Practice note on bail

OISC

Aim and purpose of this practice note

Section 83 of the Immigration and Asylum Act 1999 places a statutory duty on the Immigration Services Commissioner, requiring him to promote good practice.

This note, which supports that duty, sets out the Commissioner's views regarding bail. The note should not be seen as definitive instructions but rather as a view on best practice. The note has been developed with assistance from the Immigration Appellate Authority (IAA), the Immigration Service (IS) and external specialists in the field. Their assistance is gratefully acknowledged.

This document takes in the changes produced by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. All references to the IAA/T will from April 2005 be references to the Asylum and Immigration Tribunal. Adjudicators will be referred to as immigration judges.

This note is for information only. It will not discuss the merits of the Government's detention policy and should not be used in that regard. It will not give suggestions as to how best to frustrate the Home Office case, but will outline the procedures and requirements that may assist in securing release.

What is covered in this practice note?

The areas covered are:

1. Background
2. Temporary admission, temporary release and restriction orders
3. CIO bail
4. Adjudicator/IAT bail
5. Procedure
6. Sureties
7. The hearing
8. Reporting conditions
9. Continuation of bail
10. Breaches of reporting conditions
11. Other points

1. Background

1.1 Reasons for detention

The following are liable for detention:

- those seeking leave to enter
- those awaiting a decision on whether to cancel leave to enter
- those refused leave to enter
- those who have entered in breach of a deportation order
- those who have been served with a decision to deport
- those subject to a deportation order following a court recommendation for deportation
- those who are illegal immigrants
- those who have breached their conditions of stay
- those where there are reasonable grounds for suspecting that removal directions may be given.

1.2 The IS instructions state that detention must be used sparingly and for the shortest period possible.

1.3 There is a common law presumption in favour of bail, subject to the restrictions on the granting of bail under paragraph 30 of Schedule 2 of the Immigration Act 1971 (as amended). This presumption is reflected in the IAA *Guidance Notes for Adjudicators* (May 2003), the UNHCR's *Guidelines on the Detention of Asylum Seekers* and Chapter 38 of the Immigration Service's *Operation Enforcement Manual*.

1.4 The Government's 1998 White Paper *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* stated that detention would most usually be appropriate:

- to effect removal
- initially to establish a person's identity or basis of claim
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

1.5 In addition, asylum applicants may be detained where it appears to an Immigration Officer (IO), but in practice a Chief Immigration Officer (CIO), that the application is straightforward and capable of being decided quickly.

1.6 IS instructions detail the factors influencing a decision to detain as follows:

- there is a presumption in favour of temporary admission or temporary release
- there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified
- all reasonable alternatives to detention must be considered before detention is authorised
- once detention has been authorised, it must be kept under close review to ensure that it continues to be justified
- there are no statutory criteria for detention, and each case must be considered on its individual merits
- the following factors must be taken into account when considering the need for initial or continued detention.

For detention:

- What is the likelihood of the person being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)?
- Is there a previous history of complying with the requirements of immigration control (e.g. by applying for a visa, further leave, keeping to terms of temporary admission etc.)?
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? Does the person have a history of settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations, which afford incentive to keep in touch?

Against detention:

- Is the subject under 18?
- Has the subject a history of torture?
- Has the subject a history of physical or mental ill-health or are they pregnant?

1.7 The IS should give the detainee **written reasons for detention** in all cases at the time of detention and thereafter at monthly intervals, or at shorter intervals in cases involving families. The following forms are issued: IS91 'Detention authority', IS91R 'Reasons for detention' and IS91M 'Movement notification'. The detainee only gets the IS91R and should get a new one when reasons for detention change. The subsequent monthly update is IS151F. The IS91 and 91M go to the person doing the detaining (the police or a contractor), the 91M is a receipt for the detained person and a record of movements.

1.8 There are many other considerations in dealing with detention that are not covered by this note. Advisers may refer to the IS instructions or other sources to get further information.

1.9 It is for advisers to assess and challenge the reasons for detention in order to give their clients an informed overview of their position and to seek their release if so requested.

2. Temporary admission, temporary release and restriction orders

2.1 These are all methods of allowing detainees their freedom. Temporary admission is a power normally exercised by an IO instead of detaining a person. Temporary release is a power exercised by an IO to release a person who is actually detained. Those under restriction orders are those who would otherwise be detained under the authority of the Secretary of State (i.e. those liable to deportation) instead of an IO.

2.2 It is always possible to apply to the Home Office or the IS to consider the temporary admission of a person who is being detained under immigration powers. Advisers, once instructed, should try to speak with the official dealing with the case, requesting the reasons for detention. Advisers should attempt to address the criteria for detention as listed above and explain why detention is inappropriate or explore alternatives. It is advisable for advisers to ensure that suitable accommodation is available for the detainee as this is a factor that would make release more likely. If release is not secured through a telephone call, advisers should write to the official requesting temporary admission and the reasons for detention in writing.

2.3 If temporary admission is granted, the applicant will be given an IS96 form setting out the conditions of admission. It is usual that the release will be subject to conditions such as residence at a particular address and regularly reporting to the police or IS. Employment restrictions are also generally imposed, although illegal entrants and overstayers do not usually have such a restriction imposed. Advisers must stress to their clients the need to abide by the terms of the conditions laid down, as failure to do so may lead to the withdrawal of temporary admission and re-detention. Once imposed, if the conditions imposed are found to be too onerous, advisers can apply, upon instruction, to the same authority to change them.

3. CIO bail

3.1 A CIO or, after eight days from the date of detention, the Secretary of State for the Home Department, may grant bail in the same circumstances as an adjudicator or the Immigration Appeal Tribunal (IAT). In addition, they can grant bail on the basis of the applicant having an appeal pending. Bail may also be granted in these circumstances by a police inspector, who, for the time being, has custody of the detainee.

3.2 The CIO can accept sureties, which may be sufficient to justify the grant of bail where temporary admission was deemed inappropriate. Advisers should think of this as a viable alternative to the grant of temporary admission and less costly than applying for bail before an adjudicator. The IS Operation Enforcement Manual gives a guide to the level of surety a CIO might ask for:

'Each case should be assessed on its individual merits but a figure of between £2,000 and £5,000 per surety will normally be appropriate. Where there is a strong financial incentive to remain here, it is justifiable to fix bail ... at a larger sum.'

3.3 In considering whether to apply for temporary admission, an adviser should take the following factors into account:

- Has temporary admission been applied for?
- If temporary admission has been refused, what was the basis of the refusal? This will generally equate to the reasons for detention in the IS91R.
- It is unlikely that a CIO would grant an applicant bail on their own recognisance; somebody else would usually need to act as their surety.
- Are there friends, relatives or organisations that are willing and able to stand as surety in the amounts outlined in the Operation Enforcement Manual?
- If there are such candidates, do they understand the requirements of standing surety?
- Can the sureties show that they have funds available should the applicant abscond?
- Can the sureties demonstrate that they can exercise some control over the applicant should bail be granted?

Note: advisers should not take funds from the sureties unless this is one of the conditions of bail. The OISC takes a serious view of any breach of this principle.

4. Adjudicator/IAT bail

4.1 Similar rights to bail attach to applications made to the Tribunal and before an adjudicator. The rest of this note addresses the circumstances of an application before an adjudicator/immigration judge. It must be noted that at bail hearings it is for the Home Office to justify detention. As previously stated, there is a common law presumption in favour of bail and, once an adjudicator has granted bail, it continues until the applicant:

- is re-detained by an immigration officer for a breach or likely breach of a condition upon which bail has been granted
- is removed
- has a successful outcome to an appeal
- is granted leave to enter or remain
- the bail lapses.

4.2 In the meantime sureties remain bound by their recognisance. Advisers must ensure that the applicants and sureties are aware of and understand this if bail is granted. An adjudicator has no statutory power to revoke bail once it has been granted.

5. Procedure

5.1 Part 5 of the Immigration and Asylum Appeals (Procedure) Rules 2003 sets out the procedure governing bail applications before the IAA/T. A bail application form can be obtained from the IAA and this should be completed to begin the process.

5.2 The form asks for the amount of recognisance that the applicant agrees to be bound by, and the names, addresses and occupations and the amounts of recognisance in which two sureties, if any, agree to be bound by. Although it may be helpful to have two sureties, there is no such requirement in law. The applicant may be able to, or will have to stand as his/her own recognisance.

5.3 The form must state the address where it is proposed that the applicant will reside. It is then sent to the IAA who will notify the Home Office. The Home Office will then make security checks on the proposed sureties and the bail address before the application is heard. It is a requirement of the instructions to adjudicators on bail that bail applications are heard within three working days of the application being received by the IAA.

5.4 Once the security checks have been made and if the Home Office is opposing the grant of bail, it draws up written reasons for opposing bail. This is known as a bail summary. The bail summary should be sent to the applicant if unrepresented or to their advisers not later than 2pm on the afternoon before the hearing, unless the IS have been given less than 24 hours' notice of the hearing. The bail summary tends to be an amplification of the reasons for detention as detailed in the IS91R.

5.5 In preparing for a bail hearing, an adviser must seek to get as full instructions as possible from their client in an attempt to address the Home Office's objections to bail. The adviser must be open with their client about the prospects of success in the application and to determine what conditions may be acceptable to the client.

6. Sureties

6.1 It is advisable that the sureties are interviewed to first determine whether there is any adverse information the Home Office security checks may expose that may jeopardise the application, since for example, it is unlikely that a surety with a criminal conviction would be acceptable, nor one suspected of involvement in helping immigration offenders and second, to ensure that the sureties are fully aware of their obligations as surety and of their right under paragraph 33(1)(b) to seek to be relieved of their obligations should they so wish. As there is the potential for a conflict of interest between the applicant and the surety, advisers may wish to suggest to the surety that they take independent legal advice.

6.2 The sureties are almost always required to attend the bail hearing. They should bring with them to the hearing suitable evidence of their identity, immigration status, income and assets. If the potential surety only has limited leave to remain in the UK, they should bring evidence of when that leave expires. While the absence of such evidence is not fatal at a bail hearing, it may affect the weight an adjudicator attaches to their oral evidence.

7. The hearing

7.1 Home Office may oppose bail for the reasons stated in the bail summary described above. The adviser will then be required to respond to the reasons given for continued detention. It should be the rule rather than the exception that the applicant attends the hearing. This will be necessary, in particular, if there is a dispute over the facts as set out in the bail summary. The adjudicator may also wish to satisfy him/herself that the applicant understands and is likely to comply with any conditions that are being imposed. Further, the applicant has a right to attend the hearing of their application, be legally represented and have an interpreter provided if necessary. The applicant, if in attendance, can then be called to give oral evidence if required. The adjudicator may then be satisfied that it would be appropriate to grant bail in principle. They may also wish to hear evidence from sureties in support of the application. As stated earlier, in seeking to counter the assertions made in the Home Office bail summary, advisers must address the reasons given in that summary.

7.2 The court may need to be reminded about the presumption in favour of bail. It must be remembered that the burden of proof for showing that detention should be continued rests with the Home Office or its representative, in this case the Presenting Officer. Common reasons used to rebut the presumption are:

- the applicant has previously failed to comply with conditions of bail or temporary admission
- s/he is likely to commit offences
- the applicant is likely to cause danger to public health
- s/he is suffering from a mental disorder
- the applicant is under 17 and no proper arrangements for their care has been made.

7.3 The adjudicator hears the evidence and determines whether to allow bail or not. If a bail application is refused, an applicant has a right to make a fresh application on the same grounds and any further grounds that may have arisen. Renewed bail applications should not be a review of previous decisions. Adjudicators must have regard to the reasons for the decision given by previous adjudicators and should generally expect to see fresh additional grounds and/or some change in circumstances. When bail is refused, a form should be given to the applicant that explains the reasons for the decision in brief. It should be noted that in Scotland there would usually be a full determination.

8. Reporting conditions

8.1 The primary condition imposed on granting bail is to appear before an adjudicator or IO at a specified place, date and time (the primary condition). The adjudicator will then have to decide whether it is necessary to impose further conditions (secondary conditions) to ensure compliance with the primary condition.

8.2 If the adjudicator decides that secondary conditions are necessary, these usually require conditions of residence and reporting to the local police station or Immigration Service Reporting Centre. Normally an application for bail should not be made until the applicant has an address at which to reside.

9. Continuation of bail

9.1 As indicated above, once bail is granted it continues until the applicant is re-detained, removed, is granted leave or has a successful appeal. Provided the applicant complies with the primary condition of their bail to appear before the adjudicator on a specified date, then the adjudicator has no power to do anything other than to continue bail with a fresh primary condition to appear before an adjudicator or IO on another date, together with such secondary conditions deemed necessary.

9.2 Where bail is to an adjudicator pending appeal, the applicant should attend. It is the primary condition upon which they were granted bail in the first place. His/her attendance should only be excused in exceptional circumstances, e.g. illness or other unavoidable circumstances preventing his/her appearance. The adjudicator has no power to require the attendance of sureties. For so long as the applicant remains on bail, their recognisance continues. When bail is granted subject to sureties, they should be advised that it would be in their interests to attend to see that the applicant has done so. They could also be advised that if the applicant does not appear in answer to the primary condition, their attendance to provide an explanation for the absence of the applicant is a matter that may be taken into account in any subsequent forfeiture proceedings.

9.3 If an applicant fails to appear in answer to the primary condition and/or fails to comply with secondary conditions, an IO is entitled to re-detain the applicant. If the applicant has failed to comply with any secondary conditions but has not been re-detained and appears before an adjudicator in answer to the primary condition, it is for the immigration authorities to decide what steps to take with regard to re-detention. If the applicant appears, but has failed to comply with secondary conditions, the adjudicator would have to continue bail with a fresh primary condition and probably more stringent secondary conditions.

10. Breaches of reporting conditions

10.1 If bail has been granted but the applicant fails to re-appear at the specified place on the specified date, both they and their sureties risk losing part or all of the monies that they have offered as forfeiture. The applicant also runs the risk of being detained because an IO or a police officer has the power to arrest and detain any person that they reasonably believe to be in breach or likely to breach their conditions of bail. Once re-detained under these circumstances, the chances of a successful fresh application for bail will be greatly diminished.

11. Other points

11.1 Unless otherwise allowed, OISC-regulated advisers are not permitted to make applications to the High Court for obtaining temporary admission and bail. They are also not permitted to make applications for habeas corpus.