ILPA COMMENTS ON TRIBUNAL BAIL NOTE AND FORMS

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ILPA is grateful for sight of the note and forms.

We make the following comments:

THE NOTE

Paragraphs 2, 21 and paragraph 22 of the note: management of bail

It is suggested at paragraph 2 that the Home Office will in future be responsible for the great majority of immigration bails. Insofar as this is because most persons on immigration bail will be persons who would previously have been on temporary admission, this is uncontroversial. Insofar as it suggests that where previously the Tribunal would have managed bail it will now pass this task to the Home Office, it is not. Paragraph 22 states that the Tribunal will expect 'in most cases' to transfer the continued administration of a bail case to the Home Office as it is empowered to do by Schedule 10, paragraph 6(3)). Reference is made to this in paragraph 21. We do not consider this to be compatible with the overriding objective under the Tribunal Procedure Rules[1] to deal with cases fairly and justly.

The persons concerned are persons whom the Home Office has determined should be deprived of their liberty and have been released because the Tribunal did not agree, and overruled the Home Office. The Schedule as presented to Parliament[2] contained a power of the Secretary of State to change an electronic monitoring, or a residence, condition of bail imposed by the First-tier Tribunal and you will be aware that , following opposition from *inter alia* the House of Lords' Select Committee on the Constitution[3] and the former Conservative Lord Chancellor Lord Mackay of Clashfern,[4] the Schedule in its current form[5] envisages the Secretary of State,

[1] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604 (L. 31).
[2] HC Bill 74 2015–2016, Schedule 5.
[3] HL Paper 75 of session 2015–2016.
[4] See Hansard, HL col 1787 (15 March 2016)
[5] See amendment 82, House of Lords' Report stage, Hansard HL col 1787 (15 March 2016).

and not the Tribunal, determining whether it is impracticable or a breach of human rights for an electronic tag to be imposed in an immigration case. This is discussed below. But it is the backdrop against which decisions to transfer the continued administration of a bail case to the Tribunal will be taken. It is a backdrop that sees the Hone Office as the primary decision-maker on conditions and management of bail, reducing the role of the Tribunal in providing independent oversight of restrictions on liberty.

The comment in paragraph 21 that where administration of bail has been transferred to the Home Office then in the event of a breach there will be no forfeiture hearing before the Tribunal provides a further argument against transferring the administration of bail to the Home Office. *Audi alteram partem* in the decision whether to order forfeiture as elsewhere. We consider that management of bail should only be transferred to the Home Office where the person gives their free and *informed* consent to this or where, after hearing argument, the Tribunal determines that there are reasons making it fairer and more just to transfer management of the bail conditions to the Home Office than to manage them itself. We envisage that such occasions will be rare indeed.

The power to impose a restriction on studies is new. During debates on the Immigration Bill, the Minister in the House of Lords stated: 'I emphasise that this is an existing power used only in the most exceptional circumstances pertaining to terrorism.'[6] This we envisage to mean something akin to the Academic Technology Approval Scheme set out in Part 15 of the Immigration Rules.

Paragraph 6 of the note 'auto-referral'

Some of those 'auto-referred' to the Tribunal will have no representation and little or no idea of how to plead for bail. But, given the presumption of temporary admission (henceforth immigration bail) set out in Chapter 55.1 of the *Home Office Enforcement Instructions and Guidance*, the Secretary of State is required to defend the decision to detain in such cases, rather than the person detained have to make the case for release.

It will be important that reasons for maintaining detention are provided in good time for these hearings, which may represent the only judicial oversight of the detention of persons too distressed or depressed to apply for bail, or otherwise incapable of doing so.

Paragraph 7 of the note onwards: consent of the Secretary of State when removal directions are in force.

Ministers did not suggest that the change from a reference to the Secretary of State's consent to release on bail to the Secretary of State's consent to release on bail represented a material change and the point was not questioned in debates. No attention is drawn to the change in the Explanatory Notes. This supports the understanding described in paragraph 9 that it was not intended to make any substantive change in the law. The change that has been made, which is described in the note as 'controversial' is inimical to the rule of law. We consider, however, that the Secretary of State's being able to bar release when a Tribunal judge would have granted it is also controversial and inimical to the rule of law.

[6] Lord Keen of Elie, Immigration Bill, House of Lords Committee, Hansard, col 1658 (1 Feb 2016).

We concur with the Tribunal that the approval of the government minister in the making of a judicial decision is a matter of concern and that it is wrong in principle that a judge should be asked to grant bail only with the consent of the Secretary of State. We consider that a judicial decision's having no effect when the Secretary of State considers it inappropriate that it should have effect is also a matter of concern and wrong in principle. We consider that it is similarly a matter of concern and wrong in principle that the final decision on whether an electronic tag be imposed rests with the Secretary of State and not with the Tribunal, as discussed below. We consider that it is similarly a matter of concern and wrong in principle that a person could, against their will, see the management of their bail conditions transferred to the Secretary of State, the party that wished to maintain their detention, as discussed above.

We concur that the effect of the procedure rules is that if an application for bail is made, the Tribunal is required to list and hear the application. We consider that the way in which the Tribunal proposes to deal with sub-paragraph 3(4), issuing a note setting out the reasons why, in the opinion of the tribunal judge, bail should be granted and then, if consent is withheld issuing a refusal decision, stating both the reasons why the judge would have granted bail and also that refusal is a mandatory requirement under paragraph 3(4), is the minimum that is required by the overriding objective of the procedure rules to dispose of proceedings justly and fairly.

Paragraph 10 provides:

> If the Secretary of State delays in responding to the note it should be assumed that consent is refused and this should be noted in the refusal decision.

We suggest that it is necessary to have fixed period, for example, two days, by which a response should be provided by the Secretary of State and that if no response is received within this period then it should be assumed that there is no objection to the grant of bail and the judge should go ahead and make the decision s/he wishes to make. This is consistent with reading the provision in a way that is most consistent with the right to liberty. The Secretary of State should not impede or delay the giving of effect to a judicial decision to release by omission, whether as a result of lack of resources or otherwise. We make this recommendation mindful of the frequency of delays or failure to respond by the Secretary of State, including in proceedings before the Tribunal.

The point made in paragraph 13 that where the Home Office does not produce removal directions before the Tribunal the Home Office will not be able to show that the person applying for bail is subject to directions for their removal within 14 days is applicable to cases in which the 'removal window' policy set out in the Enforcement Instructions and Guidance at Chapter 60.2.1. applies.

Considerations and conditions - Paragraph 17 of the note onwards

If the Tribunal considers that to impose such an electronic monitoring condition will breach a person's human rights then, despite the decision of the Secretary of State's representative to the contrary, the Tribunal or Commission will continue to be bound by s 6 of the Human Rights Act 1998. We are mindful of the provision in s 6(2) which states

> '**6 Acts of public authorities**
>
> …

(2) Subsection (1) does not apply to an act if—
  (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

We consider that, at the very least, if the Tribunal is of the view that electronic monitoring would breach Convention rights it should make a bail in principle decision and explain in its decision why electronic monitoring would breach the Convention rights. It should request that the Secretary of State respond within two working days. If the Secretary of State fails to do so, or responds that she disagrees, the Tribunal should grant bail and explain why in its view electronic monitoring would breach the detainee's Convention rights but that because of the statutory framework it has to impose electronic monitoring. This would provide the basis for the person to seek judicial review of the Secretary of State's implementation of electronic monitoring pursuant to the Tribunal's decision to grant bail.

The decision-making structure could operate to allow the Secretary of State to declare a tag 'impractical' in circumstances in which the Tribunal considers that it should be imposed, or to advance human rights arguments against its imposition that the Tribunal considers to be without merit. Then the judge or immigration judge will be unable to impose the condition they wished to impose and will have to decide whether to grant bail without a tag, or that, without the tag, they will not grant bail. We consider that not to grant bail in these circumstances would be incompatible with the presumption of liberty.

The note says that the bringing into force of the new provisions on electronic monitoring may be postponed until 2018. The provisions were enacted to give effect to what we suggest was an ill-considered commitment in the Conservative Party Manifesto and if it is not in the manifesto of the party which takes power in 2017 then we consider that it should be revisited in the light of careful consideration of the points made above.

Financial conditions paragraph 19 onwards

In Scotland at the moment a caution is normally deposited when bail is granted. Bail in Scotland is normally granted for a specific period and the cautioner's obligations end when that period does unless the cautioner consents to their continuing. The Tribunal can change or vary the amount of caution or the identity of the cautioner and deal with an application by the cautioner to be relieved of his/her obligation. Bail conditions are varied by the Tribunal by consent or following an oral hearing.

Schedule 10 paragraph 5(8) provides

> (8)In Scotland a sum payable under a financial condition may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

We understand that the Home Office would need to instruct Sheriff Officers to recover payment through diligence. This would involve the service of a Charge for Payment which, if not complied with, can be followed up with further enforcement such as an earnings arrestment where an employer is obliged to transfer the debtor's wage to the creditor, a bank arrestment where the bank is obliged to transfer any money over a certain level in the debtor's account to the creditor, or an attachment on any assets such as vehicles or at the debtor's business

premises. We understand that it is generally not worth carrying out an attachment at a domestic residence as most assets are exempt. The process is fairly expensive and dependent upon knowing the debtor's employer, bank and assets they hold. Unless this information is already held, it would be necessary to instruct investigations before even getting to enforcement.

We concur with comment in the note that

> *'it is questionable whether there is any significant purpose to be served by imposing a financial condition for a comparatively small sum when the cost and difficulty in enforcing payment is likely to be disproportionately high compared with the amount to be recovered."*

Practice Note 1 of 2012 makes reference to difficulties in enforcement in cross-border cases at Annex 7[7]

> *6. A further issue arises in relation to the enforcement of recognisances. It has been recognised for some time that where bail is granted in English form and the surety resides in Scotland, the recognisance cannot be enforced without great practical difficulty. The available route, which has never been tested, would appear to be to obtain on order for payment from a Magistrates' Court and register this in Scotland as a foreign judgment in order to do diligence upon it under Scots law.*
>
> *7. The appropriate way to avoid this problem is to require that where the proposed sureties reside in Scotland, caution is taken by the Tribunal in Scotland, even where bail in principle is granted by the Tribunal in England (which may also set the amount of caution). On the other hand, if the applicant is detained in Scotland but the sureties reside in England, there seems to be no reason why bail should not be granted in English form by the Tribunal in England. If bail is granted by the Tribunal in Scotland, caution will normally be required even though the sureties reside in England.*

We consider that this is problematic. It creates a jurisdictional problem and raises complicated questions around where forfeiture hearings would take place.

The Practice Note does not discuss difficulties of enforcing in Scotland more generally. It does provide

> "*In Scotland UKBA* [stet.] *has developed procedures to address this, for example by inviting the Tribunal to renew bail prior to its expiry, or by granting CIO bail for a short period of 3-4 weeks during the course of which the cautioner will have the caution returned by the Tribunal in order to be re-deposited as caution with UKBA.* "

Enforcement – paragraph 21 of the note

See comments on paragraph 2 above.

Transfer of bail to the Secretary of State – paragraph 22 onwards of the note

See comments on paragraph 2 above.

[7] *Bail guidance for judges presiding immigration and asylum hearings* https://www.judiciary.gov.uk/wp-content/uploads/2014/07/bail-guidance-immigration-judges.pdf

Paragraph 21 of the note

ILPA would welcome the opportunity to provide comments on the Tribunal's bail guidance in draft.

FORMS

We consider that a person who is unrepresented will struggle with these forms. They are wordy (for example in form B2 'Nationality or citizenship held' rather than 'Nationality') and length itself can present a barrier to a non-native speaker of English. While sentence structure is generally clear, some vocabulary, such as the word 'bailee' or phrases such as 'Reference for correspondence' 'your request to vary' 'additional grounds' and 'honour the conditions of bail' are difficult to understand. Questions such as 'Are directions for your removal from the United Kingdom currently in force' require a technical understanding.

These problems would be mitigated, although not removed, were the forms issued in a language a person detained understands and were they permitted to complete them in that language when unrepresented.

We are confused as to why the forms require to know whether a person's office is regulated by the OISC but not whether the person is a solicitor or working in an alternative business structure.

Form B1

This should contain a prompt for a party to make representations as to why he/she should not be subject to electronic monitoring. It should be stated that in a deportation case electronic monitoring will be mandatory unless the Secretary of State informs the Tribunal that it would breach the detainee's Convention rights and the person be invited to address why electronic monitoring would breach their Convention rights.

The question Do you consent to future management of bail being transferred to the Home Office? (we assume that the upper case 'T' on transferred is a typographical error) is unlikely to make any sense to the unrepresented detainee. This also arises on **form B2**. Contrast 'Are you applying for a Direction to transfer future management of bail to the Home Office in form B3, where the default setting is that management of bail remain with the tribunal. The default setting should be that administration of bail remain with the tribunal and therefore that an unrepresented person does not consent. If, as at present, the form asks for reasons for not consenting, it is necessary that the form contain an explanation of what the transfer will mean.

In the notice to the applicant after part L it is confusing, especially to a non-native speaker, to switch from 'your' meaning the person applying for bail and 'your' meaning the person applying for bail and their sureties ('financial condition supporters')

Form B2

In the notice to the applicant after part L it is confusing, especially to a non-native speaker, to switch from 'your' meaning the person applying for bail and 'your' meaning the person applying

for bail and their sureties ('financial condition supporters'). In section 6 of the form section 6A speaks of the person on bail in the third person, second 6B in the first person. This is confusing.

Form B3

What will happen when form B3 is used to apply to the Home Office to vary bail granted by the First-tier Tribunal? Will the form be sent to the Tribunal (as provided on it) and then forwarded to the Home Office for consideration?

In section 6 of the form section 6A speaks of the person on bail in the third person, second 6B in the first person. This is confusing.

ILPA

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