evidence. Alternatively, there may have been good grounds for believing that they would not appear for their trial, or they may have been remanded in custody for their own protection. A defendant may initially have been granted bail, but failed to surrender or breached bail conditions that were in themselves reasonable, and thus remanded in custody after alternative measures had failed. It has even been suggested that there may be more reason to be concerned about a positive correlation between pre-trial detention and subsequent conviction and custodial sentences, because the former may, in part, explain the latter (in other words, the fact of pre-trial detention may be a factor that reduces the chances of a fair trial).[258]

Nevertheless, if a significant proportion of those kept in pre-trial detention are acquitted, are convicted but receive a non-custodial sentence, or receive a shorter sentence than the period spent in detention, this should at least prompt examination of whether some remands in custody are unnecessary, whether the decision-making process can be improved, and whether the trial process for those kept in custody could be shorter.

Ministry of Justice statistics for the year ending March 2014 show that of the 35,500 defendants who were remanded in custody at some stage of proceedings in magistrates' courts, 18 per cent were acquitted or not proceeded against, and 61 per cent were convicted and sentenced.[259] Of those who were convicted and sentenced, 62 per cent were given a custodial sentence, which equates to 37 per cent of those who were remanded in custody.[260] In the Crown Court, of the 37,300 defendants who were remanded in custody at some stage of the proceedings, 12 per cent were acquitted or not proceeded against, and 86 per cent were convicted and sentenced. Of those who were convicted and sentenced, 92 per cent were given a custodial sentence, which equates to 78 per cent of those who were remanded in custody. It is not possible, from these statistics, to compare sentence length with the time spent in pre-trial detention. However, the statistics demonstrate that in magistrates' courts, 39 per cent of

[257] Howard League, *Revealed: The wasted millions spent on needless remand* (see note 63 above).
[258] A. Sanders, R. Young, M. Burton, *Criminal Justice* (Oxford University Press, Oxford 2011), p. 532.
[259] In addition, 18% were committed for sentence.
[260] See Ministry of Justice, Court Proceedings Tables 2014, Tables Q3.2 and Q3a. The figures for defendants remanded in custody include those who were committed to the Crown Court for sentence, but not those who were committed for trial.

those remanded in custody were either acquitted (or not proceeded against) or received a non-custodial sentence,[261] and the equivalent figure for the Crown Court is 19 per cent.

2. Case outcomes for defendants kept in pre-trial detention

2.1 Whether the defendant was convicted or acquitted

The data regarding case outcomes is derived from the case-files examined. We were not able to trace the case outcomes of the PTD hearings that we observed. Table 37 shows the case outcomes in the 47 cases in which the defendant was kept in pre-trial detention at some stage prior to final disposal of the case.

Table 37
Outcomes of cases where defendant remanded in custody at some stage
Case-file data

Case outcome	**Number**	**%**
Convicted/pleaded guilty	36[262]	76.60
Acquitted	4	8.51
Case dropped/no evidence offered	7	14.89
Total	47	100.00

Table 37 shows that in just over three-quarters of cases where the defendant had been kept in pre-trial detention, they either pleaded guilty or were found guilty following a trial. Direct comparison with national statistics is not possible because the case-file data comprised a mixture of magistrates' court and Crown Court cases, but the two sets of data are broadly similar.

The four cases in which the defendant was acquitted involved allegations of handling stolen property, murder, criminal damage and putting a person in fear of racially aggravated violence. In the first two cases, the defendant was remanded in custody at the first hearing, and in the latter two cases they were remanded in custody following contact with the complainant in breach of bail conditions, and failure to surrender to custody, respectively.

In seven cases the prosecution was not proceeded with or no evidence was offered. In six of these cases the defendant was accused of assault by beating or (in one case) common assault, and in the seventh case they were accused of assault occasioning actual bodily harm. In three of the seven cases the complainant failed to attend court to give evidence, in two cases the witness was recorded as having 'changed their story' and/or the prosecutor decided that the witness was unreliable, and in two cases no reason was recorded. Most of these cases involved assault allegedly committed in the context of domestic violence, and they indicate particular problems with this category of case. The alleged offence, in itself, is not serious (all of them apart from the case of actual bodily harm, are summary-only offences), but the context indicates a need for the complainant to be protected. The prosecutors, and judges and magistrates, interviewed were aware of the need to protect victims of domestic violence, but also the difficulties of doing so effectively. Whilst the prosecutors said that they were willing to consider applying for bail with appropriate conditions in such cases, they looked in particular at any history of violence as disclosed by the list of previous convictions, or by the police report, and at whether any address offered by the defendant was sufficiently far away from the complainant as to afford some degree of protection for them. It is relevant to note, in

[261] This excludes those defendants who were committed for sentence, in respect of whom the sentence is unknown.

[262] In one case the accused was remanded in custody until a hospital place was available, and then given an absolute discharge.

this context, that whilst in three of the cases the defendant had been remanded in custody at the first hearing, in the other four cases the defendant had initially been granted conditional bail which they subsequently breached, resulting in a remand in custody.

2.2 Whether convicted defendants received a custodial sentence

For those defendants who were remanded in custody at some stage of the process, and who either pleaded guilty or were convicted following a trial, questions arise as to whether they received a custodial sentence, and the length of any custodial sentence compared to the length of time spent in pre-trial detention. Table 38 shows the sentence given to the 36 defendants who were remanded in custody and who were convicted or pleaded guilty.

Table 38
Sentence where defendant convicted/pleaded guilty and had been remanded in custody at some stage
Case-file review data

Sentence	**Number**	**%**
Custodial sentence	21	58.33
Non-custodial sentence	11[263]	30.55
Custodial and non-custodial sentence	3[264]	8.33
Not recorded	1	2.78
Total	36	100.00

Table 38 shows that in almost one third of cases in which the offender had been remanded in custody and was sentenced, the penalty imposed was a non-custodial sentence, and that in about two-thirds of cases a custodial sentence was imposed. This is similar to the national picture for magistrates' courts, but the proportion of those who received a non-custodial sentence is significantly less than in the national Crown Court statistics, which is likely to be explained, in part, by the case mix within the case-file sample.

2.3 Whether the period in pre-trial detention exceeds the length of the sentence

For those defendants who had been remanded in pre-trial detention and received a custodial sentence, an important question is whether or not the period spent in pre-trial detention exceeded the length of the sentence, information that is not available in the published national statistics. Of those offenders who had been remanded in custody at some stage of the process and who received a custodial sentence, none was in pre-trial detention for longer than the sentence imposed. This includes the three offenders who were given a suspended sentence although, of course, that sentence may never have been activated. If the early release provisions are taken into account,[265] one of the offenders was in pre-trial detention for longer than the time that would have been spent in prison under the sentence. For the remainder, since time spent on remand is deemed to be time served under the sentence (see section 3.1

[263] In 1 case the defendant was found to be unfit to plead, and in 1 case the defendant was placed in hospital and given an absolute discharge.
[264] In 3 cases the defendant was given a suspended prison sentence and a non-custodial sentence (e.g., a requirement to do unpaid work) or other order (e.g., a restraint order).
[265] The Criminal Justice Act 2003 broadly provides that a person given a determinate sentence of 12 months or more is released on licence at the half-way point, and if given a sentence of less than 12 months, is released unconditionally at the half-way point.

below), following sentence they would have gone to prison for the period that equates to the difference between the time spent in pre-trial detention and half of the sentence imposed.[266]

3. Whether time in pre-trial detention reduces the length of sentence or time served

The relationship between pre-trial detention and sentence length raises two distinct issues. The first is whether the fact that a defendant has been in pre-trial detention affects the decision regarding sentence, either in terms of whether a custodial sentence is imposed or, if it is, the length of that sentence. The second issue, which is more straightforward, is whether time spent in pre-trial detention is taken into account in terms of the time served under the sentence; and this is dealt with first.

3.1 Whether time spent in pre-trial detention is treated as time served under a sentence

It was not within the scope of the research to examine whether time spent in pre-trial detention is, in practice, treated as time served under a custodial sentence. However, a summary of the relevant statutory provisions is set out here because whilst some provisions regarding sentence deemed to have been served should apply automatically, others require action by the sentencing judge or magistrates. An explanation of the provisions will also assist with comparisons across jurisdictions.

The general rule is that where a custodial sentence is imposed on an offender who has been remanded in custody in connection with the offence for which they are sentenced, or a related offence, the number of days for which the offender was remanded in custody counts as time served as part of the sentence.[267] This should be applied automatically, and it is not necessary for the sentencing court to give any direction. Where a suspended sentence is imposed, credit for time spent in pre-trial detention is applied if and when the suspended sentence is activated, and not when it is imposed.[268] The provisions do not apply to time spent in police detention, although the sentencing court may take any such period into account when determining sentence.[269] The provisions also do not extend to time spent by an offender remanded on bail. However, there is provision for time spent subject to a 'qualifying curfew condition' accompanied by electronic monitoring to be counted as time served,[270] and it has been held that it may be appropriate for a sentencing court to take into account the period spent in a bail hostel if they were subject to restrictive conditions.[271]

Even if the automatic 'time-served' provisions apply, a sentencing court may take the period spent in pre-trial detention into account in determining the sentence so that, where appropriate, the offender is released.[272] For example, if the appropriate sentence is six months' imprisonment and the offender has spent three months in pre-trial detention, a sentence of six months would result in the offender's immediate release. However, if a community penalty is the appropriate sentence, the result may be that the offender in this

[266] For example, if the sentence was 6 months' imprisonment, and they had spent two months in pre-trial detention, following sentence they would go to prison for one month.

[267] Criminal Justice Act 2003, s. 240ZA, which came into force in respect of offenders sentenced on or after 3 December 2012. The section applies to sentences of imprisonment, detention in a young offender institution, detention under the Powers of Criminal Courts (Sentencing) Act 2000, s. 91, and extended sentences of imprisonment or detention. It does not apply to detention and training orders, so that a court should make an appropriate direction when imposing such a sentence.

[268] Criminal Justice Act 2003, s. 240ZA(7).

[269] *R v Al Daour* [2011] EWCA Crim 2392.

[270] Criminal Justice Act 2003, s. 240A. A 'qualifying curfew condition' is one that requires a defendant to remain at one or more specified places for a total of not less than nine hours on any given day. The amount of credit to be given is to be calculated by reference to s. 240A(3). Where it applies, the amount of credit give should be announced in open court by the judge of magistrate.

[271] *R v Watson* [2000] 2 Cr App R (S) 301.

[272] See *R v Barrett* [2010] 2 Cr App R (S) 551, and *R v Maugham* [2011] 2 Cr App R (S) 493.

example has served the equivalent of a six month sentence but is also punished by means of the community penalty.

Since there are a number of circumstances where time spent in pre-trial detention is not automatically deducted from the sentence served, but may nevertheless be relevant to the sentencing decision, accurate information about time spent in detention (or, where appropriate, on bail) should be made available at the time of sentencing. We did not examine this in the fieldwork for this research.

3.2 The impact of pre-trial detention on sentence

In view of the number of variables relevant to the type of sentence imposed and the length of any custodial sentence imposed, and the limited number of cases examined in the case-file sample, it is not possible to analyse whether the fact that a defendant was remanded in custody affected the sentence imposed. However, in the interviews with judges and magistrates we sought to discover whether the fact that an offender has been in pre-trial detention affected their sentencing decisions, although their responses were relatively brief in this regard.

As might be expected, the judges and magistrates suggested that the fact that an offender has been in pre-trial detention may affect their sentencing decisions, but it was evident that this could work in different ways, and that sometimes it has no impact. One judge said that it may lead him to reduce the custodial sentence that he would otherwise impose:

> 'Yes, there are a number of cases when a defendant is approaching time served [where] I will make a significant reduction [in] sentence [so] that they are soon released. So if a defendant has served, for instance, the equivalent of two years [in pre-trial detention], and the sentence would be two and a half years' time served[273]… I'll [often] reduce the sentence yet further… [so]… I can bring forward the release date.' (Judicial officer 04)

None of the other judges and magistrates said that they would actually reduce a custodial sentence on account of time spent in pre-trial detention. The examples of pre-trial detention having an impact on sentence given by two of the other judges and magistrates interviewed involved imposing a community sentence in circumstances where they may otherwise have imposed a custodial sentence. This approach, according to one judge:

> 'could work to the defendant's benefit… say if he's been inside for two weeks waiting for a pre-sentence report and the offence isn't that serious, I may decide, well, instead of giving him a six week sentence or an eight week sentence, in fact I'll let him out now, and I'll give him this community order and see if he can comply.' (Judicial officer 03)

The fact of pre-trial detention may also affect the terms of the community penalty imposed. Two of those interviewed indicated that they were mindful of the need to take into account both the punitive and rehabilitative elements of any penalty imposed. Thus they might impose a community penalty, but reduce the punitive element that otherwise might be included in the sentence (such as a curfew or unpaid work requirement). However, as one magistrate indicated, the fact that an offender has been in pre-trial detention may not affect the sentence if the purpose of that sentence is rehabilitative rather than punitive:

[273] That is, after applying the early release provisions.

> 'I suppose [that] if we were looking at rehabilitation rather than any form of punishment… it [pre-trial detention] wouldn't really count because if we were pretty sure that what we really wanted was to get this person off drugs, and we felt that a drug rehabilitation requirement under a community order would be the best outcome, then we wouldn't be really looking at [the] remand in custody.' (Judicial officer 05)

It is apparent that the relationship between pre-trial detention and sentence is complex. The judges and magistrates interviewed were aware of the provisions concerning the deeming of time spent in pre-trial detention as time served under a sentence, and were also aware of the potential impact of the early release provisions. Pre-trial detention may result in a shorter sentence being imposed in some cases, and may lead to a community penalty being imposed in circumstances where a custodial sentence may otherwise have been considered. However, depending on the circumstances, pre-trial detention may, or may not, affect the terms of any community penalty imposed.

4. Conclusions

In this research we were only able to use the case-file data in order to examine the case outcomes for those defendants who had been remanded in custody at some stage of their case, and the number of such cases was relatively small. However, the findings raise some questions about the use of pre-trial detention.

Of those defendants who were remanded in custody at some stage of their case as it proceeded through the courts, nearly one-quarter were acquitted or the case against them was not proceeded with. Of the remainder, just under one-third received a non-custodial sentence. Thus nearly half[274] of those who were kept in pre-trial detention were not subsequently sent to prison.[275] Of those who did receive a custodial sentence, nearly all received a sentence that was effectively longer than the period spent in pre-trial detention.

This suggests that in making PTD decisions close attention should be paid to (a) the strength and veracity of the prosecution evidence, and (b) the likely sentence.

In the PTD hearings observed, very little attention was paid to the strength of the evidence (particularly at the initial PTD hearings) and, indeed, since evidence was not adduced, there was little opportunity for it to be examined by the courts when making PTD decisions. Changing the approach to consideration of the strength of the evidence would require courts to engage in a closer examination of the evidence, including by examining witnesses, and the courts have firmly turned their face against such an approach; although there was some evidence from our observations that more account was taken of the strength of the evidence at review hearings in the Crown Court, when normally much more was known about the evidence. We saw that of the cases that were dropped or where no evidence was offered, in several of them the complainant either failed or refused to give evidence or 'changed their story'. This was a cause for much frustration on the part of both prosecutors and judges/magistrates, but it may be concluded that the decision to withhold bail was not necessarily inappropriate, especially in those cases where a remand in custody followed a grant of bail which was subsequently breached. This is an area which would benefit from

[274] 22 out of the 47 who had been remanded in custody (i.e., 11 acquitted/case dropped, plus 11 who received a non-custodial sentence, excluding those who received a suspended sentence), which equates to 46.80%.

[275] This is a greater percentage than in the equivalent national statistics, but the case-file sample includes a mix of magistrates' and Crown Court disposals, and the figures for those who were remanded in custody and given a custodial sentence in magistrates' courts, referred to in section 1, do not include those who were committed to the Crown Court for sentence.

more research, with a much larger sample, which could help establish whether it is mostly domestic violence cases where this issue arises.

Perhaps more fruitful, in terms of considering whether the use of pre-trial detention might be reduced, is an examination of whether courts take sufficient account of the likely sentence. The likely sentence should be more predictable than the strength or veracity of the evidence at the point when the PTD determination is made, since much of the relevant information should or could be available to the court. This is not straightforward since, as we have seen, the fact that a defendant has been in pre-trial detention may affect the decision as to whether they should be given a non-custodial sentence. Nevertheless, it is an issue that could be usefully explored.

Chapter IX Conclusions and recommendations

1. Introduction

The primary purpose of this research project was to examine the process by which decisions are made regarding pre-trial detention in criminal proceedings and to seek to identify good practices. The work in England and Wales was part of a wider project involving similar research in nine other EU jurisdictions. The findings should assist in understanding why the various jurisdictions make such different use of pre-trial detention, whether forms of legal regulation and practices can be identified which may assist in reducing the use of pre-trial detention in those countries that currently use it excessively, and contribute to discussions within the EU regarding whether and how to establish minimum standards that would apply to all Member States. It is also hoped that they will contribute to the improvement of PTD decision-making in England and Wales.

England and Wales has one of the lowest pre-trial detention populations in the EU, when measured by the proportion of the prison population who are in pre-trial detention. However, this jurisdiction has one of the highest per capita prison populations. Not only does this mean that the absolute number of people in pre-trial detention is relatively high, but the relatively high use of custodial penalties has an impact on other relevant measures such as those based on the proportion of defendants held in pre-trial detention who subsequently receive a custodial sentence, and those concerning the time spent in pre-trial detention compared to the length of any custodial sentence imposed.

Broadly, the regulatory framework governing PTD, and PTD decision-making, in England and Wales complies with the standards set by the ECHR and the jurisprudence of the ECtHR. The Law Commission, in its report published in 2001, concluded that 'there are no provisions which *cannot* be interpreted and applied compatibly' (original emphasis) with the ECHR, although it did propose that the BA 1976 be amended so that it is clear that the fact that a defendant was on bail at the time of the alleged offence giving rise to a PTD hearing[276] is not an independent ground for refusing bail. It also expressed concern about the reasons given by courts when withholding bail, suggesting that they 'should be closely related to the individual circumstances pertaining to the defendant, and be capable of supporting the conclusion of the court'.[277]

This provides an important reminder that compliance with human rights standards is not simply a question of whether the law accords with those standards, but also upon how that law is put into practice. Apart from the practitioner survey, the fieldwork for this project was conducted in one region of the jurisdiction, and the sample sizes were relatively small. We cannot know, therefore, the extent to which our findings can be generalised, although some – such as bail decisions relying heavily on information provided by the police, that prosecution applications are normally successful, that little time is spent on PTD hearings, and that the courts' reasoning for withholding bail is often formalistic – are similar to those found in previous research. However, the research does provide insights into current practice and perceptions regarding PTD decision-making, enables certain conclusions to be drawn, and provides a basis for recommendations designed to improve both law and practice.

Bearing in mind ECtHR standards regarding the regulation of PTD and PTD decision-making, the research found many positive attributes which provide a significant degree of assurance that most of those standards are met most of the time. Defendants who are charged with a criminal offence and kept in custody by the police are produced in court promptly – normally within 24 hours of being charged – and are normally produced in person (although

[276] BA 1976, sch. 1, part I, para. 2A.
[277] Law Commission, *Bail and the Human Rights Act 1998: Executive Summary* (see note 51 above), p. 2.

defence lawyers expressed some concern about video-link hearings, and defendants are not routinely produced for PTD reviews in the Crown Court). Defendants are almost always represented by a lawyer at PTD hearings, with a duty law scheme in place to ensure representation for defendants without a lawyer, and those lawyers do have the opportunity to address the court about the decision to be made. Prosecutors interviewed strongly indicated that the BA 1976 is uppermost in their mind in determining whether to apply for a remand in custody or on bail, and that systems are in place designed to ensure that in those cases where the defendant is remanded in custody, custody time-limits are complied with. Judges and magistrates stressed the importance of the presumption of innocence and the prima facie right to bail, and most defence lawyers thought that their PTD decisions are mostly fair. Extensive use is made of alternative measures (i.e., bail), and their use is not confined to cases where the defendant is accused of a minor offence. Where conditions are attached to bail, they are normally achievable,[278] and very rarely involve the deposit or forfeiture of money or other valuable commodity. If bail is withheld, a defendant has up to two further opportunities to apply for bail without having to demonstrate a change of circumstances, and if released on conditional bail, has an unfettered right to apply to vary or remove any condition attached to bail. The regulations on custody time limits appear, on the whole, to provide an effective mechanism for ensuring that the majority of defendants who are remanded in custody are not detained for excessive periods of time.

However, evidence from the research raises a range of concerns about both the law governing PTD and the way that it is put into practice, suggesting that whilst England and Wales is largely compliant, there are some areas of practice which may routinely breach ECHR standards. We set out below the major concerns arising from the research findings, together with appropriate recommendations.

2. The regulation of pre-trial detention

The Bail Act 1976 has been amended on numerous occasions since it was enacted, and provisions regarding pre-trial detention are also contained in other statutes.[279] The result is a complex regulatory framework that is applied not only by professional lawyers and judges, but also by lay magistrates, often in the context of severe time-pressures. In relation to those grounds for withholding bail that are relied upon most often, the BA 1976 distinguishes between grounds for withholding bail, and factors that may be taken into account in considering whether those grounds are satisfied. However, we observed hearings where it appeared that lay magistrates, in particular, relied upon factors rather than grounds in making and substantiating their decision, and this reflected the perceptions of many of the defence lawyers who responded to the practitioner survey. The Law Commission, it its report on bail published in 2001, provided guidance designed to assist bail decision-takers in applying the Bail Act in a way that is in compliance with ECHR standards.[280] However, the judges and magistrates that we interviewed indicated that they had received little or no training on the application of the ECHR to PTD decision-making, and none referred to the Law Commission guidance. The prosecutors interviewed also indicated that apart from initial training provided when the Human Rights Act 1998 was enacted, they had not received training on the application of the ECHR to PTD. Furthermore, the recommendation of the Law Commission that the provision inserted into the Bail Act 1976 enabling bail to be withheld from a defendant who was on bail at the time of the alleged offence be amended to make it clear that

[278] In the sense that they do not require the defendant to do something which is difficult for them to do before being released on bail.

[279] In particular, Criminal Justice and Public Order Act 1994, s. 25, and Coroners and Justice Act 2009, s. 115.

[280] Law Commission, *Bail and the Human Rights Act 1998* (see note 51 above), Part XIII 'Suggested guidance for bail decision-takers'.

it is not an independent ground for withholding bail, has not been implemented. Neither have the relevant provisions of the EU Directive on the right to interpretation and translation.

Recommendations

- The law on bail should be simplified and codified so that it is contained in one statute, and reviewed to ensure that it complies with all relevant ECHR standards.
- The law on bail should be amended to make clear that the fact that a defendant was on bail at the relevant time is not an independent ground for withholding bail.
- Judges, magistrates and prosecutors should receive regular training on the application of the ECHR and ECtHR case-law to PTD, and which should incorporate the guidance provided by the Law Commission (suitably updated).
- Legislation and regulations should be introduced to ensure compliance with the requirements of the EU Directive on the right to interpretation and translation.

3. Information available to the defence

Whilst we were informed by the prosecutors interviewed that most of the information that they were supplied with by the police for the purpose of PTD hearings was also made available to defence lawyers at the beginning of the court day, many defence lawyers who responded to the practitioner survey indicated that whether such information is provided, the level of information provided, and the time that it is provided, varies significantly both between different courts, and depending upon whether the hearing is on a weekday or on a Saturday. Furthermore, many defence lawyers, and some prosecutors, indicated that the case summaries provided by the police vary greatly in quality, and often do not provide a fair and complete summary of the available information. It appears that the disclosure of information and materials to the defence for the purposes of PTD hearings is not regulated by statute, the CrimPR, or by the Attorney General's guidelines on disclosure. This suggests non-compliance with EU Directive on the right to information,[281] which requires Member States to ensure that case documents which are essential to challenging effectively the lawfulness of arrest or detention are made available to the accused and their lawyer.[282] The lack of routine access by the defence to information relevant to a PTD hearing is particularly important given the fact that, whilst strength of the evidence is a relevant factor under the Bail Act 1976, we found that there was little opportunity in most PTD hearings for the strength of the evidence to be seriously tested.[283] Providing access to relevant evidence by the defence is a pre-condition for effective consideration of the strength of the evidence

Recommendations

- The Bail Act 1976 and the CrimPR should be amended to give effect to the relevant provisions of the EU Directive on the right to information, and to provide a clear obligation on the police or CPS to provide timely access for the defence to all relevant case materials.
- Training for police officers on preparing case summaries should be introduced and/or improved, in order to ensure that they provide a full and fair account of the evidence and other relevant factors.

[281] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[282] Art. 7(1). In addition, Art. 6(1) requires Member States to ensure that accused persons are provided with information about the criminal act they are accused of in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence; which must include the right to bail.
[283] See Chapter VIII.

- Prosecutors and defence lawyers should be under a professional duty to consider the strength of the evidence, in particular where the initial decision of the court is to remand a defendant in custody.

4. The prima facie right to bail in practice

Whilst both judges and magistrates, and prosecutors, were fully aware of the significance of the presumption of innocence and the prima facie right to bail, the evidence suggests two particular constraining factors. First, PTD hearings are normally very short, and we found in our observations of PTD hearings that more time was often spent on the management of a case (for example, taking a plea, determining the venue, finding a date for an adjourned hearing) than on the decision regarding PTD. In the city courts observed, the high case-loads of prosecutors was mirrored by the large number of cases dealt with by the courts. This inevitably puts pressure on prosecutors, defence lawyers and PTD decision-makers. One particular consequence of this concerns consideration of the likely sentence in the event of conviction, which is significant given that we found that almost one-third of defendants who had been in pre-trial detention and who were sentenced were given a non-custodial sentence.[284] Giving adequate consideration to the likely sentence requires careful examination of the factors that are relevant to sentence and this, of course, takes time.

Second, the evidence suggests that in some circumstances the burden of persuasion regarding whether bail should be granted or withheld effectively shifts from the prosecution to the defendant. Many of the defence lawyers who responded to the practitioner survey complained that, particularly in cases where their clients were accused of more serious offences, the burden is on them to persuade a court to grant bail. Furthermore, it was suggested that this is particularly so (irrespective of case seriousness) on a second application for bail, where the defendant was remanded in custody at the first PTD hearing. It appears that there are good reasons for such concerns since some of the magistrates' court judges/magistrates interviewed indicated that they would follow the previous PTD decision unless satisfied that there were good reasons for not doing so.[285] Therefore, whilst in principle the prima facie right to bail indicates that the burden of establishing that an exception applies falls on the prosecution, it appears that this may not be the case in practice, at least in second applications in magistrates' courts. This suggests that both domestic law and ECHR standards are regularly breached in practice.

Recommendations

- More time and resources should be made available in magistrates' courts to remove the time pressure which inhibits full consideration of the relevant factors at PTD hearings.
- The Bail Act 1976 should be amended to make it clear beyond doubt that the burden of establishing an exception to the right to bail falls on the prosecution, that this applies at both the first and the second PTD hearing in magistrates' courts, and at review hearings. Review hearings should be conducted on a regular basis, and decisions should be made having regard to all relevant factors and circumstances.
- The training of judges and magistrates should stress the implications of the prima facie right to bail, especially when dealing with a second application, and the importance of considering the likely sentence before making a PTD decision.

[284] See Chapter VIII, section 2.2.
[285] See Chapter VII, section 4.1.

5. Alternative measures

Whilst the domestic law on conditional bail is compliant with ECHR standards, the extensive discretion given to judges and magistrates to attach conditions to bail risks breach of a defendant's rights under the ECHR, Articles 8, 10 and 11 in particular cases. Whilst we did not come across any such case in our PTD hearing observations or examination of case files, the fact that prosecutors, and judges and magistrates, receive little if any relevant training means that they are unlikely to recognise a potential breach. The major problems with alternative measures that were identified in the research related primarily to: the inconsistent, and inadequate, provision of bail information and similar schemes, both across different courts and in the same courts depending on the particular day of the court hearing; a lack of sufficient bail hostel places; and a lack of routine monitoring of compliance with certain bail conditions, and timely reporting of breaches. The use of conditional bail as an alternative to custodial remand requires confidence, on the part of prosecutors and the courts, in the efficacy of such conditions and, therefore, consideration needs to be given to how this may be achieved.

Cases involving an allegation of domestic violence are particularly problematic with regard to pre-trial detention and the principle of proportionality. Such cases in our research samples frequently involved an allegation of a summary-only offence, and whilst in some cases the defendant was remanded in custody at the first PTD hearing, in others a custodial remand followed one or more breaches of bail. Most, if not all, of those cases where a defendant had been remanded in custody, but where the case was subsequently dropped or discontinued, involved an allegation of domestic violence. This suggests that whilst a remand in custody, or bail conditions, may provide some degree of protection for the complainant, this is temporary and in some cases only of short duration. A system of domestic violence protection notices (DVPN) and orders (DVPO) was introduced by the Crime and Security Act 2010. A DVPN can be issued by the police in order to provide immediate protection for the complainant, and the alleged perpetrator can be arrested if they breach it. A magistrates' court can issue a DVPO, and may impose conditions on the alleged perpetrator for up to 28 days.[286] Examination of PTD in relation to domestic violence was not within the scope of the research, but it may be that in those cases where the complainant is reluctant to pursue, or co-operate with, criminal proceedings, using the DVPN procedure may be more appropriate.

Recommendations

- More resources should be devoted to the consistent provision of bail information/support schemes so that they are routinely available in most, if not all, magistrates' courts.
- More resources should be made available in order to ensure that sufficient bail hostel places are available, particularly for female defendants, and in appropriate locations.
- Mechanisms for monitoring, and enforcing, bail conditions should be reviewed, with a view to improving confidence in them as an alternative to custody.
- Consideration should be given to providing training for the police and prosecutors, and clear guidance, on the DVPN procedures and their relationship to criminal proceedings, so that appropriate and consistent decisions can be taken as to which procedure to pursue in a particular case.

[286] For further information see the Home Office publication *Domestic Violence Protection Orders*, available at https://www.gov.uk/government/publications/domestic-violence-protection-orders.

6. Reasoning for pre-trial detention decisions

In its report on bail and human rights, the Law Commission expressed concern about the level of reasoning provided by judges and magistrates when making PTD decisions, and particularly when withholding bail.[287] ECtHR jurisprudence provides that reasoning for decisions to remand a person in custody must be 'concrete' and not 'abstract', and must be consistent with, and sustained by, the facts of the case. The CrimPR require a court to announce the reasons for is decision 'in terms that the defendant can understand (with help, if necessary)',[288] but do not explicitly require the court to explain the reasons by reference to the facts of the case. In the majority of PTD hearings that we observed in which the court withheld bail, the announcement of the decision, and the reasons for it, was brief and formalistic. Typically, the defendant would merely be told, for example, that they were being 'remanded in custody due to fear of further offences', without any explanation of why the court had concluded this from the information supplied to it.[289] In this respect, ECHR standards, and arguably the requirements of the CrimPR, were routinely breached. The failure to provide adequate reasoning is important, not only because this is a legal requirement. A failure to provide adequate reasoning makes it more difficult for the defence to address the concerns of the court in a subsequent application, which in turn is important given that, as explained earlier, courts often feel bound by a previous PTD decision. Moreover, a significant proportion of defence lawyers believe that courts favour the prosecution over them; a perception that is likely to be encouraged if courts do not explain the basis of a decision to remand a client in custody, and do not engage with the representations made by the lawyer. The failure of courts to provide adequate reasoning for PTD decisions is a long-standing problem, but the fact that in one-third of cases where PTD was ordered the court did provide specific reasoning demonstrates that it is not inevitable. What is significant, however, is that in most of those cases where specific reasoning was provided, the court was presided over by a judge and not by lay magistrates. This suggests that lay magistrates (still) require assistance, and training, so that the provision of reasoned decisions becomes routine.

Recommendations

- The CrimPR should be amended so that they make it absolutely clear that the court must not only announce its decision in terms that the defendant can understand, but must explain its decision by reference to the facts of the case, and the representations made by the prosecutor and defence.
- Consideration should be given to introducing a provision giving the defendant or his or her lawyer the right to apply to the court for an explanation of what facts were taken into account in respect of the grounds relied upon to withhold bail
- Consideration should be given to how the training of magistrates may be improved so that they are more able to provide substantiated reasons for their PTD decisions.

[287] Law Commission, *Bail and the Human Rights Act 1998* (see note 51 above), Part X.
[288] r. 19.2(5).
[289] See Chapter V, section 5.3. We were not able to read the notice of the decision given to defendants, but since they were written by the court legal adviser on the basis of the information announced in court, it is unlikely that they would have included more information.