

CHALLENGING IMMIGRATION DETENTION

a best practice guide

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with a foreword by Lord Avebury

October 2003

ILPA
Immigration Law
Practitioners' Association



**Bail for
Immigration
Detainees**

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The Law Society is the statutory regulator and representative body for solicitors in England and Wales. The Society also has a public interest role in working for reform of the law.

Bail for Immigration Detainees (BID) exists to provide a dedicated free bail service to detained asylum seekers and migrants. BID works to improve access to bail, to raise awareness of detention issues and to offer training to legal representatives.

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Foreword

Freedom from arbitrary arrest and imprisonment is a fundamental human right, legally enforceable throughout the UK by virtue of the Human Rights Act 1998. Yet an increasing number of asylum seekers, men, women and children, and even whole families, are behind bars. They are detained by immigration officers exercising powers conferred on the Secretary of State in Acts of Parliament from 1971 to 2002, and elaborated in non-statutory documents such as the Operational Enforcement Manual. It has become quite impossible for the individual asylum seeker to know whether her detention is lawful, or if not, how to mount an effective challenge before an adjudicator or a court of law. This guide looks at the variety of circumstances in which the detention powers in the Immigration Acts are used in practice, and the means available for contesting the decision.

A detainee cannot be expected to know the legislation, still less the practices of immigration officers and the attitudes of adjudicators and the courts to detention. Prompt access to specialist legal advice is essential if the system is to be fair. It is hard enough for detained applicants to find someone to represent them and give instructions, with all the difficulties of language, non-availability of standard information and inadequate access to means of communication. Greater problems arise when a detainee is suddenly moved from one detention centre to another, and even to prison. Ministers undertook in Parliament that the practice of holding immigration detainees in prison would cease, except where the person had been arrested for a criminal offence, but this promise has been dishonoured.

The Government has made it far more difficult for genuine asylum seekers to get to the UK, by visa régimes and juxtaposed controls, and this has resulted in a sharp fall in the number of applications. At the same time the Nationality Immigration and Asylum Act has curtailed rights of appeal, and cut off support from those who failed to apply at ports of entry. The combination of measures has loaded the dice heavily against applicants, and now it is proposed to reduce the amount of time spent by professional advisers on preparing their cases.¹ No more than five hours is allowed for providing initial advice, and four hours on preparing an appeal. The proposed number of hours would be grossly inadequate, and may be unlawful because there is no evidential basis to support the conclusion that representatives could provide an effective service within those limits.

¹ Lord Chancellor's Department consultation paper: Proposed changes to publicly funded immigration and asylum work, June 2003

This guide should at least help to ensure that more people do have access to bail, and particularly the majority of applicants for whom no sureties are available. Representatives will find it extremely useful to have the information they need in such a convenient and lucid way, and the guide will do something to lessen the heavily tilted playing field on which they have to contend.

Eric Avebury

7 September 2003

Introduction

‘(Judicial) safeguards are meaningful and effective only if appropriate legal advice and information are available to detainees’

from the Joint Committee on Human Rights report on the Nationality, Immigration and Asylum Bill, 21 June 2002, page 32

Over the past decade, the number of detention spaces available to the Immigration Service has grown from about 200 to over 2000, with more planned. Detention criteria (apart from those used at Oakington) stress that the purpose of detention is to prevent people from absconding. However, the expansion of the detention estate has taken place without *any* government commissioned research into absconding.¹ Independent research shows that approximately 90% of those granted bail kept in touch with the Immigration Service.² At the same time, the legal rights of detainees in the asylum determination procedure are being eroded. Detention, in combination with fast track appeal processes, is a means of removing people without giving them access to a fair procedure.

With this increased use of detention, expectations about sureties offering large amounts of money in order for a detainee to be released have been successfully challenged. This guide aims to encourage practitioners to look critically at the decisions of the Immigration Service and Home Office in relation to detention. Do these decisions comply with international guidelines and with human rights legislation? Are the detaining authorities complying with their own internal guidance? These decisions must be challenged directly in order to have the best chance of obtaining a client's release.

The guide aims to inform practitioners of best practice by:

- focusing on preparing and presenting bail applications from assessment of case through to advocacy in court
- covering in brief other methods of obtaining your client's release from detention and remedies for unlawful detention
- discussing the wider obstacles that detention presents and how these should be addressed in pursuing your client's application to remain in the UK.

Now that public funding is available for bail hearings and statutory powers to apply for bail have been extended to cover almost all categories of immigration detainees, this guide is intended to encourage and enable practitioners to represent immigration detainees, so many of whom are still unrepresented.

Working with detained clients is challenging and stressful. It also presents rewards – obtaining someone's release from detention is no minor victory.

1 Home Office Research Development Statistics to BID 7 May 2002.

2 *Maintaining Contact: what happens after detained asylum seekers get bail?* Report by Prof Irene Breugel and Eva Natamba of South Bank University, June 2002, available on BID website www.biduk.org/info.htm

Currency

Detention is a contentious area of Government policy and it is subject to rapid changes. This is particularly so because many changes are possible without primary legislation. It is essential for representatives to keep up to date with policy and practice, as well as legislative changes. Membership of the Immigration Law Practitioners' Association (ILPA) will help to ensure that you are kept up to date. 'Call counsel' services provide telephone advice to holders of Legal Services Commission contracts.

Telephone numbers, correspondence addresses and fax numbers are changed often and frequently without notice. It is therefore important that you keep up to date with any changes.

This guide is published in October 2003. References in the text to current practice and procedure are current through September 2003.

Note that the guide does not address the differences in procedures and approaches in the Scottish courts.

Note on style

To aid clarity in the text, I have assumed all clients to be female, all solicitors, sureties, accommodation providers, immigration officers and home office presenting officers to be male and adjudicators to be female.

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The following publications have been invaluable reference sources: *Macdonald's Immigration Law and Practice*, by Ian Macdonald and Frances Webber, (5th edition), Butterworths, 2001, *Support for Asylum Seekers* by Sue Willman, Stephen Knafler and Stephen Pierce, LAG, 2001, and *JCWI Immigration, Nationality and Refugee Law Handbook*, 2002 edition, edited by Duran Seddon.

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Abbreviations

Home Office/immigration service procedures

CIO	Chief Immigration Officer
DSI	Dublin screening interview
HIU	Heathrow Intelligence Unit
HOPO	Home Office Presenting Officer
IDIs	Immigration Directorate Instructions
IS151F	Monthly progress reports
IS91R	Initial checklist reasons for detention
MODCU	Management of Detained Cases Unit
NASS	National Asylum Support Service
SAB	Subject Access Bureau
SASH	Suicide and self harm
TA	Temporary admission
TR	Temporary release

Courts

ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
IAA	Immigration Appellate Authority
IAT	Immigration Appeals Tribunal

Legal representation

CLR	Controlled Legal Representation
OISC	Office of the Immigration Services Commissioner
OSS	Office for the Supervision of Solicitors

Law

AIA 1993	Asylum and Immigration Act 1993
DCR 2001	Detention Centre Rules 2001
DPA 1998	Data Protection Act 1998
HRA 1998	The Human Rights Act 1998
IA 1971	Immigration Act 1971
IAA 1999	Immigration and Asylum Act 1999
IAA(P)R 2003	Immigration and Asylum Appeals (Procedure) Rules 2003
NIAA 2002	Nationality Immigration and Asylum Act 2002

Publications

UNHCR guidelines	UNHCR's guidelines on the detention of asylum seekers, revised edition, February 1999
Guidance Notes	Bail guidance notes for adjudicators from the Chief Adjudicator (third edition), May 2003
OEM	Immigration Service's Operation Enforcement Manual

1

Statutory framework for detention and bail

THIS CHAPTER DEALS WITH:

- Who can be detained?
- Is detention lawful?
- Arbitrary detention and the role of Article 5 of the European Convention on Human Rights
- Who can apply for bail?

Who can be detained?

In order for someone entering or living in the UK to be detained, there must be a statutory power to detain. The Immigration Act 1971, as amended, ('IA 1971') is where the majority of the statutory powers of detention for those subject to immigration control are set out. The Nationality, Immigration and Asylum Act 2002 ('NIA 2002') extends these powers, in particular, by giving the Secretary of State (i.e. the Home Office) the same powers as immigration officers to detain people.¹

If someone is detained in circumstances where there is not a statutory power to detain, the detention is unlawful. It is rare for someone to be detained without a power existing to detain, although there have been examples, such as when someone with dual French/Algerian nationality was detained because the Immigration Service did not believe that the man was also a French national.

What is more common is the situation where a power existed to detain the person at the outset, but the detention has *become* unlawful because it has continued longer than is reasonable for the statutory purpose. This is most common in removal cases.

An example of detention becoming unlawful is the Immigration Service detaining someone for the purposes of removal but then, because of problems in that person's country of origin, or because of administrative delay in obtaining travel documents, the detention continues for many months without the Immigration Service coming any closer to actually removing the person. At some point (the length and circumstances are set out in case law), the Immigration Service can no longer legitimately say that the detention is for the purpose of removal and detention becomes unlawful. ► See chapter 8.

¹ NIAA 2002 s62 extends powers of immigration officers under sch 2 IA 1971 to the Secretary of State and also broadens them to include situations where the Secretary of State has 'reasonable grounds to suspect that he may make a decision of that kind'.

Immigration officers' / Secretary of State's powers to detain

The powers to detain those who are subject to immigration control are set out below.² An example is given in relation to each power. In most cases, you do not need to know which power is being used to detain your client in order to prepare a bail application.

Those arriving in the UK pending examination by an immigration officer or the Home Office to establish whether they need or should be granted leave to enter³

A man arrives from a country that does not require entry clearance for a visitor's visa and says that he wants to visit the UK for 6 months before returning to his home country. An immigration officer suspects that he has come to work in the UK. The immigration officer decides to interview him before deciding whether to grant him leave to enter as a visitor. He detains the man until the interview can take place and a decision can be made.

Those who, on arrival in the UK with leave to enter granted prior to arrival, have, on examination, had their leave suspended pending completion of the examination and a decision on whether to cancel leave

A woman arrives with a student visa in her passport. An immigration officer suspects that she intends to claim asylum and has asked her questions about her life in her home country. The immigration officer wants to contact the woman's relatives and the college at which she is supposed to be studying in order to verify her account. He detains her while these inquiries are carried out.

Those refused leave to enter, and if there are reasonable grounds for suspecting that a person is someone in respect of whom removal directions may be given⁴

A man arrives with a British passport that the immigration officer suspects is forged. After questioning the man and inspecting the passport, the immigration officer decides to refuse leave to enter the UK. He detains the man while arrangements are made to return him to the country he arrived from.

Illegal entrants and those reasonably suspected of being illegal entrants, pending a decision on whether to issue removal directions and pending removal in pursuance of those directions⁵

Immigration officers carry out a raid on a factory. A worker is asked for proof that she has the right to work. She cannot produce any proof or any identity documents. She is arrested and declared an illegal entrant. She is detained while the Immigration Service makes arrangements for her removal.

Those who, having limited leave to remain or enter, do not observe a condition attached to their leave to enter or remain beyond their leave, or obtained their leave by deception, or are reasonably suspected of being such persons, pending a decision on removing them or pending removal⁶

A student is found working full-time, in breach of her conditions. She is interviewed and admits the breach. She is detained while arrangements are made for her removal. She claims asylum. She is kept in detention 'pending removal' on the basis that the immigration officer believes that she claimed asylum to delay her removal.

² These powers are contained in IA 1971 sch 2 para 16. The Secretary of State is given parallel powers to detain under NIAA 2002, s62.

³ IA 1971, sch 2, para 16(1)

⁴ IA 1971, sch 2, paras 8 and 16(2) as amended by IAA 1999, s140(1)

⁵ IA 1971, sch 2, para 9 and 16(2) as amended by IAA 1999, s140(1)

⁶ IAA 1999, s10(1)(a) and (b) and s10(7). s10(1)(c) and s10(7) gives the power to detain members of the family.

'Members of a crew of ship or aircraft who remain beyond the leave granted to enable them to join their ship or aircraft or abscond having unlawfully entered without leave, or are reasonably suspected of having done so'⁷ (These circumstances are uncommon.)

Detention of persons liable to deportation

'Administrative removal' has to a large extent replaced 'deportation' as the legal mechanism by which people subject to immigration control are removed from the UK.⁸ The two main circumstances in which deportation is still relevant are:

where a criminal court has recommended deportation as part of a sentence for a criminal offence

where the Secretary of State considers that someone should be excluded from the UK for the 'public good'.

There are three separate powers of detention for those who are liable to deportation⁹. These powers can *only* be exercised by the Secretary of State, and not by the Immigration Service.

1 Where a criminal court has made a recommendation for deportation

Where a recommendation for deportation made by a court is in force and the person is not in custody or on bail that person must be detained pending the making of a deportation order, unless either the court by which the recommendation is made or an appeal court otherwise directs, or the Secretary of State directs that the person be released pending further consideration of the case, or he is released on bail.¹⁰

Despite the wording of the section, the Secretary of State has conceded that the presumption of liberty *does* apply where someone has been given a recommendation for deportation.¹¹ This concession came about because otherwise the power to detain would be in breach of the guarantees contained in Article 5 European Convention on Human Rights (ECHR).

In practice, the effect is that the Secretary of State must consider whether or not the person should be detained under Immigration Act powers after the end of the criminal sentence. If he chooses to detain, he must give reasons.

A recommendation for deportation can be appealed within the criminal courts, as it forms part of the sentence.

A man is convicted of a serious criminal offence and recommended for deportation after the completion of his sentence. He is an asylum seeker waiting for a decision on his case from the Home Office. At the end of the sentence, the Secretary of State must decide whether the man should be transferred to immigration detention pending the outcome of his asylum case. If the Secretary of State decides to detain, he must give reasons for detention.

7 IA 1971, sch 2, paras 12–14, 16(2)

8 This change was initiated by the IAA 1999.

9 IA 1971, sch 3, para 2 (as amended)

10 IA 1971, sch 3, para 2(1), amended by IAA 1999, s54 – commenced on 10 February 2003 by (Commencement No 12) Order 2003, SI No 2

11 *R v SSHD ex parte Sedrati, Butraigo-Lopez and Anaghatu*, heard by Mr Justice Moses on 17.5.01, unreported. See report by Shahram Taghavi in ILPA mailing of September 2001.

2 Where a notice of intention to deport has been served

For the reasons set out above, it is rare to come across a client who is detained under this power.

Where notice has been given to a person of a decision to make a deportation order under section 3(5) of the 1971 Act, and that person is not in custody or on bail, he or she may be detained under the authority of the Secretary of State pending the making of the deportation order.¹²

There is now a power to apply for bail.¹³

3 Where a deportation order has been signed

Persons against whom a deportation order is in force may be detained under the authority of the Secretary of State pending their removal or departure from the UK. If they are already detained under either of the previous provisions [i.e. recommendation to deport or notice of intention to deport] they shall continue to be detained unless the Secretary of State directs otherwise or unless they are released on bail.¹⁴

In the last example, the man is kept in detention while his claim for asylum is processed. Asylum is refused and his appeal dismissed. The Secretary of State signs a deportation order and travel documents are applied for. The man is kept in detention pending deportation.

Is detention lawful?

Both the common law and the ECHR set limits to the detention powers of the state. These overlap, although the courts do not always see them as identical.

The meaning of both the common law and Article 5 ECHR are developed through case law. Both are subject to shifts in interpretation, but the following principles have developed.

Lawfulness of detention under the common law

The following principles limit detention under the common law:

The statutory powers to detain are to be strictly and narrowly construed, i.e. if detention is not for a statutory purpose (or is no longer for that purpose) it will be unlawful.¹⁵

The power to detain is impliedly limited to a period that is reasonably necessary for the statutory purpose to be carried out.¹⁶

Detention must be in accordance with Home Office policy.¹⁷

Detention must be justified in all the circumstances of the individual case, including an assessment of above factors, actual risk of absconding, impact on detainee, etc.¹⁸

12 IA 1971, sch 3, para 2(2)

13 IAA 1999, s54 (commenced 10 February 2003)

14 IA 1971, sch 3, para 2(3) as amended by IAA 1999, s54(3) (commenced 10 February 2003)

15 *Re Hardial Singh* [1984] 1 WLR 704

16 *ibid*

17 *R v Special Adjudicator and Secretary of State for the Home Department, ex parte B* [1988] INLR

18 *The Queen (on the Application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, judgement of Lord Dyson

Lawfulness of detention under ECHR

The ECHR has now mostly been incorporated into domestic law as a schedule to the Human Rights Act 1998 (HRA 1998), which came into force in October 2000. With the incorporation of the Convention into domestic law, the case law of the European Court of Human Rights (ECtHR) becomes important precedent when considering the application of ECHR rights.

Article 5

Article 5 ECHR grants a right to liberty and sets out the exceptions when detention can be lawful, namely:

to prevent a person making an 'unauthorised entry' against someone for whom 'action is being taken to effect deportation or extradition' (i.e. removal).

The exceptions to liberty must be narrowly interpreted and detention must not be applied in an arbitrary manner:

it must be in accordance with procedures defined by law¹⁹
the law must be sufficiently clear and precise.²⁰

Article 5, as it is relevant to immigration detention, is set out below.

Article 5(1)

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...

Article 5 (1)(f)

The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
[Note: in the UK context, this includes removal.]

Article 5(2)

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and any charges against him...

Article 5(4)

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.

Two concepts have been particularly explored in the context of Article 5 ECHR: detention must be proportionate, and alternatives to detention must have been properly considered before detention can be lawful.

Proportionality

The detention must be proportionate to the aim being pursued in the circumstances of the case.

The House of Lords affirmed that the test for proportionality is:

'Whether: (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.²¹

19 Note that ECtHR has imported some concepts from jurisdiction of Article 6 ECHR (right to a fair hearing) to consideration of fair procedures under Article 5.

20 See e.g. *Amuur v France*, 20 May 1996, 17/1995/523/609. Also *Kawka v Poland* 25874/94

21 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26: (as per Lord Clyde in the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69).

In this context you must consider factors such as:

Is detention necessary to prevent absconding in the individual's case?

Is the length of detention proportionate to the purpose, i.e. to make a decision as to whether to grant entry, or to effect a removal?

Is the effect of detention on the individual proportionate to the purpose, e.g. due to mental/physical health problems, history of torture, age, etc.²²

Alternatives to detention

There is an obligation for detaining authorities to consider alternatives to detention.²³

This requirement is also acknowledged by UK detention policy.

...The government is mindful that the deprivation of liberty is a grave step which must only be used with great care and when no alternative ways of ensuring compliance are likely to be effective.²⁴

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.²⁵

For example, would reporting restrictions or sureties be sufficient to ensure compliance?

22 This reflects the approach of the Court of Appeal in *Queen (on the Application of) v SSHD* [2002] EWCA Civ 888, judgement of Lord Dyson.

23 See *Witold Litwa v Poland* (ECHR), Application No 26629/95, judgement 4.4.2000

24 See appendix 1, OEM ch 38.1

25 See appendix 1, OEM ch 38.3

26 See chapter 3 on habeas corpus

27 1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right....
3) In this section 'public authority' includes...
(a) a court or tribunal...
(s6 HRA 1998)

28 See the approach of the High Court in *R v Sec of State for the Home Department ex parte Kelso* [1998] INLR 603, in which no initial bail application was made to an adjudicator. Distinguish the cases where there is jurisdiction for an adjudicator to grant bail versus the situation where there is no jurisdiction (now uncommon). Also distinguish the situation where an application is before the High Court already on the substantive case – here the High Court can exercise its inherent jurisdiction to consider bail.

Jurisdiction of adjudicators in relation to Article 5 ECHR

The High Court is the proper venue for applications challenging the lawfulness of detention.²⁶ The power of adjudicators to consider arguments, particularly under Article 5 ECHR, relating to the lawfulness of detention, is the subject of some debate.

However, it should be noted that:

The Human Rights Act 1998 (HRA 1998) creates a positive duty on a public authority, including the Immigration Appellate Authority (IAA), not to breach any of the rights protected, including Article 5²⁷

Case law indicates that, even if you intend to lodge an application at the High Court, you should, in most circumstances, put forward arguments in a bail application before an adjudicator.²⁸

You should always consider *all* the arguments for your client's release, aside from whether these arguments are primarily based on issues of lawfulness. These arguments must form the basis of your application for bail.

To a large extent, in practice, the acceptability of lawfulness arguments in the IAA depends on the approach used. For example, many adjudicators will take the view that severe delays in removal constitute grounds for bail, even though this argument is primarily based on issues of lawfulness.

Derogation from Article 5 ECHR

In 2001 the UK lodged a derogation from the provisions of Article 5 in relation to those suspected to be connected to 'terrorism' to allow for their indefinite detention.²⁹ The derogation allowed for UK law to breach Article 5 ECHR. The exercise of this power of detention is not the subject of this guide.

Who can apply for bail?

The right to apply for bail, to the Immigration Service, Home Office or to the IAA, applies to almost everyone in immigration detention.³⁰

The question of whether the court or Immigration Service has the jurisdiction to consider a bail application is a question of whether there is a statutory power to apply for bail. If there is no statutory power (now very rare) the court or Immigration Service does not have jurisdiction.

The only group who still cannot apply for bail (i.e. there is no jurisdiction) are those who are held pending examination, who have not yet been in the UK for 7 days.

The statutory powers granting the right to apply for bail are set out below.

Those detained pending examination who have been in the UK for more than 7 days³¹

A family enters the UK and claims asylum. They are housed in temporary accommodation for 2 days before being detained for examination (i.e. full asylum interview). The interview has still not taken place 5 days after their detention begins. They have been in the UK for 7 days and become eligible to apply for bail.

²⁹ s21 Anti-terrorism, Crime and Security Act 2001. The power of indefinite detention was challenged in *A and Others v SSHD*, 30 July 2002.

³⁰ sch 2, paras 22, 29 and 34 IA 1971 (as amended). Note the effect of NIAA 2002 s68(2) extending the power to grant bail to the Secretary of State. In practice the change is unlikely to make a difference to the applicant or her representative as the port/enforcement department will still deal with the application.

³¹ IA 1971, sch 2, para 22(1)(a), (1B), as amended by AIA 1996, sch 2, para 11(1)–(3) – this is the only circumstance in which a detainee must have been in the UK at least 7 days before being able to make a bail application. See chapter 3 for effect on Oakington cases.

³² IA 1971, sch 2, para 22(1)(a), inserted by IAA 1999, sch 14, para 63

³³ IA 1971, sch 2, para 22(1)(b), as amended by AIA 1996, sch 2, para 34

³⁴ IA 1971, sch 2, para 22(1)(b)

Those detained pending a decision on revocation of leave³²

A man has leave for one year on the basis of his marriage to a British citizen. He is arrested for assaulting his wife. His wife reports that she has not lived with him for several months and that he has been harassing her. The police bail the man and report the matter to the Immigration Service and an immigration officer orders that the man be detained while the Immigration Service decides what action to take. The man is entitled to apply for bail.

Those refused leave to enter pending removal directions³³

An asylum seeker is interviewed and his case is refused. He is detained while arrangements are made for removal. He has the right to apply for bail. Note that if a judicial review is lodged he would also have the right to apply under this section.

Those suspected of being an illegal entrant or overstayer pending the giving of directions³⁴

A man is arrested for a minor offence. When he gives his identity, the police discover that he is an overstayer who arrived 6 years ago on a visitor's visa and this was never extended. He is detained while arrangements are made for removal. He has the right to apply for bail.

Those detained under IA 1971 Schedule 2 who have an in-country appeal pending to the appellate authority (including an asylum appeal, a human rights or race discrimination appeal, an appeal against the validity of a refusal of leave to enter or removal directions, an appeal against refusal of entry, an appeal against the destination of removal or an asylum appeal against removal to a safe third country)³⁵

A woman enters the UK and claims asylum. She is sent to Oakington and her case is refused. She lodges an appeal and is kept in detention. She has the right to apply for bail under this provision up until the time that the adjudicator determines her appeal.

Those detained under IA 1971 Schedule 2 who have applied for leave to the Immigration Appeals Tribunal (IAT)³⁶

If the woman in the last example has her appeal refused, but she exercises her right to apply for leave to appeal to the IAT, she has a right to apply for bail under this provision until the time that the IAT determines her application for leave, or if leave is granted, determines her appeal.

Those detained under IA 1971 Schedule 2 who have applied for or who have been granted leave by the IAT to appeal to the Court of Appeal³⁷

In the last example, if the woman's application for leave to appeal to the IAT is turned down, she may be eligible to apply for leave to the Court of Appeal. She would then be eligible to apply for bail under this provision.

Those detained under IA 1971 Schedule 2 for whom removal directions are in force³⁸

A man has applied for asylum. The Home Office states that his case should be dealt with by a third country under the Dublin Convention and issues removal directions. He has the right to apply for bail. Note that if a judicial review is lodged he would also have the right to apply under this provision.

Right to apply for bail for those liable to deportation

Under the 1971 Act, there were much reduced rights to apply for bail for those who have:

- a recommendation for deportation
- a notice of intention to deport
- a deportation order.

Under these provisions, it was only possible to apply for bail when certain types of appeals had been lodged.

Provisions to extend the right to bail were contained in the 1999 Immigration and Asylum Act. These were only brought into force on 10 February 2003.³⁹

The result of this change is that there is now a power to apply for bail from the Immigration Service or IAA in all deportation cases – no matter whether any appeal or what type of appeal has been lodged.

35 IA 1971, sch 2, para 29(1)

36 IA 1971, sch 2, para 29(4)

37 AIA Act 1993, s9A

38 IA 1971, sch 2, para 34(1)

39 IAA 1999 (Commencement No 12) Order 2003, SI No 2 brings into force IAA 1999, para 54. This extends IA 1971, paras 22–25 to deportation cases.

Repeal of automatic bail hearings

Part III of the Immigration and Asylum Act 1999 made statutory provision for two automatic bail hearings for all those detained under the Immigration Acts. The relevant sections were never brought into effect and are repealed by the Nationality, Immigration and Asylum Act 2002. This means that the onus remains on the representative to make a bail application for his client.

The repeal of Part III has *no* impact on the existing rights to apply for bail.

THIS CHAPTER COVERS:

- **outline of Home Office policy and sources of policy**
- **Immigration Appellate Authority guidelines** in relation to:
 - Home Office policy and international guidelines
 - sureties
 - documentary evidence from sureties
 - burden and standard of proof
- **international guidelines for detention and bail.**

Outline of Home Office policy

Home Office policy determines whether and how the power to detain is used in an individual's case, by reference to various criteria, not all of which are published.¹ Published Home Office policy is based on:

- excluding certain categories of people from detention, either completely, or in particular circumstances
- weighing up various factors in deciding whether someone who can be detained, should be – these factors mostly concern risk of absconding
- prioritising certain categories in the allocation of detention spaces.

The Home Office has also established schemes that use detention in a different way, in particular Oakington reception centre.

The Harmondsworth fast track pilot scheme extends the Oakington model through the appeals process.² Nationality is an important criteria for both of these schemes.³

It is important to consider the policy guidelines in order to consider whether your client's detention is in accordance with them. If it is not, as is often the case, this will form the basis of your application for release.

¹ See chapter 5 on detention on the basis of a special exercise and race discrimination.

² This scheme was announced by Home Office press release dated 18.03.03. The appeals system is governed by new Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003, SI 2003 No.801 (L.21).

³ See chapter 3 on Oakington and fast track cases. Race discrimination is dealt with in chapter 5.

Sources of policy

The following are sources of policy:

Operational Enforcement Manual (OEM), chapters 38 and 39, 2001

▶See appendix 1

Fairer Faster Firmer, White Paper, published 1998 ('1998 White Paper')

Secure Borders, Safe Haven, White Paper, published January 2002 ('2002 White Paper')

Criteria for transfer from removal centres to prisons, issued by David Wilson, Deputy Director Detention Services, June 2002

▶See appendix 6.

Detention policy is mostly contained in the OEM, chapters 38 and 39, which states that broad policy in relation to detention is as set out in the 1998 White Paper. The OEM applies to enforcement departments of the Home Office. It is understood that similar policy is set out in Immigration Directorate Instructions (IDIs) relating to the Immigration Service at Ports. However the current IDIs have not been published.

Since the OEM was disclosed, the government has changed detention policy to allow for the long-term detention of families.⁴ In addition, the commitment to end the use of prison spaces for detainees has been reversed since the Yarl's Wood fire in February 2002. ▶See also chapter 8.

You should make sure that you are familiar with the Operational Enforcement Manual. ▶See appendix 1 for key sections.

The effects of the policy on preparation of applications for release in general and for specific categories of detainees are dealt with in the appropriate sections of this guide.

Immigration Appellate Authority guidelines

The Bail Guidance Notes for adjudicators from the Chief Adjudicator ('the Guidance Notes') set out the procedure that adjudicators should follow when hearing bail applications. They were revised significantly in May 2003. ▶See appendix 2.

You should be aware of the Guidance Notes when preparing a bail application: in some ways they can be a useful tool, in other ways they present obstacles that may need to be addressed. The main issues that they raise are discussed below.

Approach to be taken by adjudicators to Home Office policy and UNHCR guidelines

The Guidance Notes advise adjudicators that they should be familiar with the Immigration Service policy on detention and the UNHCR guidelines.⁵ The Guidance Notes state 'although you are not bound by this Policy and the guidelines, there is authority for saying that you should consider them when deciding issues of bail'. Adjudicators should be referred to this paragraph if they refuse to have regard to detention policy and/or international guidelines.

⁴ Note that this significant change in detention policy was originally announced only by letter in October 2001 and was later included in the 2002 White Paper. See also chapter 7.

⁵ Appendix 3, para 1.3.

Approach to be taken by adjudicators to sureties

It is important to be familiar with the Immigration Appellate Authority guidelines when developing arguments in relation to the necessity or suitability of sureties.⁶ The Guidance Notes stress that there is no tariff figure, that the amount of recognizance from any surety is 'always a matter for the individual adjudicator'. The 'surety checklist' attached to the Guidance Notes (see end of appendix 2) encourages adjudicators to obtain a wide range of information (financial, relationship to detainee, stability of family life, standing in the community) from prospective sureties **before** making a decision as to whether someone is suitable and what level of recognizance should be required.

What the Guidance Notes say in relation to sureties

- It should be borne in mind that asylum seekers rarely have relatives or friends in the UK who can act as sureties.
- Adjudicators are reminded that sureties are only required where you cannot otherwise be satisfied that the applicant will observe the conditions you may wish to impose. Where there is clearly no prospect of an applicant being able to obtain sureties, but in principle there is a case for granting bail, then you should consider if more stringent conditions might meet the particular needs or concerns of the case.
- Suitability [of a surety] includes family and social ties as well as residence and financial considerations.
- Sometimes you are asked to consider accepting a nominal sum as a sufficient recognizance. What is a nominal sum to one person may be a substantial sum to another.
- With regard to the amount of recognizance:
 - a) it must be realistic in the sense that it must be well within the resources of the surety, and not so high as to be prohibitive;
 - b) it must be assessed in relation to the means of the surety alone;
 - c) it must be sufficient to satisfy you that it will ensure that the applicant and the surety will meet their obligations;
 - d) it must be realisable in the event of forfeiture.

The instruction not to impose an amount that is prohibitive is taken from the UNHCR guidelines.

Documentary evidence required by adjudicators

The Guidance Notes suggest strict requirements in relation to documentary evidence from sureties. If a surety is not able to comply with these requirements, you must take instructions as to why this is so. See chapter 9 for guidance on how to assess a prospective surety. Lack of documentation itself should not normally be a reason to reject someone as a surety.

⁶ Para 2.2, 2.3 and 'surety checklist' and 'notice to applicants, their representatives and sureties' attached to the Guidance Notes and included at appendix 2.

Burden and standard of proof⁷

In immigration bail applications, the burden of proof is considered to be more straightforward an issue than the standard of proof.

Burden of proof

There is no statutory presumption of liberty in relation to immigration detainees, as there is in relation to those in criminal detention.⁸

However, it is accepted that the burden of proof is on the Home Office to justify continued detention and to set out the reasons why bail (or temporary admission) should not be granted as a suitable alternative.⁹

Standard of proof

A test that is commonly applied by adjudicators is:

‘is the applicant more likely than not to abscond?’ This:

ignores all other factors, such as length of detention, ill-health, likelihood of imminent removal, etc.

arguably tends to reverse the burden of proof onto the applicant, by focusing on risk of absconding, and removes it from the Secretary of State, by not focusing on the need to justify continued detention.

The current Guidance Notes revise the position of previous Guidance Notes. It is important that you bring the revised position to the attention of the adjudicator.

What the Guidance Notes say about the standard of proof

- The Immigration Service’s OEM suggests 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’
- It is suggested you adopt the ‘substantial grounds for believing’ test which would be higher than the balance of probabilities but less than the criminal standard of proof. **If allegations in the bail summary are contested in evidence then the Secretary of State should adduce evidence, including any documents relevant to the decision to detain, to support such allegations. (emphasis added)**
- The risk of absconding, although the principal factor, is just one of the factors to be taken into account on an application for bail and has to be balanced against other factors.
- The UNHCR guidelines make helpful comments on the detention of minors, vulnerable persons and women.

⁷ See also Guidance Notes, Paras 1.4 and 2.5

⁸ This was included in IAA 1999 in the context of routine bail applications, never implemented, and repealed by NIAA 2002 s68(6).

⁹ This principle is set out in the case of *Re Hardial Singh* [1984] 1 WLR 704 and affirmed by the Privy Council in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97.

It is *crucial* to note that the Guidance Notes require the Secretary of State to adduce evidence where allegations in the bail summary are contested.

This passage must be relied on to request documentary evidence from the Immigration Service prior to the hearing to back up any allegations that your client does not accept. ► See chapter 9. You should consider this requirement in a broad sense – for example, if the Immigration Service states that your client is in good health when this is not the case, you should request disclosure of the evidence for the assertion.

The Guidance Notes refer to factors set out by the Court of Appeal. These are set out in this guide, in the context of representing those with criminal convictions, but the factors are of general relevance as well. ► See chapter 8.

International guidelines for detention and bail

Sources of international law that form the basis for international guidelines:

UN Declaration Article 9:

‘no one shall be subjected to arbitrary arrest, detention and exile’

International Convention on Civil and Political Rights, Article 9(1):

‘no one shall be subjected to arbitrary arrest or detention’

Universal Declaration on Human Rights

‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’.

UNHCR guidelines

The United Nations High Commissioner for Refugees (UNHCR) drew up revised guidelines on applicable criteria and standards relating to the detention of asylum seekers (UNHCR guidelines, included at appendix 3) in February 1999. These are statements of principle that should be adhered to by Contracting States (including the UK). There is no right to a remedy if a guideline is breached. It is useful to refer to the guidelines when preparing an application for bail or other application for release, in particular guideline 4, which covers alternatives to detention.¹⁰

UN Working Group on arbitrary detention

The UN Working Group was established in 1991. It visited the UK in 1998 to investigate the use of immigration detention and made a number of recommendations to the UK government, most of which have been ignored.¹¹

The ‘criteria for determining whether or not custody is arbitrary’ deal with detention in general, including the detention of migrants and asylum seekers. They play a similar role as the UNHCR guidelines (see above), in that they are statements of principles rather than directly enforceable law. Again, they can be useful to refer to when preparing applications for bail or release. ► See appendix 4.

¹⁰ Note that Guidance Notes refer to the UNHCR guidelines.

¹¹ For BID’s report on compliance with these recommendations *Immigration Detention in the UK*, September 2002, see the BID website www.biduk.org/info.htm

3

Methods of obtaining release

3 Obtaining release

THIS CHAPTER COVERS:

- applications for temporary admission and temporary release
- Oakington and fast track cases
- Chief Immigration Officer bail
- bail from an adjudicator
- bail from the Immigration Appeals Tribunal
- High Court remedies in detained cases – habeas corpus and judicial review.

Temporary admission/temporary release

The Immigration Service and the Secretary of State have the power to release anyone held in detention.¹ Temporary admission (TA) is granted to someone who has not yet had a decision on whether she should be granted leave to enter. Temporary release (TR) is granted to someone who has been refused leave to enter or who has overstayed her permission to stay.

When you are instructed by someone held in detention, you should immediately make an application for TA/TR as appropriate. This is both because it may lead to the release of your client and because it helps you to find out the reasons for detention. Where you are already aware of reasons for detention, and these are contested by your client, you should request disclosure of supporting evidence for the Immigration Service reasons. You can argue by analogy with the requirement contained in the Guidance Notes that the Secretary of State provides evidence of any allegations in the bail summary that are contested by the detainee.²

You should base the application on the policy contained in the OEM.

►See appendix 1.

¹ NIAA 2002, s62(3) extends the power of immigration officers to the Secretary of State.

² Guidance Notes para 2.5.3 and see chapter 2

An application for temporary admission/temporary release should contain:

- a request for the reasons for detention (if not already disclosed)
- the factors set out in the OEM that support your client's case – for example settled family life or an outstanding appeal that are an incentive to keep in touch
- any factors that indicate that your client should not have been detained, for example, ill-health or a history of torture or rape (you should refer to the OEM guidelines on who should not be detained)³
- any factors that make it less likely your client will abscond – such as children in school, regular medical appointments, disability, etc.
- details of the address that your client will be released to including, if appropriate, the connection between your client and the address provider
- alternatives to detention that would be appropriate and that your client would accept, such as regular reporting to a police station.⁴ (Note that the Immigration Service has the power to impose reporting restrictions).⁵

If TA/TR is refused, it is open to you to make a further application at any time, although without a change in circumstances it is likely to be refused again. Passage of time can be a change in circumstances, but you should first of all consider what other options are available to you.

Oakington and fast track schemes

Oakington reception centre was set up to detain applicants while their initial claims for asylum were determined within 7 days.⁶ Unlike other detention centres, it is not necessary for the Immigration Service to have evidence that the person is likely to abscond in order to justify detention at Oakington. In fact, risk of absconding is a factor that is supposed to indicate that Oakington is *not* suitable.⁷

The Oakington procedure is supposed to sift detainees both before and once they have arrived at Oakington.⁸ It is apparent that this is not happening, especially in the case of victims of rape/torture or other trauma, whose cases call for medical or psychological evaluation.

At the end of the Oakington process, the Immigration Service must decide whether to release your client or to transfer her to a detention centre or even to a prison. Therefore it is important to make an application for temporary admission before the period is finished, relying on the criteria for Oakington and the OEM. If your client has described a history of torture or rape, you should set out these factors.

Always ask for reasons if temporary admission is to be refused. If refused, you will need to consider other methods for release.

The government is in the process of developing and implementing other schemes for the 'fast tracking' of cases that they consider to be straightforward. Some, such as non-suspensive appeals for a list of 'safe' countries, focus on almost immediate removal so that release or bail is hardly an issue unless there is delay in carrying out the removal, or judicial review is lodged.

3 Appendix 1, OEM para 38.8

4 See chapter 1 section on alternatives to detention.

5 IA 1971, sch 2, para 21.

6 Oakington is now also being used for those without suspensive appeals from 'white list' countries under NIAA 2002.

7 See *R v SSHD ex parte Saadi and others* [2002] UKHL 41 para 18

8 Barbara Roche's announcement to Parliament on 16 March 2000 'asylum applicants will be detained at Oakington where it appears that their application can be decided quickly, including those which may be certified as manifestly unfounded... If the claim cannot be decided in [a period of about 7 days], the applicant will be granted temporary admission or, if necessary in line with existing criteria, moved to another place of detention'. Quoted in *JCWI Immigration, Nationality & Refugee Law Handbook*, 2002

Others, such as the Harmondsworth pilot scheme allow appeals in country but reduce the process to a matter of days rather than weeks before first appeal. The Harmondsworth scheme is only supposed to apply to those matching existing detention criteria.⁹ The scheme only applies to certain nationalities, at present.¹⁰

As with Oakington cases, you should make an application for temporary admission for a client placed in such a scheme. This should be done immediately, setting out the factors against detention and any factors that make your client unsuitable for the scheme.

Detainees in Oakington and fast track schemes still have the right to challenge their detention.

It is important to consider all aspects of this guide for all clients, even those in the fast track systems, against Home Office detention criteria and legal principles applying to detention.

Chief Immigration Officer bail

Chief Immigration Officer bail is a grant of bail by a Chief Immigration Officer (CIO), rather than by an adjudicator.¹¹ The power is now also exercisable by the Home Office.¹² It appears that this change will not make a practical difference in applications for CIO bail. You must make an application in writing to the CIO or senior official at the Immigration Service or Home Office Enforcement department that is dealing with your client's detention case.

CIO bail is an option in all cases except for those detained pending examination who have been in the UK less than 7 days. ►See chapter 1.

In contrast with TA/TR, the Immigration Service/Home Office:

- has the power to request sureties
(and to set the amount of recognizance)
- is obliged to take a recognizance from the detainee
(in many cases this will be a nominal sum, such as £1).

As with an application for TA/TR, an application for CIO bail can be a means of finding out the reasons for detention, which will then assist in the preparation of an application for bail to an adjudicator.

The OEM sets out the Immigration Service's policy on sureties for applications for CIO bail.¹³ It states, 'each case should be assessed on its individual merits but a figure of between £2000 and £5000 per surety will normally be appropriate'.

Although there are cases when CIO bail is granted for significantly less money (and occasionally without any sureties at all), it should be borne in mind that the Immigration Service will generally demand higher amounts from sureties than adjudicators. On occasions, the disparity can be huge: in one case an adjudicator granted bail for a recognizance of £1 from a surety when the Immigration Service had requested £10,000.

9 See Home Office press release 18.03.03: 'Up to ninety asylum seekers at a time with straightforward claims will be detained throughout the process, providing they meet the detention criteria'.

10 See letter of 26.03.03, from Home Office to LSC setting out list of nationalities. Published in ILPA mailing April 2003.

11 IA 1971, sch 2 para 22 (1A), (2)

12 NIAA 2002, s68(2)(b) extends power to Secretary of State.

13 OEM, para 39.5

If TA/TR has been refused, the normal procedure for a client with sureties would be to apply for CIO bail. If your client does not have any sureties, or those she does have can only offer small amounts of money, CIO bail is unlikely to be granted. In such cases you should immediately consider an application for bail to an adjudicator, if TA/TR is refused.

You can make repeated applications for CIO bail, but as with TA/TR, without a change in circumstances (which can include passage of time) it is likely that the application will continue to be refused.

Bail from an adjudicator

Most detainees have the right to apply for bail to an adjudicator. ►See chapter 1. This is done by completing the prescribed form and sending it to the Immigration Appellate Authority. The application is heard by an adjudicator, usually in the presence of the detainee. The Immigration Service is represented by a Home Office Presenting Officer (HOPO), or occasionally by counsel. ►See chapters 9 and 10.

The adjudicator has the power to:

- refuse bail

- grant unconditional bail

- grant bail subject to conditions such as residence, reporting, sureties.

- See chapter 10.

If the adjudicator refuses the bail application, you may:

- Make further applications after a change in circumstances (including the passage of time). The Guidance Notes suggest 28 days is enough time to constitute a change in circumstances if 'the lapse of time is relevant to the particular case'.¹⁴

- Make further applications with 'fresh additional grounds'.¹⁵ Fresh additional grounds may be further evidence to illustrate the same situation. For example, evidence that the Immigration Service is still unable to arrange removal or further medical evidence.

- Keep pressing the Immigration Service to release your client on TA/TR.

- Make an application for judicial review/habeas corpus.

- See chapter 11.

¹⁴ Appendix 2, para 3.3

¹⁵ Appendix 2, para 3.1

Bail from the Immigration Appeals Tribunal

If your client has applied for leave to appeal to the Immigration Appeals Tribunal (IAT), or has been granted leave and is waiting for a hearing date, or is awaiting a determination from the IAT, the IAT has similar powers to adjudicators to hear applications for bail.¹⁶

If your client is in such a situation, you have a *choice* of whether to make a bail application to an adjudicator or to the IAT. An application for bail to the IAT is lodged and listed in the same way as is an application for bail to an adjudicator. ►See chapters 9 and 10.

If your client has been granted leave to appeal to the IAT, there is a *duty* on the adjudicator or the tribunal (whoever you have chosen to hear the bail application) to release her subject to certain requirements. This duty *only* exists if your client is at this stage of her case. The requirements are that:

- the appellant enters into a proper recognizance, and
- provides sufficient and satisfactory sureties if required.

However, there are certain exceptions to this duty.

The adjudicator/Tribunal does *not* have to release the applicant if:

- she has previously failed to comply with conditions of bail
- she is likely to commit an offence if released
- she is suffering from mental disorder and detention is necessary to safeguard her own interests or the public¹⁷
- she is under age of 17 and necessary arrangements have not been made for care.¹⁸

If an application for bail is refused, you have the same options as set out in the previous section. ►See chapter 11.

Note that an application for bail to the Immigration Appeals Tribunal (IAT) is *not* an appeal against an earlier refusal of bail by an adjudicator. There is no right of appeal against a refusal of bail.

High Court remedies in detained cases

Habeas corpus

Habeas corpus is the correct remedy when it is alleged that detention is unlawful, and not just unreasonable or the wrong decision as may be alleged when arguing for temporary admission or bail.

Detention for immigration purposes can clearly be lawful given the very wide powers allowed under the immigration acts but it is subject to constraints as follows:

- it is only lawful if exercised for one of the purposes allowed under immigration law
- it is only lawful if it is for a reasonable period of time
- it is only lawful if the Home Secretary exercises reasonable expedition. ►See chapter 1.

¹⁶ IA 1971, sch 2, para 29(4). Note that the term 'leave' is replaced by 'permission' in NIA 2002, s101.

¹⁷ There is no guidance as to what circumstances would warrant the refusal of bail under this section. See also chapter 7 for related issues.

¹⁸ IA 1971 sch 2 para 30(2). Note that this does not justify ongoing detention of a minor. The Immigration Service is obliged to make arrangements for care immediately and normally detention would only be maintained for one night at the most.

The leading cases, from which these principles are distilled, are set out below. They illustrate the type of case where this High Court action might be useful:

R v Governor of Durham Prison ex parte Hardial Singh

[1983] Imm AR 198

The applicant was an Indian national who was sentenced to 2 years for burglary. He waited for 5 months whilst the Home Office tried to get a travel document to return him to India. The then Woolf J stated that unless it was possible to show that he would be removed within a very short time indeed that his detention would be unlawful. He considered important that the applicant was ready to return to India; that the Home Office had not done what they should have done nor had they acted promptly and that the applicant had attempted suicide.

R v Secretary of State for the Home Department

ex parte Wasfi Suleiman Mahmud [1995] Imm AR 311

The applicant was an Iraqi who had been granted refugee status in Germany. He entered the UK and was convicted of a drugs offence and sentenced to 4 years imprisonment. He wanted to return to Germany, and indeed took proceedings himself in Germany to achieve this, but the German authorities refused to have him back. He had been detained for 10 months when the matter came to court. Law J was influenced by the fact that only fruitless negotiations were going on and stated that a reasonable period of detention had certainly passed.

Tan Te Lam v Superintendent of Tai A Chau Detention Centre

[1997] AC 97

Vietnamese boat people were detained for periods of up to 44 months under the Immigration Ordinance. The case came before the Privy Council. The question as to whether the applicants had applied for voluntary repatriation was considered of fundamental importance because this was of an express provision in the ordinance under which they were detained. It was emphasised that the burden of proof is on the Home Office to show the legality of the detention. The appeal was allowed and the applicants released, as removal was not possible within a reasonable period of time. This was because the applicants would not be accepted for repatriation by the Vietnamese government who regarded them as non-Vietnamese nationals (their being of Chinese origin).

R v SSHD ex parte I Court of Appeal 28.6.02

2002/0743 & 2002/0768 [2002] EWCA Civ 888

An Afghan with exceptional leave to remain was convicted of indecent assault and given a 3-year sentence and a deportation order was signed against him. He was detained for 16 months after the end of his sentence. He was held in a prison like a convicted prisoner – locked up for 19.5 hours a day with no education or work. He was depressed and needed sleeping tablets. He was treated as having made a new asylum claim 2 months after his detention began. His solicitors stated that the Home Office had no intention of removing him.

At the time of the hearing before the High Court there were no possible forced returns to Afghanistan, no direct flights, and no voluntary returns available either.

When the matter came before the Court of Appeal there was a possibility of voluntary return but only a hope (and not a reasonable prospect) that forced returns would be in place within the next month.

The risk of re-offending was considered relevant to the period for which a person could reasonably be detained. His new asylum claim was not relevant as it was not this that was preventing his removal. The refusal to go voluntarily was considered by the majority (Simon Brown LJ and Dyson LJ) of some limited relevance but not central, particularly as it had only just become an option, although Mummery LJ found this significant and found against the appellant on this basis.

Additional considerations:

Before embarking on a habeas corpus challenge it is necessary to ensure that there is no proper argument that the detention or its length could be attributed to the client. It is not usually possible to bring a habeas corpus action where the client is still in detention because, for example, she refuses to sign an application for a travel document to return to her country of origin, although this may be possible if, on the facts, refusal to sign made no difference – for instance in a case when the client could not be removed anyway due to lack of flights to that country.

When commencing a habeas corpus action for a client who has been detained pending a removal which has not taken place, it is important that she understands that the action may well bring about that removal: the action amounts to a challenge to the Home Office to 'release or remove' and sometimes of course the result is a removal as legal action places extra pressure on the Home Office to obtain travel documents.

It is important to discuss with a client in this position what will happen if they are released: this may come about quite suddenly if the challenge has merits. Some clients may find themselves without access to benefits, social services assistance and asylum support. It is important that some plan be made for where the client will go and how she will survive, and of course that applications for any support to which she is eligible are made.¹⁹

Compensation for unlawful detention

If a client is released following an order or writ of habeas corpus this is a finding that detention has been unlawful and damages may be available via a civil action in the County Court for the tort of false imprisonment. The client will need to be referred to appropriate lawyers specialising in civil actions to bring such a case.

Damages will depend on the length of time of the unlawful detention and the other circumstances of the case, and may run to thousands of pounds.

¹⁹ See chapter 9 on accommodation.

Judicial review

Judicial review is the correct remedy if the challenge is to an underlying administrative decision such as service of notice to an illegal entrant, or refusal of leave to enter.

Habeas points can be pleaded in a judicial review action if a joint challenge is appropriate, and the distinction between the two remedies has become somewhat blurred. However:

- relief is discretionary in judicial review; habeas corpus is a remedy as of right

- a judicial review must be brought as soon as possible and within no more than 3 months of the decision complained about; there is no time limit in habeas corpus.

4

Contacting your client in detention

THIS CHAPTER COVERS:

- places of detention
- telephones and faxes
- legal visits
- movement of detainees within detention estate
- criminal prisons.

4 Contacting your client

Places of detention

Most immigration detainees are detained in 'removal centres', previously known as detention centres.¹ These have security equal to category B prisons, although the regime is mostly more 'relaxed' than regimes in prisons in terms of visiting hours, access to incoming telephone calls, etc. The centres are mostly operated by private contractors, although three are ex-prisons that are run by the prison service (with correspondingly tougher regimes).

The removal centres are:

- Campsfield House
- Dover (prison service)
- Dungavel House
- Harmondsworth
- Haslar (prison service)
- Lindholme (prison service)
- Tinsley House.

In addition, Oakington reception centre is also a secure unit, but is used for 'fast track' processing of initial asylum decisions. The point of the fast track is to take initial decisions within 7 days. People are usually not kept in Oakington following the initial decision.²

¹ The name was changed by NIAA 2002.

² For more on Oakington, see chapter 3.

Telephones and faxes

Removal centres provide facilities to allow you to telephone your client and for your client to telephone you.³ However, you should remember that long distance conversations at day-time rates are very expensive, particularly if the phone card tariff is not favourable. If your client does not have money to pay for a telephone card, the detention centre may provide limited free access to a telephone.⁴ *You should make it your practice to offer to telephone your client back when she telephones you.*

It is possible to send faxes to a client in detention. These will not, in practice, be confidential, and may take some time to be delivered. You should put your client's detention number and room number/ telephone extension on any faxes to ensure that they are correctly delivered. Your client will normally have access to a fax machine, for which she may have to pay, although the detention centre may refuse to fax long documents.

In general, letters to detainees are confidential.⁵

Removal centres use forms of segregation as a means of punishing detainees. This may include restricting your client's right of access to a telephone. Your client may be accompanied to the telephone by security guards. If your client is being treated unfairly, you should take her instructions on complaints to the detention centre manager.⁶

Legal visits

Visiting regimes vary greatly. You should telephone ahead to check what arrangements are necessary for a particular centre, especially when booking a private room. As with prisons, you and any interpreter must bring proof of identity, and a letter of introduction from your firm.

³ See appendix 7 for a list of telephone numbers and visiting times for removal centres.

⁴ In principle this is governed by Rule 31 Detention Centre Rules 2001 which states that the Secretary of State may bear the cost of any telephone calls. Practice varies considerably between centres – see AVID website www.aviddetention.org.uk

⁵ DCR 2001, rule 27 sets out limited exceptions.

⁶ Treatment of detainees is governed by the Detention Centre Rules 2001 [SI No 238]; removal from association comes under rule 40.

⁷ See appendix 5. You can make written representations to the Immigration Service based on these criteria.

Movement of clients within detention estate

The Immigration Service frequently moves detainees between centres, especially if they are considered to be 'troublemakers' (a policy known as 'ghosting'). Another factor is the availability of places. The Immigration Service is generally reluctant to agree to requests to transfer a particular detainee – although the published criteria do allow for transfer requests to be made on specific grounds.⁷

Obviously there are huge practical problems in representing a client who is moved from a relatively local detention centre to one hundreds of miles away, for example from Harmondsworth to Dungavel in Scotland. Detainees may be left stranded without adequate representation because they have been moved.

If your client has been moved, you must decide what is in that client's best interests – should you find another firm to deal with the case, or should you continue to act and arrange visits as necessary? This decision must depend on the stage the client's case has reached, the availability of alternative representation, and the date of any appeal hearings.

Criminal prisons

Immigration detainees are still sometimes placed in criminal prisons. This is for different considerations than apply to the transfer of detainees between removal centres.⁸

An immigration detainee in a criminal prison will have the same daily regime as the other prisoners and the same access to telephones, faxes, visits etc. Therefore, you will not be able to telephone or fax your client. Your client will be able to telephone you, but only at specified times and, again, with limited access to phone cards.

If you require urgent contact with your client, you can request via the Duty Governor that a message is passed to the wing where the detainee is held. The prison should make arrangements for your client to telephone you.

Visiting times at prisons are much more restricted (although comparable with some detention centres such as Lindholme and Haslar) and visits will always require advance booking – sometimes more than a week in advance. Again, proof of identity will be required for you and any interpreter together with a letter of introduction for both of you from your firm.

⁸ To challenge your client's detention in a prison, see chapter 8.

5

Obtaining reasons for detention

THIS CHAPTER LOOKS AT:

- why reasons for detention are important
- summary of procedure for detaining/reviewing detention
- reasons/reviews of detention and unlawful detention
- obtaining disclosure of reasons/reviews of detention
- detention on the basis of a special exercise and race discrimination.

Why reasons for detention are important

The Immigration Service's Operational Enforcement Manual (OEM, extracts reproduced at appendix 1) sets out the purposes of detention policy and reasons for which individuals can be detained. ►See chapter 2. The Immigration Service and Home Office have the power to detain a person, but *only* for the purposes and reasons that are set out in the disclosed criteria, namely the OEM.

It is therefore essential to discover the Immigration Service's reasons for detaining your client. Without these you will not be able to advise your client properly nor to prepare a bail application effectively. You should not assume that the reasons will be accurate or that they will present a complete picture of your client's situation. Indeed you may take the view that the lack of reasons that are in accordance with the OEM indicates that the detention of your client is arbitrary and therefore unlawful.

Detention must be reviewed in order to remain lawful. In reviewing detention, the Immigration Service must consider whether detention *remains* justified in all the changing circumstances of your client's immigration or asylum case, health, family life, etc.

Reviews of detention are important, in particular if it is not apparent to you why your client was originally detained or why she should remain in detention (for example, because she claimed asylum immediately and her health is deteriorating). The reviews will reveal whether the decision to maintain detention is based on incorrect or inadequate information, which can then be addressed in an application for release or bail.

Although temporary admission or temporary release (TA/TR) applications will reveal current reasons for detention, you will not normally be given the relevant documents from the Immigration Service file. In addition, the reasons for detention may well change over time.

It is common practice for the Immigration Service to add reasons to a bail summary that were not previously relied on, in order to strengthen an otherwise weak detention decision at the time of a bail application.

It is important to know the procedures by which the Immigration Service records and reviews decisions to detain in order to press for disclosure.

Summary of procedure for detaining/reviewing detention

The initial decision to detain is disclosed by means of a checklist form called an IS91R. This reveals little of value because the wording is so general. A Chief Immigration Officer (CIO) or Inspector will then write a more detailed file note with the reasons for detention, in accordance with the OEM. This is not disclosed.

The detainee is notified of the right to seek bail via forms IS98 and 98A. These, and the IS91R are supposed to be translated into the detainee's language at the point that they are handed to the detainee by the immigration officer.

The procedure for review of detention is set out in the OEM.¹

Detention must be:

reviewed after 24 hours by an Inspector and thereafter, as directed, usually weekly, by an Inspector. If circumstances change in the interim, however an Inspector must review detention again. Detention must be reviewed again by an Inspector after 28 days, after which the DRU [Detention Review Unit] takes responsibility for reviewing detention... The SEO [senior officer] in the DRU reviews detention at the 1-month stage and has the authority to maintain detention up to the 2-month stage. From the 2 to 11 month stage, detention reviews are conducted monthly by Colin Harbin, Deputy Director and at 12 months and over by the Chief Inspector.

It must always be considered whether continued detention is essential when detention is being reviewed.

Note that the Detention Review Unit is now known as the Management of Detained Cases Unit or 'MODCU'.

Detention reviews should comprise grounds for detention, timescale, proposal for progressing case, prospects of removal, and compassionate circumstances. This is not disclosed. Instead, the detainee should be given a 'monthly progress report' on form IS151F. This sets out the stage the case has reached and normally does not contain any reasons for detention. In practice, detainees do not even always receive a monthly progress report.

¹ Appendix 1, ch 38.6

Obtaining disclosure of reasons/reviews of detention

You can write or telephone the port and ask an immigration officer to read out the initial and subsequent detention reviews from the file. Some immigration officers will do so (although many refuse). Any information obtained from phone calls should be written down in a detailed contemporaneous record of the conversation. If possible, you should confirm the telephone conversation by means of a follow-up letter, which can be used in court.

If, as is likely, the information is not disclosed, you can pursue the matter by writing to the inspector at the relevant port. You may receive a response that the Inspector is not able to disclose the reviews, but you should be directed to the Subject Access Bureau (SAB) at the Home Office. The SAB deals with information requests under the Data Protection Act 1998 (DPA 1998). The SAB may take up to 40 days to deal with the application.² However, such a request may be useful in terms of challenging the legality of detention after your client has been released. ► See chapter 3.

Reasons/reviews of detention and unlawful detention

One of the fundamental principles of lawful detention is the need to give reasons for detention to the detainee. Article 5(2) ECHR requires that 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'. There is also a common law duty to give reasons.³ This is on the basis that if you do not know why you are detained, you cannot know whether the detention is 'in accordance with the law'.

Policy and regulations on written reasons

The White Paper 1998 states

Written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals, or at shorter intervals in the case of detained families. Taking into account that most people who are detained are held for just a few hours or days, initial reasons will be given by way of a checklist similar to that used for bail in a magistrates court.

A statutory requirement to give reasons to a detainee is contained at Rule 9 of the Detention Centre Rules 2001, which states

Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly.

The failure to give reasons for detention (except the initial checklist) arguably makes detention arbitrary and therefore unlawful under Article 5 ECHR, as well as a breach of the Detention Centre Rules and government policy.

² A subject access request is made under DPA 1998, s7. You will need to attach correspondence with the Immigration Service and explain any urgency. If you do not receive a satisfactory response, the Information Commissioner is responsible for overseeing and enforcing the principles of DPA 1998 and can be requested to do an assessment of the subject access request. See www.dataprotection.gov.uk AVID periodical No 12 deals with procedures at SAB.

³ *R v Secretary of State for the Home Department ex parte Mohammed Fayed* [1996] EWCA Civ 946

Detention on the basis of a special exercise and race discrimination

Where there are apparently no grounds under the OEM for detention in your client's case, you may need to consider whether the detention has been ordered on the basis of a 'special exercise'. These are undisclosed instructions to Immigration Service staff as to how to process particular nationalities or other groups. The Immigration Service has acknowledged the existence of 'special exercises' but denies that these form the basis for decisions to detain.⁴

Special exercises raise the issue of discrimination based on nationality or ethnic group. This is covered by the Race Relations (Amendment) Act 2000.

This act, which amends the Race Relations Act 1976, makes it unlawful for any public authority, including the Home Office and Immigration Service to discriminate on grounds of race or colour or ethnic origin. However, there is an exception so that it is not unlawful for a 'relevant person' to discriminate on grounds of nationality or national origin in certain immigration and nationality functions. A 'relevant person' is a Minister acting personally or a person acting in accordance with a 'relevant authorisation'.

The Race Relations (Immigration and Asylum) Authorisation 2002 permits certain discrimination on grounds of nationality where certain criteria have been satisfied (for example 'there is statistical evidence showing an emerging trend of adverse decisions or breaches of the immigration laws by persons of that nationality').⁵ Note that this could breach Article 14 ECHR (prohibition against discrimination) if the discrimination cannot be objectively justified or is not proportionate.⁶

The discriminatory acts that are covered by this authorisation include:

- subjecting a person to more rigorous examination
- detaining a person pending examination
- imposing conditions or restrictions on grants of leave or temporary admission
- prioritising certain groups for removal.

The list of nationalities that are covered by the authorisation are not made public and due to the vague wording of the authorisation, could probably include any nationality that attempts to enter or claim asylum in the UK.

⁴ Exchange of correspondence between Immigration Service Enforcement Directorate and BID, Oct 2000 and Jan 2001.

⁵ Note that this authorisation expired on 24 May 2003 and at the time of writing had not been replaced potentially making unlawful the discrimination that had been allowed by the authorisation.

⁶ Remember that Article 14 cannot found a claim on its own, it must be used in conjunction with another article.

The Race Relations (Immigration and Asylum) (No 3) Authorisation 2001 makes lawful the use of language testing to help determine nationality. So far the nationalities that this is lawful for are: Afghanistan, Somalia, Sri Lanka and Iraq.

The Race Relations (Immigration and Asylum) (No 2) Authorisation 2001 has now been revoked. This allowed discrimination by reason of a person's ethnic origin where that person was of particular named ethnic origins.

The use of race relations legislation is outside the scope of this guide. However, practitioners should take steps to acquaint themselves with relevant provisions as there may be scope for challenging the detention of certain groups and discriminatory treatment within detention. Note, for example, that the authorisation to discriminate in terms of detention only expressly covers detention pending examination (and not pending appeal or removal).

A race discrimination claim must be made at the earliest opportunity and, where relevant, should be included in grounds for appeal to the IAA. If you are considering challenging the detention of your client on race discrimination grounds, you should consult specialist counsel at the earliest opportunity.

6

Assessing your client's case

THIS CHAPTER LOOKS AT:

- taking instructions
- evaluating your client's case for bail and obtaining evidence
- the relationship between bail application and substantive case
- when to make a bail application
- whether sureties are necessary
- who can stand as a surety
- how much does a surety need to offer
- the merits test for Controlled Legal Representation.

Taking instructions from your client

Your client's instructions are the heart of her application for leave to stay in the UK.¹ This applies as much to detained clients as to those living freely. Your client's instructions *also* form the basis of any application for release or bail.

It is essential to obtain very full and clear instructions at the outset on all matters that might be relevant either to a bail application or to the substantive case.

You should visit your client in detention, with an interpreter if necessary. The statement that you prepare from your instructions should be read back to your client to ensure that the information is complete and accurate.

It is very time consuming to take proper instructions, even more so when you must also take instructions relevant to a bail application. It can also be a long journey to visit your client if she has been moved to a distant detention centre. However, without full and accurate instructions, you will not be acting in the best interests of your client, thereby potentially breaching your professional duty, as well as prejudicing your client's application to stay in the UK and her chance for release.

There are three main areas that form the basis for instructions relating to an application for release:

- effect of detention on your client
- circumstances in UK (particularly if not detained from arrival)
- immigration history.

¹ See *Making an Asylum Application, a best practice guide*, ILPA, 2002

Effect of detention

You must take your client's instructions on how detention is affecting her, in terms of:

- mental and physical health and any disruption in care as a result of being taken into detention
- any previous experience of detention, torture and/or sexual assault in country of origin
- any problems in detention, e.g. treatment by staff or other detainees, access to religious observances, etc.

When you take instructions on this issue, you should bear in mind the following:

Detention can cause mental illness or exacerbate the effects of trauma arising from experiences in the country of origin.

Conditions of detention and mental suffering can increase physical health problems.²

Detention can increase a client's difficulties in pursuing her substantive case in terms of contacting potential witnesses or obtaining documentary evidence from her country of origin.

Detention can impede or prevent a client from revealing the full extent of her substantive case – for example, a client who was sexually assaulted in detention in her country of origin may experience additional difficulties in talking about her experiences than a client who is not detained.³

A detained client can be wrongly perceived to have a weaker case, merely because she is detained.

The best method for addressing the effects of detention is to obtain her release from detention as soon as possible.

Your client's circumstances in the UK

This is particularly important when your client has not been detained from arrival. The following areas should be explored:

Family members also living in the UK – do they have status?

What are their circumstances? Was your client involved in caring for/financially supporting anyone?

Is your client in a relationship? If so, with whom, for how long, and were they living together? Any children? What is the status of her partner?

Where was she living (if you do not have this information already)?

Who provided the accommodation? Is this still available to her?⁴

Was your client employed (if she had permission to work)?

If so, where and for how long?

Was she pursuing education or a qualification?

Does she already have a profession that she is allowed to practice in the UK (e.g. health profession)?

Was she involved in any political, community or religious organisations?

What type of activities did she engage in and for how long?

² *A Second Exile; the mental health implications of detention of asylum seekers in the UK*, C.K. Pourgourides, S.P. Sashidharan, P.J. Bracken, 1996

³ See *IAA Asylum Gender Guidelines, Nov 2000*, for general comments and caselaw on difficulties women face in making their cases.

⁴ Accommodation as an issue in a bail application is discussed at chapter 9.

Did she have any medical or psychological problems? Was she obtaining any treatment and if so, from whom and for how long?

From any of these areas, particularly the last four bullet points, is there someone who would be willing to write a letter in support of a bail application emphasising community ties or likely adverse effects of detention, as appropriate, etc? Is there anyone who would stand surety?⁵

Immigration history

Finding out about a client's immigration history is important because it will be the basis of the bail application. In particular, you will need your client's instructions on the Immigration Service reasons for detention. For example, if your client is accused of 'practicing deception' in her immigration history, this will be used by the Home Office to discredit the applicant in a bail application. Likewise, when your client has complied with conditions, such as to report to the Immigration Service on a particular date, you can use this to support the application.

The following questions are suggested as a starting point:

Entry

How did your client arrive in the UK (lorry/plane/train/boat)?

Did she have a valid passport?

Did she pass through immigration control when she arrived?

If so, what did she say to immigration officers?

If she entered with a false passport, at what point and to whom did she reveal that the passport was false?

Did the officer make a note of this?⁶

If she entered illegally, e.g. in a lorry, how and when did she contact the authorities?

At what point did she claim asylum and where?

Was she granted temporary admission, even for a few hours?

If detained on arrival, what were the initial reasons given for detention (she should have been given a checklist IS91R and this should have been translated if necessary)?

If she arrived with other members of her family, have they been detained also?

After entry

Did she comply with conditions of entry or temporary admission, i.e. live at address and attend interviews when required?

Did she inform her representatives, the Immigration Service, the Home Office and/or the IAA as appropriate, of any changes of address?

Was she required to report to the police or to the Immigration Service (a condition most often imposed after a refusal of asylum claim)? If so, did she report as directed?

In what circumstances was she detained?

5 For detailed discussion on sureties see below and chapter 9.

6 Note that in some cases, a detainee will instruct you that she did tell an immigration officer that her passport was false or that she wanted to claim asylum, but this is not recorded on the port file. This may happen; e.g. at Heathrow. The Heathrow Intelligence Unit (HIU) is responsible for checking travel documents for forgeries before the passenger arrives at the immigration control desk. The HIU officers do not carry notebooks or officially record any conversation between them and the passengers they speak to (letter from HM Inspector, HIU to BID, 28 March 2002).

If detained for removal, why has this not yet taken place?
 Have removal directions been served in the past?
 What prevented the removal from taking place?
 Has she been asked to complete a bio-data interview or an application for travel documents? If so, did she cooperate?
 If she did not cooperate, why not?

Evaluating your client's case for bail

You must evaluate your client's case in order to determine the positive and negative factors. This will allow you to prepare your client's application for release.

This will involve considering three overlapping areas:

Are the reasons for detention accurate in your client's case?
 What elements of your client's case are actually disputed by the Immigration Service (for example disputes about age or nationality? ►See chapter 8
 What elements of your client's case have not been considered properly or at all by the Immigration Service (for example, health, family situation, factors making absconding unlikely, etc)?

Issues likely to be relevant to a bail application

Length of detention: the longer detention has continued the more the Immigration Service must justify its necessity.

Any delay in progressing the case by the Home Office, the Immigration Service or the IAA.

Did your client attempt to deceive or in fact present herself to the authorities, whether at the port, Home Office or police to claim asylum (and see below, Article 31)?

If your client failed to present herself at any point in the process, what were the reasons for this?

If your client failed to keep in contact, e.g. did not notify change of address, why did this happen?

Was your client granted temporary admission, even for a short time, or told to return another day, before being detained?

Has your client ever resisted removal and if so, in what circumstances?

If you are told that removal is imminent, have you subsequently launched an appeal or other legal challenge?

Similarly, if removal is in theory imminent, does the Immigration Service have the necessary travel documents to carry this out?

Has the Immigration Service attempted to obtain them?

►See chapter 8.

If the Immigration Service has said that your client is likely to abscond is there any evidence of this from past behaviour?

Is detention in accordance with the OEM: for example, is your client a victim of torture? If so, have the Immigration Service indicated what are the 'serious exceptional circumstances' that allow for detention of a torture victim? ►See chapter 7.

What is the overall prospect of success in the substantive case?

Breaches of temporary admission, previous deception or a history of absconding are not sufficient to justify detention per se. You should consider the circumstances that led to the breach or deception and any history of compliance. Neither can a low chance of success in the substantive case itself justify detention throughout the process. The length of detention and the overall circumstances of the case must be weighed against any evidence of risk of absconding.

Role of Article 31 of the Refugee Convention

Article 31 of the Convention exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Article 31 has been considered by the UK courts in relation to the prosecution of asylum seekers for use of false documents, in the case of *Adimi*.⁷

The principle of Article 31 is often ignored by the Immigration Service and by adjudicators who will often detain or refuse bail on the grounds that someone entered illegally, even if she presented herself to the authorities as soon as possible.

You should consider whether your client can seek the protection of Article 31, arguing by analogy with the case of *Adimi*. The key question is whether your client has demonstrated that it was her intention to seek asylum, so that delay in claiming asylum or the use of false documents or deception should not lead her to be detained.

Article 31 is relevant where your client:

- claimed asylum before she was refused leave to enter at an airport
- entered the UK illegally and sought out the authorities (Immigration Service, Home Office, police, etc) in order to claim asylum
- instructed a solicitor with the intention of claiming asylum, although she had not actually claimed before she was arrested and there is no significant delay between contacting the solicitor and the arrest
- is accepted by the Home Office or Immigration Service as 'travelling to the UK with the intention of claiming asylum'. This type of comment is sometimes included in the reasons for refusal letter from the Home Office.

⁷ See *R v Uxbridge Magistrates' Court and Another ex parte Adimi* [1999] INLR 490, per Simon Brown LJ at page 498 'If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached his condition' (i.e. he is entitled to claim protection of Article 31).

Obtaining evidence

Evaluating the case is half the task. You must then consider what evidence is available to your client. This is particularly important when preparing for a bail application in the IAA, when the adjudicator or tribunal will be balancing the account of the Immigration Service against your client's case.

Is any evidence available apart from that of your client?

If so, where can this be obtained?

Obtaining evidence could include:

Writing to the Immigration Service to request further clarification where necessary. You can refer, by analogy if necessary, to the Guidance Notes which require the Secretary of State to present evidence of any contested allegations contained in the bail summary. ▶ See chapter 2.

Ensuring that you request the whole file from previous representatives (so that you can see what instructions were given by your client and what action was actually taken by the representatives, for example when your client changed address).

Advising your client to seek documentary evidence where available (or, where appropriate, taking action yourself to obtain this). This is particularly relevant for: nationality, age, identity.

Seeking documentary evidence to confirm why your client, for example, failed to attend an interview due to ill-health.

Requesting medical reports in relation to pre-existing medical problems.

Requesting medical records from the detention centre.
▶ See chapter 7.

Instructing an expert to assess your client's physical or mental health in detention. ▶ See chapter 7.

Requesting letters in support from health professionals, college tutors, children's schools, employers, etc, as appropriate indicating the reasons why your client is not likely to abscond or should not be detained.

The aim is to strengthen your client's evidence with that obtained from other sources, and also to present a full picture of her situation and the effect of detention on her. At the same time, you are requesting that the Immigration Service provides proof where there is an allegation that your client contests.

Relationship between bail application and substantive case

To a certain extent it is possible to see a bail application as separate from the substantive application. Certainly, there are aspects of preparing a bail application, such as seeking accommodation or taking instructions from sureties, that are generally separate. However, it is important to see where the connections lie, both in terms of assisting the bail application and in not undermining the substantive case by actions taken to progress a bail application.

Factors which can assist in obtaining your client's release

considering what factors in your client's substantive case support an application for release, for example a history of sexual assault or torture, or a serious medical condition

when obtaining a medical or psychological report, instructing the expert to address both short and long term effects of detention on your client's mental/physical health as well as the factors relevant to her substantive case.

You should consider the possible effect on the substantive case of

making a bail application without checking your client's instructions on her immigration history for consistency with what she has said in any interviews with the Immigration Service or Home Office

-serving a medical or psychological report that contains useful information for the bail application but is factually inaccurate about details of the substantive case.

When to make a bail application

Once you have received full instructions from a detained client, you should take immediate steps to lodge a bail application, subject to the rules on jurisdiction. ►See chapter 1.

At the same time, applications for temporary admission or temporary release (TA/TR) and/or Chief Immigration Officer (CIO) bail should be pursued. ►See chapter 3. Such applications may, of course be successful in themselves but, even if they are not, they provide some of the groundwork that needs to be done in order to present a bail application.

There are certain stages in the substantive immigration case that are more advantageous for making a bail application. However, you will also need to take into account other factors such as reasons for detention and the state of health of your client.

Generally, it is better to make a bail application as early as possible within any particular stage, for example while waiting for:

- a first decision
- an appeal hearing
- a decision on an application for leave to appeal to the tribunal
- a decision on an application to the High Court or Court of Appeal.

Where your client has a substantive appeal within the next week, you should request a bail application to be heard at the same time as the appeal.⁸ Equally, if you are drafting grounds for judicial review, you should consider whether to include an application for bail (particularly relevant where previous bail applications have failed).

If your client is facing removal, you must still consider whether it is appropriate to make a bail application. A bail application would usually be appropriate where removal is delayed in the following circumstances:

- delays in obtaining travel documents
- delays in response from a third country ►See chapter 8
- a change in circumstances in your client's home country that means removal is no longer imminent or even possible.⁹

If your client has resisted removal or failed to cooperate with an application for a travel document, this can prejudice an application for bail. ►See chapter 8. However, you must take your client's instructions on any such allegations, as the circumstances of resisting or non-cooperation are crucial.

Sureties

Purpose of a surety

A surety is one means of exerting control over the actions of an individual on bail (together with imposing reporting and residence conditions and taking a recognizance from the person applying for bail). A surety is at risk of losing his recognizance if the person for whom he is standing surety absconds. This is intended to encourage the surety to take all reasonable steps to prevent the person absconding and if, she does abscond, to notify the authorities of this fact. If the surety does carry out these steps, he should not forfeit the recognizance that he put forward.¹⁰

A surety will be assessed by the Immigration Service or the court on four main grounds:

- What is the relationship between the surety and the person applying for bail, i.e. can the surety exercise control over the applicant?
- How close does the surety live to the proposed bail address, i.e. is it practical for the surety to exercise control?
- What will this control be likely to entail: telephone conversations, regular visits, occasional visits?

⁸ Subject to the minimum requirement of 3 days' notice of a bail application to the IAA. See also chapter 9.

⁹ e.g. some Zimbabweans remained in detention for removal after the suspension of removals to Zimbabwe in January 2001.

¹⁰ See chapter 9 on selecting and preparing sureties and chapter 10 on forfeiture.

Does the surety have the amount of money that he proposes to offer as a recognizance and is he likely to continue to have it?
Is the surety someone who can be relied on to fulfil his role effectively?

Does your client need a surety?

It is a common perception that adjudicators require two sureties offering substantial amounts of money to secure bail. **There is no legal requirement to offer any sureties.** This requirement was deleted from the procedure rules by Immigration and Asylum Appeals (Procedure) rules 2003, SI 2003 No 652. The rules now state that the application for bail must contain 'the full names, addresses, occupations and dates of birth of *any* persons who have agreed to act as sureties...' (emphasis added). In addition, UNHCR guidelines, the Guidance Notes and caselaw all criticise this practice.¹¹

You should look at the circumstances of your client's case when considering whether or not sureties are necessary. It is possible to obtain bail without any sureties, even for clients who have not always had a history of compliance with the Immigration Rules, depending on the circumstances.¹² It is difficult to predict the outcome of a bail application.

If your client does not have anyone who can stand as a surety, it remains your professional duty to take your client's instructions as to whether she wants an application for bail to be made in any event. This is the case unless removal is *in fact* imminent (rather than in the view of the Immigration Service).

Sureties may not be necessary if:

- there is little reason for detention or the reasons given are inconsistent with the OEM (which is quite frequently the case)
- there has been a history of regular reporting to police/Immigration Service over a period of time prior to detention, which may include appointments to complete travel documents, etc.
- there has been a delay in effecting a removal to a third country in asylum cases
- there has been prolonged detention without a resolution of an asylum, human rights or immigration application
- there are medical or psychological problems.
- there are other compassionate factors
- detention is based on a 'special exercise' ► see chapter 5
- detention commenced from arrival.

11 UNHCR guidelines set out at appendix 3, see also chapter 2.

12 BID issued an open letter to solicitors through ILPA on 8 October 2001 giving examples of cases in which sureties were not required. Available on BID website www.biduk.org

Who can stand surety

There is no requirement in primary legislation that a surety is a UK national or settled in the UK. The revised 'Notice to applicants, their representatives and sureties' sent out with hearing notices by the IAA states, at paragraph 5:

Representatives are reminded that it is their responsibility to ensure that the proposed sureties bring with them to the hearing suitable evidence to prove their identity income and assets. In particular they are requested, where possible and relevant, to produce the following documents:

- a) passport or other means of establishing identity
- b) if right to reside in UK is limited, evidence of when that right expires...¹³

This guidance acknowledges that sureties do not need to be settled, however by implication it excludes those without any 'right to reside', such as asylum seekers. To this extent it conflicts with primary legislation and you should not reject a surety simply because they do not have a right to reside in the UK.

Where your client does not have friends or family with settled status to stand surety, you should consider the following options:

Asylum seekers as sureties

Bail has been granted in cases where asylum seekers have acted as sureties offering small amounts of money (as little as £5). Some adjudicators appear to distrust asylum seekers as sureties but it could be argued that an asylum seeker is more at risk of adverse consequences if he does not comply with his undertaking to the court than a British national or a person with indefinite leave to remain.¹⁴

Immigrants with limited leave as sureties

If there are time limits affecting the surety (e.g. the expiry of a visa) then the expiry date may be set as the date for the renewal of bail (by which time another surety may be available).

Alternatives to traditional sureties

Occasionally, refugee community groups, church groups, asylum seeker support organisations or a member of a visitors' group will provide a surety.¹⁵

The Bail Circle

The Bail Circle (set up by the Churches Commission for Racial Justice) has a register of individuals from all walks of life, including churches, who will offer themselves as sureties for detainees.¹⁶

The Bail Circle has a relatively small pool of potential sureties. You should contact the organisation well in advance of any hearing and you cannot assume that a surety will be found for your client. The amounts offered by Bail Circle sureties tend to be under £500. Usually, and unless there are unusual/urgent circumstances, the Bail Circle cannot accommodate requests for CIO bail because the amounts tend to be exorbitant. Priority tends to be given to victims of torture, split families, minors, the sick.

¹³ See Guidance Notes, appendix 2

¹⁴ Where your client is to live with another asylum seeker, e.g. with her spouse, the use of the spouse as a surety is implicitly recognised by the Guidance Notes, para 2.3.4

¹⁵ See contacts, appendix 8

¹⁶ See contacts, appendix 8

It may be useful to note the BID/Bail Circle open letter to the Chief Adjudicator of 11 February 2000, which has been circulated to all adjudicators considering bail applications. This clearly notes that, at that date, there were only some 142 potential sureties on the Bail Circle register willing to come forward and take on the duties of a surety. In spring 2002, there were 175 people on the Bail Circle list. In July 2002, there were 2009 places in immigration detention. It follows that the demand for sureties effectively denies bail, as there are not enough sureties for those asylum seekers who do not have family/friends in the UK.

There may be objections to a surety who is not known to the client because he will not be perceived as being able to ensure that the client will comply with conditions of release. In order to counteract this, it is helpful to allow time for the surety to make contact with or visit the client before the bail hearing.

Amount of recognizance from sureties

The primary issue here is how much a surety can afford, taking into account income, outgoings, financial commitments, income security, etc. However, it is clear that levels have dropped over the last four years. It is becoming common for sureties of £200–£300 to be pledged and accepted, although in some circumstances, sureties offering as little as £10–£50 have been accepted.

The Guidance Notes make clear that ‘what is a nominal sum to one person may be a substantial sum to another’. ▶See chapter 2. UNHCR guidelines point out that in order for bail with sureties to be a real alternative to detention, it is important that ‘the amount set must not be so high as to be prohibitive’.¹⁷ Note that this phrase is included in the Guidance Notes.¹⁸

If your client has sureties who are only able to afford a small amount of money, you can decide either to run the bail application without sureties, or to make an argument that the sureties are suitable because of the relationship with your client and because the amount on offer is a significant proportion of the surety’s income.

Remember that if adjudicators become accustomed to seeing sureties offering hundreds or even thousands of pounds, they will come to expect it and refuse to grant bail for others who do not have such funds at their disposal.

17 UNHCR guidelines, guideline 4: alternatives to detention

18 Para 2.3.3(a)

Controlled Legal Representation

In order to represent your client in a publicly funded bail application before an adjudicator, you will need to consider whether she is eligible for controlled legal representation (CLR), by applying the means and merits tests. The client has to be eligible under both tests.

The Legal Services Commission Manual contains current guidance and is updated twice a year by a loose-leaf service.¹⁹ Changes are also published in the LSC magazine *FOCUS*, which is sent free to all contract holders and on the LSC website. ILPA's legal aid sub committee and the Law Society's Access to Justice committee comment on proposed changes. It is essential that you keep up to date with current guidance, failing which your client may be refused CLR when eligible.

The current merits test requires you to assess the chances of success of the bail application. The test can be found in Rule 5 in section 5 of the General Civil Contract (solicitors and Not For Profit Specification).

CLR can cover a bail application even if the client is considered not to be eligible in relation to the substantive application (2A-276; para 10).

Applying the merits test

The assessment process by you is simply that, an assessment. It does not require you to obtain bail for your client but is an assessment by you of the chances in the light of the information available to you at the time that you carry out the assessment. You should consider all the issues that are raised in this best practice guide in coming to your conclusion.

The test (version dated 16 December 2002) requires you to assess the prospects of the application being successful in terms of three categories: moderate/better (where the prospects are clearly over 50%); unclear (where it is not possible to predict because further investigation is required) or borderline (where the chances are 50:50); or poor (where the prospects of success are less than 50%). The current test requires you to refuse CLR if the client falls outside the first category unless the case falls within the specific exceptions, which are listed in the guidance. It is essential that you consider the exceptions:

- i) The case is of overwhelming importance to the client, concerning the life, liberty or physical safety of client or family, as will often be true in asylum cases.
- ii) The case raises significant issues of human rights.
- iii) The case has significant wider public interest.

When applying these exceptions, you should consider factors such as whether the use of detention in your client's case is arbitrary as measured against Home Office policy, UNHCR guidance, etc.

► See chapter 2. Arbitrary detention is in breach of Article 5(4) ECHR and therefore falls within exception (ii). ► See chapter 1. Similarly, when considering wider public interest in exception (iii), you should consider the concerns about the use of immigration detention raised by HM Chief Inspector of Prisons and others.

¹⁹ Published by Sweet and Maxwell

Further investigation will be needed where:

- there are no reasons for detention that refer to the client
- the reasons given are dubious
- there has been no serious up-to-date review of detention.

In these circumstances, you should not refuse CLR until you have carried out the investigations and re-assessed the case. ►See chapter 6.

You should note on your file why you have granted CLR and how in your view the client falls within the required merits test. The grant of CLR is to be kept under review. If the client ceases to be eligible, CLR should be withdrawn. There is nothing to prevent a client being reassessed for CLR in the future after a refusal of CLR.

CLR already granted for appeal

If you have granted CLR to a client to pursue her appeal, there is a strong argument that you cannot refuse CLR for a bail application.

If you refuse CLR

If you refuse CLR you must notify your client of her right to a review of your decision (Rule 5.4). Assistance in the review can be given under Legal Help.

7

Vulnerable detainees

THIS CHAPTER COVERS

issues relevant to all detainees who might be considered especially 'vulnerable' for reasons of mental or physical health, disability, pregnancy, or age.

It also covers families affected by detention.

It is divided into the following sections:

- the Home Office policy and its application
- the statutory obligations of the detention centre
- arguments under Articles 3 and/or 8 of the European Convention on Human Rights
- obtaining medical and other evidence
- clients on hunger strike
- pregnant women and nursing mothers
- the elderly and people with disabilities
- considerations when organising a bail application
 - organising follow-up treatment/support
- unaccompanied minors and disputed minors
- families in detention and families split by detention
 - policy and effect
 - lodging the application for bail
 - evidence
 - split families
 - child protection.

Home Office policy and its application

The Immigration Service's Operational Enforcement Manual (OEM, extracts reproduced at appendix 1) sets out, at paragraph 38.8, categories of people 'normally considered suitable for detention in only very exceptional circumstances'.

What is meant by 'very exceptional circumstances' is not defined and, in practice, it is common for people in some of these categories to be detained for lengthy periods, apparently without consideration of their circumstances.¹

¹ *Protection not Prison: torture survivors detained in the UK*, a report by the Medical Foundation for the Care of Victims of Torture, Sept 2001

The categories set out in the OEM are:

- those suffering from serious medical conditions or the mentally ill
- those where there is independent evidence that they have been tortured
- pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this
- unaccompanied minors
- the elderly, especially where supervision is required
- those with serious disabilities.

When your detained client falls into one of these categories, the Immigration Service is demonstrating that it does not believe your client's situation constitutes sufficient grounds for release. This may be because the Immigration Service disputes your client's situation (such as that she is a victim of rape) or because it is not aware of all the relevant circumstances.

You will need to rebut this, which is very difficult without appropriate evidence, unless the doctor at the detention centre agrees that your client should not be detained. This is not very common.

If your client's instructions indicate that she falls into one of these categories, you should apply for temporary admission/temporary release (TA/TR) setting out her circumstances and, if appropriate, what evidence you have that she falls into the category. The application will be made on the basis that the detention is in breach of Home Office policy contained in the OEM. ►See chapter 3.

If the application for TA/TR is refused, you should make a bail application, relying on the issues that you have already raised with the Immigration Service through applying for release. The response to TA/TR may be helpful to the bail application if it shows a failure to take Home Office policy properly into account.²

² This approach is recommended by the Guidance Notes, para 7.

The statutory obligations of the detention centre

These are relevant where your client instructs you that:

- her mental or physical health is being harmed by detention
- she needs treatment for mental health problems
- she is considering or attempting self harm or suicide
- she is a victim of torture/rape or other serious sexual assault.

The detention centre must comply with its statutory obligations, set out in the Detention Centre Rules (DCR 2001).³

Duties of medical staff at the detention centre:

Rule 35 DCR 2001

- 1 The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
 - 2 The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions...
 - 3 The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
 - 4 The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
 - 5 The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.
-

The fundamental issues are whether the medical centre staff have:

- reported to the detention centre manager and/or Immigration Service, as appropriate
- properly provided treatment under sub-paragraph 5, as appropriate.

If the medical centre has not complied with the rules, you should write to the medical centre, the detention centre manager and to the Immigration Service. You should also apply for TA/TR, and bail if necessary, on these grounds.⁴

³ DCR 2001 – SI No 238

⁴ Note that detainees held in prisons (apart from those re-designated removal centres such as Lindholme, Dover and Haslar) do not come under the Detention Centre Rules. However, you should argue that protection for detainees in prison cannot be less than that provided to those in removal centres.

Arguments under Articles 3 and/or 8 of the European Convention on Human Rights

You will have considered whether the Immigration Service is in breach of the OEM by detaining your client. However, lack of access to treatment or assistance in detention and/or the effect of detention on those who are mentally or physically ill or disabled potentially raise issues under Articles 3 and/or 8 of the European Convention on Human Rights (ECHR), as well as under the OEM (and the DCR 2001 as above). The detention of a family or splitting up a family through detention of one or more members also raises issues under Article 8 ECHR (which are considered separately below)

The main question in this context is:

Is the effect of either the lack of treatment or assistance, or of being in detention, severe enough to constitute a breach of Articles 3 or 8?

The Guidance Notes state (in relation to Article 3 ECHR)

Representations under this Article are likely to relate to the conditions in which the applicant is being held. Any complaints about such conditions should have been addressed to the Home Office in the first instance. It is suggested that only if there is evidence that such complaints may be justified and the Home Office has refused to act upon them does it then become a matter for us to consider when making sure our decision is HRA compliant. Remember that the conditions would still have to attain a 'minimum level of severity'.⁵

Following this approach, initially you should make an application for TA/TR, setting out the reasons why detention is not appropriate due to:

inadequacy of treatment or care provided
effect of detention on your client or her child.

The Guidance Notes refer to a 'minimum level of severity' which is the evidential threshold for establishing a breach of Article 3 ECHR.⁶

This means that not all circumstances of detention will constitute a breach of Article 3 and in practice you will not succeed in establishing a breach without strong independent evidence.

Circumstances that have constituted a breach of Article 3 include:

a failure to meet the needs of a severely disabled woman who was detained for several days⁷
a lack of adequate specialist medical supervision and the accompanying use of disciplinary procedures against a prisoner⁸

In contrast, a circumstance that was not considered to be a breach of Article 3:

the effect of detention without time limit for a person detained under anti-terrorism legislation.⁹

The implications of these decisions are that detention can only amount to a breach if the effect on the individual is severe, the effect is connected to the detention *and* adequate steps within the detention framework have not been taken to prevent this.

⁵ Para 7.2

⁶ This test is applied in *Aerts v Belgium* [ECtHR] judgement of 30 July 1998 paras 61–67 concerning detention of mentally ill man in psychiatric wing of a prison 'The court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case... In the present case there is no proof of a deterioration of Mr Aert's mental health...'

⁷ *Price v UK* [ECtHR] 33394/96, 10 July 2001

⁸ *Keenan v UK* [ECtHR] reported in *The Times*, 14 April 2001

⁹ Special Immigration Appeals Commission in *A and others v Secretary of State for Home Department*, 30 July 2002

Article 8 ECHR, in protecting family rights and the autonomy of the individual, may also be breached by the effect of detention on individuals in particular circumstances. In this context, the issues that are discussed in relation to Article 3 also apply to Article 8. Issues relating to family life are discussed below.

When considering whether there is a breach of Article 8 ECHR, you will have to consider whether the use of detention is 'proportionate' in the individual's circumstances. ▶ See chapter 1. This is because Article 8 is a qualified right that may be breached in appropriate circumstances.

Obtaining medical and other evidence

What evidence do you need in order to obtain your client's release? It is likely that this evidence will also play an important role in your client's application to remain in the UK. You may already have obtained evidence for your client's substantive case, for example, before she was detained. You should use this to support an application for release if appropriate.

Evidence from detention medical centre

If your client informs you that she (or her child, if detained together) is mentally or physically ill, or due to disability she is unable to care for herself properly in detention, or she is pregnant, you need to take the following initial instructions:

Has she reported her concerns to the medical centre?

Is she or her child receiving treatment or assistance?

If so, what treatment or assistance, how regularly, and from whom?

Did the condition pre-date detention?

If so, what treatment or assistance did she or her child receive previously, if any? Who was this provided by?¹⁰

Does the condition appear to relate to experiences from her country of origin (see below)?

If your client instructs you that she or her child has medical problems, but has not requested assistance from the medical centre, take her instructions on why this is.

Obtaining evidence from the detention medical centre is normally the first step in obtaining release for a client with mental or physical health problems.

¹⁰ You should request evidence of this and the opinion of the provider as to the likely impact of detention.

You should take the following steps to obtain evidence:

Request medical records from the detention medical centre. Note that you may need to agree to pay photocopying and administration charges and that you will have to provide a signed medical authority from your client to obtain the release of records.

If your client has been moved between centres or to/from a prison, make sure that you have the records from all these centres (which should be forwarded when the client is moved).

If your client or her child has been sent by the medical centre for hospital treatment outside the detention centre/prison, the notes from this, or the letters from the treating doctor to the detention centre, should also be disclosed.¹¹

If records from external doctors are not disclosed, you should request an opinion directly from the treating doctor. You may find that this doctor believed that your client should not have been returned to detention when treatment concluded.

For the purposes of a bail application, it may be sufficient to rely on the medical records from the detention centre. Note that the term 'SASH' means 'suicide and self harm' and is used for detainees who are closely watched to prevent them attempting suicide.

Expert evidence

Do your client's instructions to you suggest that:

she has experienced torture, rape or other sexual assault (and rape can constitute torture)?

she has experienced traumatic events such as witnessing the murder of a family member?

she is suffering from mental illness?

she is unable to care for herself in detention (due to disability or age-related condition)?

her child's health is suffering in detention?

If so, you will need to consider whether or not to obtain an expert medical report. Expert evidence of mental or physical health problems or of disability or of a history of abuse or trauma is often crucial to obtaining leave to remain. It is also relevant to a bail application.

Whether you instruct an expert to visit your client in detention to prepare a report depends on how serious the condition is and whether you consider that such evidence is necessary in order to obtain your client's release. If you believe that you can obtain her release without an expert report (because there are strong grounds for bail without additional evidence), you should wait to instruct the expert after your client has been released.

Expert evidence is harder to obtain for a detained client than for others. However, it is possible to find experts who will carry out an assessment within detention centres, usually relying on the facilities of the medical centre.

¹¹ If your client was sent for such treatment without an escort, you may be able to rely on this as evidence that she is unlikely to abscond.

The Detention Centre Rules (DCR 2001) specifically allow for outside health professionals to attend a client in detention.¹² The cost of this can be covered by Legal Help or Controlled Legal Representation, as appropriate.

In order to produce a useful report, it is important that experts are properly instructed.¹³

You should not rely on the detention medical staff to produce an expert report, although medical centres do sometimes offer to provide medical reports if a fee is paid. The staff are not normally qualified to the level that the courts expect in relation to medical or psychological evidence. This does not mean that you cannot also rely on the medical records that are disclosed by the detention centre, which may include a letter from a specialist if your client was referred for treatment (see above).

Expert evidence in cases of rape and torture

The OEM includes torture victims in the list of those who should not be detained **only** when there is 'independent evidence' of the torture. Rape is not explicitly mentioned, although it is implicitly included, as it can be a form of torture.¹⁴ Even if the rape may not legally constitute torture, because it did not take place in detention, the same considerations apply.

Choosing the appropriate specialist depends on your client's instructions. There may be physical and/or mental effects to be explored. Particularly in the case of rape, you may find that your client is reluctant to talk about her experiences and does not ask for any medical or psychological treatment. This is probably even more likely with detained clients than others. In such cases, you should argue that your client must be released in order to allow her to be properly assessed by an expert (a letter from the proposed expert confirming this approach should also be sent).

Remember that the DCR 2001 require the medical centre to report to the manager and the manager to report to the Secretary of State (in practice, normally the Immigration Service) on any detainee that the medical practitioner 'is concerned may have been a victim of torture'.¹⁵

¹² DCR 2001, Rule 33 (11)

¹³ See *Making an Asylum Application, a best practice guide*, ILPA, 2002.

¹⁴ *Aydin v Turkey* (ECHR) (1997) 25 EHRR 251 'The Commission also found that rape committed by an official or person in authority on a detainee must be regarded as treatment or punishment of especially severe kind.... The Commission found that the applicant had been the victim of torture...'. See IAA Asylum Gender Guidelines, Nov 2000, para 2A.19.

¹⁵ See above, rule 35(5) DCR 2001.

Obtaining instructions in cases of mental illness

In cases of very severe mental illness, you should consider whether your client is sufficiently able to give you instructions. If you feel that your client is so disturbed that you are unable to take instructions from her, you should make this clear in an application for temporary admission or bail. You may need to seek an expert opinion.

For fuller discussion on this issue, you should refer to the relevant section in *Making an Asylum Application, a best practice guide*, ILPA, 2002.

Clients on hunger strike

This is a very distressing experience for a detainee – and also for her representative. At the same time, it is quite likely that the Immigration Service and the detention centre will primarily see your client as a troublemaker rather than someone who is ill. Similarly, an adjudicator is likely to see hunger strike as a form of emotional blackmail and possibly evidence of a risk of absconding (particularly in removal cases). You must consider how you can rebut this view.

In order to prepare an application for release, you will need instructions as to why your client has chosen to go on hunger strike in order to establish the causes of the protest. You may discover that this relates to a particular issue, such as treatment in detention. If this is the case, you should request records of any incidents/punishment from the detention centre manager and any complaints made by your client. If your client is not being treated in accordance with the Detention Centre Rules (DCR 2001), you should complain to the detention centre manager. These complaints would then form part of the application for release or bail.

Expert evidence of medical/mental condition may be necessary, but the necessity must be balanced against a need to make a bail application quickly. For discussion on obtaining medical evidence, see above.

Pregnant women/nursing mothers

The OEM states that pregnant women are normally considered unsuitable for detention ‘unless there is the clear prospect of early removal and medical advice suggests no confinement prior to this’. In practice, these guidelines are not always adhered to.¹⁶

Many of the issues set out in previous sections of this chapter also apply when preparing bail applications for pregnant women and nursing mothers. A pregnant woman will have both physical and emotional needs related to her pregnancy. If these needs are not met, it may impact on the health of her baby.

The UNHCR guidelines state, ‘as a general rule the detention of pregnant women in their final months and nursing mothers, both of whom have special needs, should be avoided’.¹⁷

Research carried out on pregnant women in prison:

...demonstrates that the experience of being pregnant in a custodial setting induces fear and stress. Being pregnant in prison has been found to have negative implications for a woman’s reaction to the discovery of her pregnancy, her diet, her support network, antenatal care, exercise, birth preparation and the woman’s knowledge about her pregnancy. Pregnant women in custody suffer feelings of isolation, insecurity and disempowerment. Antenatal care is compromised by the necessity of negotiating access to midwives and doctors with gatekeepers such as prison officers and nurses.¹⁸

16 See *A crying shame, pregnant asylum seekers and their babies in detention*, a report by Maternity Alliance, London Detainee Support Group and BID, 2002. See BID website www.biduk.org/info.htm

17 UNHCR guidelines, appendix 3

18 Canvin K. *Hard Labour? Pregnancy in Prison*, Howard League Annual Conference, Oxford, 2001; Canvin K. *Pregnant Prisoners’ Expectations for Pregnancy*, Human Reproduction Study Group Conference (Medical Sociology Group – British Sociological Association), Northampton 1997. Quoted in *A crying shame, pregnant asylum seekers and their babies in detention* (see note 16).

The most straightforward argument for bail or release in relation to pregnant women is that removal is unlikely to happen prior to 'confinement'. Confinement in this context must be interpreted to include the months up to the birth in which it is not safe for a pregnant woman to fly. You should check with the medical centre or the doctor previously involved in the client's care in order to ascertain when this deadline might be in your client's case. As a general rule, doctors advise against flying from the sixth month of pregnancy.

In addition, there may be powerful arguments that detention is harming the health of the mother or that it is leading to inadequate antenatal care. This argument is separate to an argument that detention is in breach of the OEM. Therefore, depending on the circumstances, you may need to argue that detention breaches Article 3 and/or 8 ECHR (see above).

As pregnant women are taken to a local hospital for some aspects of their care (such as scans), it may be possible to obtain the hospital doctor's opinion (and written report) of the health of the mother and baby. If a client is not taken for a check up when she should be, there will be a strong argument that she is not receiving adequate antenatal care in detention and must be released.

There is no explicit reference to nursing mothers not being suitable for detention, however, you can make similar arguments as for pregnant women including: health needs of mother and baby, viability of return, and length of detention. The baby may be referred to a paediatrician for a health assessment, in which case you can seek the doctor's opinion on the effect of continued detention on mother and child. You may need to refer to specialist organisations dealing with maternal and child health for more detailed arguments.¹⁹

The elderly and people with disabilities

The OEM states that 'the elderly, especially where supervision is required' and 'people with serious disabilities' are not normally considered suitable for detention. There is no guidance on what age is elderly or what amounts to a serious disability. In both cases, you should consider the care needs of your client (and, if appropriate, what care she was receiving prior to detention) compared to the care she is receiving in the detention centre. The viability of removal is a key question for a client in either of these categories.²⁰

As with other categories discussed, you should refer to sections of this chapter on obtaining medical evidence.

¹⁹ See *A crying shame, pregnant asylum seekers and their babies in detention* as a useful starting point (see note 16).

²⁰ You will need to be aware of current Home Office policy and concessions affecting these categories.

Considerations when organising a bail application

If your client falls into any of the preceding categories, it is urgent that you seek to obtain her release. Paradoxically, adjudicators can be reluctant to grant bail, depending on your client's situation. The main reasons put forward by adjudicators for refusing bail relate to queries about whether there is sufficient evidence that your client falls into the category, whether a detainee who is mentally or physically ill will be able to access better medical care if released than she is receiving in detention, and whether a detainee who is mentally ill can be safely released into the community?²¹

These concerns must be addressed in order to heighten the chance of success of a bail application.

The first issue – evidence – is dealt with above. The others relate to what care is available to the detainee after she is released and are dealt with below.

Organising follow-up treatment/support

As mentioned above, it can be very important for a bail application to demonstrate that, if your client is released, she will have access to appropriate health care and that she will not be a danger to herself or other people. Where your client was receiving care or treatment before being detained, she should, if possible, return to these providers on release.

Where your client was not receiving treatment or care prior to detention, you should consider what services she has received in detention and how these could be continued on release. It may be sufficient to show that there is a GP who is ready to register her immediately. In more severe cases, you should consider:

Are there any specialist agencies that provide services to people in your client's situation?

A referral to the local social services team for the area where your client is living for an assessment of need.²²

It can be difficult to set up a 'care package' in advance, but some agencies will write letters to explain what services they would offer on your client's release.

It is helpful if you can show that there are family or friends or a church or community group willing to offer practical and emotional support on release. Some organisations provide counselling or befriending services to immigrants. These individuals or organisations should write letters outlining their relationship to your client and what support they can offer, for use in a bail hearing.

²¹ Although not applying in all cases, para 30 of sch 2, IA 1971 gives indirect support for this view. Para 30 applies so that where leave to appeal to the tribunal has been granted, bail shall be granted, subject to sureties if required, except where '...the appellant is suffering from mental disorder and...his continued detention is necessary in his own interests or for the protection of any other person...'.
²² See chapter 9 on accommodation for more discussion on this issue.

The type of accommodation available on release may be an important factor. If you will be relying on emergency accommodation, you should enquire whether the organisation arranging the accommodation has suitable accommodation or services for vulnerable clients. ►See chapter 9.

Unaccompanied minors and disputed minors

The OEM states that ‘unaccompanied children and persons under the age of 18’ are unsuitable for detention.²³ Unfortunately, this has been superseded by the policy on detention of children with their parents (see below).

In relation to unaccompanied minors, if the Immigration Service accepts that your client is a minor, arrangements will be made to take her into local authority care. In these circumstances, detention may be used if the arrangements are not completed, but for a maximum of one night.

The OEM also states: ‘sometimes people over the age of 18 claim to be minors in order to effect their release from detention’.²⁴ This is the main area of contention in respect of detained unaccompanied minors as the Immigration Service makes inexperienced and relatively rapid judgments as to whether a child is telling the truth about her age.

In some cases, minors are instructed by agents or parents to pretend to be older than 18. In this situation, it is likely that the child will continue to lie about her age when first speaking to immigration officers. Even where the Immigration Service accepts that the child travelled on a false passport, it is common for the age given in the passport to be used as if it were the correct age by the Immigration Service.

The OEM places an obligation on the Immigration Service to refer disputed minors to the Refugee Council Children’s Panel.²⁵ In practice this is not always done. If your client has not already been referred, you should do this yourself.

The Children’s Panel will send a member of the panel to visit the child and is sometimes willing to provide an opinion, based on physical characteristics and interview, of the child’s age. The Children’s Panel does not claim to be experts at age-determination, but it can be very helpful if the Children’s Panel does conclude that your client is a minor.²⁶

You should also contact the local authority social services department who will normally conduct its own assessment. This can be useful in your dealings with the Immigration Service. Social services will normally offer appropriate accommodation if the assessment concludes that your client is a minor. ►See chapter 9.

Identity documents from your client’s home country can be used to establish your client’s age. You must take your client’s instructions as to whether there is any means of obtaining such documents. If this is not possible, you should ask your client whether she knows anyone in the UK who is a friend or relative from home who will be able to confirm her age. This can sometimes assist in persuading an adjudicator that the applicant is telling the truth.

23 OEM, para 38.7.3

24 OEM, para 38.7.3

25 OEM, para 38.7.3.1

26 This is a difficult area. The Royal College of Paediatrician’s view is that there is no recognised means of conclusively determining age.

Remember that there are different guidelines for the determination of asylum claims by minors. For example, minors and disputed age minors are not suitable for Oakington and minors should not normally be interviewed. See *Making an Asylum Application, a best practice guide*, ILPA, 2002, for discussion on interviewing minors.²⁷

Families in detention/split families

Policy and effect

In October 2001, the government changed detention policy so that families would be subject to the same policy as single adults. This means that a family can now be detained throughout their claim on the grounds that the family will otherwise abscond. In the past, the 'head' of the family was detained on these grounds, while the children and remaining parent would be granted temporary admission. Whole families were only detained immediately prior to removal.²⁸ This change of policy is not based on any evidence that families are likely to abscond, which raises an issue as to why it is necessary or justified.²⁹

Families are facing detention of many weeks and sometimes months in much the same way as single adults. Family members are sometimes separated during the process of detention.

In one case, a mentally ill father, who had not been at home when immigration officers arrived to detain the family, was left behind without information as to the whereabouts of his wife and children. He was also left homeless as the locks were changed on the house. In this case, the wife and children were actually removed from the UK without the father, despite serious worries about his mental health.

In another case, a mother was detained with her young child for over 5 months, continuing even when the detention medical centre expressed concerns about the stress caused to the mother by caring for her child in detention and the effect of the stress on the child's well-being and safety.

27 Note that minors who reach 18 before the initial decision is made on the asylum claim will now be interviewed on their claim – letter to Greater Manchester Immigration Aid Unit 28.8.02, ILPA mailing, September 2002.

28 OEM, para 38.7.3.2 for previous policy.

29 Letter to BID from Immigration Service dated 18 June 2002 confirming that change of policy not based on any statistical evidence that families abscond.

30 This is an assessment under Children Act 1989 s17. For more information, see *Support for asylum seekers* by Sue Willman, Stephen Knafler, Stephen Pierce, LAG, 2001, or consult a specialist practitioner.

Lodging the application for bail

Families have the same rights to apply for bail as individuals. You can lodge one bail application and the whole family should be produced at the hearing.

In principle, if you lodge separate applications for each member of the family, separate reasons for detention should be produced.

Evidence

The detention of families raises similar issues as with other groups discussed in this chapter. In particular, you should consider the mental and physical health of both parents and children, with expert evidence if appropriate.

Children who are detained are still covered by the terms of the Children Act 1989 and you should consider requesting an assessment to be carried out by the local authority social services department.³⁰

This is particularly appropriate if there is evidence (for example from the medical centre) that the child is failing to thrive in detention.

Families often have strong links with local communities if they have not been detained since arrival. This is due to children attending school and the family's contact with GPs, social workers, etc.

The family's GP, social worker, etc may be able to provide a report setting out any ill-health, past trauma, or other reason why a particular family should not remain in detention.

If there are school-age children, you should obtain evidence from the school that the child previously attended. In any case, school reports may be of assistance in showing that the child was doing well at school and integrated into the school community. These factors should be considered by an adjudicator when deciding whether the detention of the family is 'proportionate' under Article 8 ECHR.

You should refer to other sections in this chapter for information on obtaining medical evidence, including expert medical evidence of the effect of detention.

Split families

Where a family has been split up by detention, i.e. one parent has been detained whilst the other has been granted temporary admission with the children, much of the same preparation work applies. If the children/parent are settled into a community, this is evidence that there is less chance that the detained parent will abscond if released on bail. You should seek evidence of the effect of separation on the family, particularly on the children's development, behaviour and well-being.

The OEM states:

...It would have to be shown to a court that a decision to detain corresponded with one of the legitimate interests which justify interference and that the interference in family life caused by the detention went no further than was strictly necessary to achieve that aim.³¹

The point of collecting the evidence described above is to demonstrate that the interference to family life is disproportionate.

Child protection

The NSPCC is contracted to the Immigration Service to provide training and advice on child protection issues. Under the existing arrangement 'child protection' does not include issues arising out of the effect of detention per se – such as length of detention or the physical or mental health of the child. At the same time, the NSPCC's work includes investigating allegations of child abuse that are brought to their attention.³²

³¹ Para 38.1.1.2

³² For guidance on a legal representative's duties of disclosure of suspected child abuse, refer to the Professional Ethics department at the Law Society, or equivalent regulatory body.

8

Challenging detention for those considered at high risk of absconding

IN THIS CHAPTER

a consideration of issues affecting those particularly at risk of long term detention:

- delays in removal
- travel document cases
- third country cases
- legal arguments about prolonged detention
- cases of disputed nationality/identity
- detention in prison
- clients with criminal convictions.

Delays in removal

It is quite common for clients who have exhausted all appeal rights and are detained for removal to wait for months in detention.

This is commonly the case for one of the following reasons:

- The country concerned is inefficient in issuing travel documents or reluctant to accept back those who have claimed asylum. (The longest delays are in relation to Chinese, Algerian, Pakistani and Indian clients).
- The Immigration Service is attempting to return someone to the wrong country in disputed nationality cases.
- The Immigration Service has already attempted to return someone on a travel document that has not been accepted by the country of origin (such as an 'EU letter' which is not proof of identity or nationality).
- Your client has refused to cooperate with the completion or signing of a travel document application or has resisted removal.

Travel documentation

In cases where the Immigration Service is applying for a travel document from the country of origin, (and there is no dispute as to nationality) you will need to ascertain:

- when was the travel document application submitted to the embassy?
- what reminders have been sent to chase it up?
- what is the Immigration Service's view of the length of time the application will take and what is this estimate based on?
- has any response been received and, if so, what was this response?
- has your client cooperated in providing information and/or documentation (see below)?

You can contact the Immigration Service or the Travel Documentation Unit for information about travel documents. You may find that the case has been transferred to the Management of Detained Cases Unit (MODCU), based in Leeds. This has superseded the Detention Review Unit and is responsible for overseeing many detained enforcement cases.¹

Once you have ascertained that travel documents are not yet available, you should consider making an application for bail for your client. In fact, you may find that it is necessary to make several bail applications if the travel document application continues to be delayed. Adjudicators tend to be reluctant to grant bail immediately to someone who is merely awaiting removal. A series of bail applications will demonstrate to the court that no progress has been made on the case, despite the weeks or months of further detention.

Where the Immigration Service has given a previous estimate of how long the travel documentation will take, and this is proved to be mistaken, you can lodge a further bail application at the point at which the estimated time has elapsed (presuming that this is a period of weeks rather than months). You can argue that this constitutes 'fresh additional grounds' since the previous bail application.² Therefore you do not need to wait until the passage of time itself constitutes a change in circumstances (the Guidance Notes suggest that 28 days is the period needed for this argument).³

In such a case, it is important to request disclosure from the Immigration Service as you will need to obtain proof of the delays and problems. If you do not make inquiries, it is likely that the Immigration Service will not disclose fully what is happening on your client's case and you will have greater difficulty in obtaining your client's release.

At a certain point, the length of detention without progress on the case is itself a reason for release, even for a client with a poor immigration history.⁴

¹ See contacts, appendix 8.

² Guidance Notes para 3.1 and chapter 11

³ Para 3.3

⁴ *Ex parte Hardial Singh* [1984] 1 All ER 983, *Wasfi Mahmud* [1995] Imm AR 311, see also chapter 3 on habeas corpus.

Refusal to cooperate

For clients who are alleged to have refused to provide information to the Immigration Service or High Commission or to sign a travel document application, you must first of all understand precisely what has occurred, for example:

did your client refuse to provide any information?

If so, in what circumstances?

did your client refuse an interview with the High Commission?

You should then take instructions as to *why* she refused to cooperate (if she did refuse). For example, a client may be willing to comply once she has received advice on her case from her representative. Has she answered the same questions on a previous occasion? If your client instructs you that she has not refused to cooperate, you should request disclosure from the Immigration Service of the evidence on which the allegation is based. You should rely on the Guidance Notes which require the Secretary of State to present evidence at a bail hearing on which contested allegations are based. ▶ See chapter 2.

For clients who completely refuse to cooperate, you should note that this is *not*, in itself, a criterion for detention within the OEM. However, refusal to cooperate may be seen as evidence of risk of absconding.⁵

Third country cases

Many of the issues discussed in the previous section apply equally to clients who face removal to a 'safe' third country under the Dublin Convention, except that instead of an application for a travel document, a request for acceptance has been made to the third country. In addition, you should consider the time limits under the Dublin Convention as these may assist in arguing that removal is, in practice, unlikely, as the third country will probably not accept the client.

You can obtain the Dublin Screening Interview (DSI) from the Immigration Service, so that you can see on what basis the Immigration Service are applying to have your client's case dealt with under the Convention. Occasionally the Immigration Service refuses to disclose on the basis that it is a matter for the Third Country Unit. In practice, the Third Country Unit will disclose it. Similarly, you can obtain information about the date of application and any responses received from the Immigration Service or Third Country Unit.

⁵ See *Queen (on the Application of I) v SSHD* [2002] EWCA Civ 888; see also chapter 3 on habeas corpus.

Legal arguments on prolonged detention

Length of detention and delay by the authorities (Immigration Service, Home Office, IAA, High Court, etc) are issues that you should consider in all bail applications.

The case law relating to prolonged detention is discussed in the context of habeas corpus in chapter 3. Some passages of particular relevance to preparing a bail application for clients detained for removal are set out here.⁶

A case that focused on the **powers of detention pending removal** is *The Queen on the Application of I v SSHD*. Lord Justice Dyson states

It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.⁷

The concept of **reasonableness** is also discussed in the judgement of Woolf J in *R v Governor of Durham Prison ex parte Hardial Singh*

Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other reason. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case.⁸

Lord Justice Simon Brown in the case of *I* (see above) confirmed the approach of the Privy Council in *Tam Te Lam v Tai A Chau detention centre*:

It seems to me plain that the reference there [in the case of *Tam Te Lam*] to a 'reasonable time' is to a reasonable further period of time having regard to the period already spent in detention.⁹

The purpose of detention must continue to fall within the **statutory purposes** as set out in *Wasfi Mahmood*:

It seems to me that the implied restriction of which Woolf J speaks in the *Hardial Singh* case, whose effect is that the power [to detain] may only be exercised in effect for a reasonable period, is a necessary and salutary restriction in the name of the vindication of a detainee's fundamental rights. While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards.¹⁰

⁶ This section will inevitably become outdated quickly.

⁷ [2002] EWCA Civ 888, para 48

⁸ [1984] 1WLR 704, p 706

⁹ [1997] AC 97, at para 20

¹⁰ [1995] Imm AR 311, per Laws J at page 314

The European Court of Human Rights (ECtHR) deals with **delay on the part of the authorities in *Kolompar v Belgium***:

‘Notwithstanding the applicant’s conduct, there had been a problem of inactivity on the part of the State. The limitations on the right guaranteed under Article 5 were to be interpreted strictly. Accordingly, the State should have taken positive measures to expedite the proceedings and thereby shorten Mr Kolompar’s detention. As it had not done so, it had not fully satisfied the requirements of Article 5 para. 1(f).’¹¹

Disputed nationality and identity

Sometimes the Immigration Service or the Home Office contends that a person:

- is not a national of the country claimed
- is giving false information as to identity.

Because of the allegation of deception and/or because it makes it more difficult to return someone if their asylum or other application fails, it is more likely that such clients will face prolonged detention.

If it is not clear to you why your client is considered to have deceived the Immigration Service, you should request reasons.

If reasons are not forthcoming, or you are not clear what evidence the assertions are based on, it may be helpful to refer to the Guidance Notes. These require the Secretary of State to present evidence of any allegations in the bail summary that are contested.¹² By analogy, the Secretary of State should also disclose prior to a bail application being made.

Clearly, it is helpful if you or your client can obtain evidence of nationality and identity from her home country. If you are unable to obtain this, you must consider how nationality and/or identity can be proved in other ways:

Does your client know anyone in the UK who can verify these – through testimony, photographs, etc. If your client does know someone, you should make arrangements for that person to be present at the bail application, to give evidence. Perhaps he or she may also stand as a surety? ► See chapter 6. If neither of these is possible, you should arrange to take a detailed sworn statement that can be used at court.

Where your client’s nationality is being challenged, it will probably be necessary to obtain a detailed statement from your client in order to establish her substantive case (covering such areas as family history, local knowledge of geography, history and culture, language and dialect, ethnic identity, etc). This may also mean instructing an expert to give an opinion as to nationality, which should assist in obtaining release.

Where there is a dispute as to nationality, the Immigration Service may have conducted a nationality interview (for example, in cases in which the Immigration Service allege that a Sierra Leonean is actually a Nigerian). It is important to obtain these interview notes so that you can check the accuracy of your client’s replies.

11 *Kolompar v Belgium*, (ECHR) Application No 11613/85, judgement 24.09.1992, para 39

12 Guidance Notes, para 2.5.3 and see chapter 3

The dispute as to nationality may be the only reason that your client is detained. Therefore, any evidence to establish this will be helpful in relation to an application for TA/TR or bail. As a great many asylum seekers do not have evidence of their name and date of birth, these factors are less likely to be primary reasons for detention, except if the client is a 'disputed minor'.¹³

You should consider whether your client has a claim under race relations law for discrimination on the basis of nationality or national origins. This subject is outside the scope of this guide and you should seek advice from specialist counsel as any discrimination claim should be put forward at the earliest opportunity (including in grounds of appeal to the IAA).

Detention in prison

After the fire at Yarl's Wood detention centre in February 2002, the Home Office announced that some detainees would be held in criminal prisons.¹⁴ The factors that are to be taken into account are concerns about:

- national security
- criminality
- security
- control.

There is a presumption that detainees should remain within Immigration Service detention.

The transfer is often carried out without providing any reasons to the detainee or to her solicitor. This makes it very difficult to see if the criteria are being properly applied. It is very important to request reasons from the Immigration Service and to take instructions from your client about any reasons given. If allegations are made which your client denies, you should request copies of the relevant detention centre records.

Transfer to a prison can be difficult to challenge but unless you challenge it, it is unlikely that your client will be granted temporary admission, or bail.

It is important to note that, even in cases where a detainee is transferred back to a detention centre, any allegations about behaviour will probably lie on the Immigration Service file. This can impede efforts to gain TA/TR even where all other circumstances point to this being granted.

¹³ For age dispute cases where your client instructs you that she is a minor, see chapter 7.

¹⁴ See chapter 2 on policy relating to detention and bail and appendix 6 for policy

Clients with criminal convictions

The fact that your client has a previous criminal conviction does not necessarily justify a refusal of bail. Indeed, clients with criminal convictions often face lengthy periods in immigration detention following the completion of a criminal sentence.

Factors that must be considered, in addition to the criminal conviction, are:

- length of period of detention
- nature of the obstacles preventing deportation/removal
- diligence, speed and effectiveness of steps taken to deport/remove
- conditions of detention
- effect of detention on detainee and her family
- risk that if she is released, she will abscond
- danger she will commit further offences if released.¹⁵

Your client may have been recommended for deportation by the court.¹⁶ Even if she has not been, it is likely that the Immigration Service will maintain detention after the completion of a custodial sentence.

¹⁵ See Lord Dyson, the Court of Appeal case of *The Queen on the Application of I v Secretary of State for the Home Department* [2002] EWCA Civ 888. It involved detention under IA sch 3 para 2(3) – following a recommendation for deportation, but can be applied more broadly. See chapter 3.

¹⁶ See chapter 1 on powers to apply for bail for those facing deportation which have been brought into force.

9

Preparing a bail application to the Immigration Appellate Authority

IN THIS CHAPTER:

the practicalities of making a bail application. Accurate and thorough preparation is very often the key to success. The chapter is divided into the following sections:

- **accommodation –**
general issues, privately arranged accommodation, accommodation through the National Asylum Support Service or social services
- **preparing sureties for the hearing**
- **preparing your client for the hearing**
- **which court will hear the application**
- **arranging a hearing date**
- **completing the bail application form**
- **grounds of application**
- **documents for the hearing**
- **obtaining the bail summary**
- **interpreters**
- **applications to the tribunal.**

Accommodation

General issues

The procedure rules require an address to be provided in an application for bail to the Immigration Appellate Authority (IAA), or, if you are unable to provide an address, you must provide the reason for this.¹ In practice, it is extremely difficult to obtain bail without an address, the main reasons being that the adjudicator will want to make it a condition of bail that your client resides at a particular address and reports regularly at the nearest police station or reporting centre.

The Guidance Notes deal with the issue of addresses at some length² These set up quite a system for dealing with the National Asylum Support Service's (NASS) refusal to allocate addresses in time for the submission of a bail application or to allow access to emergency accommodation (see below).

1 Immigration and Asylum Appeals (Procedure) Rules 2003, SI 2003, No 652, para 32(d)

2 Para 2.4.3–2.4.4. See appendix 2, the Guidance Notes refer to NASS Policy Bulletin 64, however the updated version is yet to be published at the time of writing (as is pointed out in the Guidance Notes). The previous version is available at the 'asylum in the UK' section of the Home Office website www.ind.homeoffice.gov.uk and also www.asylumsupport.info

Finding suitable accommodation can greatly improve an application's chance of success. The accommodation that is most likely to *improve* the chances is that provided by a family member or friend of your client, the logic being that your client will have a heightened sense of responsibility to such a person. Ideally, the person will also stand as a surety in a bail application, even in a small amount (e.g. £10–£100 if the person is on a low income).³

For clients without access to accommodation with family or friends the situation can be much more difficult. Lack of an address can seriously impede access to bail. Because of the increasing restrictions on eligibility for accommodation from either NASS or social service departments, there may be potential for challenge by judicial review, as the detained client is caught in an untenable position. If your client is in a situation where she cannot obtain bail *because* of lack of an address, the Home Office (through NASS) or other statutory authority's failure to provide one may be a breach of Article 5 ECHR as it precludes any alternative to detention.⁴

In all cases, you should take your client's instructions about any proposed address. You should also consider related factors, such as the location of any sureties.⁵ Adjudicators may refuse bail on the grounds that the proposed address is too far from the sureties.

The practicalities of arranging accommodation depend on who is providing it and what type of accommodation it is.

Firstly, is your client able to live:

- with a friend or relative who is not an asylum seeker?
- with a friend or relative who is an asylum seeker but lives in private rented accommodation?
- in accommodation provided by a religious or community organisation?

The issues for these three scenarios are dealt with first below. All other scenarios are dealt with separately, under the section 'accommodation by NASS or social services'.

Privately arranged accommodation

If your client says that she has someone who can provide an address, contact this person to find out if he is still willing to provide accommodation for your client.

If the answer is 'yes' you need to find out:

- Does he own or rent the property?
- How many bedrooms are there in the property?
- How many people are living there now and where would your client sleep?
- How does he know your client?
- Is he willing to come to court to confirm that your client can live at the address?

³ See chapter 6 on amount of recognisance from surety.

⁴ This issue has been partly recognised by the 2003 procedure rules which do not make an address mandatory for an application for bail. The difficulty now will be persuading an adjudicator to release on bail without an address and what destitution your client would face

⁵ See chapter 6 on duties of a surety.

You will need to advise the person about what documents he will need to bring to court. These are:

- proof of identity (where proof of identity contains an address, check that the address is the same as is written on the bail application form)
- proof of residence at the address (would be fulfilled by next bullet point)
- proof of ownership/tenancy
- proof of landlord's permission – see below.

There is no requirement for the adjudicator to examine the person providing accommodation as there is for any sureties; however, it is much better for the strength of the bail application for the accommodation provider to come to the hearing. If this is not possible, it will be necessary for the accommodation provider to write a letter that can be presented to the adjudicator, together with copies of the necessary documents, confirming that he is able to accommodate the client. It is helpful for the accommodation provider to give the reason why he is not at the hearing, including, if possible, evidence of non-availability, such as a letter from his employer.

The documents needed depend on the type of accommodation – whether it is owned or rented, and by whom.

Friend/relative owns the accommodation

If the person owns the property he must demonstrate proof of ownership to the court, usually via deeds or a mortgage statement. Remember that the accommodation may be legally owned by someone else, for example, the spouse or parents of the accommodation provider. In this case, the legal owner should write a letter confirming his agreement to your client living in the property. If two or more people jointly own the property all should provide consent.

Friend/relative rents the accommodation

If the friend/relative rents from a private landlord, a housing association, or a local authority, he will need to get written permission from the landlord to have the detainee living at the address if the tenancy requires this. The friend/relative will need to bring this letter and his tenancy agreement to court. If the accommodation is rented jointly, the other person will also need to provide written consent.

If there are potential difficulties with obtaining documentation regarding the accommodation being provided by the friend/relative, you should, if possible, obtain a back up address through an emergency accommodation provider.⁶

⁶ See below: 'detainee has no accommodation address'.

Accommodation provided by member of religious or charitable organisation

Occasionally a charitable or religious organisation will offer an address. An officer of the organisation will need to provide written confirmation of the offer and of the type of accommodation being offered. Documentary evidence of ownership or tenancy is less likely to be required than in the case of a private individual. The letter from the officer should explain the connection, if any, between your client and the organisation, for example, if she is a member of the religious community that is offering the accommodation.

Accommodation by NASS or social services

First it is necessary to determine what support your client is entitled to, if any. The details of this subject are outside the scope of this guide and you will need to refer to up to date specialist texts and/or specialist advice.⁷

The fields of asylum support and community care (including accommodation and financial support provided both through the National Asylum Support Service (NASS) or local authorities' social services departments) are specialist areas of legal practice. However, there is a significant overlap with immigration practice and you must be familiar with rules of entitlement and methods of accessing support. This section covers, in brief, the practicalities of accessing different types of support for the purposes of an application for bail.

7 A useful reference is *Support for Asylum Seekers*, by Sue Willman, Stephen Knafner, Stephen Pierce, LAG, 2001 (although this does not contain NIAA 2002 provisions). Also see www.asylumsupport. Some solicitors deal exclusively with this area of law – you can find local practitioners in your Community Legal Service Directory.

8 Asylum Support (Interim Provisions) Regulations 1999 [SI No 3056]

9 IAA 1999, s116 amends s21 of the National Assistance Act 1948 so that 'A person to whom s115 of the IAA 1999 (exclusion from benefits) applies may not be provided with residential accommodation under s1(a) if his need for care and attention has arisen solely – (a) because he is destitute; or (b) because of the physical effects, or anticipated effects, of his being destitute'. From the House of Lords judgement of *Westminster City Council v NASS* [2002] UKHL 38.

10 This definition of asylum seeker is contained in IAA 1999 and NIAA 2002.

11 NIAA 2002, sch 3, para 1(6)

12 NIAA 2002, sch 3 para 1(3)

Overview of support available

It is necessary to distinguish the two main types of support provided by social services:

- provided under the Interim Regulations which pre-dated and overlapped with the formation of NASS and entitlement for which is similar to NASS⁸
- provided under what is collectively termed 'community care' legislation for needs (including accommodation) arising *not* 'solely' out of destitution.⁹

NASS and social services support, under the Interim Regulations, are only available to those who have either claimed asylum or claimed that removal from the UK would breach Article 3 ECHR.¹⁰ Most clients in detention come within these categories.

Clients who have never come within the definition of an 'asylum seeker' are never entitled to NASS or social services (Interim Regulations) support. The only support that would ever be available would be that provided to prevent a breach of ECHR,¹¹ arising from the effects of destitution on the individual/family concerned.

The exclusion from any kind of support does not apply to a child (but the duty to support a child does not extend to a duty to support the child's parents).¹²

The following possible scenarios apply:

- Your client is the dependant of someone who is supported by NASS or social services (under the Interim Regulations).¹³
- Your client was previously accommodated by NASS or social services (under the Interim Regulations) *and is still entitled to support*
- Your client is entitled to NASS support, but has never accessed this before.
- Your client has 'needs arising other than from destitution'.
- Your client is no longer an asylum seeker and has needs arising *only* from destitution.
- Your client is detained with her children (and *is not* the dependent of someone receiving NASS or social services support).
- Your client is a minor (and is not the dependent of someone receiving NASS or social services support).

The scenarios are dealt with separately below.

Your client is a dependant of someone entitled to NASS or social services (Interim Regulations) support

NASS or social services will **not** provide accommodation for your client to stay with a friend or relative, unless the relative is the dependant of your client or vice versa (and the relative is *already* receiving support from NASS or social services).

The NASS rules on dependants differ from those in immigration law, for example your client can be the dependent of her spouse even if both have separate asylum claims. This means that if your client is removable but her husband's case is not finished, she will remain eligible for support.

Dependants for the purposes of NASS are:¹⁴

- husband or wife
- dependent child under 18
- disabled family member over 18
- unmarried heterosexual couple who can show that they have been living together for two out of the three years before the application for support, or before the joint application if they arrived in the UK separately.¹⁵

As a starting point, you should contact the accommodation provider where the person is living as the provider may be able to authorise your client to live at the address without a separate application to NASS. If this does not work, you will need to approach NASS directly. This can take some time, even to work out which section should deal with your request and then to allow NASS to process the request and provide written confirmation for the court hearing.¹⁶ You will need the NASS reference number and address of the spouse before making an application.

Note that NASS should pay the fares of a dependant who is receiving support from NASS to attend the bail hearing.¹⁷

¹³ The NASS and social services rules on dependants are wider than those in the immigration rules and are set out in regulations.

¹⁴ These are set out in IAA 1999, s94 and Asylum Support regulations 2000, s2(4) [SI No 704].

¹⁵ There is no provision for same sex couples, which needs to be challenged under Article 8 ECHR.

¹⁶ If NASS refuses to provide accommodation where there is entitlement, this may be challenged by judicial review. This applies in all cases of incorrect refusal to provide accommodation.

¹⁷ IAA 1999, s96(1), and NASS Policy Bulletin 56

The procedure is similar for accommodation provided by social services, except that you will need to address your request to the appropriate Local Authority Asylum Team. Note that the definition of who is a dependent for these purposes is slightly different than that under the NASS rules and appears to include same sex couples.¹⁸

Your client was previously accommodated by NASS or social services (under the Interim Regulations) and is still entitled to support

First of all you will need to check that your client is still entitled to support. If she is not entitled you will need to refer back to the list of scenarios for other options. See footnote 7 for sources of information if you are not sure. A client with a first decision or an appeal to the adjudicator or tribunal outstanding will be still be eligible. Eligibility also extends to those using the statutory review procedure to challenge a refusal of leave to appeal to the IAT.

The procedure for accessing support is the same as set out in the previous section. However, some social services departments will attempt to shift the burden to the local authority for the area of the detention centre. This position is not usually tenable, and should be resisted (depending on length of association with each area).

Your client is entitled to NASS support but has never accessed this before

At the time of writing, two possible, though sometimes tenuous, routes exist to accessing NASS support, for the first time, from detention:

- emergency accommodation through a charity
- working under contract to NASS¹⁹
- application to NASS.

Applying for emergency accommodation

Local practice varies, but some organisations will provide an address at a hostel for those who are eligible for NASS assistance. This is accessed by telephoning one of the charities in your area or the area of the detention centre (or the area where the sureties live) and enquiring whether emergency accommodation would be available on the proposed date of the bail application.²⁰ If it is available, you will need to fax the client's details and case status to the charity.

NASS has attempted to curb the availability of emergency accommodation to those seeking bail by requiring the detainee to obtain a 'letter of authority' from NASS prior to the grant of emergency accommodation.²¹ As a result, most charities now refuse to provide accommodation without such a letter of authority. At present the only means of obtaining a letter of authority for a detained client is by completing and submitting a NASS application form.

18 See Asylum Support (Interim Provisions) Regulations 1999, reg 2 [SI No 3056].

19 See appendix 8 for contacts.

20 See below, section on sureties, if this is an issue.

21 See NASS Policy Bulletins 64 and 75 (as per footnote 2). Note that the updated version of NASS Policy Bulletin 64 has not yet been published. A draft version is still under consultation at the time of writing.

Applying to NASS

If you are unable to access emergency accommodation directly, your client will need to complete a NASS application form prior to any bail hearing being lodged. She should be able to obtain the form from the Immigration Service at the detention centre. NASS has made no provision at the detention centres to assist detainees in completing forms.²²

The Immigration Service should arrange for photos to be taken to submit with the form. The policy is set out in NASS Policy Bulletin 64 (see footnote 2 this chapter). In relation to photographs, it appears that an arrangement was made between NASS and the Immigration Service. At the time of writing, it seems to be working in practice, although Policy Bulletin 64 does not include any reference to the arrangement.

You may provide assistance to your client to complete and submit the form, if necessary.

The NASS policy is under review at the time of writing. The draft wording agreed between NASS and the IAA states that the application for bail should be completed with the phrase:

No address can currently be provided. An application has been made to NASS and the applicant agrees to reside at such accommodation as may be provided by NASS in accordance with the terms and conditions of support given, and to notify the IAA/CIO/Secretary of State of the address of such accommodation within 24 hours of being provided with it.²³

In order to deal with this unresolved situation, it is recommended that you:

check the current version of Policy Bulletin 64 on the NASS website (see footnote 2)

unless directed otherwise by a revised version of the policy, use the wording set out above to complete applications for bail for clients awaiting a NASS address.

The Guidance Notes describe the procedure, from the court's point of view. You should refer to the Guidance Notes for further details, but also you must ensure that the position has not been further revised.²⁴ Note that, at the time of writing, this procedure continues to be under negotiation.

If bail is refused on the ground that an address is not yet available, or you are forced to withdraw due to delay by NASS and this is prejudicial to your client, you should consider a challenge to NASS policy by way of judicial review.

Your client has 'needs arising other than from destitution'

If your client is 'in need of care and attention' in addition to a need created by the physical effects of destitution, she may be eligible for accommodation, support and services under the community care legislation.²⁵ This can be accessed by requesting a community care assessment from the local authority social services department.

It can be difficult to obtain help from a local authority while your client remains in detention and it may be necessary to obtain medical evidence before the local authority will agree to assess your client.

22 In contrast to the position of those outside detention.

23 This is set out in the draft revised Policy Bulletin 64, para 3.6

24 See appendix 2, especially paras 2.4.3–2.4.4. The NASS policy on this issue has changed numerous times over the past year and the scheme has many pitfalls, some of which may be open to legal challenge.

25 *Westminster City Council v NASS* [2002] UKHL 38. Those with needs for care and attention are excluded from NASS support which must be provided by National Assistance Act 1948, s21, following an assessment of need under NHS and Community Care Act 1990, s47.

You should also use the medical evidence to press the Immigration Service to release on temporary admission/temporary release (TA/TR).

Potentially, a refusal to carry out an assessment merely because your client is in detention is unreasonable and challengeable by judicial review – if an address from social services would be the only means to obtain your client's release on TA/TR or bail.

Your client is *no longer* an asylum seeker and has needs arising *only* from destitution

The Immigration and Asylum Act 1999 (IAA 1999) allowed for the provision of support under the 'hard cases scheme' to asylum seekers who are no longer eligible for NASS or Social Services (interim regulations) support.²⁶ NASS sets out restrictive criteria for accessing the scheme, but these do not cover all situations where a client is not able to return to her own country.

Provision under the hard cases scheme is in the form of board and lodging outside London, with no cash allowance or vouchers. Application is by letter to NASS, setting out the client's circumstances and reasons for needing support.

The hard cases scheme is amended by the Nationality Immigration and Asylum Act 2002 (NIAA 2002).²⁷ Under IAA 1999, the scheme was only available to those 'temporarily admitted', 'released from detention' or 'released on bail'. The effect of this was that detained clients were not able to make an application prior to being released from detention, and therefore could not obtain an address for a bail hearing. Watch for up to date guidance as to how existing policy will be changed in line with amendments in NIAA 2002.²⁸ There is also a new power to provide accommodation and support to those who are awaiting arrangements to remove them from the UK.²⁹

For a client who is not removable, due, for example, to a suspension of removals to her home country, the Immigration Service cannot maintain detention just because the client has no address to be released to. In these circumstances, you should pressurise the Immigration Service into releasing on TA/TR so that she can approach NASS for assistance. Failure to provide assistance would be unreasonable if your client has nowhere else to go and could be challenged by judicial review.

Your client is detained with her children (and is *not* the dependant of someone receiving NASS or social services support)

Under IAA 1999, families with dependent children were not excluded from support up until the point when they left the UK. Now, under NIAA 2002, this position is changed for families of failed asylum seekers. A child cannot be excluded from support, but the duty to support does not necessarily extend to the parents. This is a complex area and you should have reference to specialist advice.³⁰

²⁶ IAA 1999, s4

²⁷ NIAA 2002, s49 allows the Secretary of State to provide accommodation for any failed asylum seeker. However, NIAA 2002, sch 3 excludes certain categories from support, including under this act. These categories include 'failed asylum seekers'.

²⁸ See NASS, Asylum support, or Refugee Council websites for up to date policy.

²⁹ NIAA 2002, sch 3, para 8

³⁰ See footnote 7 for resources and who to contact.

Your client is a minor (and is not the dependant of someone receiving NASS or social services support)

If the detainee is under 18, she is not entitled to NASS assistance and remains the responsibility of a local authority social services department. One potential difficulty is finding a local authority who will accept responsibility for the minor. This can be a problem particularly when the client's age is in dispute, as is usually the case when someone has been detained.³¹

The minor remains the responsibility of the local authority that assisted her before detention if she was not detained on arrival. In the more common scenario that the client was detained on arrival, the local authority in the area of the detention centre should be responsible.

If the local authority does not accept responsibility due to disputing that your client is a minor (which happens occasionally and only in circumstances where the Immigration Service has also previously disputed age), you will need to approach NASS. This can be a difficult situation to resolve. ►See chapter 7.

Selecting and preparing sureties

This section assumes that you are making a bail application **with** sureties. You do not necessarily need sureties to make a bail application. ►See chapter 6.

The following issues are dealt with:

- assessing a prospective surety
- explaining the duties of a surety
- documents a surety must bring to court
- sureties who cannot attend a bail hearing
- late notice of sureties.

Assessing a prospective surety

To assess a surety, you should take instructions on the following issues:

- his personal details for the bail application form.
- his status in the UK
- any criminal record? if so, for what offences, when and what sentence imposed?
- any immigration offences (overstaying, breaching conditions, etc)?
- how does he know your client?
- how long has he known your client?
- how often has he contacted/visited your client while she has been in detention?
- did he know your client in her country of origin?
- how would he keep in contact with your client after her release?
- how much money would he be able to offer as a recognizance?³²

³¹ For more discussion on age dispute cases see chapter 7.

³² It is important to ask him to consider a maximum. If not, the surety may be placed in untenable position in court and might feel obliged to offer more than he could afford. Remember you must be sure that a surety actually has access to the money that he intends to offer.

what evidence can he provide of this money (see 'documents' below).

what is his income and what are his financial obligations?

what makes him believe your client will comply with the conditions that may be imposed?³³

what would be the consequences for the surety if he were to lose the recognizance?

is the surety able to attend court?

The following considerations then apply:

Is the person willing to stand surety?

You must obtain the surety's consent to stand as surety before putting his details in a bail application form. *Do not* rely on your client's instructions on this issue. If it appears that a surety has withdrawn, it will unnecessarily prejudice the bail application.

Is there any other role that the surety could play?

It may be useful to take instructions from any surety on the reasons given for opposing bail. This is particularly the case where the Immigration Service raises identity, nationality or age as an issue. The surety may be able to give evidence or bring evidence to court to help prove your client's account.

Has the surety shown integrity – especially in relation to his finances?

Check how the surety's instructions about his income and outgoings fit in with the financial evidence he brings to court. In particular, do any wage slips and bank statements reflect both income and expenditure: are there any unexplained significant amounts of income or outgoings? Ask for the origin/purpose of these.

Do the bank statements belong solely to the surety in a personal capacity or are they joint statements, or business statements (if the surety is self-employed)? You will need the surety to obtain consent from any co-holders of bank accounts.

Make sure that the financial evidence does not demonstrate that the surety is committing any criminal offences, for example non-payment of tax, or working too many hours while on benefits, etc. Such a surety is likely to undermine a bail application.

Will he strengthen the bail application?

The amount of recognizance offered by the surety is not the only factor of relevance to the court or Immigration Service. A weak surety can ruin a bail application that might otherwise succeed, either with only one surety or none at all.

You may be in a position of having to decide whether or not to use a proposed surety or which of a number of possible sureties you should rely on. In addition to those set out above, you should consider the factors set out in chapter 6 'purpose of a surety'.

³³ See chapter 10 for conditions of bail.

Explaining the duties of a surety

You must advise a prospective surety about his duties to the court/Immigration Service, what is expected of him in practice and what the risks are. You should also explain that he has the option of seeking independent legal advice.

The following points should be explained:

The primary duty of a surety is to notify the relevant authority (Immigration Service, court, etc) if the person for whom he is standing surety absconds, or threatens to abscond.

In order to fulfil this duty, the surety must maintain regular contact with the client. What type of contact and what is sufficiently regular depends on the circumstances. You will need the surety's instructions on what he considers reasonable.

If the surety does not fulfil this duty and the client absconds, the surety will risk losing the recognizance. Where bail was originally granted by the IAA, there will be a forfeiture hearing where the circumstances will be considered by an adjudicator, before any money is lost. ▶See chapter 10.

It is preferable for the surety to demonstrate that he is fulfilling his duties as a surety by attending the bail renewal hearing at court or by attending with the client to answer to bail to the Immigration Service.³⁴

If the surety cannot attend a bail renewal hearing or appointment, he will need to notify in writing the reasons for this and express his consent to any bail conditions or variation of bail specified.

Sureties sometimes express concern that standing as a surety will affect their own immigration status (where they are not British citizens). Where a surety has acted in line with his duty to the court/Immigration Service, no harm should occur. Conceivably, where an asylum seeker, or person with limited leave stands as a surety and does not take steps to inform the court/Immigration Service if the person absconds, this could reflect badly on his character, although there is no formal connection between the actions of a surety and the decisions made on his own immigration case.

There is no criminal liability for sureties who fail to inform the court/Immigration Service that a person has absconded.

³⁴ See chapter 10 on bail renewal hearings and Guidance Notes, s4 at appendix 2.

Documents a surety must bring to court

You must make it clear to prospective sureties that the court demands sight of all of the documentation that applies in their case, and if they do not bring documents, the bail application may be refused on that ground. The documents are:

- identification: passport or other means of identification and evidence of status in the UK³⁵
- proof of address, for example, rent book, driving licence, recent utilities bill, tenancy agreement
- details of employment – if possible a letter from employer
- evidence of income – if possible, 3 month's worth of pay slips and last 3 months bank/building society statements
- if self-employed, last set of accounts submitted to Inland Revenue
- details of assets – if possible, 3 months of saving accounts statements
- details of major liabilities: loans, etc.³⁶

If a bank account is owned jointly, written consent of the other party must be brought to court.

Sureties who cannot attend bail hearing

You should not refuse to represent your client in a bail application merely because her surety finds it impossible to attend court. If a surety is not available to come to the court hearing, you should consider whether it might be best to:

- find a different surety
- do without a surety altogether
- postpone the bail hearing.

Which of these steps you take depends on balancing the following issues:

Could the surety come to court if the application was held on a different date in the near future?

What are the surety's reasons for non-attendance?

Do these relate to: type of profession, caring responsibilities, health, disability, travel arrangements, etc? Is the surety able to obtain evidence of his reason for non-attendance?

Is there a need for the surety to attend for other reasons, for example to give evidence of age/nationality, etc?

What is the relationship between your client and the surety?

The closer the relationship, the more important it is to show that the surety is willing to demonstrate his commitment.

An example of a situation where it would probably be better to rely on the surety, despite non-attendance is:

The surety is a family friend who is a hospital doctor and finds it difficult to take time off. He can provide evidence of this, a supporting letter and he has no role at the hearing other than acting as surety.

³⁵ A surety does not need to be settled in the UK. See also chapter 6.

³⁶ The documents are set out in the notice to applicants and sureties attached to bail hearing notices.

An example of a situation where it would probably be better not to rely on the surety at all is:

The friend of a friend of your client is reluctant to take time off from work. He has not contacted your client in detention. In any case, he will not be able to perform his role of keeping in contact as he may go abroad.

Where the surety is also the partner or spouse of the detainee, it is very important that he attends the hearing. The only circumstances where this would not be necessary would be severe health problems or disability, lack of arrangements to pay for travel (despite application to NASS) and long distance, or due to having to look after young children. In all these cases, you will need a strong letter in support from the surety, ideally backed up with a letter from the GP or an agency in close contact with the surety (for example a refugee support agency).

The absence of a surety can easily be used as a reason to refuse a bail application, if the circumstances are not clearly explained and documented. The Guidance Notes state:

It is only in exceptional circumstances that you are likely to proceed with the hearing of a bail application in the absence of any of the sureties being proffered, unless it is a case where you feel sureties are not required in any event.³⁷

Despite the strong terms of the Guidance Notes, it is possible to obtain bail without the surety being present, as long as the reasons for the absence are explained and documented. An absent surety must still provide documentation as set out above.

Late notice of sureties

Generally, the Immigration Service request details of any sureties at least 48 hours in advance of the hearing so that a police check can be carried out. The details are included on the bail application form, which the court is responsible for sending to the Immigration Service.

If a surety's details are not available until after the form has been lodged, you should fax the details to the Immigration Service, as well as to the court, so that the Immigration Service has an opportunity to carry out the checks before the hearing. This must be done as a matter of courtesy and to ensure that your client will not be prejudiced at the hearing. You should telephone the duty Chief Immigration Officer (CIO) to confirm that she has received your fax and will carry out the checks as necessary.

Preparing your client

You will have taken your client's instructions on a wide range of issues prior to lodging a bail application with the court. Having obtained a listing you will need to discuss with your client the following issues:

- procedure at the hearing (see chapter 10)
- conditions of bail (see chapter 10, conditions of bail)
- giving evidence at the hearing (see chapter 10, evidence from the applicant).

³⁷ Para 2.2.3

Which court will hear the application?

Generally the Immigration Appellate Authority (IAA) will only list a bail application at the court nearest to the detention centre. In order to find out which court is appropriate, you should contact the IAA. If the application is listed at the nearest court, your client will be produced at court. In some circumstances it will be essential for your client to be produced, although in all circumstances it is preferable.³⁸

However, there are many occasions when it is difficult to arrange a bail hearing at the court nearest the detention centre. This is especially the case where your client has been transferred far from his previous home and/or far from your firm. In such circumstances, a surety may be unwilling or unable to travel to a distant hearing centre, or finding suitable representation may be a problem. Where you find yourself in such difficulties, there are two approaches that can be taken:

- making an application at a convenient court, without your client being produced at the hearing
- making representations to the IAA to have the application listed at a convenient court with your client's presence.

Circumstances which in the past have been regarded as sufficiently special to warrant production of the applicant at another hearing centre have included:

- a surety who was unable to travel due to a disability
- emergency cases – where a detainee is seriously ill or, in the case of the detention of a child, the IAA may be open to producing applicants in a convenient court
- the court does not sit on the day your sureties can attend.

A request for production at a different hearing centre should be made at the time of the filing of the application (which should be filed with the hearing centre that you wish the application to be heard at). The request will be considered by the regional adjudicator.

It is worth pointing out in such an application that the Guidance Notes state, 'it should be the rule rather than the exception that the applicant attends the hearing.'³⁹

In relation to production, the European Court of Human Rights in *Niedbala v Poland*⁴⁰ notes: '...the 'officer' must hear the individual brought before him in person and review whether or not the detention is justified...'

³⁸ See chapter 10 on evidence from the applicant.

³⁹ Para 2.1.2

⁴⁰ ECtHR, application no 27915/95, 4 July 2000, para 49

Bail hearing in the absence of the client

In certain circumstances, it is not *essential* for your client to be present at the bail hearing, although in all cases it is desirable.⁴¹ You can make an application without production, *if necessary*, when there is no allegation of deception or other contested matter which requires your client to give evidence.

If the court refuses to list with production, you will have to decide whether to request a listing without production or to give up your preferred location. This depends on balancing up the various factors, including, if appropriate, the issues discussed in relation to non-attendance by a surety (see above).

If you do not require your client to be produced, you can request a listing at any convenient court.

Arranging a hearing date

One can merely request a listing and the application will be listed on a day that is convenient to the court. However, you can contact the bail clerk to negotiate a date. This can be of assistance if sureties are only able to be in court on particular days. If enough notice is given (about one week) then the bail clerks will usually arrange a suitable date.

Practice Direction on speed of listing

The Chief Adjudicator issued a Practice Direction in 2001 stating that all applications must be listed within three working days of the application being submitted to the IAA. This practice direction is not always complied with, particularly at the smaller 'satellite' courts.⁴²

If you are having difficulty obtaining a listing quickly, you should contact the manager of the relevant court or, if necessary, the regional adjudicator. See also above: which court will hear the application.

⁴¹ See section on 'evidence from the applicant' below.

⁴² Satellite courts, e.g. Havant, Bromley, East Retford, tend to sit in magistrates courts on certain days of the week only. They are serviced by an IAA centre, such as Taylor House and York House in London, Leeds, Manchester, etc.

Completing the bail application form

A new bail application form came into effect on 1 April 2003. It may be revised due to concerns that have been raised and you will need to make sure that you are using the most up to date form.

The 2003 procedure rules remove the right to apply for bail orally and make use of the correct form mandatory. The Guidance Notes require the court to provide a copy of the correct form on the day of the hearing, if the correct form has not been used. However the Guidance Notes also state:

If there is any failure to comply with the Rule that you consider minor in nature and such as would not prejudice the Secretary of State there is nothing to prevent you from proceeding and you should proceed with the hearing of the application, provided all the information required by the Rule is then supplied. You may want an explanation for the failure to comply with the Rule.⁴³

If you do not use the correct form, or do not complete it properly, you may face a complaint from the IAA to the Office for the Immigration Services Commissioner (OISC) or the Office for the Supervision of Solicitors (OSS). This will be for breach of the procedure rules.

There are elements of the form that are not very clearly set out. The following practice is recommended for the following sections:

Decision maker's reference number.

If possible, put both the port reference and the Home Office reference numbers

Undertaking of the applicant

if the applicant does not have any money to put forward as a recognizance it will be necessary to insert a nominal amount (such as £1). You should endeavour to arrange for the applicant to sign the undertaking, but you should not miss an opportunity to make a bail application because you cannot easily contact your client (for example if your client is detained in a prison or there is delay in processing faxes at the detention centre).⁴⁴

Grounds for bail (see below).

Help with your appeal:

amend to read 'help with your bail application' unless you are also representing the applicant with her appeal (which has already been lodged).

Have you been granted Controlled Legal Representation (CLR)?:

this section does not specify whether it is CLR granted for bail, for an appeal, or both. It is not a requirement of the rules to provide this information and therefore it is potentially ultra vires.

⁴³ See appendix 2, Guidance Notes, para 2.7.1

⁴⁴ The requirement for a signed undertaking at this stage is not contained in the Immigration and Asylum Appeals (Procedure) Rules 2003 (IAA(P)R 2003) which only state (at rule 32(2)(e)): 'The application notice must contain the following details... the amount of recognizance in which he will agree to be bound'. Rule 32(3) states 'The application must be signed by the applicant or his representative...'. It is potentially ultra vires and in breach of Article 5(4) by restricting access to the court.

Grounds for bail

The bail application form contains a requirement that 'you need to tell us all of the grounds for your application'. The procedure rules do not explicitly require bail applications to contain detailed grounds, merely stating: 'the grounds on which the application is made and, where a previous application has been refused, full details of any change in circumstances which has occurred since the refusal'.⁴⁵

There may be a difficulty in putting forward comprehensive grounds as to why bail is a suitable alternative to continued detention when the Immigration Service has not disclosed the reasons for detention/for opposing bail. It may be necessary to point this out in the initial grounds by way of explanation. In practice, adjudicators have not restricted a bail application to those grounds that have already been put forward, although the new form has only recently come into effect.⁴⁶

Documents for the hearing

You do not need to lodge documents with the court or Home Office Presenting Officer (HOPO) unit in advance for a bail application. However, you cannot rely on the court having access to any documents previously served for the substantive case, or even served for a previous bail hearing, as the files may be separate. You should therefore ensure that the advocate at court has a complete set of documents and copies for the HOPO and court.

Obtaining the bail summary

The bail summary is prepared by the Immigration Service once it receives notice that a bail application has been listed.

The rules require that the bail summary is served on the representative by 2pm on the day before the hearing, unless the Secretary of State 'was served with notice of the hearing less than 24 hours before that time', in which case he must serve the bail summary 'as soon as reasonably practicable'.⁴⁷

The Guidance Notes state:

If allegations in the bail summary are contested in evidence then the Secretary of State should adduce evidence, including any documents relevant to the decision to detain, to support such allegations.⁴⁸

It is therefore very important that you obtain your client's full instructions on the bail summary as early as possible so that you can request evidence from the HOPO unit in advance of the hearing, if any allegations are contested by your client.

⁴⁵ IAA(P)R 2003, rule 32(2)(g)

⁴⁶ The IAA has, on occasion, submitted complaints to the OISC for failure to put forward detailed grounds.

⁴⁷ IAA(P)R 2003 rule 33(2)

⁴⁸ Para 2.5.3

On occasions, no bail summary is served at all or it is served late.

The Guidance Notes state:

If no bail summary is available, you should proceed without it. *This implies that bail would have to be granted.* If it is provided late, then you can consider it. However, if the allegations contained in it are disputed, its late submission and the lack of time given the applicant to prepare his response to it must affect the evidential weight you can attach to it and any evidence submitted in its support⁴⁹ (emphasis added).

You may need to draw the adjudicator's attention to the Guidance Notes when dealing with late submission or absence of a bail summary. Note that the issue in terms of late submission is whether any allegations are contested. If your client does not contest any allegations, it will be difficult to argue that she is prejudiced by late submission.

Interpreters

As for substantive appeals, the court will book an interpreter on request. You should make a request at the same time as you lodge the bail application (there is space on the application form). Remember that you should request an interpreter to be available for any sureties who do not speak English, as the adjudicator may also want to question the sureties at the hearing.

The court interpreter cannot act as an interpreter between you and your client, except in the bail hearing itself. This is because the interpreter's duty to the court may be compromised. Therefore, it is important to provide an independent interpreter at the hearing to enable instructions to be taken on matters raised at court.

Applications to the tribunal

Bail applications can be submitted to the tribunal, rather than the adjudicator, for any cases that have appeals pending before the tribunal either before or after leave has been granted.⁵⁰ The tribunal can hear bail applications for clients who have appealed to the Court of Appeal (whether or not leave has been granted) or where the Home Office is appealing a decision of the tribunal.⁵¹

The procedure is the same as for bail applications to an adjudicator except that all tribunal applications are heard at Field House in London. Applicants will be produced from some detention centres and from more distant ones will be able to take part in the bail application by video link. You should ascertain which will apply in your client's case.

Bail applications before the tribunal may be heard by a single judge or a panel. They will usually be placed on a list of substantive hearings rather than there being a court set aside for bail applications.

⁴⁹ Para 2.7.2

⁵⁰ IA 1971, sch 2, para 29(4)

⁵¹ AIA 1993, s9A. Note differences with IA 1971, para 22 and 29 sch 2 – see also chapter 4.

10

The bail hearing

THIS CHAPTER COVERS

the procedure of a bail hearing and a bail renewal hearing and the issues that may arise:

- **procedure at the bail hearing**
- **withdrawing the application**
- **evidence from the applicant**
- **examination of sureties**
- **if bail is granted**
- **reasons for refusal**
- **conditions of bail**
- **completing bail forms when applicant or surety not at hearing**
- **bail renewal hearings**
- **release from bail**
- **if your client absconds/forfeiture.**

Procedure at the hearing

Procedure at the hearing is covered in paragraphs 2.7 and 2.8 of the Guidance Notes. A Home Office Presenting Officer (HOPO) will usually represent the Immigration Service at the bail hearing. The HOPO will have a copy of the bail summary on file, which you must obtain before the hearing starts if you have not already been served with a copy.¹ Ensure that you have the current version on which the HOPO is relying.

If a further bail summary is served, or none has been served previously, you may have to ask for time from the adjudicator to take your client's instructions on the issues raised.² The adjudicator is likely to be sympathetic to this request.

The Guidance Notes take a firm line on the failure of the Secretary of State to produce a bail summary as required by the procedure rules.³

At the beginning of the hearing, the adjudicator will usually wish to check that the bail summary is complete and that the HOPO does not wish to add anything. The HOPO normally has a file that only contains the bail summary and the results of the surety checks, so is unlikely to have anything to add.

¹ See chapter 9 on obtaining the bail summary.

² See chapter 9 on interpreters.

³ See chapter 9 on obtaining the bail summary and Guidance Notes, para 2.7.2.

The adjudicator may consider that the bail summary is inadequate. The Guidance Notes recommend that the HOPO be given time to make further inquiries.⁴

The Immigration Service sometimes provides a summary of additional allegations that they instruct the HOPO not to disclose. These normally relate to arrests, charges, cautions or convictions for criminal offences either for the applicant or a surety. If the HOPO seeks to rely on such an allegation in the hearing, you should request sufficient details of the incident so that you can take instructions from your client or the surety. You will need to request an adjournment to do this. This practice may conflict with the requirement in the 2003 procedure rules to disclose the bail summary prior to the hearing, with the implication that the applicant should have a chance to consider any allegations against him. See chapter 9 on obtaining the bail summary and Guidance Notes paras 2.5.3 and 2.7.2.

Bail hearings can be quite fluid in their structure. The formal order of the hearing is:

Evidence from applicant (see below for further discussion).

Cross-examination of the applicant.

Submissions by the HOPO.

Applicant's submissions.

Decision of the adjudicator as to whether bail is right in principle. Most adjudicators give at least some reasons for their decision⁵

If bail is granted in principle, and the adjudicator considers that sureties are necessary, he will ask for any surety to be examined.

Evidence from surety.

Cross-examination of surety.

The adjudicator is likely to request confirmation of accommodation and the surety's documentation.⁶

Decision on whether the surety and accommodation are suitable and if suitable, what other conditions apply (e.g. reporting at police station).

⁴ Para 2.7.3

⁵ Immigration and Asylum Appeals (Procedure) Rules 2003, rule 33(5) requires that 'where bail is refused, the notice must include reasons for the refusal'. This is done via form ADJ50, a copy of which is attached to the Guidance Notes (but not reproduced at appendix 2).

⁶ See surety checklist attached to the Guidance Notes and included at appendix 2.

Withdrawal

It is quite common for adjudicators to put pressure on representatives to withdraw bail applications, by indicating that if the application is not withdrawn, it will be refused. The advantage of this practice is that it is possible to withdraw an application rather than disadvantage the client with a refusal (the reasons for which will be considered by a subsequent court).

You must be aware of the adjudicator's indications. These may be difficult to gauge precisely. You should outline all the grounds for the application in order to discover whether any factor might outweigh the factor tending towards withdrawal. Having done this, you will have to take a view:

If you do not withdraw, will the adjudicator definitely refuse the application?

Is there another way around the situation, for example withdrawing a problematic surety?

Did you expect that bail would be refused, but that you would be able to return in several weeks' time to illustrate that no progress was happening on the case?⁷ In this situation, you may decide to continue so that the adjudicator has to give reasons for refusal and may also comment on whether or when a new application would be appropriate.

Before agreeing to withdraw, you should request an adjournment to take your client's instructions. You will need to explain to your client what happened in court and the reasons why you think withdrawal is the best option. You should note that it is generally very frustrating for clients when applications are withdrawn, in part, as they are unlikely to have understood fully what was happening.

Evidence from the applicant

Some adjudicators consider this to be necessary if the bail summary raises deception or other credibility issues and/or there is a dispute over the facts. Indeed, if the application has been listed without production of the applicant, and the case raises an issue of this kind, the adjudicator may refuse to hear the application in the absence of the applicant.⁸ At other times, adjudicators indicate there is no need to hear evidence from an applicant on the basis that the representative's submissions are sufficient.

The Guidance Notes state:

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.⁹

In preparation for the hearing, you should consider and discuss with your client whether or not she should give evidence. However, even if you decide not to call evidence and merely proffer her for cross-examination, you should be prepared for the adjudicator asking your client questions.

⁷ This is particularly likely in removal cases where there is delay, e.g. in obtaining travel documents. See also chapter 8.

⁸ See chapter 9 on which court will hear the application.

⁹ Para 2.1.2

Examination of sureties and setting amount of recognizance

If an adjudicator is minded to grant bail she will then normally examine the sureties. Then frequently, what can only be described as ‘bartering’ starts. Adjudicators often attempt to drive up the level of recognizance offered by the sureties while the applicant’s representative tries to ensure that sureties are not forced above a level they consider appropriate.

You will already have taken detailed instructions from the surety.
 ▶ See chapter 6. You must be prepared to make submissions at the hearing as to why the amount that the surety offers is sufficient. This will include issues such as:

- amount of recognizance in relation to the financial situation of the surety
- other obligations of surety – for example family obligations that reasonably come before any obligation to the applicant
- other factors that make the surety suitable: close ties to the applicant, proximity to applicant’s bail address, regularity of contact, reliability of surety, etc.¹⁰

It is essential that you are clear about:

- the *maximum* amount of money that he is prepared to offer
- whether or not the surety would be willing to deposit all or part of the money in a solicitor’s client account.¹¹

You should not pressurise the surety into offering more than he wants to, although you can warn him if you think that the amount is not realistic and that bail will be refused only on this ground.

If bail is granted

Bail is granted by the adjudicator signing a form that has also been signed by the applicant and by any sureties. The conditions of bail are set out on the form.

Some adjudicators ask the applicant’s representative to fill out the bail forms. Usually the court rises to allow this to be done. The sureties and applicant are then asked to sign their undertakings on the bail forms in the presence of the adjudicator.

If bail is refused – reasons for refusal

An adjudicator must give written reasons for the refusal of bail.¹² This is done on a form with a checklist and a small space for additional comments. It does not serve as a complete record. It is normal practice for adjudicators to give oral reasons at the time of the refusal, although there is no statutory requirement to do this.¹³ You should keep a detailed note of the reasons and any comments made as they may be relevant to a subsequent hearing.

10 See surety checklist attached to the Guidance Notes and included at appendix 2 for the type of information required from sureties.

11 See chapter 10 and below. Note that money that is to be deposited must be relatively instant access as the detainee will not be released until it has been deposited.

12 IAA(P)R 2003 rule 33(5). This is done on form ADJ50.

13 Guidance Notes, para 2.7.7 require adjudicators to make a note in the court file of evidence given, arguments for and against bail and the reasons for the decision

Conditions of bail

The adjudicator is allowed to impose conditions on bail that she considers necessary to ensure that the applicant answers to her bail. The Guidance Notes make clear that *the primary condition of bail is to appear before an adjudicator or immigration officer at a specified place on a specified date*. Other conditions (secondary conditions) can only be imposed if the adjudicator considers that they are necessary to ensure compliance with the primary condition.¹⁴

The possible conditions are described below. Note that a condition prohibiting employment should *not* be imposed by an adjudicator, as this is not necessary to achieve the purpose of bail. This is set out in the Guidance Notes, para 2.4.6. This does not prevent the Immigration Service imposing the condition, but only at the point where the applicant is released from bail onto TA/TR (see below). While the applicant is on bail granted by the IAA, the IAA remains in control of the conditions.

Signing on at a police station or Immigration Service Reporting Centre

There is often a process of negotiation regarding signing conditions (which are almost always imposed as a condition of bail).

Prior to the hearing, you should ensure that you:

- know the name and address of the police station nearest to the proposed address
- take instructions from the accommodation provider about the travel time to this police station
- take instructions from the applicant about any difficulties that she will experience in signing at the police station (attending a course, childcare, disability, hospital appointments, etc). You must also take her instructions as to what signing conditions she is willing to accept.

It is common for an adjudicator to require the applicant to sign at a police station two or three times a week, although this may be reduced or increased depending on the amount of recognizance taken from any sureties.

Normally the requirement is to sign in within a period of 12 hours (for example 8am–8pm). Occasionally adjudicators impose a very short period of an hour or so in which to sign. This obviously increases the risk of an applicant being deemed to have failed to sign on. Such a short timescale should be resisted.

The Home Secretary has discretion to pay travel expenses for those complying with reporting restrictions.¹⁵

Note that it is increasingly common for Immigration Service Reporting Centres to be used instead of police stations. This will require considerably longer travelling times as there are fewer reporting centres than police stations. If a reporting centre is to be used, you should make representations about the length and convenience of the journey and therefore the frequency of reporting that should be required.

¹⁴ Guidance Notes, para 2.4.1

¹⁵ NIAA 2002, s69 and s71

Residence condition

A condition to reside at the bail address is always imposed.

Return date for renewal of bail

Bail will either be granted to an adjudicator or to an immigration officer. This depends on whether the bail is granted pending appeal (in which case it is granted to an adjudicator), or pending examination or removal (in which case it is granted to an immigration officer).

The date for renewal of bail can be any time from a few weeks to several months from the date of the bail hearing. This date is set by the adjudicator at the hearing, but you can make submissions on this point.

You should consider the following issues:

Your client may be concerned about a particular date chosen for bail renewal (for example if she has a hospital appointment on a particular date or a regular appointment on a particular day of the week).

Your client and any sureties may have to travel a considerable distance to attend the bail renewal hearing and wish it to be set as far in advance as possible.

If the surety will have to take time off from work or study, you can ask the adjudicator to release the surety from the need to attend the bail renewal, citing the reasons why this should be done.

Often, if bail is granted to an immigration officer, the applicant will be released on temporary admission/temporary release (TA/TR) when she reports to the port at the end of her period of bail (if she has abided by conditions and is still not removable). This grant of TA/TR may be with or without reporting conditions.

If bail is granted to an adjudicator it must be continued if an appeal is still pending, unless the applicant does not appear at the hearing (in which case forfeiture will be ordered). Note that adjudicators have no power to revoke bail once it has been granted. If an applicant does not comply with any conditions, it is up to the Immigration Service to arrest her.¹⁶

Deposit of recognizance

Some adjudicators have required a surety to lodge his recognizance or part of his recognizance in the client account of the solicitor, on the grounds that this acts as an extra inducement to the surety to perform his duties. Within the jurisdiction of the English courts, there is no legal basis for such a practice. Further, there are concerns that money can be laundered in this context, putting solicitors at risk. The Law Society can supply guidance in this regard.

¹⁶ If your client has no bail address see chapter 9 for details of her obligations to notify an address once allocated by NASS. See Guidance Notes, para 4.

The Guidance Notes state:

Adjudicators in England, Wales and Northern Ireland have no power to impose a condition for the deposit of recognizance money or the giving of such an undertaking. Apart from having no jurisdiction to impose such conditions, such a deposit also raises money laundering concerns. The practice should no longer be followed in England, Wales and Northern Ireland.¹⁷

In these circumstances, you should refuse to arrange or accept a deposit of recognizance, relying on the Guidance Notes. The situation in Scotland is different in this regard, and you should seek advice where necessary.

Completing bail forms when applicant or surety is not at hearing

When an adjudicator has agreed to grant bail with a surety who was not present at the hearing, the surety may be required to sign the bail forms in front of the desk officer at his local police station. The form is faxed to the police, and then faxed back to the court on completion.¹⁸ Occasionally the form may be faxed directly to the surety.

If the applicant is not present, then the form is faxed to the detention centre and, after being signed by the applicant, faxed back to the court. It is important to inform the applicant of the outcome of the application as quickly as possible so that she understands what forms she is being asked to sign.

Again, you should check that your client has actually been released. Once the 'release order' has been issued and sent to the detention centre, your client's detention becomes unlawful and, if release is unreasonably delayed, she may be entitled to compensation.

Answering to bail to the court or Immigration Service

A date and place for the bail renewal will have been set at the bail hearing. Whether your client is bailed to the court or to the Immigration Service, she *must* attend, as this was the primary condition on which bail was originally granted.

The Guidance Notes make clear that the court has no statutory power to revoke bail.¹⁹ This is an important clarification of a situation that was unclear in the past. Therefore, if bail has been granted to an adjudicator (or to the tribunal), bail *must* be renewed as long as the applicant attends the hearing. If the applicant does not attend the hearing and the court is not satisfied that there are exceptional circumstances, the adjudicator/Tribunal will direct the commencement of forfeiture proceedings.²⁰

¹⁷ Para 2.3.2

¹⁸ This procedure is set out at para 2.7.9 of the Guidance Notes.

¹⁹ Para 4.1

²⁰ Para 4.3. Forfeiture is discussed below.

If the applicant has not complied with secondary conditions (such as residence or reporting), the Immigration Service has the power to re-detain her, whether or not she has complied with the primary condition of attending for bail renewal.²¹ If she is re-detained at court you should make representations that she should be re-bailed (as she has answered the primary condition of bail). It has been suggested by a senior adjudicator that a representative could complete a bail application form at court and request an immediate fresh application.

If your client appears at court and is not re-detained, the adjudicator/Tribunal *must* still continue bail. Even if your client has won her appeal, she will be bailed to an immigration officer as she has not yet formally been granted status by the Immigration Service/Secretary of State.

If bail is granted to an immigration officer, your client can be:

granted temporary admission/release by the Immigration Service, which can include reporting restrictions and a prohibition on employment²²

arrested for breach of any conditions of bail²³

re-detained for removal²⁴

released from bail through being granted status in the UK.

Attendance of sureties when bail is renewed at court

It is preferable that the sureties should attend, but it is not a condition of bail that they do.²⁵ The Guidance Notes state:

You have no power to require the attendance of sureties. For so long as the applicant remains on bail, their recognizances continue. They entered into their recognizances for the applicant to comply with conditions, not for them to comply with conditions. 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.

This revised guidance appears to suggest that the attendance of sureties is not necessary where the surety is certain that the applicant will attend herself to answer to bail. However, attendance of sureties will be taken into account in any forfeiture proceedings. You will need to advise sureties of this guidance.

There is no obligation on the accommodation provider to attend a bail renewal hearing. You should obtain confirmation in writing that he or she is still willing to provide accommodation for presentation at the bail renewal.

21 The power exists under IA 1971, sch 2, para 24 (1)(a). If she is re-detained, she must be brought before a court within 24 hours under para 24(2). See below section on re-detention while on bail.

22 Under IA 1971, sch 2, para 21

23 Under IA 1971, sch 2, para 24

24 Under IA 1971, sch 2, para 16(2)

25 See chapter 9 on duties of sureties. See also Guidance Notes, para 4.2.

Preparation for bail renewal at court

Bail cannot be revoked by the court. However, there is the possibility of an immigration officer attending the hearing to re-detain your client if she has not complied with secondary conditions such as residence/ reporting or because she is now removable. You will need to:

Take your client's instructions on whether or not she has complied and the circumstances of any non-compliance. You should seek evidence if possible, for example medical evidence of illness.

Consider the situation of your client's substantive case. Is she now removable or is an appeal or other legal challenge still pending? If an appeal is still pending, bail must be continued by the court and it is less likely that she will be re-detained.

Arrange representation, particularly where your client is now removable or where she has breached conditions of bail. If you consider that re-detention is not a possibility, you can write to the court setting out the position from the Guidance Notes and explain that you consider it unnecessary to provide representation for the hearing.

Advise your client of what is likely to happen at the hearing.

Preparation for client answering to bail to immigration officer

If your client is answering to bail to an immigration officer, she is at greater risk of being re-detained, unless she is still awaiting an initial decision. You should take instructions, as above, and arrange representation. If your client is facing removal, you should consider what evidence will be useful to prevent her being re-detained prior to removal. If you are lodging further representations or a legal challenge, you should make this clear to the Immigration Service in advance of the appointment.

You should inform your client of what is likely to happen at the appointment.

Varying bail conditions/bail address

Changes may have arisen between bail renewal hearings requiring a bail variation hearing or you may be using the bail renewal as an opportunity to ask for a change in conditions.

Change of address

If your client wants to move or is unable to remain in her existing accommodation, you must notify the Immigration Service and the court in writing. This must be done before your client moves, as otherwise, she will be in breach of bail conditions.

You should include in your letter:

the new address

whose accommodation is it?

(if an individual's address) the relationship of the accommodation provider to your client.

Similar considerations will apply as in the original application for bail. ►See chapter 9. The discretion remains with the authorities as to whether the address is 'suitable' for your client to be bailed to.

In many cases, the new address will be agreed without a further hearing. However, the court *may* organise a bail variation hearing in order to assess the suitability of the address. Where this happens, and the accommodation is provided by a private individual, it is necessary for the accommodation provider to produce documentation as for a bail hearing. Preferably, the accommodation provider will also come to court.

If your client has moved before informing you, it is obviously still essential to request a variation of bail, despite the fact that technically your client is already in breach of bail conditions. You should take instructions from your client as to why she moved without warning you and put forward an explanation of this to the court or Immigration Service.

Change of reporting requirements

You should take your client's instructions on reducing her reporting requirements. The request can be made:

- in writing
- at a bail renewal hearing.

Reporting requirements are intrusive, and are intended to be so. Therefore, to reduce requirements, you will need to explain why *your* client should no longer have to report so regularly, and it is helpful if you can provide supporting evidence, such as medical evidence.

If there is strong evidence, you should request a change after a short period of reporting (i.e. a few weeks) or sooner in the event of a sudden illness. In other cases, you should wait until the first bail renewal hearing, when your client proves herself by answering to her bail (attending the appointment or hearing).

The effect of reporting may be proportionately greater on certain types of clients: for example, those who are ill or have disabilities, those who suffered abuse by the police in their home country, elderly clients and those who are pregnant, have children, or other caring responsibilities. Other important factors are the distance that the client has to travel to the reporting centre and whether she has any money to pay for travel.

Change in position of sureties

Ideally, those standing surety will be willing to continue in this role for as long as your client is on bail. If a surety becomes unwilling or unable to continue, you will need to inform the Immigration Service, and/or the court, as appropriate, in writing. Similarly, if a surety is no longer able to guarantee the sum offered as a recognizance, it is necessary to inform the court or Immigration Service, with an explanation.

In these circumstances, there are three options to consider, depending on how long your client has been on bail and what is happening in her substantive case:

Is there still a second surety?

Does your client have someone else who would be willing to step in as a surety?

If not, can your client offer to report more frequently in place of the surety?

Has your client already answered to her bail before and kept her conditions? In this case you should argue that the surety is no longer necessary.

The Guidance Notes state:

The question sometimes asked is, can a surety be released from his recognizance before bail comes to an end? The answer is, only if the adjudicator agrees upon hearing an application from the person bailed for the release of one of the sureties. Either you must be satisfied that the two sureties are no longer necessary, or there must be a satisfactory replacement.²⁶

This application, as with the others described above, is made by letter to the Immigration Service/court as appropriate.

Release from bail

Your client can be released from bail in four ways:

grant of leave to remain

grant of temporary admission by the Immigration Service

removal

being taken into detention again.²⁷

When your client is released from bail, you will need to take steps to recover any recognizances deposited by sureties or your client. This will require confirmation in writing from the Immigration Service/court that your firm or the solicitor's firm holding the money is released from the undertaking.²⁸

Re-detention while on bail

If your client is re-detained, after being released on bail, you must consider whether the detention is unlawful. This would potentially be the case if she had kept to the conditions of bail and the detention was not as a result of plans for immediate removal.²⁹

If your client did abscond from bail or was suspected by the Immigration Service of absconding and was then arrested, the detention will be unlawful if she was not brought before an adjudicator within 24 hours of the arrest, unless a condition of her original release meant that she would be taken before an immigration officer within 24 hours of her arrest.³⁰

26 Para 2.3.6. This leaves ambiguous the question of what the adjudicator should do if she considers that one less surety is *not* sufficient. Arguably this should not arise as the applicant has proved herself by answering to bail. However, since the Guidance Notes make clear that an adjudicator has no power to revoke bail, it is difficult to see what action she could take even if she did have concerns.

27 The Guidance Notes do not refer to a grant of TA/TR which is a common outcome when someone is still awaiting an initial decision or is otherwise not removable, but has no appeal pending.

28 Deposit of recognizances is strongly discouraged by the revised Guidance Notes. However, in older cases this may apply.

29 Unlawful detention is discussed at chapter 1 and remedies at chapter 3.

30 IA 1971, sch 2, para 24(2). Note that a person on bail can be arrested if an immigration officer has 'reasonable grounds' for suspecting that she has absconded under IA 1971, sch 2, para 24(1)(a).

If your client absconds/forfeiture

If your client absconds, whether or not she is discovered and put in detention again, any money put forward as a recognizance, whether by sureties or your client, is liable to 'forfeiture'. Clearly your client's money is likely not to be recoverable. However, sureties' money becomes liable to forfeiture whether or not it was deposited.³¹

Forfeiture is a civil procedure by which the court determines whether or not the surety should lose the recognizance, or how much of it should be lost. An order for forfeiture will be enforced by the Magistrates Court, who will determine ability to pay and how payment should be made.

The Guidance Notes set out the procedure in relation to forfeiture hearings.³² The procedure from the point of view of the Immigration Service is set out in the OEM.³³

The Guidance Notes make clear that:

Failure to comply with secondary conditions of residence or reporting to a police station or reporting centre, on their own, or in combination, do not justify the commencement of forfeiture proceedings. Only a failure to comply with the primary condition to appear before an adjudicator or an immigration officer can justify such proceedings.³⁴

You should have advised any sureties at the outset what their duties were and what would be the procedure if the client absconded.

► See chapter 6. At the point where the risk has materialised and the client *has* absconded, there will be a conflict of interest which prevents you from advising, or acting as an advocate for your client's surety at a forfeiture hearing. At this point, although you are able to explain the basic procedure to a surety, you will need to advise him to seek independent legal advice of the implications of the procedure for his own situation.

The main issues that will be considered at a forfeiture hearing:

What steps did the surety take to fulfil his duty to inform the Immigration Service or court that the applicant had absconded or was planning to abscond?

What steps did the surety take to remain in contact with the applicant?

Has the surety performed his duties in other ways, by attending bail renewal hearings?

What is the financial position of the surety?

Has it changed since the bail hearing?

Is there more than one surety? How is the responsibility shared between them for the fact that the applicant absconded?

³¹ Deposit of recognizance is strongly discouraged by the Guidance Notes. However, it may apply in existing cases.

³² Para 6

³³ OEM, para 39.8

³⁴ Para 6.2

11

If bail is refused

IN THIS CHAPTER:

If bail is refused by an adjudicator, you have several options to pursue:

- making another bail application
- applying for temporary admission/temporary release
- administrative court action.

You should not assume that because one adjudicator refused bail, it will be impossible to obtain your client's release. In fact, persistence is often required to secure a client's release.

Making another bail application

The first step, when bail is refused, is to analyse the reasons for the refusal and the attitude of the adjudicator. For example, did she examine the sureties or accommodation provider, or consider that bail was wrong in principle? Did she make any helpful comments about the necessity of action on the part of the Secretary of State to justify further detention (for example, that your client should be transferred from a prison to a detention centre)?

You must consider whether the reasons given for refusal of bail were reasonable in your client's particular circumstances.

- Did the adjudicator ignore medical evidence and focus only on one issue, such as a previous conviction?
- Did the adjudicator take into account the provisions of Article 31 of the Refugee Convention or the likely length of detention, or merely focus on a lack of surety?

Where you consider a decision to be wholly unreasonable you can, if necessary, apply to re-list the application on exactly the same grounds.

However, whether or not you consider that the reasons for refusal were reasonable, your client will be in a much stronger position if you can address the reasons for refusal, or equally, gather evidence to undermine the reasons for detention given in the bail summary.

If the bail application was refused for a reason such as unsuitable accommodation, and you have been able to obtain suitable accommodation, a further application should be lodged immediately.

If bail was refused on the general basis that the 'applicant would abscond' or because there was no surety, and there is still no surety available, you will need to consider what evidence you can obtain that will strengthen your client's case or weaken the case of the Secretary of State. At this point, you should refer back to chapters 6, 7 and 8 (depending on your client's circumstances), but taking into account the issues that came out of the bail hearing.

The Guidance Notes discuss repeat bail applications at section 3, stating:

If a bail application is refused, an applicant has the 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.¹

This guidance illustrates the importance of providing a fresh argument or fresh evidence for the adjudicator to consider at a repeat bail application. There does not need to be a change in circumstances, if there are 'fresh additional grounds', which should be interpreted to mean new evidence about a pre-existing situation. This may be particularly relevant, for example, where you are making a case that travel documents will not be obtained within a timescale that makes detention reasonable. Strictly, there may have been no change in circumstances, as your client is still awaiting travel documents and insufficient time has passed to constitute a change (see below). However, a further bail application should be lodged if the Immigration Service had conceded in correspondence that, for example, the embassy was not cooperating.

As the Guidance Notes make clear, 'the lapse of time between bail applications may well itself be a relevant factor. It is suggested that provided a fresh bail application is made at least 28 days after the refusal of the previous application, and you find that the lapse of time is relevant to the particular case, then you should be prepared to consider arguments that were presented on the previous application as well as any fresh arguments'.² If you are only relying on passage of time as a change in circumstances, a period of detention of a further three to four weeks should be considered sufficient to provide grounds to lodge a further application.

Change in circumstances can also, of course, include developments in your client's immigration case, for example, an appeal has been adjourned or leave to appeal to the IAT has been lodged or granted, or a surety has come forward, or there has been a change in health or other circumstances. Similarly, if the reasons for detention become obsolete, for example, your client has now obtained an identity document from her home country, this is a powerful reason for a repeat bail application.

¹ Para 3.1

² Para 3.3

When considering the role of an adjudicator in a repeat bail application:

Article 5 of the ECHR requires a decision to detain to be reviewed at reasonable intervals (*Bezicheri v Italy* (1989) 12 EHRR 210). At present this can only be done in our jurisdiction by way of repeat applications for bail. What is a 'reasonable interval' is a question of fact in each case. The Court said in *Bezicheri* that the nature of the detention on remand called for short intervals before the decision to detain was again considered by the courts. In *Dougoz v Greece* (App. No. 40997, 6 March 2001) the Court held 'the review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5(1)'.³

This means that it is not sufficient for an adjudicator merely to rely on the findings of a previous adjudicator, when reviewing whether detention is still necessary.

Controlled Legal Representation

As described above, if you are properly representing a detained client, it may well be necessary to apply for bail more than once. You should indicate clearly on your file why you have decided to make a repeat bail application at a particular time.

Applying for temporary admission/ temporary release

Paradoxically, it is often worthwhile making a further application for temporary admission/temporary release (TA/TR) after the refusal of a bail application. This is particularly the case where:

- there are medical issues or
- your client is 'unsuitable for detention' as set out in the OEM.

In general the Immigration Service will be aware of issues that have been raised in court and may not want to risk a further bail application that will bring up the same issues in several weeks' time.

Administrative court action

This is potentially, although rarely, a remedy for a client who has been refused bail by an adjudicator. ►See chapter 3.

³ Guidance Notes, para 3.3

Appendix 1

Extracts from the Immigration Service's Operation Enforcement Manual

Note on versions of extracts reproduced here:

The extract from chapter 38 is taken from the version included as an appendix to the Bail Guidance Notes for Adjudicators (Third Edition), May 2003.

The extract from chapter 39 is taken from the website of the Association for Visitors to Immigration Detainees, www.aviddetention.org.uk/39.0.0.htm, which at the time of writing was the most recent version disclosed (dated 21.12.2000). Note that chapter 38 on this website is an older version than that included below.

The extracts include references to some paragraphs which are not included here. These are in square brackets.

OEM chapter 38 Detention/temporary release

Paragraphs 38.1–38.9.3

38.1 Policy

General

In the White Paper 'Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum' published in July 1998 the Government made it clear the power to detain must be retained in the interests of maintaining effective immigration control. However, the White Paper confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention (see [38.19] and chapter 39). The White Paper went on to say that detention would most usually be appropriate:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- 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.

In addition, asylum applicants may be detained at Oakington where it appears to the IO that the application is straightforward and capable of being decided quickly. (See para 38.3.1 about Oakington.)

In November 2001, the Home Secretary decided, in the light of policy on removals and the forthcoming introduction of accommodation centres, that all UK detention centres would be known as 'removal centres'.

Use of detention

In all cases detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. However, a person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.

The Government is committed to pursuing a strategy of detaining in dedicated removal centres. On 29 October 2001, the Home Secretary announced further measures to expand the detention estate, by introducing a network of induction and accommodation centres.

Three new removal centres have opened recently at Harmondsworth, Yarl's Wood and Dungavel taking the total number of spaces available in removal centres to 2790. The Home Secretary also announced that the use of prisons, other than a small number of detainees for reasons of security and control, would cease by the end of January 2002.

38.1.1 Detention and the Human Rights Act

The Human Rights Act (HRA) came into force on 2 October 2000. We believe that our detention policy and practices, if applied correctly, comply with Articles 5 and 8 of the ECHR and the HRA. Nevertheless, it is important to be aware of the HRA's provisions.

38.1.1.1 Article 5 of the ECHR

Article 5(1) of the ECHR provides:

'Everyone has the right to liberty and security of person'

Nobody is to be deprived of his liberty except insofar as the deprivation is in accordance with law and falls within one of the categories specified in Articles 5(1)(a)–(f). Article 5(1)(f) states that a person may be arrested or detained to prevent them effecting an unauthorised entry into the country, or where action is being taken against them with a view to deportation or extradition.

To comply with Article 5, the following should be borne in mind:

- a) In detaining a person it must be shown that he is being detained with a view to his removal (not necessarily deportation). Detention for other purposes (such as deterrent to others), where detention is not *necessary* for the purposes of removal of the individual concerned is not compatible with Article 5.
- b) It must be shown that progress is being made towards removal. This is not a change: this already needs to be shown in order to satisfy the courts that existing Immigration Act 1971 detention powers are being used properly.

Article 5(4) states that everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court. This Article is satisfied by a detainee's right to challenge the lawfulness of a decision to detain by habeas corpus or judicial review in England, or by judicial review in Scotland.

38.1.1.2 Article 8 of the ECHR

Article 8(1) of the ECHR provides:

‘Everyone has the right to respect for private and family life....’

It may be necessary on occasion to detain the head of the household only, thus separating a family. Article 8 is a qualified right. Interference with the right to family life is permissible under Article 8(2) if it is in accordance with the law **and** is necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Among the purposes of our immigration control are the protection of the economic well-being of the country, the protection of public safety, the prevention of disorder and crime and, to a lesser extent, the protection of health and morals. So it may be legally defensible under the HRA to interfere with a person’s right to family life by detaining them in order to enforce the immigration control.

But it would have to be shown to a court that a decision to detain corresponded with one of the legitimate interests which justify interference and that the interference in family life caused by the detention went no further than was strictly necessary to achieve that aim. This means that even if a particular policy or action which interferes with a Convention right is aimed at pursuing a legitimate aim this will not justify the interference if the means used to achieve the aim are excessive in the circumstances. However, it is not necessary for us to show that a person’s presence in this country interferes with one of the interests set out in Article 8(2). Article 8(2) does not prevent a decision to enforce a lawful immigration policy which applies in the individual’s case from being lawful. See section [37.7.3.2] for detailed information on the detention of families.

38.2 Power to detain

The power to detain an illegal entrant, seaman deserter, person liable to administrative removal (or someone suspected to be such a person) is in paragraph 16(2) of Schedule 2 to the 1971 Act as amended by section 140 of the Immigration and Asylum Act 1999. Paragraph 16(2) now states:

‘If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 or 12 to 14, that person may be detained under the authority of an immigration officer pending a) a decision whether or not to give such directions; b) his removal in pursuance of such directions’.

The power to detain a person who is subject to deportation action is set out in paragraph 2 of Schedule 3 to the 1971 Act. This includes those whose deportation has been recommended by a Court, those who have been served with a notice of intention to deport and those who are the subject of a deportation order. **Detention in these circumstances must be authorised at Inspector/senior caseworker level in ICD or above (see 38.4.2).**

Detention can only lawfully be exercised under these provisions where there is a realistic prospect of removal.

(The power to authorise the detention of a person who may be required to submit to further examination under paragraph 2 of Schedule 2 to the 1971 Act, pending his examination and pending a decision to give or refuse him leave to enter, is in paragraph 16(1) of Schedule 2 to the 1971 Act. This is not relevant to enforcement cases).

Factors influencing a decision to detain

- 1 There is a presumption in favour of temporary admission or temporary release.
- 2 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.
- 3 All reasonable alternatives to detention must be considered before detention is authorised.
- 4 Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.
- 5 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, 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 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?

(see also sections 38.5 – detention forms and procedures and 38.7 – special cases)

38.3.1 Oakington

When officers come across a person who makes an application for asylum, they should consider whether he or she meets the Oakington criteria. The purpose of Oakington Reception Centre is to enable IND to deal quickly with straightforward asylum applications. People are detained at Oakington for around a week while their asylum application is considered. They are then given temporary admission/release or moved to a longer-term removal centre.

In addition to the criteria set out at chapter 38.1 above, Oakington detainees must belong to one of the nationalities listed in regular instructions to staff.

The following are unsuitable for Oakington:

- any case which does not appear to be one in which a quick decision can be reached;
- any case which has complicating factors, or issues, which are unlikely to be resolved within the constraints of the Oakington process model;
- unaccompanied minors;
- age dispute cases, other than those where their appearance strongly suggests that they are over 18 years;
- disabled applicants, save for the most easily manageable;
- any person with special medical needs, unless they can be managed within a GP surgery environment;
- any person who gives reason to believe that they might not be suitable for the relaxed Oakington regime, including those who are considered likely to abscond.

38.4 Levels of authority for detention

Although the power in law to detain an illegal entrant rests with the IO, in practice, an officer of at least CIO rank must give authority. Detention must then be reviewed at regular intervals (see 38.6).

38.4.1 Authority to detain an illegal entrant or person served notice of administrative removal

An illegal entrant or person served with notice of administrative removal can be detained on the authority of a CIO (but see 38.4.3 and 38.7).

38.4.2 Authority to detain persons subject to deportation action

Generally speaking, the decision as to whether a person subject to deportation action should be detained under Immigration Act powers is taken at Inspector/senior caseworker in the relevant casework section level. Where an offender, who has been recommended for deportation by a Court, is serving a period of imprisonment which is due to be completed, the decision on whether he should be detained under Immigration Act powers (on completion of his custodial sentence) pending deportation may be made by the HEO-level caseworker in the relevant casework section. It should be noted that there is no concept of dual detention in deportation cases (see 38.9.3).

38.4.3 Authority to detain – special cases

Detention in the following circumstances must be authorised by an officer of at least the rank stated:

Sensitive cases: Inspector or Assistant Director;

Women: Inspector (see 38.7.1)

Women in HMP Holloway: initially, an Inspector but, within 24 hours, Assistant Director (see 38.7.1)

Spouses: initially, an Inspector, but if strong representations are made, Assistant Director (see 38.7.2)

Young persons, under 18: initially, an Inspector/senior caseworker in the relevant casework section but as soon as possible by an Assistant Director. Such persons may only be detained overnight and in a place of safety as defined in the Children and Young Persons Act 1933 (for England and Wales), the Social Work (Scotland) Act 1968 (for Scotland) or the Children and Young Persons Act (Northern Ireland) 1968 (for Northern Ireland) – see 38.7.3

Children of illegal entrants/deportees to be detained with their parent(s):
either an Inspector or AD, preferably in advance of their detention
see 38.7.3.2

Detention in police cells for longer than two nights: Inspector.

38.5 Detention forms and procedures

The Government stated in the White Paper that the IS should give **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. Recognising that most people are detained for just a few hours or days, the Government stated that initial reasons would be given by way of a checklist similar to that used for bail in a magistrates' court. New procedures were introduced on 17 October 1999 to enable this to be done and to reduce bureaucracy by cutting down the number of forms used and the number of copies of these forms required.

The forms IS91 'Detention Authority', IS91R 'Reasons for detention' and IS91M 'Movement notification' replace all of the following forms:

The old IS91, IS150A, IS150B, IS160, IS161, IS166, IS167, IS91D, IS91E, IS91E (Annex) and IS91 (Fingerprinting).

38.5.1 Form IS91 'Detention authority'

Once the appropriate authority has been obtained to detain a person, form IS91 is served by the IO on the detaining agency. This allows for the subject to be detained in their custody under Immigration Act powers. The IO must complete the first section of the form and sign and date it; the detaining authorities complete the second section of the form, the Transfer Record. The IO must staple a photograph of the detainee to the form and authenticate this by signing and dating it before handing the form, in a clear plastic pouch, to the detaining agent. Detaining agents have been instructed not to accept detainees without the correct documentation. The only exception to this will be when there is no IS presence at a police station – normally in absconder cases – and so the IS91 will need to be faxed. In such cases, DEPMU will advise as to where the original should be sent. Form IS91 is issued once, and only once, for any continuous period of detention, irrespective of how many detaining agents there are during the course of a person's detention. Where there is a change in the detaining agent, for example from the police to Wackenhut UK Ltd, it is for the first detaining agent to complete the Transfer Record on the form and forward it to the second detaining agent along with the detainee.

The new IS91s are to be returned by the final detaining authority to the Detention Cost Recovery Unit (DCRU) of the Finance and Planning Group (FPG) at Green Park House. Any IS91s that are returned to an enforcement office at the end of a period of detention must be forwarded to the DCRU without delay.

38.5.2 Form IS91R 'Reasons for detention'

This form is in three parts and is served on the person upon his detention. The IO must complete all three sections of the form. The IO is required to specify the power under which a person has been detained, the reasons for detention and the basis upon which the decision to detain was made. The detainee must also be informed of his bail rights and the IO must sign, both at the bottom of the form and overleaf, to confirm the notice has been explained to the detainee and that he has been informed of his bail rights.

It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are **always justified and correctly stated**. A copy of the form must be retained on the caseworking file. If any of the reasons given on the form IS91R change, it will be necessary to prepare and serve a new version of the form.

It is important that the detainee understands the contents of the IS91R. If he does not understand English, officers should ensure that the form's contents are interpreted. Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers).

The IS91R is currently being revised. In the revised version to be issued shortly the reasons are closely based on the nine exceptions to bail set out in para 46 of the 1999 Immigration and Asylum Act. But in the present version, five possible reasons for detention are set out on form IS91R and are listed below.

The IO must tick all the reasons that apply to the particular case:

- You are likely to abscond if given temporary admission or release
- There is insufficient reliable information to decide on whether to grant you temporary admission or release
- Your removal from the United Kingdom is imminent
- You need to be detained whilst alternative arrangements are made for your care
- Your release is not considered conducive to the public good

Twelve factors are listed, which could form the basis of the reasons for the decision to detain. The IO must tick all those that apply to the particular case:

- You do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place
- You have previously failed to comply with conditions of your stay, temporary admission or release
- You have previously absconded or escaped
- You have used or attempted to use deception in a way that leads us to consider that you may continue to deceive
- You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries
- You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the United Kingdom
- You have previously failed, or refused to leave the United Kingdom when required to do so
- You are a young person without the care of a parent or guardian and alternative arrangements need to be made for your care
- Your health gives serious cause for concern on grounds of your own wellbeing and/or public health or safety
- You are excluded from the United Kingdom at the personal direction of the Secretary of State
- You are detained for reasons of national security, the reasons are/ will be set out in another letter
- Your previous unacceptable character, conduct or associations

38.6 Detention reviews

Initial detention must be authorised by a CIO or Inspector (see section 38.4). The continued detention of all cases involving those persons in sole detention under Immigration Act powers must be subject to administrative review at regular intervals. This includes those who have been recommended for deportation by a court and who have either served any period of imprisonment or were not sentenced to a term of imprisonment. Detention must be reviewed after 24 hours by an Inspector and thereafter, as directed, usually weekly by an Inspector. If circumstances change in the interim, however, an Inspector must review detention again. Detention must be reviewed again by an Inspector after 28 days*, after which the MODCU takes responsibility for reviewing detention. However, casework arising from the decision to detain remains the responsibility of the detaining enforcement office including representations about detention, which should be brought to the attention of the casework CIO. The MODCU may override the decision to maintain detention if it is deemed necessary. It must always be considered whether continued detention is essential when detention is being reviewed.

* Such a review can be conducted early (on the 26th or 27th day) or, with prior authorisation, be conducted by a CIO on the Inspector's behalf in his absence. The CIO must apprise the Inspector of the outcome of any such reviews undertaken on his behalf as soon as is practicable as the authority for continued detention still rests with the Inspector.

The SEO in the MODCU reviews detention at the 1 month stage and has the authority to maintain detention up to the two month stage. From the 2 to 11 month stage, detention reviews are conducted monthly by Colin Harbin, Deputy Director, and at 12 months and over by the Chief Inspector.

Staff making submissions as part of one of the regular administrative reviews of detention should consider the HRA implications of the case and flag up to senior officers any areas in which we might be vulnerable.

38.7 Special cases

38.7.1 Detention of women

A woman may only be detained with the authority of an Inspector, because of the limited detention space available for women. Detention in HMP Holloway must be authorised by an Inspector and additionally reviewed within 24 hours by an Assistant Director.

38.7.2 Spouses of British citizens or EEA nationals

Illegal entrants who are living with their settled spouses may only be detained with the authority of an Inspector/senior caseworker in the relevant casework section. Where strong representations for temporary release continue to be received, the decision to detain must be reviewed by an Assistant Director as soon as is practicable.

38.7.3 Young persons

Unaccompanied minors must only ever be detained in the most exceptional circumstances and then only **overnight**, with appropriate care, whilst alternative arrangements for their safety are made. In circumstances where responsible family or friends in the community cannot care for children they should be placed in the care of the local authority. The same applies to all persons under the age of 18 (but see 38.7.3.2).

In all cases, young persons may only be detained with the authority of an Inspector/senior caseworker in the relevant casework section. An Assistant Director must review detention at the earliest opportunity and in every case of an unaccompanied child as soon as detention has exceeded 24 hours.

Juveniles may only be detained in a place of safety as defined in the Children and Young Persons Act 1933 (for England and Wales), the Social Work (Scotland) Act 1968 (for Scotland) or the Children and Young Persons Act (Northern Ireland) 1968 (for Northern Ireland). The Children and Young Persons Act 1933 defines a place of safety as 'any home provided by a local authority under Part 11 of the Children's Act 1948, any remand home or police station or any hospital, surgery or any other suitable place, the occupier of which is willing temporarily to receive a child or young person'. The Social Work (Scotland) Act 1968 defines a place of safety as 'any residential or other establishment provided by a local authority, a police station, or any hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive a child'. The Children and Young Persons Act (Northern Ireland) 1968 defines a place of safety as 'any remand home, any home provided by [the Ministry of Home Affairs] under Part VII, any constabulary station, any hospital or surgery, or any other suitable place, the occupier of which is willing temporarily to receive a child or young person'.

If detention accommodation is required exceptionally for a young person, the request must be made via the DEPMU CIO (see 38.10).

38.7.3.1 Persons claiming to be under 18

Sometimes people over the age of 18 claim to be minors in order to effect their release from detention. In all such cases people claiming to be under the age of 18 must be referred to the Refugee Council's Children's Panel. Where reliable medical evidence suggests that the person's true age is under 18 they must be treated as minors and released, once suitable alternative arrangements have been made for their care. A person who has initially claimed to be an adult should only be accepted as a minor if:

- their appearance clearly supports the claim to be a minor; or
- they are able to produce credible and conclusive medical or other persuasive evidence.

Where an applicant claims to be a minor but their appearance strongly suggests that they are over 18, the applicant should be treated as an adult until such time as credible documentary or medical evidence is produced which demonstrates that they are the age claimed. In borderline cases it will still be appropriate to give the applicant the benefit of the doubt and to deal with the applicant as a minor.

It is IND policy not to detain minors other than in the most exceptional circumstances. However, where the applicant's appearance strongly suggests that they are an adult and the decision is taken to detain it should be made clear to the applicant and their representative that:

- we do not accept that the applicant is a minor and the reason for this (for example, visual assessment suggests the applicant is over 18), and
- in the absence of acceptable documentation the applicant is to be treated as an adult.

38.7.3.2 Families

The decision to detain an entire family should always be taken with due regard to Article 8 of the ECHR (see 38.1.1.2). Previously, families were normally only detained to effect removal, however Ministers have now agreed a change in policy, putting families – including those with children – on the same footing as all other persons liable to detention. This means that families may be detained in line with the general detention criteria – see 38.3.

Detention of an entire family must be justified in all circumstances and as in any case, there will continue to be a presumption in favour of granting temporary release. Detention may be authorised by an Inspector, at whatever stage of the process it is considered necessary and, although it should last only for as long as is necessary, it is not subject to a particular time limit.

Family accommodation should be pre-booked by arrangement with DEPMU. Full details of all family members to be detained must be provided to DEPMU.

As a matter of policy we should aim to keep the family as a single unit. However, it will be appropriate to separate a child from its parents if there is evidence that separation is in the best interests of the child. The local Social Services department will make this decision. In such cases, prior arrangement and authority will be required from DEPMU and the child's parents should provide agreement in writing. As long as the child is taken into care in accordance with the law and following a decision of a competent authority Article 8 of the ECHR will not be breached (see 38.1.1.2). There continues to be a limit on the number of families that can be accommodated at any one time. There are currently family units at Oakington and:

Tinsley House	5 family rooms	Yarl's Wood	82 family beds
Harmondsworth	72 family beds	Dungavel	54 family beds

No families should be detained simply because suitable accommodation is available.

38.8 Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS accommodation or elsewhere. Others are unsuitable for IS detention accommodation, because their detention requires particular security, care and control.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS detention accommodation or elsewhere:

- unaccompanied children and persons under the age of 18 (but see 38.7.3 above);
- the elderly, especially where supervision is required;
- pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this ;
- those suffering from serious medical conditions or the mentally ill;
- those where there is independent evidence that they have been tortured;
- people with serious disabilities;

The following are normally considered unsuitable for detention in dedicated IS detention accommodation, but may be detained in alternative locations, such as prison hospitals or prisons with immigration detention units. This is because their detention requires particular security, control and care:

- the physically violent or emotionally disturbed;
- those with suicidal tendencies;
- determined absconders;
- those with a violent or serious criminal background.

Where it is agreed with the DEPMU CIO that a person normally considered unsuitable may, exceptionally, be detained in a dedicated IS detention centre, full details must be supplied on the 'Special Needs' section of form IS91 served on the custodian (see 38.5).

Where IS accommodation is inappropriate, DEPMU will seek an appropriate alternative location, such as a prison hospital, but it should be noted that such places are limited and are allocated by the Prison Service over which the IS has no control.

It should be noted that those sentenced to 12 months or more who are subject to deportation will not be transferred into IS accommodation but will be retained within the Prison Service estate until their deportation can be effected, unless granted bail or temporary admission under the Immigration Act. Those serving less than 12 months will normally be moved to IS detention accommodation on completion of their sentence pending deportation.

38.9 Dual detention

There may be occasions where a person who is subject to enforcement action is remanded in custody on criminal charges, which may or may not be related to immigration matters. An illegal entrant who is detained on criminal charges may be detained under immigration powers. A person refused leave to enter (or granted temporary admission) who commits an offence can be held in dual detention.

However, there is no concept of dual detention for those subject to deportation action.

38.9.1 Dual detention of illegal entrants

Whilst detention on criminal charges does not affect his liability to removal as an illegal entrant, it is not practice to remove where criminal charges are extant. Officers must not seek to influence police decisions about whether or not to pursue criminal matters.

Where an illegal entrant is convicted of an offence and recommended for deportation, this should be considered by the relevant casework section before removal is enforced. In the event of an illegal entrant being convicted of a serious offence but not recommended for deportation by the Court, the relevant casework section may wish to consider non-conductive deportation under section 3(5)(a) of the 1971 Act (as amended by the 1999 Act).

An illegal entrant or person served with notice of administrative removal who is serving a period of imprisonment may also be detained under powers contained in the 1971 Act. Such a person is not exempt from the arrangements for home leave (see [38.18]).

38.9.2 Detention pending criminal proceedings

Where an illegal entrant or person served with notice of administrative removal is granted bail by the Court pending trial, there is no bar to continued detention under the Act, but full account must be taken of the circumstances in which bail was granted and an Inspector must authorise such detention.

Where an illegal entrant or person served with notice of administrative removal is remanded in custody awaiting trial but it is not necessary to detain him under IS powers, serve IS96 granting him temporary release to the place of detention.

38.9.3 Dual detention in deportation cases

Unlike cases involving illegal entrants and persons served with notice of administrative removal, **there is no concept of dual detention for those subject to deportation action who are remanded in custody on criminal charges or who are serving a period of imprisonment.**

Paragraph 2(2) of Schedule 3 to the 1971 Act defines the scope of the power to detain persons served with notices of appealable decisions under section 18 of the 1971 Act. Where a court grants bail, even on an unrelated case, whether or not a recommendation forms part of the sentence, the person **cannot** be detained having been served with notice of intention to deport (form APP104). Those served with a deportation order **can**, in such circumstances, be detained.

A person who is detained under the sentence or order of a court, or who has been released on bail by a court may not be detained under Schedule 3 to the 1971 Act pending the making of a deportation order. This means that detention orders may not be made or enforced against prisoners who are serving sentences, persons released on bail by a court or persons remanded in custody awaiting trial. It is important, therefore, in Criminal cases, to monitor the offender's release date for service of the detention/restriction forms at the appropriate time. A person served with a deportation order can be detained in such circumstances (paragraph 2(3) of Schedule 3 to the 1971 Act refers).

There is no bar to detaining a person under IS powers, pending the making of a deportation order, who is on police bail pending enquiries and who has not yet been charged. It is unlikely such a person will be detained under IS powers in practice, however, as he will no longer be eligible for such detention once charged.

OEM chapter 39

Paragraphs 39.4–39.6.2

39.4 Consideration of a bail application

When deciding whether or not to oppose bail, consider the following:

- the likelihood of the applicant failing to appear when required (see 39.4.1);
- the period of time likely to elapse before any conclusive decision is made or outstanding appeal is disposed of;
- any special reason for keeping the person detained (such as those in 39.3);
- the reliability and standing of sureties (see 39.5.2);
- in deportation cases, the views of the relevant senior caseworker in the ICD.

39.4.1 Risk of absconding

Indicators of a person likely to abscond include:

- a previous escape or attempt to escape from custody;
- a previous breach of temporary admission or temporary release;
- a statement by him or his sponsor indicating an intention to go to ground;
- refusal by the person's sponsor to stand surety for him, because the sponsor is of a view the person is unlikely to comply, even if other sureties are produced;
- terrorist connections or other considerations in which the public interest is involved.

If an individual is unlikely to abscond and there is no other reason to detain him, you should normally grant temporary release. Each case should be assessed on its individual merits but you should consider the person's family, social and economic background and his immigration history. Despite an adverse background/history, a CIO may grant bail where sufficient and satisfactory sureties are produced.

39.5 Recognizances and sureties

39.5.1 Fixing the amount of bail

The amount of bail should be viewed in relation to the means of the applicant and his sureties, and should give a substantial incentive to appear at the time and place required. Each case should be assessed on its individual merits but a figure of between £2000 and £5000 per surety will normally be appropriate. Where there is a strong financial incentive to remain here, it is justifiable to fix bail (or suggesting to the adjudicator that it be fixed) at a larger sum. Property such as houses or businesses, or cars, may be offered but they are difficult to seize and should be rejected unless there are wholly exceptional circumstances in view of the potential hardship this could cause to others who have no part in the bail application.

Few applicants will have at their disposal in this country sufficient means to meet such a sum. It may therefore be necessary to accept from the applicant himself a recognizance (or, in Scotland, bail bond) in a nominal sum (e.g. £5). If the recognizance or (bail bond) taken from the applicant exceeds the nominal sum because he has cash or assets here, this sum should be taken into account.

The applicant should be required to produce two sureties who are willing to enter into recognizances for the payment of sums which satisfy the above criteria. The Procedure Rules 1984 and 1996 require that any application for bail shall include the names of two sureties and, although sureties are not required under the Act, any decision to grant bail will normally be dependent upon the availability of two nominated sureties.

39.5.2 Acceptable sureties

To be effective as a surety, a person needs to be able to exert some control over the applicant, thereby ensuring he complies with the conditions of bail. Officers will need to consider the nature of the surety's relationship with the applicant as well as their geographical proximity. In order to be acceptable, a surety should:

- have enough money or disposable assets (clear of existing liabilities) to be able to pay the sum due if bail is forfeited;
- be aged 18 or over and settled in the United Kingdom. A person on temporary admission or with limited leave will rarely be acceptable as his own stay may be limited/curtailed;
- be a householder or at least well-established in the place where he lives;
- be free of any criminal record. The gravity with which a particular offence is viewed and the consequent effect upon the bail application will be a matter for the discretion of the CIO. Officers are reminded of the need to ensure that a conviction is not spent by virtue of the 1974 Rehabilitation of Offenders Act (see IDIs Chapter 32 Section 2);
- not have come to adverse notice in other immigration matters, particularly previous bail cases or applications for temporary admission;
- have a personal connection with the applicant, or be acting on behalf of a reputable organisation which has an interest in his welfare.

There must be some credible reason why a person should be prepared to act as a surety. Unsubstantiated claims to be a friend of the applicant should be treated with caution. Professional sureties suspected of acting for financial gain or with a view to aiding evasion should be rejected.

39.5.3 Investigating sureties

The financial and general standing of all prospective sureties should be investigated as fully as possible. They will often be able to produce evidence of their financial position but take care over accepting bank books, statements of account etc at face value since it may be that sums of money have been temporarily deposited to deceive the authorities about the holder's means. A record of deposits over a period is a useful indication of financial status.

The LIO/collator of the local police force may be able to provide useful information about a surety or his address. All the usual checks available to the IS should be undertaken.

39.5.4 The taking of recognizance

In England and Wales, CIOs may not take the recognizance in cash; bail bonds are acceptable in Scotland. Under paragraph 22(2) or (3) of Schedule 2 to the 1971 Act, a CIO may request that the recognizance be lodged with a solicitor, who must be regulated by the Law Society. This only applies to cases where bail is granted under paragraph 22(1)(b) or 34 of Schedule 2 to the 1971 Act (as amended by the 1996 Act) and does not apply to paragraph 29 bail cases.

Where a solicitor gives notice that he is no longer representing the subject of the bail and requests that other arrangements are made for the safekeeping of the recognizance, that solicitor must retain the money unless the subject of the bail is then represented by another solicitor. The money can only be re-deposited with another solicitor regulated by the Law Society. Some organisations may not be regulated by the Law Society, but they may have solicitors who have been appointed by them to act on their behalf.

39.6 Procedures once a decision has been taken on bail

39.6.1.1 CIO's bail – granting

CIO's bail is a very useful tool, enabling us to retain greater control than temporary release and freeing up detention space. Where officers believe a detainee is a potential candidate for CIO's bail, they should consider inviting an application, if appropriate stipulating the level of sureties which would be acceptable.

If a CIO grants bail, complete and sign three copies of the appellant's recognizance (or, in Scotland, bail bond) (IS99) and one of each surety's recognizance (or bail bond) (IS 100) – copies should be faxed to speed the process.

- Give one copy to the person who enters into the recognizance (or bail bond);
- place the original on the local file; and
- send one copy to the adjudicator or the Tribunal if the appellant is required to appear before them.

Under paragraphs 22 and 29 of Schedule 2 to the Act and section 9A of the 1993 Act (as inserted by the 1996 Act and amended by paragraphs 105 and 106 of Schedule 14 to the 1999 Act), CIOs may attach such conditions as are likely to result in the appearance of the person bailed at the required time and place. These conditions may include:

- reporting to an immigration reporting centre or an immigration office police station, normally on a monthly basis;
- a requirement to live at a nominated address;
- where appropriate, surrender of the applicant's passport.

When granting bail it should be given to a set date, time and place. Bail should never be left open-ended.

39.6.1.2 Completing the bail pro-forma

In illegal entry or administrative removal cases, any decision to oppose bail is one for the relevant operational unit. In deportation cases, the decision is for the ICD.

Where an application is made direct to the IAA a presenting officer will represent us in court. The Presenting Officers Unit (POU) will forward a bail pro-forma to the office responsible for detention. The bail summary must be completed fully and accurately detailing why we are opposing bail. Only facts pertaining to the person's detention should be referred to. The bail summary is disclosed in court to the adjudicator and the applicant's representatives. If the representatives ask for a copy of the bail summary in advance of the hearing, this should be provided.

39.6.1.3 CIO's bail – refusing

A CIO can refuse bail orally or by means of a brief, written explanation, similar to that used when temporary release is refused. The CIO must be able to provide reasons for refusing bail. If a CIO is not prepared to grant bail, he should advise the appellant that he may apply to the IAA.

39.6.2 Adjudicator's bail

If an adjudicator decides that the appellant should be released on bail, the necessary forms will be provided and completed by the adjudicator's clerk who is responsible for notifying the detention centre if the applicant is not present in court. (The POU is responsible for notifying the port, the enforcement officer and the police). If the applicant cannot produce acceptable sureties on the spot, the adjudicator may decide to proceed under paragraphs 22(3) or 29(6) of Schedule 2 to the 1971 Act i.e. fix the amount of bail to be required and leave the recognizances to be taken later by some other person such as an IO or police officer for the area in which the surety lives. A part-time adjudicator sitting without a clerk may need the assistance of the IS in transmitting this certificate to the person who is to take the recognizances.

Whilst an adjudicator's bail should always be to a specific time and place, lengthy periods of bail are sometimes set. If an offender becomes removable because of a dismissed appeal, but bail has not been lifted, the powers contained in paragraph 22(1A) of Schedule 2 to the 1971 Act as amended by the 1996 Act can be used to re-detain the person (see [39.6.5]).

If a person is encountered who has broken the residence conditions attached to the open-ended conditions of bail, detain him and take him before an adjudicator within 24 hours.

Appendix 2

Bail Guidance Notes for adjudicators from the Chief Adjudicator

Third Edition, May 2003

Author: His Honour Judge Henry Hodge OBE, Chief Adjudicator

Appendix
2

Appendix 2 includes appendices to the Guidance Notes as originally numbered:

Appendix 4 | Notice to applicants, their representatives and sureties

Appendix 6 | Surety checklist

The Guidance Notes include references to some paragraphs which are not included here. These are in square brackets.

‘It is the Government’s policy that detention should be authorised only when there is no alternative....’

– Immigration Service Instruction, 20 September 1994

‘The detention of asylum seekers is in the view of UNHCR inherently undesirable.’

– UNHCR guidelines, February 1999

‘One only restricts a person’s liberty if it essential to do so and one judges that by having regard to all the factors that are properly to be considered in the particular case.’

– *R v SSHD ex parte Brezinski and Glowacka*, Kay J
CO/4237/95 and CO/4251/95 19 July 1996 unreported

‘Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection.’

– *Khawaja* 1984 AC74, Lord Scarman

1 Introduction

- 1.1 These notes are issued for the assistance of adjudicators when they are considering applications for bail. Although for guidance, they are issued in the hope that you will find yourself able to follow them so that there is some uniformity in both the procedure we follow and the decisions we reach. They are not a detailed exposition of the law. You may find it helpful to read Chapter 17 (Detention and Bail) of Macdonald’s Immigration Law and Practice. I am again grateful to Brock Trethowan, an adjudicator at Hatton Cross, who has drafted and revised these notes which are now in their third edition.
- 1.2 The adjudicator’s jurisdiction to grant bail is derived from Schedule 2, paragraphs 22, 29 and 34, and Schedule 3, paragraph 2 of the Immigration Act 1971 (as amended) (the 1971 Act). The procedure is governed by Part 5 (Bail) of the Immigration and Asylum (Appeals) Procedure Rules 2003 (the 2003 Rules). Sections 44 to 52, 53(5) and 55 of the Immigration and Asylum Act 1999 (the 1999 Act) have been repealed. Section 54 of the 1999 Act came into force on 10 February 2003. This removes any previous restriction on our jurisdiction to grant bail in deportation cases.

- 1.3 You should be familiar with the Immigration Service's Policy on Detention and Temporary Release set out in Chapter 38 of the Service's Operation Enforcement Manual, and the UNHCR's Guidelines relating to the Detention of Asylum Seekers, particularly Guidelines 2 and 3. Although you are not bound by this Policy and the Guidelines, there is authority for saying that you should consider them when deciding issues of bail.
- 1.4 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 1971 Act. The UNHCR Guidelines refer to it as 'a presumption against detention'. Further, Article 5 of the European Convention on Human Rights (ECHR) provides that everyone has the right to liberty and to a speedy decision by a court as to the lawfulness of any detention.
- 1.5 Once bail has been granted by an adjudicator, it continues until the applicant;
 - a) is re-detained by an immigration officer for a breach or likely breach of a condition upon which bail has been granted, or
 - b) is removed, or
 - c) has a successful outcome to an appeal.

In the meantime sureties remain bound by their recognizances. You should make sure that applicants and sureties are aware and understand this if bail is granted. An adjudicator has no statutory power to revoke bail once it has been granted.

2 The hearing

2.1 The applicant

- 2.1.1 Bail applications are required to be heard within three days of the application being received by the IAA (Practice Direction CA6 of 2001).
- 2.1.2 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. You may also wish to satisfy yourself that the applicant understands and is likely to comply with any conditions that may be imposed. Further, the applicant has a right to attend the hearing of his application, be legally represented, and have an interpreter provided if necessary.
- 2.1.3 Bail applications in the 'appropriate prescribed form' should be sent to the Hearing Centre (the appropriate Centre) nearest to the Detention Centre where the applicant is held. If the 'appropriate prescribed form' is not used, one will be faxed by the IAA to the applicant's representatives for completion and return. A list of Hearing Centres and the areas covered by them will be found at [Appendix 12].
- 2.1.4 If you hear an application in the absence of the applicant and decide you cannot grant the application without hearing him/her, then you will have to refuse the application, unless it is withdrawn. It will then be open to the applicant to renew the bail application. If the applicant or his representatives wish the application to be heard at a Centre other than the appropriate Centre, then a request for this can be made at the time of the filing of the application when it will be forwarded to that Centre for consideration by the Regional Adjudicator or Deputy for that Centre. Such a request may be granted, for example, if the applicant is detained in a part of the country well away from where the sureties live and the sureties can show there are insurmountable problems to their attendance at the appropriate Centre. That is a matter for the Regional Adjudicator or Deputy to consider. Your role is to decide the application for bail that is before you, not the venue at which it is to be heard.

2.2 Sureties

‘Clearly it would be wrong to require sureties, if there were no need for sureties, but where one reaches a situation where one cannot otherwise be sure that the obligations will be observed, Parliament has rightly provided that that extra ammunition is available to a Special Adjudicator dealing with these matters if, in fact, that will have the consequence that a person who might not otherwise be granted his liberty will be granted it.’

– *ex parte Brezinski* and *Glowacka*, Kay J

- 2.2.1 It should be born in mind that asylum seekers rarely have friends or relatives in the United Kingdom who can act as sureties. They may have no alternative but to rely on assistance from voluntary organisations to support their applications.
- 2.2.2 Adjudicators are reminded that sureties are only required where you cannot otherwise be satisfied that the applicant will observe the conditions you may wish to impose. Where there is clearly no prospect of an applicant being able to obtain sureties, but in principle there is a case for granting bail, then you should consider if more stringent conditions might meet the particular needs or concerns of the case.
- 2.2.3 Remember that a surety remains bound by his or her recognizance until bail comes to an end in one of the circumstances outlined in paragraph 1.5 above. The importance of assessing the suitability of a proposed surety is obvious. It is only in exceptional circumstances that you are likely to proceed with the hearing of a bail application in the absence of any of the sureties being proffered, unless it is a case where you feel sureties are not required in any event. You must satisfy yourself that the sureties have the means to enter into the recognizances they have offered, that they understand the obligations which they will be undertaking, and that they are suitable people to undertake such obligations. The reference to suitability includes family and social ties as well as residence and financial considerations. If any proposed surety does not attend and you consider such attendance is necessary in order to satisfy yourself as to suitability, there is nothing to prevent you from refusing the application if it is not withdrawn. This will not prevent the applicant making a fresh application when a surety is available, or making a fresh application at another hearing centre closer to where the sureties reside as mentioned in paragraph 2.1.4 a.

2.3 Recognizances

- 2.3.1 Under the 1971 Act you are still required to take a recognizance from the applicant before any release on bail. You should always enquire of the applicant or the representative if there are any assets. If the applicant has no assets, as is usually the case, the recognizance can be a nominal sum of £10.
- 2.3.2 Sometimes the applicant’s representative indicates that the sureties have deposited, or are prepared to deposit, all or part of their recognizance money with the applicant’s solicitors subject to an undertaking not to part with it without the authority of the IAA. Adjudicators in England, Wales and Northern Ireland have no power to impose a condition for the deposit of recognizance money or the giving of such an undertaking. Apart from having no jurisdiction to impose such conditions, such a deposit also raises ‘money-laundering’ concerns. The practice should no longer be followed in England, Wales and Northern Ireland. However, in Scotland adjudicators do have power to require a bail bond to be entered into.

- 2.3.3 The amount of the recognizance must be fixed with regard to the surety's means, but it must always be an adequate and sufficient sum to secure attendance. There is no tariff figure and the sums involved are always a matter for the individual adjudicator. Once you have decided that bail is right in principle and that sureties are required, then you should work your way through the 'Surety Checklist'. The sureties will have been notified of the nature of the documents they should bring with them, and your attention is drawn to the Notice to Applicants, Representatives and Sureties ADJ32 that is sent out with all Hearing Notices. Having obtained as much information as you can, then assess the amount of the recognizance bearing in mind the following in particular:
- a) it must be realistic in the sense that it must be well within the resources of the surety, and not so high as to be prohibitive;
 - b) it must be assessed in relation to the means of the surety alone;
 - c) it must be sufficient to satisfy you that it will ensure that the applicant and the surety will meet their obligations;
 - d) it must be realisable in the event of forfeiture.
- 2.3.4 Sometimes you are asked to consider accepting a nominal sum as a sufficient recognizance. What is a nominal sum to one person may be a substantial sum to another. If you have decided that the risk of non-compliance with conditions requires re-enforcement by way of sureties, then it is unlikely that a 'nominal' sum would be sufficient to ensure attendance. The only exception may be where the surety is the applicant's spouse or partner, or someone at whose home the applicant is to live, and they are on a low income with no savings. However even then you may require another surety in a more substantial amount if you find the risk of non-compliance too great.
- 2.3.5 As already mentioned in paragraph 2.2.1, sometimes officers or senior figures from Charities, Churches and other such organisations are offered as sureties. You should bear in mind that the funds of such organisations are not the assets of the person being put forward as a surety. The amount of any recognizance must be based on the means of the surety, and you must be satisfied that in the event of forfeiture the payment can and will be made by the surety. Such an organisation cannot be a surety. You may be told that such an organisation has taken the applicant under its wing, is providing its support, and will see that there is compliance with all conditions that may be imposed. If after hearing evidence from a responsible person from the organisation concerned you are satisfied that this is so, then if you have decided bail is right in principle you may feel it can be granted without the need for a surety but possibly with the imposition of more stringent bail conditions. Before doing so you may feel it relevant to ask if the organisation concerned has accepted such a responsibility before and been let down.
- 2.3.6 The question sometimes asked is, can a surety be released from his recognizance before bail comes to an end? The answer is, only if the adjudicator agrees upon hearing an application from the person bailed for the release of one of the sureties. Either you must be satisfied that two sureties are no longer necessary, or there must be a satisfactory replacement.

2.4 Conditions

- 2.4.1 The primary condition imposed on granting bail is to appear before an adjudicator or immigration officer at a specified place and on a specified date (the primary condition). You then have to decide whether it is necessary to impose further conditions (secondary conditions) to ensure compliance with the primary condition.

- 2.4.2 If you decide secondary conditions are necessary, it is usually appropriate to require conditions of residence and reporting to the local Police Station or Immigration Service Reporting Centre.
- 2.4.3 Normally an application for bail should not be made until the applicant has an address at which to reside. This can cause problems if the applicant has applied to the National Asylum Support Service (NASS) for financial support and accommodation but is waiting for eligibility to be assessed and accommodation allocated. Such accommodation will not be allocated while the applicant is detained. You will note that Rule 32(2)(c) of the 2003 Rules requires the bail application form to provide details of the address where the applicant is to reside *'or, if he is unable to give such an address, the reason why an address is not given.'* The latest version of NASS Policy Bulletin 64, which is still to be published, will explain the steps to be taken by a detained person in order for eligibility for financial support and accommodation to be assessed and sets out the wording that should be used in the bail application form when NASS is to allocate accommodation. Where an applicant is relying upon accommodation to be allocated by NASS, it will be necessary for written evidence from NASS to be produced at the hearing of the bail application confirming that NASS has accepted that the applicant is eligible for its support and that it will be allocating accommodation. NASS is aware of this requirement. If bail is granted, the condition of residence should read:
- 'To reside at such accommodation as is directed by NASS in accordance with the terms and conditions of support given, and to notify the IAA, the Chief Immigration Officer and the Secretary of State for the Home Department of the address of such accommodation within 24 hours of being provided with it.'**
- This wording has been approved by NASS. Policy Bulletin 64 will also indicate that when allocating accommodation, caseworkers should have regard *'to the location of the person or organisation acting as surety'*.
- 2.4.4 If bail is granted subject to a condition to reside at accommodation to be allocated by NASS, it may be difficult to impose at the same time a condition of reporting since you will not know where the applicant is to reside. In these circumstances the primary condition should be worded so that the return date upon which applicant is required to appear before an adjudicator or immigration officer is not less than seven days and not more than ten days after the grant of bail. Within that time the applicant will have been provided with at least temporary accommodation, and may even have been given details of when and where more permanent accommodation will be available. You will then be in a position to impose a condition to reside at the address of that temporary accommodation and subsequently at the address of the permanent accommodation from the date upon which it becomes available. You will also be in a position to impose a reporting condition if you feel it is necessary, since you have at least a temporary address for the applicant. If on the first return date the applicant is not in a position to provide the address of more permanent accommodation or the date upon which it will become available, then bail should be continued subject to a condition of residence in the same terms as set out in the preceding paragraph and noting the address of the temporary accommodation that has been provided, with a further return date of not less than seven days and not more than ten days. It is essential that the IAA and/or the immigration authorities exercise stricter than usual control over an applicant until he is residing in reasonably permanent accommodation.
- 2.4.5 The Home Office is in the process of setting up a network of Reporting Centres. At present these are at Croydon, London Bridge, Hounslow, Liverpool and Leeds. Over the next twelve months other Reporting Centres will be opening in Glasgow, Manchester, North Shields, The East Midlands and North London.

Seek guidance from the presenting officer on where reporting is to take place. The frequency of that reporting is a matter for you, but initially at least once a week may be appropriate. It can always subsequently be varied at a later hearing.

- 2.4.6 You are at liberty to impose such other secondary conditions as you may consider necessary to ensure that the applicant answers to his bail. You may be asked to impose a condition prohibiting employment. You have no jurisdiction to impose such a condition as it is not one that is necessary to ensure the applicant answers to bail

2.5 Burden and standard of proof

- 2.5.1 The burden of proving that the presumption in favour of liberty does not apply lies on the Secretary of State. As detention is an infringement of the applicant's human right to liberty, you have to be satisfied to a high standard that any infringement of that right is essential.
- 2.5.2 The Immigration Service's Operation Enforcement Manual suggests 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'.
- 2.5.3 There is no precise test laid down as to the standard of proof required in bail cases. Useful guidance is available in the Bail Act 1976. A defendant need not be granted bail if the Court is satisfied 'there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would fail to surrender to custody'. It is suggested you adopt the 'substantial grounds for believing' test which would be higher than the balance of probabilities but less than the criminal standard of proof. If allegations in the bail summary are contested in evidence then the Secretary of State should adduce evidence, including any documents relevant to the decision to detain, to support such allegations.

2.6 Factors to be considered

- 2.6.1 The risk of absconding, although the principal factor, is just one of the factors to be taken into account on an application for bail and has to be balanced against other factors.
- 2.6.2 Lord Justice Dyson noted in the recent Court of Appeal case of *ex parte 'I'* [2002] EWCA Civ 888 that although it was not possible to produce an exhaustive list of circumstances that are or may be relevant to a decision to detain pending deportation, they included the following:
- a) the length of detention,
 - b) the obstacles that stand in the way of removal,
 - c) the speed and effectiveness of any steps taken by the Secretary of State to surmount such obstacles,
 - d) the conditions in which the applicant is detained,
 - e) the effect of detention upon the applicant and his/her family,
 - f) the risk of absconding, and
 - g) the danger that, if released, he/she will commit criminal offences.

He went on to say that 'the relevance of the likelihood of absconding, if proved, should not be overstated.' Although this case related to the question of how long it was reasonable to detain a person pending deportation, the list provides some guidance for cases relating to detention pending decision or appeal.

- 2.6.3 The UNHCR's Guidelines make helpful comments on the detention of minors, vulnerable persons and women.

2.7 Procedure at hearing

- 2.7.1 When you get your bail files, check the computer records (IRIS) to see if an appeal has been received by the IAA, and if there is a date for the hearing of the appeal. Before starting the hearing, check that you have jurisdiction. Check the Application for Bail form to satisfy yourself that it complies with the requirements of Rule 32 of the 2003 Rules. The wording of Rule 32 is mandatory and requires the application notice to be in the 'appropriate prescribed form' (Form B1 in the Schedule to the 2003 Rules). If you notice when looking at the file that the 'appropriate prescribed form' has not been used, arrange for your usher to provide the applicant's representative with a copy of the form for completion. If there is any failure to comply with the Rule that you consider minor in nature and such as would not prejudice the Secretary of State there is nothing to prevent you from proceeding and you should proceed with the hearing of the application, provided all the information required by the Rule is then supplied. You may want an explanation for the failure to comply with the Rule. If the application form does not contain details of where the applicant is to reside or of the sureties and such details are provided for the first time at the hearing, and if you decide to proceed to a hearing of the application in spite of the failure to comply with the requirements of Rule 32, the Presenting Officer may ask for time to check these details. Such a request should be considered sympathetically provided it only involves putting the case back for telephone enquiries to be made. It is still for you to decide on the suitability of the residence and sureties offered, which you can only do on the basis of the information before you. If that information is insufficient, particularly if the appellant has no address at which to reside, then you will have to refuse the application and leave it to the applicant to make a fresh application when there has been time for such information to be obtained.
- 2.7.2 The 2003 Rules require the Secretary of State to file written reasons (the bail summary) for wishing to contest a bail application not later than 2.00 pm on the day before the hearing, or if served with notice of hearing less than 24 hours before that time, as soon as reasonably practicable. If he fails to file a bail summary within the required time, or if there is no bail summary, how should we proceed? If no bail summary is available, then you should proceed without it. This implies that bail would have to be granted. If it is provided late, then you can consider it. However if the allegations contained in it are disputed, its late submission and the lack of time given to the applicant to prepare his response to it must affect the evidential weight you can attach to it and any evidence submitted in its support.
- 2.7.3 If you consider the bail summary to be inadequate, you should inform the Presenting Officer at the beginning of the hearing. If the Presenting Officer asks for time to make further enquiries, you may consider it appropriate to grant a short adjournment to enable him or her to make a telephone call to obtain additional information from the entry port.
- 2.7.4 It is suggested you deal with the application in three stages. First, is this a case where bail is right in principle, subject to suitable conditions if necessary? Second, are sureties necessary? Third, are the sureties and recognizances offered satisfactory? If you indicate bail is right in principle, make it clear that your decision is subject to there being suitable and satisfactory conditions and sureties if you are going to require them.

- 2.7.5 If you find that the sureties offered are not satisfactory, you may be asked to adjourn the application to enable more satisfactory sureties to be found. This may place you in a quandary as an adjournment could cause administrative problems. If you adjourn the application, it must come back before you on the adjourned hearing within a matter of days. If you are a part-time adjudicator you may not be sitting again within that time. If you are a full-time adjudicator you may not be sitting or may be booked to sit in another court or have a full hearing list already arranged for the date on which it is suggested the adjourned bail application should be heard. Although there is no bar to adjourning a bail application, it would be better practice to refuse the application for bail so that a fresh application can be made when more suitable sureties have been found. In any event, this is likely to result in an earlier hearing of the application than if it was adjourned.
- 2.7.6 Although another adjudicator is not bound by your findings, if you have recorded in the record of proceedings that you found it appropriate to grant bail in principle and have given reasons for that finding, but that you have not felt able to grant bail because of lack of suitable sureties, then another adjudicator hearing the renewed application is likely to take the view that your findings are persuasive.
- 2.7.7 You must make a note in your record of proceedings of the following matters in particular;
- a) the evidence given,
 - b) the gist of the arguments for and against bail, and
 - c) your decision and the reasons for it.
- 2.7.8 You will note that Rule 33 of the 2003 Rules requires a written notice of decision to be served on the parties and the person having custody of the applicant. Where bail is granted, then Form ADJ42 must be completed. It must be signed by the applicant and the sureties if any in your presence, and must be signed by you. If bail is granted, remember that if it is pending decision or removal it is to an Immigration Officer and if it is pending an appeal it is to an Adjudicator or the Tribunal. If bail is granted pending decision or removal it should be to a date when a decision or removal is expected and you should ask the presenting officer when that might be. If bail is granted pending appeal to an adjudicator and the date of the appeal hearing is known, it should be to that date and to an adjudicator at the Court where the appeal is to be heard. If the appeal is to the Immigration Appeal Tribunal and the date of the appeal hearing is known, then bail should be to the Tribunal. It is suggested that bail should not be granted or renewed for a period in excess of three months in any event. It is your responsibility to complete Form ADJ42, or to see that it has been properly completed. Copies of the Form ADJ42 should then be made by your usher and handed to the applicant and his representatives, the Presenting Officer, the sureties and the custody officer. The applicant will then be released.
- 2.7.9 In the event of you having felt able to proceed with and complete the hearing of the application in the absence of the applicant or any of the sureties and bail has been granted, you should complete the back of Grant of Bail form ADJ42 appropriately, i.e. giving authority to the Governor of the Detention Centre at which the applicant is detained and/or the Inspector of Police i/c the Police Station for the area in which the surety resides to take the recognizances. The form will then be sent to the appropriate Detention Centre and/or Police Station for the recognizances to be taken. Bear in mind that the occasions when it will be possible to grant bail without the applicant and/or the sureties attending will be rare.

- 2.7.10 Where bail is refused, Rule 33(5) of the 2003 Rules requires the written notice of decision to include reasons for the refusal. It has been suggested that the arguments for and against bail as well as the reasons for the decision should be incorporated in the written notice of decision. Provided such arguments are set out in your record of proceedings and the reasons for the decision are set out in your written decision, then the requirements will have been satisfied. The front of Form ADJ50 should be completed, and the reasons for your decision should be written out on the back of the Form. You should sign both the front and the back of the form. Copies should then be made and handed to the parties and their representatives.

3 Renewed applications for bail

- 3.1 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.
- 3.2 Article 5 of the ECHR requires a decision to detain to be reviewed at reasonable intervals (*Bezicheri v Italy* (1989) 12 EHRR 210). At present this can only be done in our jurisdiction by way of renewed applications for bail. What is a 'reasonable interval' is a question of fact in each case. The Court said in *Bezicheri* that the nature of detention on remand called for short intervals before the decision to detain was again considered by the courts. In *Dougoz v Greece* (App. No. 40907, 6 March 2001) the court held 'The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5(1)'.
- 3.3 The lapse of time between bail applications may well itself be a relevant factor. It is suggested that provided a fresh bail application is made at least 28 days after the refusal of the previous application and you find that the lapse of time is relevant to the particular case then you should be prepared to consider arguments that were presented on the previous application as well as any fresh arguments.

4 Continuation of bail

- 4.1 As indicated in paragraph 1.5 above, once bail is granted it continues until the happening of one of the events set out in that paragraph. Provided the appellant complies with the primary condition of his bail to appear before you on the specified date, then you have no power to do other than to continue bail with a fresh primary condition to appear before an adjudicator or immigration officer on another date, together with such secondary conditions as you may deem necessary. The appearance of the applicant before you in answer to the primary condition is an opportunity to consider any applications to vary the secondary conditions, e.g. residence and the frequency of reporting. If the applicant has been on bail for some time and has faithfully complied with all conditions, there is nothing to prevent you from varying the frequency of reporting on your own initiative, provided you give the presenting Officer an opportunity to make representations.
- 4.2 Where bail is to an adjudicator pending appeal, the applicant should attend. It is the primary condition upon which he was granted bail in the first place. His attendance should only be excused in exceptional circumstances, e.g. illness or other unavoidable circumstance preventing his appearance.

You have no power to require the attendance of sureties. For so long as the applicant remains on bail, their recognizances continue. They entered into their recognizances for the applicant to comply with conditions, not for them to comply with conditions. 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.

- 4.3 If an applicant fails to appear before you in answer to the primary condition and/or fails to comply with secondary conditions, an Immigration Officer 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 you in answer to the primary condition, it is for the immigration authorities to decide what steps to take with regard to re-detention. As has already been made clear, you have no power to terminate bail. If the applicant appears, but has failed to comply with secondary conditions, you would have to continue his bail with a fresh primary condition and probably more stringent secondary conditions. If the applicant does not appear, it would seem pointless to impose a fresh primary condition. You can only hope that steps are taken by an immigration officer to detain him. You should direct the commencement of forfeiture proceedings and authorise the completion and issue of the form of Notice to Show Cause (Forfeiture) ADJ47. The form should be completed by the bail clerk and brought to you to check and sign. If it is not possible for the form to be prepared for your signature on the day you direct such proceedings, then it should be brought to you or a full-time adjudicator as soon as possible thereafter for checking and signing. In any event you should make a note in your record of proceedings that you have directed Forfeiture Proceedings are to be taken.
- 4.5 When continuing bail by imposing a fresh primary condition for the applicant to appear before an adjudicator or immigration officer, you must complete the form ADJ42. This relates to continuation of bail as well as to grant of bail. It must be signed by you, the applicant and the sureties if present. Copies should be made and given to all concerned. If the sureties have not attended, make a note on the file cover that copies are to be sent to them.

5 Continuation of bail after hearing of appeal

- 5.1 The action we should take at the end of the hearing of an appeal where the appellant is on bail is to continue bail with a primary condition that the appellant appears before an adjudicator in six weeks time, together with such secondary conditions as may be necessary. By then the determination should have been promulgated and the Home Office should have decided what action to take if the appeal has been dismissed and any certificate has been agreed, or no application for leave to appeal has been filed.
- 5.3 If the appellant appears before you in six weeks time for bail to be continued and an application for leave to appeal has been filed or granted, bail should be continued to appear before the Immigration Appeal Tribunal if there is a date for the appeal hearing. If leave to appeal is still being considered or no date for the appeal hearing has been notified, then bail should be continued to appear before an adjudicator in not more than four weeks time, when it is to be hoped there will be a decision on the application for leave and an appeal hearing date. If there is no appeal or leave to appeal has been refused, and there is no immigration officer present to detain the appellant, bail should be continued with a fresh primary condition that the applicant appears before an immigration officer on a date, and at a time and place to be given to you by the Presenting Officer.

6 Forfeiture proceedings

- 6.1 The adjudicator's jurisdiction in Forfeiture Proceedings is derived from Schedule 2, paragraph 31 of the 1971 Act.
- 6.2 Failure to comply with secondary conditions of residence or reporting to a Police Station or Reporting Centre, on their own or in combination, do not justify the commencement of Forfeiture Proceedings. Only a failure to comply with the primary condition to appear before an adjudicator or an immigration officer can justify such proceedings. Normally an adjudicator will have seen the bail file and authorised the issue of such proceedings, but check that all the documents are in order and that the Notice to Show Cause ADJ47 has been properly issued.
- 6.3 The applicant, if it has been possible to serve the Notice to Show Cause upon him, and the sureties should appear on the hearing of the proceedings. If they do not, satisfy yourself that they have been properly served with the Notice to Show Cause before continuing with the hearing.
- 6.4 When assessing whether or not there should be forfeiture of the recognizances and the amount to be forfeited, take account of the following matters in particular with regard to the sureties:
 - a) the level of their responsibility for the applicant's failure and the steps taken by them to ensure compliance,
 - b) any steps taken by them to report any concerns to the Immigration Authorities,
 - c) whether the applicant failed to comply with any secondary conditions and any steps taken by the sureties to ensure compliance, and
 - d) any other explanations offered by the sureties.
- 6.5 Ability to pay and method of payment is primarily a matter for the Magistrates Court enforcing your Order. The sureties' current financial circumstances are only relevant if they satisfy you that there has been a substantial change in such circumstances since entering into the recognizance. However if this is the case, there should already have been an application to reduce the amount of the recognizance and the reasons for any failure to have done so will be relevant.
- 6.6 If the applicant and/or any sureties fail to appear and there is no explanation for such failure, you have little alternative but to order the whole of the recognizance to be forfeited.
- 6.7 Record your decision and the reasons for it in the Record of Proceedings. This is particularly important if you proceed in the absence of the applicant and/or the sureties. Check and sign the Order for Forfeiture ADJ48 when it has been prepared for you.

7 Legality of detention and the Human Rights Act

- 7.1 Detention under the 1971 Act is an exception to the right to liberty under Article 5 of the European Convention on Human Rights (ECHR). Proceedings by which the lawfulness of the detention is challenged are normally by way of Habeas Corpus or application for leave to apply for Judicial Review to the Administrative Court. The adjudicator's decisions must be compatible with the Human Rights Act 1998 (HRA). To that extent you may find it necessary from time to time to consider representations under Articles 3, 5, 6, and 8 of the ECHR.

7.2 Article 3

Representations under this Article are likely to relate to the conditions in which the applicant is being held. Any complaints about such conditions should have been addressed to the Home Office in the first instance. It is suggested that only if there is evidence that such complaints may be justified and the Home Office has refused to act upon them does it then become a matter for us to consider when making sure that our decision is HRA compliant. Remember that the conditions would still have to attain a 'minimum level of severity'.

7.3 Article 5

The detention still has to be lawful in accordance with Article 5(1)(f), i.e. to prevent an unauthorised entry, or where deportation or extradition proceedings are being taken. Not all asylum seekers are attempting to gain unauthorised entry. Some are here having been granted leave to enter, perhaps as a visitor, and then have applied for asylum. Such people are only liable to detention if they have failed to comply with any residence or reporting conditions that may have been imposed under Section 71 of the Nationality, Immigration and Asylum Act 2002. If this is not clear from the bail summary, seek clarification from the Presenting Officer. If detention is preparatory to deportation, it will only be justified for so long as deportation proceedings are in progress. If it is claimed that the detention is unlawful, then an application for bail to the IAA is not the appropriate application or forum to test its lawfulness. If an applicant is seeking bail, it presupposes that the detention is lawful.

7.4 Article 6

Although it is argued that Article 6 does not apply to asylum claims, excessive delay is a factor that should be taken into account, particularly where such delay is not the fault of the applicant.

7.5 Article 8

This will be raised from time to time, particularly when detention separates spouses and children where some may have been granted temporary admission, or it is claimed that the circumstances or conditions of the detention amount to an interference with private life (physical and moral integrity). If you reach the conclusion that detention must be maintained, then any interference with the applicant's private or family life is likely to be in pursuance of a legitimate end, in accordance with the law, and proportionate.

8 Conclusion

Unless the Secretary of State satisfies you there are substantial grounds for believing the applicant would fail to comply with the primary condition attached to the bail, then bail should be granted.

Guidance Notes appendix 4**Notice to applicants, their representatives and sureties**Appendix
2

Please read this Notice carefully.

- 1 Both the applicant and any sureties are required to attend the hearing.
- 2 Applications for bail shall be submitted to the IAA at the Hearing Centre (the appropriate Centre) nearest to the Detention Centre at which the applicant is being held. If an applicant wishes to request that the bail application to be heard at a Hearing Centre (the preferred Centre) other than the appropriate Centre, then the applicant must apply in writing to the Regional Adjudicator for that preferred Centre, setting out the reasons for wishing the bail application to be heard at that preferred Centre rather than the appropriate Centre.
- 3 If the applicant does not propose to attend the hearing of the bail application, please notify the IAA. Where the applicant or any surety does not appear on the hearing of the bail application and the Adjudicator decides evidence from them is required before a decision can be made, then the application is likely to be refused.
- 4 Please advise this Authority if the applicant or any surety will require an interpreter and, if so, in which language and dialect. Interpreters are not usually booked for these applications unless it is known that one will be required.
- 5 Representatives are reminded that it is their responsibility to ensure that the proposed sureties bring with them to the hearing suitable evidence to prove their identity, income and assets. In particular they are requested, where possible and relevant, to produce the following documents:
 - a) passport or other means of establishing identity;
 - b) if right to reside in the United Kingdom is limited, evidence of when that right expires;
 - c) recent wage slips or, if self-employed, a copy of their latest set of accounts as submitted to the Inland Revenue or a letter from their accountants certifying their personal taxable income;
 - d) Bank statements and Building Society passbooks, preferably covering the last three months, with evidence of current balances;
 - e) rent books or mortgage statements, together with other documentation showing the address of the surety, e.g. current driving licence or NHS Medical Card;
 - f) any documentary evidence showing the value of any property or other assets belonging to the surety.
- 6 Representatives are reminded of their duty to ensure that sureties can meet their commitments.

Guidance Notes appendix 6

Surety checklist

- 1 You should have made a decision initially as to whether or not bail is right in principle in accordance with the guidelines. If you have found against bail in principle, then there is no need to hear evidence from sureties.
- 2 Where you find that bail can be granted subject to suitable conditions, the question to ask yourself is whether or not there are such conditions that can be imposed without the need for sureties. If there is no need for sureties, there is no need to hear evidence from them.
- 3 If you decide sureties are required you will need to hear evidence from them. Remind yourself of the contents of the Note sent to applicants with the Notice of Hearing of the application. This lists the documents a proposed surety is requested to bring to court. When questioning sureties, try to avoid reference in open court to actual figures for their income, savings and liabilities as they may find this embarrassing. Sometimes this is unavoidable, particularly if they have failed to bring documentary evidence with them. Questions should be asked of the proposed surety to satisfy yourself on the following matters, subject to their relevance:

Identification

- The proposed surety should bring his/her passport or other means of identification.
- If his right to reside in the United Kingdom is limited, evidence of when that right expires.
- He should have proof of address, e.g. rent book, mortgage statement, current driving licence or recent Council Tax, gas or electricity bills, etc.
- Obtain a telephone number for future reference.
- Relationship to the applicant.
- Is the surety a blood relative or related by marriage, or not related at all?
- How long has the surety known the applicant?
- How much contact has there been between the surety and the applicant in the United Kingdom?
- Will the applicant feel a sense of moral obligation towards the surety?
- Will the applicant live with the surety, and what arrangements have been made?

Occupation and income of surety

- Details of employment. This will include length, position, nature of work and hours.
- Evidence of income by way of the pay slips or bank/building society statements/pass-books. These should cover a sufficient period of time to satisfy you that the income is regular.
- If self employed, the latest set of accounts submitted to the Inland Revenue or a statement from accountants.

Assets and liabilities

Seek details of any assets which may add weight to the surety's financial standing in terms of his/her ability to act as a surety.

Seek details of any major liabilities which may detract from the surety's financial standing.

Ask to see documentary evidence to support this information, in particular statements of any savings accounts. Ask for particulars of any recent substantial deposits.

If you are considering taking into account the value of the equity in a home, only do so if the money can easily be obtained, e.g. by way of an affordable re-mortgage or further charge.

Documentary evidence

You should seek some documentary evidence to support the oral evidence of the surety relating to his financial circumstances. The absence of such documentary evidence is not fatal, but may affect the weight you attach to such oral evidence.

Criminal convictions

If the Home Office have had sufficient time to check the sureties, the Presenting Officer should be in a position to give you such details. However you are perfectly entitled to ask for this information yourself. (s.7(3) Rehabilitation of Offenders Act 1974)

Stability

Look for evidence of stability in the life of the surety. This may be found in evidence of marital status and details of family, as well as the nature and length of employment, and standing in the community.

Awareness of obligations

Ask the sureties to explain to you their understanding of the nature of the obligations being undertaken. If it appears to you they do not understand the nature of such obligations, make them clear in simple terms and warn of the consequences of failure by the applicant to appear in answer to his bail. Remind the sureties that their obligations continue until the applicant is re-detained, removed, or his appeal is successful.

Appendix 3

UNHCR's guidelines on the detention of asylum seekers

Revised edition, 26 February 2003

Appendix
3

Introduction

- 1 The detention of asylum seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.
- 2 Of key significance to the issue of detention is Article 31 of the 1951 Convention. Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are **necessary**, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country.
- 3 Consistent with this Article, detention should only be resorted to in cases of **necessity**. The detention of asylum seekers who come 'directly' in an irregular manner should, therefore, not be automatic, or unduly prolonged. This provision applies not only to recognised refugees but also to asylum seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one. Conclusion No 44 (XXXVII) of the Executive Committee on the Detention of Refugees and Asylum Seekers examines more concretely what is meant by the term '**necessary**'. This Conclusion also provides guidelines to States on the use of detention and recommendations as to certain procedural guarantees to which detainees should be entitled.
- 4 The expression '**coming directly**' in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept '**coming directly**' and each case must be judged on its merits. Similarly, given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression '**without delay**'. The expression '**good cause**', requires a consideration of the circumstances under which the asylum seeker fled.

The term 'asylum seeker' in these guidelines applies to those whose claims are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.

- 5 Asylum seekers are entitled to benefit from the protection afforded by various International and Regional Human Rights instruments which set out the basic standards and norms of treatment. Whereas each State has a right to control those entering into their territory, these rights must be exercised in accordance with a prescribed law which is accessible and formulated with sufficient precision for the regulation of individual conduct. For detention of asylum seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.
- 6 Although these guidelines deal specifically with the detention of asylum seekers the issue of the detention of stateless persons needs to be highlighted. While the majority of stateless persons are not asylum seekers, a paragraph on the detention of stateless persons is included in these guidelines in recognition of UNHCR's formal responsibilities for this group and also because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum seekers and stateless persons. The inability of stateless persons who have left their countries of habitual residence to return to them, has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

Guideline 1 Scope of the guidelines

These guidelines apply to all asylum seekers who are being considered for, or who are in, detention or detention-like situations. For the purpose of these guidelines, **UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.** There is a qualitative difference between detention and other restrictions on freedom of movement.

Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.

When considering whether an asylum seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

Guideline 2 General principle

As a general principle asylum seekers should not be detained.

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

Guideline 3 Exceptional grounds for detention

Detention of asylum seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with EXCOM Conclusion No 44 (XXXVII) the detention of asylum seekers may only be resorted to, if necessary:

1 to verify identity

This relates to those cases where identity may be undetermined or in dispute.

2 to determine the elements on which the claim for refugee status or asylum is based

This statement means that the asylum seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

3 in cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

4 to protect national security and public order.

This relates to cases where there is evidence to show that the asylum seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centres, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.

Guideline 4 Alternatives to detention

Alternatives to the detention of an asylum seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum seeker concerned and prevailing local conditions.

Alternatives to detention which may be considered are as follows:

Monitoring requirements

Reporting requirements: Whether an asylum seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments.

Residency requirements: Asylum seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.

Provision of a guarantor/surety

Asylum seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.

Release on bail

This alternative allows for asylum seekers already in detention to apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.

Open centres

Asylum seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.

These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum seekers while allowing asylum seekers basic freedom of movement.

Guideline 5 Procedural safeguards

If detained, asylum seekers should be entitled to the following minimum procedural guarantees:

- to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
- to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
- to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum seeker or his representative would have the right to attend;
- either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;
- to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

Detention should not constitute an obstacle to an asylum seeker's possibilities to pursue their asylum application.

Guideline 6 Detention of persons under the age of 18 years

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, **minors who are asylum seekers should not be detained.**

In this respect particular reference is made to the Convention on the Rights of the Child in particular:

- Article 2** which requires that States take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members;
- Article 3** which provides that in any action taken by States Parties concerning children, the best interests of the child shall be a primary consideration;

Article 9 which grants children the right not to be separated from their parents against their will;

Article 22 which requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance;

Article 37 by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time.

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development (both physical and mental), is catered for while longer term solutions are being considered.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

If children who are asylum seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma.

Children who are detained, benefit from the same minimum procedural guarantees (listed at Guideline 5) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.

Guideline 7 Detention of vulnerable persons

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum seekers falling within the following vulnerable categories:

- unaccompanied elderly persons
- torture or trauma victims
- persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary.

Guideline 8 Detention of women

Women asylum seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

Where women asylum seekers are detained they should be accommodated separately from male asylum seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum seekers should be granted access to legal and other services without discrimination as to their gender, and specific services in response to their special needs. In particular they should have access to gynaecological and obstetrical services.

Appendix
3

Guideline 9 Detention of stateless persons

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

Guideline 10 Conditions of detention

Conditions of detention for asylum seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points in particular should be emphasised:

- the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- the segregation within facilities of men and women; children from adults (unless these are relatives);
- the use of separate detention facilities to accommodate asylum seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;

the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;

the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;

the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;

the opportunity to continue further education or vocational training;

the opportunity to exercise their religion and to receive a diet in keeping with their religion;

the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries etc.;

access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

Conclusion

The increasing use of detention as a restriction on the freedom of movement of asylum seekers on the grounds of their illegal entry is a matter of major concern to UNHCR, NGOs, other agencies as well as Governments. The issue is not a straight-forward one and these guidelines have addressed the legal standards and norms applicable to the use of detention. Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based.

Appendix 4

UN Working Group on Arbitrary Detention

Criteria for determining whether or not the custody is arbitrary

From: *Civil and Political Rights, Including Questions of Torture And Detention*:
Report of the Working Group on Arbitrary Detention
GENERAL, E/CN.4/1999/63, 18 December 1998

Commission on Human Rights, Fifty-fifth session,
Item 11(a) of the provisional agenda

Appendix
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- 69 In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees:

Guarantee 1: To be informed, at least orally, when held for questioning at the border, or in the territory concerned if he has entered illegally, in a language which he understands, of the nature of and grounds for the measure refusing admission at the border, or permission for temporary residence in the territory, that is being contemplated with respect to him.

Guarantee 2: Decision involving administrative custody taken by a duly authorized official with a sufficient level of responsibility in accordance with the criteria laid down by law and subject to guarantees 3 and 4.

Guarantee 3: Determination of the lawfulness of the administrative custody pursuant to legislation providing to this end for:

- a) The person concerned to be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality;
- b) Alternatively, the possibility of appealing to a judge or to such a body.

Guarantee 4: To be entitled to have the decision reviewed by a higher court or an equivalent competent, independent and impartial body.

Guarantee 5: Written and reasoned notification of the measure of custody in a language understood by the applicant.

Guarantee 6: Possibility of communicating by an effective medium such as the telephone, fax or electronic mail, from the place of custody, in particular with a lawyer, a consular representative and relatives.

Guarantee 7: To be assisted by counsel of his own choosing (or, alternatively, by officially appointed counsel) both through visits in the place of custody and at any hearing.

Guarantee 8: Custody effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law.

Guarantee 9: Keeping up to date a register of persons entering and leaving custody, and specifying the reasons for the measure.

Guarantee 10: Not to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations.

Guarantee 11: To be informed of the guarantees provided for in the disciplinary rules, if any.

Guarantee 12: Existence of a procedure for holding a person incommunicado and the nature of such a procedure, where applicable.

Guarantee 13: Possibility for the alien to benefit from alternatives to administrative custody.

Guarantee 14: Possibility for the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and specialized non-governmental organizations to have access to places of custody.

70 Where the absence of such guarantees or their violation, circumvention or non-implementation constitutes a matter of a high degree of gravity, the Working Group may conclude that the custody is arbitrary.

Appendix 5

Criteria for transfers between removal centres

David Wilson, Deputy Director, Detention Services
June 2002

Given that transfers between removal centres are preferable to transfers to prisons, the same factors may come into play. Transfers for whatever reason are kept to a minimum.

Whilst existing removal centres are of a broadly common security rating, they vary with respect to facilities. Some have better facilities for detainees who need to be temporarily removed from association (under Rule 40) or are refractory (Rule 42). In some instances it may be sensible to move someone with a conviction for a sexual offence to an all male centre.

Health care factors do not come into play in moving detainees to prisons but may influence moves between removal centres as most centres do not have in-patient facilities.

Transfers may sometimes be arranged for domestic or compassionate reasons or to enable a detainee to be more easily visited by a representative.

They may also be set up for operational reasons as a stage towards removal from the UK or to create vacancies in a particular centre.

Transfers are arranged by the Detainee Escorting and Population Management Unit (DEPMU) at Feltham, not directly between centres.

Appendix 6

Criteria for transfers from removal centres to prisons

David Wilson, Deputy Director, Detention Services
June 2002

Given the physical limitations of existing removal centres, detainees may exceptionally be moved to prisons on security or control grounds. Options for transfer within the removal centre estate must be exhausted before consideration is given to transfer to a prison.

A number of factors are taken into account and balanced in reaching decisions:

National security – for example, where there is information that a person is a member of a terrorist group or has been engaged in terrorist activities.

Criminality – for example, convictions or prison sentences in UK or abroad, especially for violence, sexual offences or arson.

Security – for example, where the detainee has escaped or attempted to escape from, police, prison or immigration custody, or planned or assisted others to do so.

Control – for example, engagement in disorder, arson, violence or damage, or planning or assisting others to so engage.

In some cases decisions will be based on hard information such as convictions. In other cases judgements have to be made about the quality of criminal or other intelligence. The overriding concern is to protect security and the safety of detainees and staff, but with a presumption that detainees should remain in Immigration Service detention if at all possible.

Decisions are made at Inspector level by the Detainee Escorting and Population Management Unit (DEPMU) at Feltham based on advice and information from a variety of sources, including Immigration Service staff and contractors. The Deputy Director, Detention Services reviews cases of those in prisons with DEPMU on at least a monthly basis.

Appendix 7

Immigration removal centres – contact and legal visit details

Note that the details may be subject to change, particularly the times and procedures for legal visits.

Campsfield House
Langford Lane
Kidlington, Oxford OX5 1RE
Tel 01865 845 700
Fax 01865 377 723
Medical Centre tel 01865 845 701

Legal visits:
by appointment, book by telephone,
need client's port reference
Monday–Sunday:
9am–12, 1.30–5pm, 7–9pm

Dover
The Citadel, Western Heights
Dover CT17 9DR
Tel 01304 246 400
Fax 01304 246 401
Legal visits: by appointment
Monday–Friday: 9–11.30am, 2–4pm
Saturday–Sunday: 2–4pm

Dungavel
Strathaven, S. Lanarkshire
Scotland ML10 6RS
Tel 01295 225 300
Fax 01295 276 803
Legal visits: by appointment
Monday–Sunday: 9.30am–12.30pm,
1.30–5.30pm, 6.30–8.30pm

Harmondsworth
Crown Site. Colnbrook Bypass
Harmondsworth
W. Drayton UB7 0DF
Tel 020 8283 3850
Fax 020 8283 3851

Legal visits: by appointment, via fax
Monday–Sunday: 9am–12, 2–6pm,
7–8.30pm (in emergencies only)

Haslar
2 Dolphin Way, Gosport, Hants. PO12 2AW
Tel 02392 604 000
Fax 02392 510 266
Extensions: Dorm A: 215, Dorm B: 373,
Dorm D: 380, Dorm E: 384,
Dorm G: 369, Dorm H: 234
Legal visits: by appointment, via fax
Monday–Sunday (except Wed): 2–4pm
Thursday: 9–11.30am

Lindholme
Bawtry Road, Hatfield Woodhouse
Doncaster DN7 6EE
Tel 01302 848 700
Legal visits: by appointment
Tel 01302 848 980, Fax 01302 848 750
Monday, Wednesday, Friday: 1.30–3pm

Oakington Reception Centre
Oakington Barracks
Longstanton nr Cambridge CB4 4EJ
Tel 01954 783 000
Fax 01954 789 505

Legal visits: book 24 hrs in advance,
preferably by email –
reception.oakington@group4.com
need client's port reference
Monday–Sunday: 9am–7pm

Tinsley House
Perimeter Road, South
Gatwick, W. Sussex RH6 0PQ
Tel 01293 434 800
Fax 01293 434 825
Medical Centre tel 01293 434 867
Legal visits: by appointment, by fax
Monday–Sunday: 9am–12, 1.30–8.30pm

Yarl's Wood
Twinwoods Road, Clapham
Bedfordshire MK41 6HL
Tel 01234 821 800
Fax 01234 821 152
Legal visits: book by telephone.
Monday–Sunday: 10am–12, 1–5pm, 5–9pm

Appendix 8

Useful contacts

Organisations that offer advice on bail

BID London
28 Commercial Street
London E1 6LS
Tel 020 7247 3590
Fax 020 7247 3550
www.bid.org

BID South (Haslar cases)
247 Fratton Road
Portsmouth, Hants PO1 5PA
Tel 02392 291916
Fax 02392 291913

BID Oxford (Campsfield cases)
PO Box 1319
East Oxford P.O., OX2 0ZN
Tel 0845 330 4536
Fax 0845 330 4537

Organisations that try to find sureties for detainees

Bail Circle
A network of sureties for people in immigration detention, funded by the Churches Commission for Racial Justice
Tel/fax 020 7377 9356

Oxford Bail Support Group
(for Campsfield cases)
Tel 01865 511079

Emergency accommodation providers

Migrant Helpline
Room 65, No 1 Control Building
Eastern Docks, Dover CT16 1JA
Tel 01304 203977
Fax 01304 203995

Refugee Action (London)
The Old Fire Station
150 Waterloo Road, London SE1 8SB
Tel 020 7654 7700
Fax 020 7401 3699
www.refugee-action.org.uk

Refugee Action (East Midlands)
International Community Centre
61b Mansfield Road
Nottingham NG1 3FN
Tel 0115 941 8552
Fax 0115 941 9980

Refugee Action (NW – Liverpool)
34 Princes Road, Liverpool L8 1TH
Tel 0151 702 6300
Fax 0151 709 6648

Refugee Action (NW – Manchester)
24–26 Lever Street
Manchester M1 1DZ
Tel 0161 233 1200
Fax 0161 236 4285

Refugee Action (South)
50 Oxford St, Southampton SO14 3DL
Tel 02380 248130
Fax 02380 632995

Refugee Action (South Central)
Unit 13, Standingford House
Cave Street, Oxford OX4 1BA
Tel 01865 792524
Fax 01865 791624

Refugee Action (South West)
Senate House, 36 Stokes Croft
Bristol BS1 3QD
Tel 0117 989 2100
Fax 0117 924 8576

Refugee Arrivals Project (RAP)
First Floor Queen's Building
Heathrow Airport, Hounslow TW6 1DL
Tel 020 8759 5740
Fax 020 8759 7058
www.refugee-arrivals.org.uk

*Emergency accommodation providers
continued*

Refugee Council
3 Bondway
London SW8 1SJ
Tel 020 7820 3000
Fax 020 7582 9929
www.refugeecouncil.org.uk

Refugee Council (West Midlands)
First Floor, Smithfield House
Digbeth, Birmingham B5 6BS
Tel/fax 01216 221515

**Refugee Council
(Yorkshire & Humberside)**
First Floor, Wade House
The Merrion Centre
Leeds LS2 8NG
Tel 01132 449094
Fax 01132 465229

Refugee Council (Eastern Region)
First floor, 4–8 Museum Street
Ipswich IP1 1HT
Tel 01473 221560
Fax 01473 217334

Scottish Refugee Council (Glasgow)
5 Cadogan Square
170 Blythswood Court
Glasgow G2 7PH
Tel 0141 249 9799
Fax 0141 243 2499
www.scottishrefugeecouncil.org.uk

Refugee Council Advice Line
The advice line gives advice to
refugees, asylum seekers and advisers
on asylum support issues
Tel 020 7346 6777 (Monday, Tuesday,
Thursday and Fridays 10am–1pm and
2–5pm; Wednesday 2–5pm only)

Visitor's groups

**Association of Visitors to
Immigration Detainees (AVID)**
PO Box 7
Oxted RH8 0YT
Tel 01883 717275
Contact: assistant coordinator
www.aviddetention.org.uk

Other organisations

www.asylumsupport.info
for NASS policy bulletins and
other support information

Asylum Aid
28 Commercial Street
London E1 6LS
Tel 020 7236 5123
www.asylumaid.org.uk

Bail for Immigration Detainees (BID)
28 Commercial Street
London E1 6LS
Tel 020 7247 3590
www.biduk.org

Bar Council
3 Bedford Row
London WC1R 4DB
Tel 020 7242 0082
www.barcouncil.org.uk

Detention Advice Service (DAS)
308 Seven Sisters Road
London N4 2AG
Tel 020 8802 3422
das@das.ndirect.co.uk

Electronic Immigration Network (EIN)
www.ein.org.uk

HM Inspectorate of Prisons
First Floor Ashley House
2 Monck Street, London SW1P 2BQ
Tel 0870 267 4298
Fax 020 7035 2142
[www.homeoffice.gov.uk/justice/
prisons/inspprison](http://www.homeoffice.gov.uk/justice/prisons/inspprison)

**Her Majesty's Stationery Office
(HMSO)**
www.hmso.gov.uk
Tel 01603 723011

Immigration Appellate Authority (IAA)
Field House
15 Bream's Buildings
London EC4A 1DZ
Tel 0845 6000 8777/020 7073 4200
Fax 020 7073 4090
www.iaa.gov.uk

Immigration Advisory Service (IAS)
County House
190 Great Dover Street
London SE1 4YB
Tel 020 7357 6917
www.ias.org

Immigration Law Practitioners' Association (ILPA)

40–42 Charterhouse Street
London EC1M 6JN
Tel 020 7251 8383
Fax 020 7251 8384
www.ilpa.org.uk

Joint Council for the Welfare of Immigrants (JCWI)

115 Old Street, London EC1V 9RT
Tel 020 7251 8706
Fax 020 7251 8707
www.jcwi.org.uk

Language Line

Swallow House
11–21 Northdown Street
London N1 9BN
Tel 0800 169 2879
www.languageline.co.uk

Law Society

113 Chancery Lane
London WC2A 1PL
Tel 020 7242 1222
Fax 020 7831 0344
www.lawsoc.org.uk

Legal Services Commission (LSC)

85 Gray's Inn Road, London WC1X 8TX
Tel 020 7759 0000
www.legalservices.gov.uk

London Advice Services Alliance (Lasa)

Universal House
88/94 Wentworth Street
London E1 7SA
Tel 020 7377 2748
www.lasa.org.uk

Parliament – find your MP

www.parliament.uk

Refugee Council Children's Panel

3 Bondway, London SW8 1SJ
Tel 020 7582 4947
Fax 020 7840 4388
www.refugeecouncil.org.uk

Refugee Women's Resource Centre

28 Commercial Street, London E1 6LS
Tel 020 7377 5123
www.asylumaid.org.uk

Women Against Rape**Black Women's Rape Action Project**

Crossroads Women's Centre
230A Kentish Town Road
London NW5 2AB
Tel 020 7482 2496
Fax 020 7209 4761
www.womenagainstrape.net

Immigration Service**Immigration and Nationality Directorate (IND)**

Lunar House
40 Wellesley Road
Croydon CR9 2BY
Tel 0870 606 7766
www.ind.homeoffice.gov.uk

Management of Detained Cases Unit (MODCU)

Waterside Court
Kirkstall Rd, Leeds LS4 2QB
Tel 0113 386 5780
Fax 0113 386 5855

National Asylum Support Service (NASS)

Voyager House, 30 Wellesley Road
Croydon CRO 2AD
Tel 0845 602 1739 (helpline)
Tel 0845 600 0914 (support and discontinuation helpline)
Fax 020 8633 0129

Third Country Unit

29 Wellesley Road
Croydon CRO 2AJ
Tel 020 8760 2956
Fax 020 8760 2953

Travel Document Unit

29 Wellesley Road
Croydon CRO 2AJ
Tel 020 8760 2560/1/2/3/4/5
Fax 020 8760 2963

Publications

Support For Asylum Seekers, Sue Willman, Stephen Knafler, Stephen Pierce, LAG, 2001

Macdonald's Immigration Law & Practice, Fifth Edition, Ian A Macdonald QC, Frances Webber, Butterworths, 2001

Immigration, Nationality and Refugee Law Handbook, JCWI, 2002

Making An Asylum Application, a best practice guide, ILPA, 2002

Putting Children First, a guide for immigration practitioners, Jane Coker, Nadine Finch, Alison Stanley, LAG, 2002

Other best practice guides

This guide is one in a series of ILPA best practice guides.

Other titles are:

Best practice guide to asylum and human rights appeals

Mark Henderson; ILPA/Refugee Legal Group, 2003

Making an asylum application, a best practice guide

Jane Coker, Garry Kelly, Martin Soorjoo; ILPA, 2002

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and copies of any guide in the series contact ILPA

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Email info@ilpa.org.uk

Fax 020 7251 8384

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