

The Law Commission
Consultation Paper No 157

Criminal Law

**BAIL AND THE HUMAN RIGHTS
ACT 1998**

A Summary

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The consultation paper was completed on 15 November 1999, when Stephen Silber QC was also a Commissioner.

This summary of the consultation paper is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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BAIL AND THE HUMAN RIGHTS ACT 1998

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BAIL AND THE HUMAN RIGHTS ACT 1998
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A SUMMARY

PART I: INTRODUCTION AND OVERVIEW

1. This paper considers the compliance with Article 5 of the European Convention on Human Rights of the English law of bail as it relates to adults between charge and verdict or other determination of a case. It is not a general review of the law of bail on the usual model of Law Commission projects.¹
2. There is a distinction between the approach of the European Court of Human Rights and the Law Commission. The Court considers the application of the law in particular cases and determines whether or not there has been a breach of the Convention. Our focus, on the other hand, is on the law itself, not individual applications. Our task in this paper therefore is to ask whether a particular provision is *capable* of being used compatibly at all, and if so, if it is *likely* to be so used. Having done so, we propose the minimum reform we consider reasonably necessary to secure compliance. We identify two categories of provision which require attention.
 - (1) Provisions which are either inherently incompatible, in that they *cannot* be implemented in a compatible manner; or those which are arguably incompatible, in that a compatible interpretation is so strained that there is a *serious doubt* whether it could be a legitimate reading, even with the aid of Human Rights Act 1998, section 3.²
 - (2) Provisions which can be applied compatibly, and therefore should be so applied under section 3, but which, in practice, are likely to be applied in a non compatible manner.³

Our main conclusions and proposals

3. We propose that provisions falling into the first category should be repealed or amended.⁴ They are

¹ Paras 1.1 – 1.5. In this summary, the text is cross-referenced to the full consultation paper, which in turn contains full references to the appropriate authorities.

² Section 3 requires public authorities, including courts, to read legislation “so far as it is possible to do so” in a compatible way.

³ Paras 1.9 – 1.13.

⁴ Para 1.28.

- (1) paragraph 2A of Part I of Schedule 1 to the Bail Act,⁵ which permits a court to refuse bail if the offence charged is indictable and the defendant was on bail when he or she is alleged to have committed it;⁶
 - (2) paragraph 6, which permits a court to refuse bail if, having been granted bail in the present proceedings, the defendant has been arrested under section 7 of the Act (for example, for breach of a bail condition);⁷ and
 - (3) section 25 of the Criminal Justice and Public Order Act 1994, which, in the absence of exceptional circumstances, *prohibits* the granting of bail to a defendant who has previously been convicted of an offence of homicide or rape and is now charged with another such offence.⁸
4. Although provisions in the second category need not be repealed or amended, it would be desirable to provide appropriate guidance on their application.⁹ The provisions are
- (1) paragraph 2(b), which permits a court to refuse bail where there are substantial grounds for believing that, if granted bail, the defendant would commit an offence;¹⁰
 - (2) paragraph 3, which permits a court to refuse bail on the ground that this is necessary for the defendant's own protection;¹¹ and
 - (3) Part IIA of Schedule 1, which provides that after the second bail hearing a court need not hear arguments which it has heard previously.¹²
5. More generally, we propose that magistrates and judges should be provided with appropriate guidance and training on making bail decisions in a way which is compliant with Article 5, and recording those decisions in such a way as to indicate clearly how they have been reached; and that magistrates' courts should be required to use forms which encourage compliant decision-making and the recording of decisions in a compliant way.¹³

⁵ Hereafter, references to a paragraph are to part 1, sched 1, Bail Act 1976 unless otherwise stated.

⁶ See Part VI below.

⁷ See Part VIII below. Our conclusion applies equally to para 5 of Part II of Sched 1, which applies where the defendant is charged only with non-imprisonable offences.

⁸ See Part IX below.

⁹ Para 1.29.

¹⁰ See Part V below. The same principle applies to the corresponding power of a custody officer in a police station under Police and Criminal Evidence Act 1984, s 38(1)(a)(iii).

¹¹ See Part VII below. Our conclusion applies equally to para 3 of Part II of Sched 1, which applies where the defendant is charged only with non-imprisonable offences, and s 38(1)(a)(vi) of the Police and Criminal Evidence Act 1984, which applies to police bail after charge.

¹² See Part XII below.

¹³ Para 1.30. See Part IV below.

6. We believe that in other respects, the law and practice relating to bail is unlikely to lead to violations of the Convention.¹⁴

Damages

7. The compatibility or otherwise of a provision is relevant to whether damages may be awarded for a violation. If a superior court finds a provision incompatible, it may issue a declaration to that effect, but applying the provision will not give rise to a claim for damages. On the other hand, damages may be awarded where a potentially compatible provision is applied in an incompatible way. Damages may be awarded against the Crown where a court breaches Article 5 of the Convention, regardless of good faith. We discuss the European Court's approach to the award of damages for breaches of Article 5.¹⁵

PART II: THE LAW OF BAIL IN ENGLAND AND WALES

8. In this part, we set out the existing law. For the purposes of this summary, we refer to the principal provisions with which we deal as we discuss them below.

PART III: THE SUBSTANTIVE RIGHTS UNDER ARTICLE 5(1)(c) AND ARTICLE 5(3)

9. Paragraphs (1)(c) and (3), which are to be read as a whole, are the provisions centrally concerned with the pre-trial phase of criminal proceedings. They have been the subject of extensive case law, and the Court has had to interpret them with only "limited respect" to the text of the Convention.¹⁶
10. The key points about the case law on Article 5(1)(c) are:
 - (1) the provisions must be seen in the light of the overall purpose of article 5, which is to prevent *arbitrary* detention.¹⁷
 - (2) They concern the deprivation of physical liberty, not mere constraints on it.¹⁸
 - (3) The notion of "lawfulness" in Article 5 requires firstly that detention be in accordance with a procedure laid down in national law, and secondly that it conforms to the purpose of Article 5 and to the values of the Convention in general.¹⁹
 - (4) Detention can only be justified under Article 5(1)(c) for the purpose of bringing the person detained before a court. The phrase justifying detention of a person "when it is reasonably considered necessary to prevent his committing an offence" therefore does not cover a general

¹⁴ Para 1.31.

¹⁵ Paras 1.6 – 1.8, 1.17 – 1.23.

¹⁶ Paras 3.1 – 3.3.

¹⁷ Para 3.4.

¹⁸ Para 3.5.

¹⁹ Paras 3.6 – 3.7.

practice of preventive detention. In the English context, it appears to have no significant application.²⁰

- (5) There are certain requirements before a body counts as a “competent legal authority” or “judge or other officer”, including that it has the power to review the facts of a case, decide it according to “legal criteria” and order the release of the detained person.²¹

11. In respect of Article 5(3), the key points are:

- (1) That the requirement for the “prompt” production of a defendant to (in the English context) a magistrates’ court is strict. Although the Court has not laid down a specific requirement, the Commission operates a rule of thumb that four days is the limit.²²
- (2) The requirement for “trial within a reasonable period or release pending trial” is in fact two distinct and cumulative requirements. A detainee must be tried within a reasonable period *and* has a qualified right to release pending trial. The former need be of no concern.²³

In respect of the latter, the Court must be satisfied that there were reasonable grounds for continued detention before a denial of bail can be compliant. To determine the question, the Court concentrates on the actual decision making process in the national court. *Potentially* good grounds for denying bail include that

- (a) there is a danger that the defendant would fail to attend trial, interfere with evidence or witnesses or otherwise obstruct justice, or commit a serious offence;
 - (b) it is necessary for the purposes of the investigation;
 - (c) the defendant’s release would disturb public order; and
 - (d) detention is necessary for the defendant’s own protection.²⁴
- (3) Release can be conditional on “guarantees to appear for trial”.²⁵

²⁰ Paras 3.8 – 3.9.

²¹ Paras 3.10 – 3.11.

²² Paras 3.13 – 3.14.

²³ The English custody time limit regime provides a significantly greater degree of protection than that offered by the Convention jurisprudence.

²⁴ Paras 3.15 – 3.22.

²⁵ Paras 3.23 – 3.24.

PART IV: REASONS AND REASONING IN BAIL DECISIONS

The Convention

12. The Court closely examines the *reasons* given in a particular case in the national court to justify one or more of the potential *grounds* for denying bail. As a result, reasons, and the associated reasoning processes, take on a particular importance. The Court makes its own assessment of the cogency of the reasons relied on in the particular case. We give examples.²⁶
13. Although the Court has indicated that there is no requirement to give reasons per se, in fact the methodology effectively requires a high standard of recording reasons. In practice, the Court does not distinguish between the recorded reasons and the national court's underlying reasoning process. There are particular positive features of such reasoning that the Court requires. In particular, reasoning must
 - (1) be "concrete" and focused on the facts of the case, rather than "abstract" or "stereotyped";
 - (2) be consistent with and sustained by the facts – that is, the Court will make its own assessment of the facts. The facts must continue to sustain the conclusion for as long as the defendant is detained.
 - (3) take into account the arguments put by the defendant.²⁷
14. There are also negative requirements, not to assume a particular ground is made out by the existence of a particular factor. Thus,
 - (1) the strength of the evidence alone cannot justify detention;
 - (2) the severity of the likely sentence on conviction cannot of itself justify a conclusion that the defendant would abscond if released;
 - (3) the fact that flight from the jurisdiction is possible likewise does not itself justify the conclusion he would abscond;
 - (4) the fact that the defendant has a criminal record cannot automatically lead to the conclusion that he or she would offend if released.²⁸
15. The underlying rationale, we consider, is that national courts should exercise a properly judicial discretion, with a particular emphasis on detailed consideration of the facts of the case.²⁹

English law

16. The Bail Act 1974 requires reasons to be given to a person who is denied bail.³⁰ However, we understand that magistrates' courts commonly record their bail

²⁶ Paras 4.2 – 4.8. There is no discernible margin of appreciation in this area.

²⁷ Paras 4.9 – 4.15.

²⁸ Paras 4.14 – 4.15.

²⁹ Para 4.17.

decisions on forms allowing for both the ground (ie exception to the right to bail) and one of the statutory reasons set out in the Bail Act 1976³¹ to be simply ticked. Similarly, the form of words for announcing a bail decision suggested in *Stone's Justices Manual* simply repeats the statutory formulae. Although neither precludes the use of other reasons, both must encourage reliance on the statutory reasons alone. We consider that reasons recorded (and announced) in this way would be likely to be found "abstract" and "stereotyped" by the Court. It would also be difficult to establish that the reasons were sufficiently supported by the facts, or that the defendant's arguments had been addressed. Given the method of the European Court, this would be the result whatever the quality of the underlying reasoning process actually adopted by the magistrates.

17. It may be, however, that that reasoning process is also itself likely to be flawed. The way the statutory reasons are set out and used leaves open the possibility that magistrates' court will use the existence of, say, a criminal record to automatically assume that the defendant will offend on bail. There is some support for this suggestion in recent research on bail decision making.³²

Administrative law

18. Quite apart from the Convention position, it is arguable that as a matter of English administrative law, the tick-box forms are not an adequate discharge of the duty under Bail Act 1976, section 5 to give reasons.³³

Conclusions

19. We provisionally propose that there should be appropriate guidance and training on making and recording decisions on bail, and that magistrates' courts should use forms which encourage rather than discourage compliant decision making and recording.

PART V: EXCEPTIONS TO THE RIGHT TO BAIL(1): THE RISK OF OFFENDING ON BAIL

20. Bail can be denied under English law where it is feared that a defendant will commit an offence if granted bail (paragraph 2(b)). The Convention jurisprudence accepts in principle that this is an acceptable ground for detaining a person, but certain requirements emerge from the Convention case law.³⁴

The Convention requirements

21. The offence it is feared will be committed must be a serious one. There is no guidance as to how serious the offence need be, and the facts of the cases considered by the Convention have all been at the more serious end of the

³⁰ Bail Act 1976, s 5.

³¹ Para 9 of Part I, sched 1.

³² Paras 4.20 – 4.23.

³³ Para 4.24.

³⁴ Paras 5.1 – 5.2.

spectrum. It is difficult to go beyond the conclusion that at the very minimum, the offence must be one that would be likely to be punished by imprisonment.³⁵

22. The danger of offending must be “plausible”, or a “real risk”. It would not appear that the requirement is for a high level of probability that the offence would be committed.³⁶
23. Detention must be an “appropriate measure” to deal with the danger. This phrase originates in a case in which prison was not an appropriate measure where the defendant needed psychiatric care, but it would, we suggest, also encompass a requirement that detention must be necessary to avert the danger.³⁷

Arguments for concluding that there is a real risk

24. The requirements mentioned in paragraphs 22 and 23 above must be judged in the light particularly of the “history and personality” of the defendant. A criminal record is relevant, and reasoning based on previous convictions has been upheld by the Court. To be relevant, previous convictions must be similar in nature and gravity to the offence it is feared the defendant will commit.³⁸
25. In the cases considered by the Court, the offence it was feared the defendant would commit was similar in nature and gravity to that with which he was charged. Our view of the Convention principles is that there should be some appropriate connection between the offence charged and that feared, and that connection will usually be such a similarity. However, in an appropriate case, it may be justified to deny bail where there is a factual nexus which provides a connection between two dissimilar offences. In such circumstances, there would be a requirement that the offence feared was serious, but there would be no such requirement in respect of the offence charged.³⁹

Conclusions

26. Provided these requirements are met, we conclude that it can be legitimate under Article 5(3) to refuse bail on the ground that if released the defendant might commit an offence. The requirements are not, however, laid down in the Bail Act. It is therefore possible that non-compliant decisions could be made under the Act. One way of avoiding this would be to amend the Act, but we do not consider this necessary.⁴⁰

³⁵ Paras 5.3 – 5.4.

³⁶ Para 5.5.

³⁷ Para 5.6.

³⁸ Paras 5.7 – 5.10.

³⁹ Paras 5.11 – 5.12.

⁴⁰ Paras 5.14 – 5.16.

27. We provisionally propose that the danger of non-compliant withholding of bail on this basis should be averted by means of guidance to judges, magistrates and police officers. We also ask for views on the form of such guidance.⁴¹

PART VI: EXCEPTIONS TO THE RIGHT TO BAIL (2): DEFENDANT ON BAIL AT THE TIME OF THE ALLEGED OFFENCE

28. Where a defendant was already on bail for another offence at the time that the offence⁴² for which he is charged was committed, he need not be granted bail in proceedings on the second charge (that is, the defendant is not subject to the right to bail). He or she may be granted bail, but there is no presumption in favour of doing so (paragraph 2A).⁴³
29. That the alleged offender was already on bail does not in itself constitute a ground for denying bail which has been, or would be, recognised by the European Court. It amounts to the sort of mechanical thinking about categories of defendant that the Court does not accept. Neither can it be a *reason* for another ground. If it were, the most it could amount to would be a factor to be taken into account in determining whether another ground existed (and the obvious candidate would be that in paragraph 2(b): that the defendant would commit an offence if bail were granted). But if that were the case, paragraph 2A would be wholly redundant – it would never justify a decision to deny bail when paragraph 2 did not. The fact that it is alleged that the defendant committed an offence whilst on bail is relevant to paragraph 2(b) anyway. The highest function that it could reasonably fulfil would be as one of the criteria within paragraph 9⁴⁴ which a court has to take into account in deciding whether or not one of the grounds set out in paragraph 2 exists.⁴⁵
30. We question whether an interpretation that stripped paragraph 2A of any meaning would be allowable, even under Human Rights Act 1998, section 3. But even if it could, it is highly likely that courts will be misled into concluding that where paragraph 2A applies, that in itself constitutes a ground for refusing bail, and such decisions would violate the Convention. Thus paragraph 2A is either inherently incompatible with the Convention; or it is capable of being compatibly interpreted, but is nevertheless likely to result in decisions which amount to violations, and are therefore “unlawful” within the meaning of the Human Rights Act 1998.⁴⁶

⁴¹ Para 5.17.

⁴² The paragraph only applies to indictable offences.

⁴³ Paras 6.1 and 6.5.

⁴⁴ The relationship between para 2A and para 9 as currently drafted is problematic. Para 9 requires the court to take account of the circumstances listed in “taking the decisions required by paragraph 2 and 2A”. But the only decisions required by para 2A are whether or not the defendant was on bail and whether or not he or she is charged with an indictable offence, which clearly do not require the sorts of considerations mentioned in para 9. If a defendant loses the right to bail as a result of para 2A, the court still has to decide whether or not to grant him bail. It may be that the words quoted from para 9 can be construed as applying to that decision.

⁴⁵ Paras 6.3 – 6.11.

⁴⁶ Paras 6.12 – 6.13.

31. We therefore provisionally propose that paragraph 2A should be repealed; and that paragraph 9 should be expanded to include in the list of considerations to be taken into account in taking the decisions required by paragraph 2, whether the defendant was on bail when the offence was committed.⁴⁷

PART VII: EXCEPTIONS TO THE RIGHT TO BAIL (3): FOR THE DEFENDANT'S OWN PROTECTION

32. The right to bail is excluded where the court is satisfied that the defendant should be kept in custody for his or her own protection. The Strasbourg case law is very sparse in this area. It *has* been held that the protection of the defendant can be a reasonable ground for detaining a defendant, but “only ... in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place.” There is some reason to doubt whether the protection of the defendant would extend to protecting him or her from self-harm. Accordingly, we provisionally propose that the courts be offered guidance (which should acknowledge the difficulty of being certain about the Convention position), and ask what form such guidance should take. We also ask for information on how this exception to the right to bail is used, and in what circumstances.⁴⁸

PART VIII: EXCEPTIONS TO THE RIGHT TO BAIL (4): ARREST UNDER SECTION 7

33. Section 7 of the Bail Act 1976 provides a power of arrest, by warrant where a defendant fails to surrender to the court, and without warrant where a police officer reasonably believes he or she is not likely to surrender to custody, will break a bail condition or has broken such a condition. Where a person has been arrested under section 7, the right to bail no longer applies subsequently in the same proceedings.⁴⁹
34. A bail condition can only be imposed to prevent one of the events set out in paragraph 2. The rationale of this exception seems to be that where a defendant has been arrested under section 7, there *must* be good reason for supposing that he or she would do one of the things set out in paragraph 2. That paragraph is *deemed* to apply. This is objectionable in Article 5 terms:
- (1) It requires the conclusion that a person will act again as they did in the past, a form of automatic inference contrary to the Article 5 reasoning requirements.
 - (2) Because a section 7 arrest need only be based on an officer having *reasonable grounds* for believing the defendant will act in a certain way, it need not be the case that he or she *did* in fact behave in that way for the exception to take effect.

⁴⁷ Para 6.14.

⁴⁸ Paras 7.1 – 7.6.

⁴⁹ Paras 8.1 – 8.2

- (3) Arrest for breach of a bail condition can justify withdrawal of bail even where the defendant is not charged with an imprisonable offence, and therefore could not have been detained in the first place to prevent a recurrence of the offence. So a defendant could lose his or her right to bail, and be detained, as a result of a past breach of a condition to refrain from certain conduct, when they could not be detained where it is likely that they will engage in the same conduct in the future.⁵⁰
35. We conclude that a refusal to grant bail on the ground that the defendant has been arrested is likely to violate Article 5 unless it can be justified on one of the other exceptions to the right to bail – in which case, it is redundant. Paragraph 9 already requires a court to have regard to “the defendant’s record as respects the fulfilment of his obligations under previous grants of bail” as a factor in assessing whether the paragraph 2 grounds are made out. That is all that need be said.⁵¹
36. It may be that this exception is not inherently incompatible, because it does not prevent the grant of bail. But at best it is *misleading*. It serves no useful function, and might cause courts to “unlawfully” deny bail. Accordingly, we provisionally propose that it be repealed.⁵²

PART IX: EXCEPTIONS TO THE RIGHT TO BAIL (5): SECTION 25 OF THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

37. As originally enacted, section 25 forbade the granting of bail to a person accused of homicide or rape (or attempted rape or murder) who had previously been convicted of one of those offences. It was amended in the Crime and Disorder Act 1998 to allow bail to be granted to such a person only in “exceptional circumstances”. The Government considered that the original version was not compliant,⁵³ and that the provision as amended would be. Doubts have, however, continued to be raised over the compatibility of the section, even as amended.⁵⁴
38. Consideration of the Convention case law, and analogous cases in which the Court has considered whether reverse burdens of proof as to guilt violate article 6(2) (as recently analysed in *R v DPP, ex p Kebilene*⁵⁵) lead us to the conclusion that section 25 might or might not contravene Article 5(3), depending on the part played by the section in the reasoning on which the decision is based. There are alternative approaches to the proper construction and application of the section:

⁵⁰ Paras 8.3 – 8.7.

⁵¹ Para 8.8.

⁵² Para 8.9.

⁵³ The European Commission of Human Rights came to this conclusion, and subsequently the Government conceded that there was a violation.

⁵⁴ Paras 9.1 – 9.9.

⁵⁵ [1999] 3 WLR 972.

- (1) A court might conclude that where the section applies, it has no real discretion (that, for instance, only some very unusual feature⁵⁶ of the two relevant offences – that charged and that previously committed – would amount to an exceptional circumstance, and absent that bail must not be granted).
 - (2) At the other extreme, a court might deprive the section of any significant meaning. Absent the section, a court would only very rarely have grant bail in the relevant circumstances anyway, so any such case would inevitably be “exceptional”.
 - (3) A middle course would be for the court to go through the usual process of balancing factors for and against the granting of bail, but (because of section 25) give special weight to those counting against a grant of bail. Such a court could take all relevant circumstances into account, but might nonetheless deny bail because the case fell within section 25, where it would not otherwise have done so.⁵⁷
39. The first would not be compliant, for essentially the same reasons as the original version. The second would be compliant (although it is debatable whether it is an acceptable interpretation), but redundant, and thus does not justify the retention of the section. There are arguments on both sides as to whether or not the third interpretation is compatible.⁵⁸ On balance, and tentatively, we come to the conclusion that it is. If this is right, then once the Human Rights Act 1998 is fully in force, section 3 will *require* this compatible interpretation to be adopted.
40. But, where one natural reading – the first – is non-compliant, the section is liable to be misunderstood in a non-compliant way. There is therefore a case for taking steps to ensure such misunderstandings do not arise. One way of doing so would be via guidance. However, our provisional view is that it should be for Parliament to clearly spell out, within the context of the Convention, what weight should be given to different factors arguing for and against bail. Accordingly, we provisionally propose that section 25 be amended. We invite views on the alternatives of providing guidance, and the form of such guidance.

PART X: CONDITIONAL BAIL

41. In English law, a defendant can be released subject to conditions. This could raise compatibility issues in two ways.⁵⁹

⁵⁶ For instance, a doctor previously convicted of negligent manslaughter of a patient, but allowed to continue practice, who is now accused of a similar offence, but who has been suspended from practice pending trial.

⁵⁷ Paras 9.10 – 9.23.

⁵⁸ On the one hand, it could be said that the true question is whether an allowable ground is made out on the facts of the case, not whether the defendant fits into a pre-determined legal category. On the other hand, s 25 does leaves room for a true exercise of judicial discretion in a way comparable to that in the reverse burden cases.

⁵⁹ Para 10.1.

42. Firstly, a defendant who is denied bail could argue that he should have been granted bail subject to conditions. There is clear Convention case law to the effect that if the danger that a defendant would abscond could be averted by the deposit of a security, it is a breach of Article 5(3) to detain him or her. Although the Convention itself does not mention (and the case law does not deal with) conditions imposed for a purpose other than preventing absconding, it can be assumed a similar principle would apply. We consider that the effect of English law is essentially similar, and in this respect our law is compatible with the convention.⁶⁰
43. Secondly, the Convention imposes limits on the conditions which can be imposed. Releasing a defendant on conditional bail is also in effect to authorise his detention if he or she breaches the condition. Although a violation would not arise unless an inappropriate condition was breached, it would be wrong for a court to impose a condition which could only be enforced by means of a detention which would violate Article 5. The result is that a condition could not be imposed *either* for a purpose other than one which would justify detention; *or* for one of those purposes, but where it was not reasonably necessary to secure that purpose. Generally, English law is to the same effect. There are two possible exceptions. The requirement of necessity would appear not to apply to a condition that a defendant attend an interview with his lawyers. This is a very minor anomaly which is unlikely to cause any problems in practice. The second exception relates to the apparently mandatory requirement for a condition that a person charged with murder be required to undergo medical examination for the purpose of reporting on his or her mental condition. It would appear that the provision is unlikely, however, to give rise to a real risk of violations of the Convention. Our conclusion is that in this respect too, English law is sufficiently compatible with the Convention.⁶¹

PART XI: THE RIGHT TO CHALLENGE THE LEGALITY OF PRE-TRIAL DETENTION

44. Article 5(4) gives a detained person the right to periodic judicial review of the lawfulness of his detention. In the context of detention for an alleged offence, there is some overlap between the requirements of Article 5(4) and Article 5(3). The two are, nevertheless, distinct. In particular, Article 5(4) requires determination by a court rather than a judicial officer. While in England, the “judicial officer” is in fact the magistrates’ court, the requirement is still of importance because it implies certain procedural safeguards.⁶²
45. Before considering these, we point out that Article 5(4) does not require that these benefits are available at every hearing which does, in fact, deal with bail. The requirement is for a “speedy” opportunity to challenge detention. If a defendant’s first appearance does not satisfy the Article 5(4) requirements, the next remand hearing might; as might one of the opportunities available to challenge the magistrates’ decision (appeal, judicial review or an application for *habeas corpus*).

⁶⁰ Paras 10.1 – 10.9.

⁶¹ Paras 10.10 – 10.21.

⁶² Paras 11.1 – 11.5.

46. The procedural safeguards which emerge from the Convention case law are, firstly, that the defendant must be able to participate in the hearing, even if only through his or her representative; secondly, that the hearing must be “adversarial” and the parties must enjoy “equality of arms”; and finally, it is at least arguable that the hearings must be held in public.
47. It is clear that, for a hearing to be Article 5(4) compliant, it is essential that the defendant is able to participate in it, at least through his or her representative. It is not so clear whether the defendant personally is entitled to be present, but the tendency of the cases is to suggest that it is only in exceptional circumstances that the personal appearance of the defendant will be necessary. In English law, there is no express requirement for the defendant to be personally present at bail hearings. However, we understand that the practice of magistrates is to allow it. It may be that Crown Court and High Court judges do so too. We ask practitioners for information on whether courts are in practice willing for defendants to be present, and to hear oral representations when appropriate (for instance, where the defendant has special characteristics which have a bearing on his suitability for bail).⁶³
48. Article 5(4) requires an “adversarial” hearing – one in which the defendant has an equal opportunity to present his or her case and to respond to the prosecution’s arguments. It includes a requirement to disclose to the defendant’s lawyer at least those documents “which are essential in order effectively to challenge the lawfulness of his client’s detention”. English bail hearings appear essentially adversarial in character. Some recent research indicates that magistrates decisions are significantly influenced by police and prosecution objections to bail. On one view, this undermines the adversarial nature of the hearings. Alternatively, it may be that the police and prosecution act responsibly in their approach to making objections to bail. We ask for views.⁶⁴
49. It is the requirement for disclosure which might appear most troublesome, however. There is no requirement for disclosure for this purpose in English law. If bail were refused when the prosecution had declined to make disclosure of documents in their possession, it is possible that there may be a violation of Article 5(4).⁶⁵
50. It does not follow that new legislative disclosure requirements are necessary. In the first place, Article 5(4) does not require disclosure before a defendant may be detained. Where, for instance, no disclosure has been made on first appearance, disclosure of the necessary documents at the next remand hearing will satisfy Article 5(4) as long as it qualifies as a “speedy” hearing. Secondly, the scale of disclosure required is nothing like that before trial. Only documents “essential” for the purpose of countering the prosecution’s arguments need be disclosed (and there may be very few, or none). Further, the requirement is one for equality of arms between the prosecution and the defence, which suggests that only those documents referred to by the prosecutor in argument need be disclosed. We

⁶³ Paras 11.10 – 11.14.

⁶⁴ Paras 11.15 – 11.18.

⁶⁵ Para 11.19.

believe that most prosecutors would be willing to disclose such documents, in the absence of a good reason not to (such as the protection of witnesses).⁶⁶

51. The Court originally found that Article 5(4) hearings need not be in public. More recently, the Court has appeared to take into account the fact that a hearing was in private in determining whether in a particular case Article 5(4) had been violated. We sum up the current position as being that while there is no general *requirement* for a public hearing, a failure to provide one against the wishes of the defendant may be *relevant* to determining whether the procedure was compliant.⁶⁷
52. Hearings in the magistrates' courts are in open court. In the Crown Court and High Court, applications generally take place in chambers. In the High Court, they are open to the public unless the judge orders otherwise. Although in theory the same is true of Crown Court hearings, in practice security arrangements and practice preclude the attendance of members of the public at bail hearings.⁶⁸
53. Our conclusion is that, although the position is not entirely clear, it is unlikely that a defendant refused bail in England or Wales would have a valid complaint under Article 5(4). However, we ask for further information as indicated above, particularly from practitioners.⁶⁹

PART XII: REPEATED APPLICATIONS

54. Article 5(4) also gives defendants a right to make *further* applications to a court. Our consideration of the Strasbourg case law suggests that it should be assumed that a defendant has a right to make periodic challenges to the lawfulness of his detention, whether or not there have been material changes of circumstances apart from the passage of time. This suggests two questions: first, are English bail hearings sufficiently frequent? Second, are they such as to provide an *effective* right of challenge?⁷⁰
55. The case law provides no simple guide to how long may elapse between hearings. However, there is nothing to suggest that the maximum period between bail applications in England and Wales of 28 days is too long.⁷¹
56. In respect of the second question, English law requires a court to hear any argument of fact or law on the first two appearances of a defendant. Thereafter, the magistrates need not hear any argument they have heard earlier unless there is a new consideration. If there is, they must again hear all of the arguments, including the old ones. If magistrates construe this strictly, and in particular if they refuse to treat the passage of time alone as a change of circumstances (and there is evidence to suggest that they do), their decisions may violate Article 5(4). However, we conclude that an expansive interpretation of the provision to include

⁶⁶ Paras 11.20 – 11.21.

⁶⁷ Para 11.22.

⁶⁸ Paras 11.23 – 11.24.

⁶⁹ Para 11.25.

⁷⁰ Paras 12.1 – 12.5.

⁷¹ Paras 12.6 – 12.9.

the passage of 28 days as a new circumstance is a possible reading of the Act, and therefore should be adopted under Human Rights Act 1998, section 3. We provisionally propose that magistrates be given guidance to this effect, and invite comments on what form the guidance should take.⁷²

⁷² Paras 12.10 – 12.23.

PART XIII

PROVISIONAL PROPOSALS AND CONSULTATION ISSUES

In this part we list our provisional proposals and conclusions, and other issues on which we seek respondents' views. More generally, **we invite comments on *any* of the matters contained in, or issues raised by, this paper, and any other suggestions that consultees may wish to put forward. For the purpose of analysing the responses it would be very helpful if, as far as possible, they could refer to the numbering of the paragraphs in this part.**

Reasons and reasoning in bail decisions

1. We provisionally propose that
 - (1) magistrates and judges should be provided with appropriate guidance and training on
 - (a) making bail decisions in a way which is compliant with Article 5, and
 - (b) recording their decision-making in such a way as clearly to indicate how their decisions have been reached; and
 - (2) magistrates' courts should be required to use forms which encourage compliant decision-making and the recording of decisions in a compliant way.

(CP paragraph 4.25; see summary paragraph 5)

Exceptions to the right to bail (1): the risk of offending on bail

2. We provisionally conclude that it *can* be legitimate under Article 5(3) of the Convention to refuse bail on the ground that, if released, the defendant might commit an offence – provided that
 - (1) the offence it is feared the defendant might commit can properly be characterised as “serious”, and would be likely to attract a custodial sentence; *and*
 - (2) it can be shown that there is a real risk of the defendant's committing the offence; *and*
 - (3) detention is an appropriate measure in the light of that risk and all the circumstances of the case.

(CP paragraph 5.14; see summary paragraph 26)

3. We provisionally propose that the risk of bail being refused on the basis of the defendant's propensity to commit offences, in a way that violates the Convention, should be averted by means of guidance issued to judges, magistrates and the police. We invite views on this proposal, and on the alternative option of amending the legislation. We further invite views on what form such guidance should take.

(CP paragraph 5.17; see summary paragraph 27)

Exceptions to the right to bail (2): defendant on bail at the time of the alleged offence

4. We provisionally propose that
 - (1) paragraph 2A of Part I of Schedule 1 to the Bail Act 1976 (which excludes the right to bail where the offence charged is indictable and the defendant was on bail when he or she allegedly committed it) should be repealed; and
 - (2) paragraph 9 of Part I should be expanded to include, within the list of considerations to be taken into account in taking the decisions required by paragraph 2, whether the defendant was on bail at the time of the alleged offence.

(CP paragraph 6.14; see summary paragraph 31)

Exceptions to the right to bail (3): for the defendant's own protection

5. We provisionally conclude that a refusal of bail for the defendant's own protection *can* be compatible with the Convention, but only if there are exceptional circumstances, and (perhaps) only if they relate to the nature of the alleged offence, and the conditions or context in which it is alleged to have been committed; and that guidance should be issued to that effect. We invite comments on what form such guidance might take. We should also be grateful for information on how often the power to refuse bail for this purpose is used, and in what circumstances; and in particular whether it is commonly used to guard against self-harm as distinct from harm by others.

(CP paragraph 7.6; see summary paragraph 32)

Exceptions to the right to bail (4): arrest under section 7

6. We provisionally propose that paragraph 6 of Part I of Schedule 1 to the Bail Act 1976, and paragraph 5 of Part II (which provide that a defendant has no right to bail if he or she has been arrested under section 7) should be repealed.

(CP paragraph 8.9; see summary paragraph 36)

Exceptions to the right to bail (5): section 25 of the Criminal Justice and Public Order Act 1994

7. We provisionally conclude that
 - (1) section 25 of the Criminal Justice and Public Order Act 1994, as amended, *can* be applied in a way which would not violate the Convention, namely by taking all relevant circumstances into account but giving special weight to the matters that bring the section into play; but

- (2) it is liable to be misunderstood and applied in a way which would violate the Convention, namely as dispensing with the need to take all relevant circumstances into account.

We invite views as to whether the risk of such misunderstanding would be best averted by amending the legislation, issuing practice directions, or providing guidance for magistrates, judges and the police in some other form. Our provisional view is that an amendment to the legislation is the most appropriate course.

(CP paragraph 9.30; see summary paragraph 40)

Conditional bail

8. We conclude that English law does not permit the detention of a defendant in circumstances in which Article 5 requires the granting of conditional bail, and that English law is therefore compatible with the Convention in this respect.

(CP paragraph 10.9; see summary paragraph 42)

9. We provisionally conclude that English law does not permit the imposition of bail conditions in circumstances in which Article 5 requires the granting of unconditional bail or of bail subject to less stringent conditions, and that English law is therefore compatible with the Convention in this respect.

(CP paragraph 10.21; see summary paragraph 43)

The right to challenge the legality of pre-trial detention

10. Our provisional conclusion is that, although the position is not entirely clear, a defendant refused bail in England and Wales is unlikely to have a valid complaint that he or she had no opportunity to challenge the decision in a court hearing, as required by Article 5(4). However, we invite information from practitioners on
 - (1) whether problems ever arise as a result of defendants being unable to attend, or to participate in, hearings of their bail applications;
 - (2) whether bail hearings are in practice truly “adversarial” in character, and in particular whether the disclosure made by prosecutors is sufficient to enable the defence to deal with the objections to bail on equal terms; and
 - (3) whether bail hearings in the Crown Court or the High Court are ever conducted in private against the wishes of the defendant.

(CP paragraph 11.25; see summary paragraph 53)

Repeated applications

11. We provisionally conclude that
 - (1) Part IIA of Schedule 1 to the Bail Act, which provides that in bail hearings after the second “the court need not hear arguments as to fact or law which it has heard previously”, *can* be applied in a manner compatible with Article 5(4) of the Convention; but

- (2) courts should be given guidance to the effect that the lapse of 28 days since the last fully argued bail application should itself be treated as an argument which the court has not previously heard. We invite views as to the form that such guidance might take.

(CP paragraph 12.23; see summary paragraph 56)