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Bail for Immigration Detainees: Submission to the Tribunal Procedures Committee Consultation on Changes to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

1. Bail for Immigration Detainees (BID) is an independent charity established in 1999 to challenge immigration detention in the UK. We assist detained asylum seekers and migrants in removal centres and prisons to secure release from detention through the provision of free legal advice, information and representation. Since 2014 we have also provided legal advice, information and representation to time-served foreign national prisoners facing deportation despite long-term residence in the UK and British partners and children, for whom there is no legal aid.

2. BID challenges the unnecessary use of immigration detention and seeks to improve access to justice for immigration detainees. We also seek an immediate end to the separation of families for immigration purposes and to the detention of vulnerable people.

3. BID believes that asylum seekers and migrants in the UK have a right to liberty and access to justice. They should not be subjected to immigration detention.

This submission

4. This submission addresses each of the questions raised in the Committee's consultation paper in turn.

5. BID is a member of the Immigration Law Practitioners' Association (ILPA), and we endorse the comments included in their submission to this consultation.

Changes to Nomenclature – Q1. Do you have any comments on the TPC's proposed changes to the Rules' nomenclature in light of the 2016 Act? Are any other changes desirable?

6. BID is in favour of the proposed changes to nomenclature.

7. In addition, we think it would be helpful for the Rules to be amended to also clarify financial conditions as being limited to a financial guarantee that is within the means of a person offering it, to help ensure that a person being granted bail will not abscond. The reason for this elaboration is to ensure that detained individuals are better able to understand the meaning of the term 'financial condition' in the bail context. Doing so would also help to ensure that unrealistic financial conditions or guarantees are not demanded of people offering to provide such conditions on behalf of detainees.

8. A template for how we propose this rule might be formed is as follows:
   a) A financial guarantee may be provided by a bail applicant or on behalf of a bail applicant; and
   b) Such financial condition should be commensurate to or within the means of the person offering it.

Notice that the Secretary of State may vary bail conditions – Q2. Should there be provisions in the rules to govern the procedure used when making the decision as to whether to make a direction under paragraph 6(3). If so, what they should be?

9. BID understands that the TPC interprets the intention behind Schedule 10, paragraph 6 of the Immigration Act 2016 as aiming to allow greater flexibility for the management of those on bail. This being the case, BID is concerned that once the Tribunal issues its direction under paragraph 6(3) for the Home Office to have sole administrative control over a person's bail conditions, it will lose its ability to make any further changes.

10. BID has experience of cases in which the Home Office has strongly opposed bail and insisted on strict curfew conditions. In some of those cases, the First-tier Tribunal has released the applicant on bail and issued conditions that were less restrictive than those sought by the Home Office, only for the Home Office to immediately impose its own conditions – often even more restrictive conditions – after the person's release. In these cases, where curfew conditions have been only recently proposed during a bail hearing, BID has had to take steps to ensure the original conditions were restored.

11. Presently, where the Tribunal retains the power to review bail – for example in relation to a change of address – the person on bail is able to refer the issue to the Home Office. If it has no objection to the proposed change, the bail applicant is able to provide the Tribunal with notification in writing of the change, together with the Home Office's written confirmation, and bail conditions are then varied. Where the Home Office opposes the request for a change in conditions a variation of bail hearing is arranged by the Tribunal where the matter is dealt with.

12. BID strongly supports the inclusion of a provision in the Rules that would govern the procedure to be used when making a decision as to whether to make a direction under paragraph 6(3). Such a provision should also take into account current arrangements in relation to applications for the variation of bail (as described at paragraphs 53-59 of the president's Bail Guidance for First-tier Tribunal Judges).

13. To ensure fairness, both parties should be properly informed of the possibility of a direction and should have the opportunity to respond. Such opportunity needs to be balanced against the need for expedition – it is also worth noting the likelihood that the Home Office may only provide an outline of its intentions in relation to possible directions in its bail summary, and just 24 hours before a bail hearing.

14. We would suggest, therefore, that Rules should take into account the following issues:

15. A requirement that the Home Office, as the detaining authority responsible for justifying detention or the need for conditions, should, where possible, state its views as to directions at least 5 days before a bail hearing, or otherwise at least 48 hours before a bail hearing (the latter will fit in well with the Tribunal's target for listing cases within 72 hours of an application being made). As ILPA has noted in its submissions to this consultation, the time frame should be able to be met by the Home Office given that it undertakes monthly reviews of detention and the fact that it should have formed a view as to the necessity of it retaining control over the conditions placed upon a person in the event of bail being granted.

16. The initial decision to grant bail should be made with the assumption that the Tribunal should retain authority to change a bail applicant's bail conditions. Should the Home Office make representations for directions to be issued to give it authority to change conditions from the outset, there should be the option of an adjourned hearing or a short recess to allow the bail applicant to prepare a response.

17. The Tribunal might also wish to consider similar issues arising with High Court bail – for example, whether it will be possible for the Tribunal to accept consideration of variation of bail

conditions where the High Court releases on bail, but wishes to give the Tribunal the power to vary conditions.

Grants of bail where a person is subject to removal directions – Q3. Do you have any comment on the Rules relating to those subject to removal directions, in light of the new legislation?

18. BID is encouraged by the TCP's understanding that the change in wording between the 2014 and 2016 Acts was not intended to produce any changes in the law or in the way the tribunals and the SSHD approach cases where removal directions are issued within 14 days. Nevertheless we remain concerned by the change that could see the Secretary of State being able to prevent a person being 'granted' bail – her power was previously limited to her being able to prevent a person being 'released' on bail. We would note that BID has had experience of cases where persons have been issued with removal notices within 14 days that prevent their release on bail but who have later not been removed.

19. Our initial experience following the implementation of the 2014 Act was that certain hearing centres refused to even list cases for hearing after receiving notification from the Home Office that a 14 days removal notice had been issued. This matter was raised by BID with the president of the First-tier Tribunal at a Tribunal Stakeholders' meeting, during which the President confirmed that the hearing centres in question were mistaken in their approach.

20. In these circumstances, and to ensure that there is no doubt on the part of any party to a bail hearing, we think it is essential for the Rules to state that where a 14 day removal notice is issued this will not prevent:
    a. Bail being granted
    b. Bail being listed for hearing and a hearing taking place
    c. In the event that it is argued that the Tribunal cannot grant bail, then a bail hearing be listed and can take place, with the possibility of the following decisions being taken:
        i. A decision to grant bail in principle
        ii. Directions issued to allow for a bail hearing to take place immediately upon a bail application being made after the expiration of the 14 day period and removal not having taken place.

21. Further, the Rules could also go on to explain the following possible outcomes to a bail hearing in the circumstances of a 14 days' notice hearing, for example:

    Bail in principle being granted and release to be authorised after the 14 day period in the event that removal does not take place. Should release be opposed by the Secretary of State, the matter to be dealt with at a re-convened hearing.

References – Q4. Is there a need for any change to the Rules in relation to those detained for more than four months? Should the Rules include a requirement that the Secretary of State provide information to the Tribunal when it makes a relevant reference? If so, what information should be required?

22. The right to a bail hearing for anyone who has not had such a hearing is defined and limited by the references from which the 4-monthly time period starts. BID has concerns that detainees who withdraw bail applications, or who may have the impression given to them by the detaining authorities that a bail application may not be in their interests or may be refused out of hand, may be encouraged to withdraw their bail applications or state that they do not wish to proceed with an application.

23. In these circumstances references given by the Home Office to the Tribunal should include:

a. Confirmation that the detainee has been provided with oral and written confirmation of their right to apply for bail and of the implications of withdrawing or deciding not to apply for bail.
b. Signed confirmation by such detainees that they have had such notice read out and explained to them.
c. Confirmation that the person has been provided with written and oral notification of the requirement that should they wish to withdraw notice that they do not wish to proceed with a bail application, then they must do so in writing.
d. Confirmation that where a bail 'event' took place due to the application of the 14 day removal rule, that the person has been informed that such event restarts the 4 month clock and it is therefore their responsibility to apply for bail should they wish to do so.

24. Where such evidence is not provided to the Tribunal, a bail application should be listed for hearing where the reference matter and the bail application can be dealt with.

Other Changes – Q5. Are any other changes desirable in light of the 2016 Act?

25. Planned changes to Section 4(1)c accommodation are likely to create additional challenges for a large number of people in securing an address to which they can be bailed. While the provision of an address is beyond the Tribunal's control, our view is that the changes create a need to review the process surrounding bail in principle. Arguments about accommodation frequently have implications for a person being able to be released on bail.

26. A standard condition of bail is the requirement to reside at a specific address. If detainees are not able to provide an address – or an address that is acceptable to the Home Office, probation service, or other interested parties – then they are unlikely to be released. Under the current Section 4(1)c regulations, they can apply for accommodation in advance of applying for bail, and when accommodation is provided, are able to be bailed to that address.

27. If changes to this system make it more difficult to secure a bail address, then it may become necessary for the Tribunal to make provision to ensure that lack of access to a bail address does not prevent detainees from accessing a bail hearing. The tribunal may, for example, want to issue new guidance on the granting of bail in principle, or on the listing of cases applying for such. We would also encourage the Tribunal to consider whether it might become necessary for judges to be empowered, upon the granting of bail in principle, to direct the Home Office to provide accommodation for a person who might otherwise be released, to ensure that their continued detention does not become unlawful and to ensure that the bailed person will be able to comply with any conditions placed upon their release on bail that requires them to be accommodated e.g. electronic monitoring.

Additional views – Q6. Do you have any other comments?

28. BID is concerned that the Tribunal is wrongly interpreting the 28 day rule that prevents bail applicants from having a bail hearing where one has been heard less than 28 days before the previous application was heard. This requirement is to be found under paragraph 25, Schedule 2 of the 1971 Act (as amended by Section 7 of the Immigration Act 2014). The relevant paragraph under the Immigration Act 2014 states:

> "7(3) In paragraph 25— (a) the existing paragraph is re-numbered as sub-paragraph (1); (b) in that sub-paragraph, for "may" substitute "must"; (c) after that sub-paragraph insert— **"(2) Tribunal Procedure Rules must secure that, where the First tier Tribunal has decided not to release a person on bail under paragraph 22, the Tribunal is required to dismiss without a hearing any further application by the person for release on bail (whether under paragraph 22 or otherwise) that is made during the period of 28 days starting with the date of the Tribunal's decision,**

unless the person demonstrates to the Tribunal that there has been a material change in circumstances." (Emphasis added)

29. The Tribunal is refusing to consider ***requests*** for bail applications to be listed for hearing 28 days after a previous application was made. Where forms applying for bail applications to be listed are submitted within the 28 day period these are rejected by the Tribunal. This means that Parliament's intention for a person to be able to apply for immigration bail every 28 days is being thwarted. The Tribunal's target for listing cases is within 3 days, while some bail applications can take 2 weeks before they are listed for hearing. Hence the Tribunal is currently applying a policy that results in bail applications not being made until between 31 and 45 days after a previous bail application was made. Where an original bail application may have taken 2 weeks to be listed for hearing this means a person may only have 2 subsequent bail applications heard over a 90 day period rather than over a 28 day period. This is, in BID's view, unlawful.

30. It is therefore necessary for Tribunal Procedure Rules to clarify the matter, and to specifically allow for forms applying for bail hearings to be submitted to listing offices within 28 days of a previous hearing, but stating that a hearing for the bail application will not be listed until 28 days after the previous hearing unless there has been a change of circumstances.

31. On a separate issue, BID would draw the Committee's attention to the "Reaching a Decision" section in the Bail Guidance for First-tier Tribunal judges. The guidance states that "[B]ail should not be refused unless there is good reason to do so, and it is for the respondent to show what those reasons are".

32. Broadly speaking, bail hearings typically focus on three key areas – availability of travel documents, risk of re-offending and risk of absconding – in addition to the Home Office's position on imminence of removal. Inevitably, the position of each party is disputed by the other, however in BID's experience, hearings are frequently characterised by limited presentation of evidence, particularly on the part of the Home Office. For example, an appellant who was detained while in the process of complying with reporting conditions will be presented by the Home Office as someone who is likely to abscond, with no supporting evidence to back that assertion. Where there is no evidence presented about an aspect of a case that is in dispute, the appellant's argument must be given equal weight to that of the respondent. In such a situation, where evidence is lacking, it is our belief that the Home Office is not fulfilling the criteria in the guidance that it must show that "there is a good reason [to refuse bail], and what those reasons are".

33. Because there is no statutory presumption in favour of release, judges are reliant on weighing the arguments – whether supporting evidence has been presented or not – in coming to their decision. We would invite the Committee to consider whether it might wish to transpose a portion of the guidance to judges into its rules, in order to clarify that the evidential burden lies chiefly (though not exclusively) on the detaining power.

34. Finally, in June 2016, BID responded to a Ministry of Justice consultation, 'Reforming the Courts' Approach to Mackenzie Friends', regarding the use of litigation friends in the First-tier Tribunal. In our response to that consultation, we noted:

    a. BID believes that that the Practice Guidance should be replaced by rules of court as it has received anecdotal evidence that litigants in person have appeared in some cases before the First-tier Tribunal where they have had a significant role, if not conduct of litigation (particularly in immigration bail cases). Rules of court will remove doubt as to the significance and importance of the rules, and remove doubt

and the discretionary approach of judges by making clear the extent of the role allowed to Mackenzie Friends.

b. BID notes that this proposed Rule includes advising persons on points of law and procedure; issues the litigant may wish to raise in court; and issues a litigant may wish to ask a witness. These are all issues that OISC-regulated Level 1 and Level 2 advisors, and unregulated advisors who are training to be regulated at a higher Level are not allowed to advise upon. To do so is a criminal offence under Section 84 of the Immigration and Asylum Act 1999.

c. These are also issues that can have a significant impact on those appearing before the Immigration and Asylum Chamber with consequences for their continued detention, and their applications to be allowed to remain in the UK. Immigration cases are also to be distinguished from other areas of the law, as poor representation and the dismissal of an immigration appeal, or a statement made in a bail case that may have negative implications on a person's substantive immigration case may result in a person being deported from the UK. Once a person is forced to leave the UK it becomes extremely difficult for them, if not impossible, to complain about poor advice delivered by persons who are additionally not covered by indemnity insurance.

d. Either [the proposed rule] should be removed; or guidance should be issued in consultation with the OISC that confirms that OISC advisors and unregulated persons working for OISC-registered organisations may also act as Mackenzie Friends before the First-tier Tribunal and the Upper Tribunal of the Immigration and Asylum Chamber, while dealing with any concerns relating to their role and regulation by the OISC. While such an approach risks undermining the purpose and the operation of the OISC regulatory scheme, it would allow persons aspiring to be professionally regulated to appear before the Immigration and Asylum Chamber in the same capacity as those who are not regulated or who do not intend to be regulated by the OISC.

35. We would again draw the Tribunal's attention to these issues, and suggest that they would be relevant when considering any changes to the Tribunal Procedure Rules.

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