Consultation on the 2011 Bail Guidance

Joint submission from the Immigration Law Practitioners' Association and Bail for Immigration Detainees

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 950 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government and other consultative and advisory groups including the President's Stakeholder Meeting and the Administrative Court User Group.

Bail for Immigration Detainees (BID) is an independent charity established in 1999 to improve access to bail for those held under Immigration Act powers. BID provides immigration detainees with free legal representation, advice, and training to make their own bail applications. With the assistance of barristers acting pro bono, BID prepares and presents bail applications in the Immigration and Asylum Chamber of the First-tier and Upper Tribunals for the most vulnerable detainees. BID provides telephone support to assist detainees in representing themselves at bail hearings, and regularly runs bail workshops in six immigration removal centres. BID works more generally to raise awareness of immigration detention through its research and publications such as A nice judge on a good day: immigration bail and the right to liberty (July 2010), and works through advocacy with civil servants via a number of Home Office-convened stakeholder groups, and with politicians. BID is represented at the President's Stakeholder Meeting.

This note is in response to the Tribunal's invitation to provide further comments on the 2011 bail guidance prompted by the responses provided by other respondents, the National Offender Management Service, Law Centre (Northern Ireland), and Close Campsfield's Bail Observation Project.

<u>Submission from the National Offender Management Service</u>

In the 'Background' section, page 1 of the National Offender Management Service submission:

The National Offender Management Service submission describes the specifically-devised risk report, *Annex A/NOMS Service 1*, provided for the use of the UK Border Agency, and which is then presented by Home Office Presenting Officers on behalf of National Offender Management Service to immigration judges and appellants' representatives at bail hearings. Over and above this current agreement between National Offender Management Service and UK Border Agency on information sharing around risk of re-offending in the community posed by Foreign National ex-offenders, all documents relating to assessments of risk of re-offending, in addition to the National Offender Management Service Annex A report (for example criminal judges' pre-sentencing remarks) which

have been taken into account by the UK Border Agency in its decision to maintain detention and oppose bail, should be disclosed to all parties to a bail hearing.

It could be made clearer within the bail guidance that the UK Border Agency should disclose all documents relating to assessments of risk of reoffending, whenever this is raised as an issue for opposing bail, whether or not the person remains within their Licence period. This point was made by BID/ILPA in paragraphs 23 and 24 of our original submission. Even where Licence conditions no longer apply, Offender Managers may provide UK Border Agency Criminal Casework Directorate caseowners with information relating to risk of reoffending, on request.

In the section 'Specific comments on Bail Guidance for Immigration Judges, by section'

Point 11. We agree with the emphasis placed by National Offender Management Service on risk factors being subject to change over time, and that immigration judges should be aware of the date when an Annex A/NOMS Service1 report was prepared by an Offender Manager. This emphasis could be reflected in bail guidance in paragraph 10 or 11.

Point 12. We agree with the National Offender Management Service submission notes – echoing the bail guidance at para 12 which refers to "recent risk assessments by the Probation authorities and/or licence conditions" - that where the National Offender Management Service is required to provide additional information to UK Border Agency's Criminal Casework Division they may provide this.

On the matter of contradictory National Offender Management Service and UK Border Agency assessments of risk of re-offending and risk of harm on release in a case, which has not been addressed in this National Offender Management Service submission, we repeat paragraph 23 of our original submission:

> "While recognising that the criminal justice system and the UK Border Agency need to define and assess risk of harm for their own distinct purposes, we consider it essential that Probation Service evidence relating to ex-offenders be automatically made available to a bail applicant and their representative (if they have one) to enable release on immigration bail wherever possible and avoid costly and damaging long term detention. It is our experience that where Probation Service evidence is made available to the UK Border Agency, the Probation Service assessments of risk of reoffending and harm to individuals may directly contradict those separately produced and submitted to immigration tribunal bail hearings by the UK Border Agency. Any departure by the UK Border Agency from existing risk assessments made by a criminal justice professional should be explained and justified. The Secretary of State should evidence her own risk assessment, and include cogent reasons for departing from any assessment of risk carried out by the National Offender Management Service. Evidence relied upon by the UK Border Agency to make any form of risk assessment that is then relied on by the Secretary of State to oppose bail should be made available to the bail applicant and their legal representative (if they have one)".

NOMS have suggested that Offender Managers should not be required to attend First Tier Tribunal hearings. [We think that so long as additional written evidence provided by NOMS to UKBA and

subsequently relied upon is disclosed to all parties to a bail application, there is no advantage in requiring Offender Managers to attend a hearing.

Point 14. We welcome the clarification offered by the National Offender Management Service in this paragraph on their role in checking the suitability of bail addresses, namely that a bail address is generally only of interest to National Offender Management Service where a release Licence for a foreign national is still in place.

Given the lead time required for the National Offender Management Service to be able to check bail addresses, we question whether the 48-hour period allowed during which a bail in principle decision remains valid could be re-examined, and somewhat extended. Just as a decision on bail follows a discussion of all the issues, resulting in no further review of the conditions of bail until a variation of bail hearing, we can see no reason why all issues cannot be agreed or decided at an initial bail hearing, subject to the UK Border Agency providing further grounds for opposing a final grant of bail should such issues arise. A decision to grant bail in principle should still be possible where the only issue may be the suitability of an address.

In any case, whenever a bail in principle decision is made, it will always be open to the UK Border Agency to argue that there has subsequently been another change in circumstance requiring an immigration judge to review the decision to grant bail in principle.

In the section 'Bail in Principle'

Point 50. BID and ILPA do not share the National Offender Management Service view that there is no place for bail in principle to be granted where the Licence for a foreign national requires residence in Approved Premises following completion of the custodial element of their sentence. A decision to grant bail in principle will make it clear to the Secretary of State that once an immigration judge has decided release on bail is appropriate, a time-served foreign national is entitled to release from immigration detention in prison on the same terms as a foreign national held in an Immigration Removal Centre who is not subject to Licence conditions.

<u>Our comments on the submission from Law Centre (Northern Ireland)</u>

On page five of this submission a series of un-numbered recommendations are made. Taking each recommendation in turn:

> *"Specify that where an immigration judge 'infers' reasons for detention, then these reasons are shared with the applicant. The applicant should have the opportunity to consult with her legal representative perhaps by way of a short adjournment" (Law Centre (NI), 2011: 5)*

In circumstances where an immigration judge infers reasons for detention in the absence of a bail summary, then we agree with this recommendation. However, we refer to paragraph 11 in our original submission which states "We consider that [the judge inferring reasons for detention from

other available information where a bail summary is not available] is problematic. We consider that an immigration judge should not attempt to infer reasons for detention in the absence of a bail summary as this places the applicant at a severe disadvantage in presenting a bail application. In addition, to make a decision that detention should be maintained on what may be historical evidence would be unjust. A lack of reasons for detention renders such detention *prima facie* unlawful […]"

> *Where a bail summary is produced at the hearing itself, the judge should consider granting a short adjournment to enable the applicant to consult with their legal representative" (Law Centre (NI), 2011: 5)*

We agree with this recommendation. However, we note that a significant minority of bail applications are from unrepresented applicants, and suggest that in such a circumstance the immigration judge could offer the applicant an additional option to withdraw their application for relisting at the earliest opportunity. This would allow the applicant to prepare their own case having had sight of the bail summary, and translate it where required. Many applicants will be otherwise unaware of this option, and may have a refusal of release on bail on their record as a result.

> *"Where a bail summary is produced very late, the applicant should not be penalised for failure to provide evidence to challenge the reasons for detention" (Law Centre (NI), 2011: 5)*

We repeat our suggestion that in such a circumstance the judge could offer the applicant the option to withdraw their application for relisting at the earliest opportunity. This would allow the applicant to prepare their own case having had sight of the bail summary, and translate it where required. Many applicants will be otherwise unaware of this option, and may have refusal of release on bail on their record as a result.

> *"Include a section advising judges on how to proceed where no legal representative is present or where a Mackenzie friend is present" (Law Centre (NI), 2011: 5)*

We support the introduction of guidelines on the facilitation and approach to be taken by an immigration judge where an immigration detainee is either unrepresented or is being assisted by a Mackenzie Friend. We support the suggestion that the immigration judge could take the applicant through the bail summary during the hearing.

> *"Remove the current direction restricting consultation time to 10 minutes prior to a video-conferencing hearing" (Law Centre (NI), 2011: 5)*

We agree with this recommendation. The ten minute period allowed for consultation between bail applicant and representative via videolink is very restrictive. Where the consultation relies on the use of an interpreter, the ten minute period currently allowed is thereby effectively reduced..

We understand that the courts and the immigration removal centre management contractors are required to manage access to videolink time with limited resources. It would however seem sensible for the court, the UK Border Agency and immigration removal centres to investigate this further with a view to extending video conferencing facilities for detainees and their representatives outside or in parallel to the hearing slots. We suggest a more realistic timeframe be considered, particularly where there is late delivery of a bail summary.

Our comments on the submission from Close Campsfield's Bail Observation Project

Under their heading 'Bail summary', the Bail Observation Project recommends that failure by the Secretary of State to produce a bail summary in advance of the hearing should automatically result in the granting of bail. We refer to paragraph 11 of the original BID/ILPA submission,

> "[…] A lack of reasons for detention renders such detention *prima facie* unlawful […] Given the presumption of liberty and burden of proof on the Secretary of State, it should not be an option for the UK Border Agency to fail to provide a bail summary. The Asylum and Immigration Tribunal Procedure Rules 2005 presume release in the absence of a summary. The current wording of the guidance could be read as suggesting that provision of a bail summary by the UK Border Agency is optional"

As indicated above, we agree with the point, made under the heading 'Video link bail hearings', that the time allowed for consultation between the applicant and their legal representative is too short at ten minutes.

Under the heading 'Accountability, scrutiny, monitoring', we agree with the recommendations made here on records of proceedings, and the legibility of bail decisions, and refer to paragraphs 52 to 56 of our original submission.