

Sulini Sarugaser-Hug
Consultant for the Working Group on Arbitrary Detention
Special Procedures Branch
United Nations Office of the High Commissioner for Human Rights

SPBConsultant6@ohchr.org

13th March 2015

Dear Sulini

WGAD Draft principles and guidelines on the right to bring proceedings before a court

Thank you for the invitation to comment on these draft principles and guidelines. We would like to make a number of comments on draft Principles 13 and 14.

Principle 13. Burden of proof

38. In every instance of detention the burden of establishing the legal basis, as well as the reasonableness, necessity and proportionality of the detention lies with the authorities responsible for the detention.

Principle 14. Standard of review

39. No limitation may be imposed on the court's authority to review the factual and legal basis of the arbitrariness and lawfulness of the deprivation of liberty.

40. The court shall consider **all available evidence** that has a bearing on the arbitrariness and lawfulness of detention, that is, the grounds justifying the detention, its necessity and proportionality to the aim sought, and not merely to its reasonableness or other lower standards of review.

41. In order to determine that a deprivation of liberty is non-arbitrary and lawful, the court shall be satisfied that the detention was carried out under grounds and according to procedures prescribed by national law, and that it was and remains non-arbitrary and lawful under both national and international law.

In our view the phrase "all available evidence" is insufficiently strong, and fails to recognise the fact that the provision of available evidence to a court may be in the hands of only one party to any proceedings to determine the arbitrariness or lawfulness of deprivation of liberty, namely the detaining authority.

Court procedure rules in force in any jurisdiction, where these exist, may or may not make provisions requiring disclosure of evidence or material by parties to a hearing. In BID's view,

proceedings to determine the lawfulness of immigration detention, evidence relied on by the detaining authority to support a decision to detain or maintain detention should always be disclosed to both the court and the detained individual..

What draft Principle 14 fails to deal with in its current wording is the eventuality that even where court procedure rules or other guidance specifically requires disclosure of evidence, this requirement may not be observed in practice by detaining authorities. This leaves the judicial decision-maker to reach a decision based on only that evidence which the detaining authority chooses to provide to the court or tribunal, rather than all the evidence which is both available to the detaining authority and in its possession, some of which may not in fact support the reasonableness, necessity or proportionality of detention or ongoing detention.

In our view draft Principle 14, and particularly the “all available evidence” aspect of this principle, can easily be frustrated by detaining authorities, and as a result the safeguarding effect of both Principles 13 and 14 is significantly reduced.

Furthermore, it cannot be assumed that individuals who have lost their liberty will have had the benefit of legal advice and representation before such a hearing, notwithstanding your Principle 9 ‘Prompt and effective legal assistance’. Without such legal assistance, it is our experience that individuals (but in particular non-nationals) are unable to marshal evidence, often from multiple sources, to put before a court, notwithstanding your draft Principle 13 that the burden of proof lies with the authorities responsible for the detention. People in custody may not be in a position to make up any shortfall in evidence provision to a court where, as in the UK, there is a duty on all parties coming before the immigration tribunal to cooperate to provide information to the tribunal.¹

Evidence for our concern

We base our concerns on our extensive experience as legal representatives acting for several hundred people each year who seek release from immigration detention before the First-tier Tribunal (Immigration & Asylum Chamber) in the United Kingdom.

The WGAD draft principles and guidelines refer to the ability of individuals to bring proceedings before a court empowered to determine lawfulness. While this is not directly comparable to applications for release from detention on immigration bail in the United Kingdom (where the judicial decision-maker is not empowered to consider lawfulness of detention but must rather assume lawfulness²) we consider that bail hearings none the less offer useful indicators.

¹ *The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*. See section ‘Evidence and submissions’. Available at <http://bit.ly/1F84No3> See: section ‘Overriding objective and parties’ obligation to co-operate with the Tribunal’, paragraph (4) Parties must— (a) help the Tribunal to further the overriding objective; and (b) co-operate with the Tribunal generally.

² “A First-tier Tribunal Judge’s power is simply to grant bail, which is itself a restriction of liberty. The judge has no power to declare the detention unlawful and give any relief if it is considered to be; such matters need to be decided in the Administrative Court or in a claim for damages. Given the wide ranging powers of the immigration authorities in relation to the detention of non-nationals, First-tier Tribunal Judges should normally assume that a person applying

BID's research into immigration bail decision making³ demonstrates the degree to which it has become the norm for

- the detaining authorities in the UK (the Home Office) to fail to provide evidence to the First-tier Tribunal to support their assertions of the need to maintain detention, and
- the failure of the First-tier Tribunal to enforce the duty of all parties to cooperate to provide information to the tribunal.⁴

The result is that for applications for release on immigration bail in the UK, the burden of proof in hearings to decide on release from detention is, in practice, almost entirely and routinely borne by the detainee.

In the UK, material provided by the Home Office⁵ to immigration tribunal bail decision-makers consists of 'cut and paste' documents which rely on standardised paragraphs⁶ and assertions about various forms of risk on release which may be factually incorrect and are typically not, in BID's experience, accompanied by supporting evidence, for example of the degree of risk of reoffending or harm to the public on release. Arguments that a detained former offender liable to deportation poses a high risk of offending or harm if released on immigration bail are often relied on by the Home Office in opposing bail and by immigration judges in justifying their decisions not to release on bail. Yet requests for evidence of risk of reoffending in individual cases obtained by legal representatives under the Data Protection Act frequently show that professional risk assessments carried out by criminal justice sector professionals and provided by them to the Home Office, indicate that such risks are in fact considered to be low in individual cases, in direct contravention of often vague assertions of high risk on the part of the Home Office in opposing release on bail.

Research carried out by BID in 2013⁷ found that in 23 bail hearings out of 25 (92%) where BID was acting for the detainee, when asked by counsel for the detainee the Home Office Presenting Officer was unable to provide evidence to the court to support assertions of high risk on release. This is despite an agreement between the National Offender Management Service and the Home Office that the Home Office will act as the vehicle for provision of offender risk

for immigration bail has been detained in accordance with the immigration laws". Tribunals Judiciary, (2012), 'Presidential Guidance Note No 1 of 2012. Bail guidance for judges presiding over immigration and asylum hearings'. See paragraph 6. Available at <http://bit.ly/1b7PcK1>

³ See Bail for Immigration Detainees, (2012), 'The Liberty Deficit: long-term detention and bail decision-making', available at <http://bit.ly/1b7OJaO> ; Bail for Immigration Detainees, (2010), 'A nice judge on a good day: immigration bail and the right to liberty', available at <http://bit.ly/1b7OUTC>

⁴ *The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*. See section 'Evidence and submissions'. Available at <http://bit.ly/1F84No3> See: section 'Overriding objective and parties' obligation to co-operate with the Tribunal', paragraph (4) Parties must— (a) help the Tribunal to further the overriding objective; and (b) co-operate with the Tribunal generally.

⁵ On behalf of the Secretary of State for the Home Department, the detaining power.

⁶ Home Office, (2014), 'Guidance - Standard paragraphs for bail summaries, version 4.0'. Available at <http://bit.ly/1xl7PDg>

⁷ Bail for Immigration Detainees, 'NOMS1 form monitoring exercise: bail hearings January – June 2013'. Unpublished internal research report.

information to the immigration tribunal at bail hearings⁸. By contrast, in the criminal justice system in the UK, offender risk information is provided by the National Offender Management Service directly to the courts, not via the Crown Prosecution Service. In BID's view it can never be appropriate for "available evidence" to be routed to judicial decision makers via just one party to a case where that party is the detaining authority.

If automatic, regular judicial oversight of detention are introduced in the UK as many organisations, including BID, now recommend⁹, we would have the same concerns about the ability or willingness of the detaining authority to provide supporting evidence to any court empowered to make decisions about lawfulness and arbitrariness of detention, given that many of the arguments about the reasonableness, necessity and proportionality of detention will be similar.

The related draft Guideline 14 'Burden of proof' makes reference to the "burden of proof [being] met in a manner that is known in detail to the detainee". We suggest that provision of detail of itself is insufficient. Again in relation to immigration bail in the UK, the case against release on bail provided by the Home Office in the form of a document called the bail summary may comprise twenty pages of detail but entirely lack supporting evidence.

We do not propose any specific amended wording to deal with these concerns, but would strongly recommend the revision of draft Principle 14, possibly also Guideline 14, to address the risks we have identified. We would be happy to discuss this in more detail with you.

Yours sincerely

Dr Adeline Trude
Research & Policy Manager
Bail for Immigration Detainees

adeline@biduk.org

⁸ The current arrangement is referred to in National Offender Management Service (NOMS) Probation Service Instruction, (2014), '*Provision of offender risk information to Home Office Immigration Enforcement regarding foreign national offenders who are being considered for deportation*'. See para 2.13.

⁹ Bail for Immigration Detainees, (2015), '*Policy paper: Safeguards against arbitrary & prolonged detention*'. Available at <http://bit.ly/1b7QIBp>