

BiD Bail for Immigration Detainees

Schedule 10, Immigration Act 2016

March 2019

Commencement: 15 January 2018

Schedule 10

- repeals and replaces Schedules 2 and 3 of the Immigration Act 1971
- removes or changes the power of temporary admission and release on restrictions & replaces this with the power to grant bail

Anyone on temporary admission on 14 January is to be considered as having been granted immigration bail from 15 January 2018

Who can be granted bail and by whom?

Any individual pending examination, removal or deportation can be granted bail by:

- the Secretary of State (SSHD - Home Office) (s.1(1)&(2)) - whether or not they are detained
- the Tribunal (s1(3)) if they are in detention and have been present in the UK for at least 8 days (s3(3))

Bail when detention would be unlawful

Individuals can also be granted bail where their detention would otherwise be unlawful (s1(5)) if they are liable to detention under s1 or if the SSHD is considering whether or not to deport them.

When bail ends

Bail ends

- when granted leave to enter or remain
- when detained under s1 of Schedule 10
- when removed or when person leaves the UK

Conditions of bail

Under s2 anyone who is granted immigration bail must be subject to at least **one** of the following conditions:

- to **appear** before the Secretary of State or First-tier Tribunal at a specified time and place 2(1)(a);
- **restrictions** on work, occupation or studies 2(1)(b);
- a condition about the person's **residence** 2(1)(c);
- a condition requiring the person to **report** to the Home Office 2(1)(d);
- an **electronic monitoring** condition 2(1)(e);
- such **other** conditions as the person granting bail thinks fit 2(1)(f);
- **mandatory** electronic monitoring under s3(3) for people who have served criminal sentences is not yet to come into force, but when it does it must be granted subject to one or more of the other conditions (s3(3)(b))

An additional **financial** condition can be applied to ensure compliance with one or more of these conditions (2(4)).

Mandatory issues to be considered

When considering whether or not to grant bail the SSHD or the Tribunal must have regard under s3 to the following factors:

- the likelihood of failure to comply with a bail condition (3(2)(a));
- whether the person has been convicted of an offence (3(2)(b));
- the likelihood of an offence being committed whilst on bail (3(2)(c));
- the likelihood of the person's presence in the UK, whilst on bail, causing a danger to public health or a threat to public order (3(2)(d));
- whether detention is necessary in that person's interests or for the protection of any other person (3(2)(e); and
- such other matters as the SSHD or the Tribunal thinks relevant (3(2)(f)).

The 14 day consent rule

A person cannot be granted bail (not just 'release' as under the Immigration Act 2014) under s3(4) without the SSHD's consent if:

- directions for the person's removal within 14 days from the date when bail is to be granted are in force; and
- the person must be given notice of the decision

Decisions to grant bail

- Must state when bail commences (s7(a))
- Must state the bail conditions (s7(b))
- May specify arrangements that must be put into place to ensure a person can comply with the bail conditions (s8)

Electronic monitoring condition

- Means a condition to cooperate with arrangements for detecting and recording a person's (s4):
 - ◇ Location at specified times;
 - ◇ Absence from a location at specified times; and
 - ◇ To wear a device
 - ◇ Make specified use of a device
 - ◇ Communicate in a specified manner and at specified times or periods

Financial condition

This term replaces 'surety'. The Tribunal also uses the term 'financial supporter'. A financial condition is a condition that would be appropriate to impose with a view to ensuring compliance with another condition.

It **must** specify (s5(3)):

- The sum of money
- When it is to be paid
- The form & manner of payment
- To be paid to the body granting bail unless the Tribunal has directed the power to be exercised by the SSHD

No sum is required to be paid unless the person liable to make the payment:

- has been given the **opportunity to make representations**; and
- representations are to be considered by the person to whom the money is to be paid

The power to vary bail conditions

Bail conditions can be imposed by the person granting bail (s6(2)) who can:

- Amend or remove conditions (s6(1)(a))
- Impose one or more new conditions (s6(1)(b)); and
- The person on bail must be given notice of the decision (s6(6))

But the Tribunal cannot amend an electronic monitoring condition (s6(5)).

Transferring the management of bail to the SSHD

- The management of bail can be passed to the Home Office by the Tribunal if the Tribunal so directs (s6(3))
- The Tribunal then loses its ability to amend, remove or impose bail conditions (s6(4))

Removal of an Electronic Monitoring condition (by the SSHD s7(3)-(5) and by the Tribunal s8)

Persons with electronic monitoring conditions who are on bail with an electronic monitoring condition and who are facing deportation (s7(1)(b)) may not have the condition removed unless:

- The condition is impractical
- It is contrary to the person's human rights

Power to enable a person to meet bail conditions

Section 4(1) of the Immigration and Asylum Act 1999 is also repealed on 15 January 2018. Section 9 of Schedule 10 replaces it. This states that:

- "The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address." 9(2); where
 - ◇ "a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition" (9(1)(a)); and
 - ◇ the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised."

Unfortunately there is no process for applying for Schedule 10 accommodation. It is also important to be aware that not everyone will be considered to be entitled to apply for Section 10 accommodation as they may be deemed by the Home Office as needing to apply for alternative forms of accommodation.

Bail addresses - Summary of the current position (as at March 2019)

Unfortunately the Home Office's policy has been contradictory and unclear in relation to whether or not a person or certain categories of persons can apply for accommodation from detention or if they are to be released from detention. The Home Office is currently reconsidering its policy but the following is a summary of the current situation:

- **Section 4(1)(c)** applications made under the the Immigration and Asylum Act 1999 that were received by the Home Office before 15/1/18 continue to be considered under the old regime.

- **Refused asylum seekers** can apply for accommodation from within detention by completing a 35-page form ASF1. However applicants need to show that they have been granted bail in principle. That is because they need to show that they will be left destitute within 14 days of the ASF1 application being made. We previously used to advise that applicants only needed to show they have a bail hearing pending within 14 days when making their ASF1 application but this unfortunately results in applicants being refused accommodation on the basis that they are being adequately accommodated in detention. This is clearly challengeable but will result in delays.
- **Asylum applicants** who have not received a decision from the Home Office on their asylum claim can only apply for asylum accommodation after they are released from detention. They need to use an ASF1 application form. However asylum applicants who are released on bail without an address can call the Migrant Help helpline on 0800 8000 630 to ask for urgent help. Migrant Help should be able to assist with applying for emergency accommodation (also known as Section 98 accommodation) and with assisting asylum applicants apply for asylum accommodation using a form ASF1.
- **All others who have not applied for asylum at all people** can include submissions about their need for Schedule 10, Section 9 (under Immigration Act 2016) accommodation as part of their grounds for bail and/or by way of submissions to the Home Office. The Home Office may or may not consider such submissions before a bail application is heard. But the Home Office has stated that when people are granted bail with a condition that they are to reside at an address it will consider the evidence it has on file to decide whether or not it will provide the person with bail accommodation.

Caution needs to be exercised when considering submissions relating to a person's claim that they are destitute to ensure that any discrepancies with their substantive immigration case, e.g. if it is based on Article 8 ties to community and family, are explained.

When making lodging submissions for Schedule 10 Section 9 accommodation it is recommended that applicants explain:

- ◇ why they cannot source alternative accommodation
- ◇ whether they have any additional aggravating medical or other circumstances
- ◇ if they will be left homeless on the streets
- ◇ why they cannot be expected to rely on any friends, relatives or people in the community

Bail applicants may consider arguing:

- ◇ That they should be released to a bail address that should be provided by the SSHD
- ◇ In the event that the SSHD has refused to provide an address or has failed to respond to a request for an address, a decision can still be made by the Tribunal to grant bail on the condition that the bail applicant is released to a bail address to be provided by the SSHD
- ◇ Where applicable, that such decision will allow other conditions of bail to be met
- ◇ That to refuse bail because of a lack of an address or in circumstances where the lack of an address would risk a breach of one or more bail conditions would not be justified and would be potentially unlawful.

Travel expenses

Where the SSHD believes there are 'exceptional circumstances' (s9(5)) she may also make a payment to a person on bail "in respect of travelling expenses which the person has incurred or will incur for the purpose of complying with a bail condition." (s9(4)).

Arrest for breach of bail

A person may be detained if there are 'reasonable grounds for believing' that a person:

- Is likely to fail to comply with a bail condition (s10(1)(a))
- Is failing or has failed to comply with a bail condition (s10(1)(b))

Such a person is to be brought before the SSHD or the Tribunal, whichever has management of bail ('the relevant authority) who "must decide whether the arrested person has broken or is likely to break any of the bail conditions." (s10(11)).

The Home Office also makes clear in a letter of 18 December 2017 that "Breach of bail conditions without a reasonable excuse is also a criminal offence under section 24(1)(h) of the Immigration Act 1971, with a maximum penalty of six months' imprisonment and/or an unlimited fine."

Automatic bail

There is now an automatic right for a person to have a bail hearing if:

- they are not facing deportation and/or are not being detained for national security reasons
- they have been detained for four months starting from a 'relevant date' (s11(1)(b))

A 'relevant date' includes events that exclude people from falling under the 4 month automatic right to bail provisions who:

- Are granted bail by the FTT (s11(3)(a))
- Withdrew their bail application (s11(3)(b))
- Provided written notice to the SSHD that they do not want to apply for bail & such notice has not been withdrawn under (s11(6)(b))

The 28 day period between bail applications

The Tribunal must refuse a bail application that is submitted within 28 days of the previous bail application (s12(1)(2)(a)) and where there has been no material change in the applicant's circumstances (s12(1)(2)(b)).



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