BAIL

Guidance Notes for Adjudicators

(Third Edition)

May 2003

BAIL

Guidance Notes for Adjudicators from the Chief Adjudicator
(Third Edition)

" 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's 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 & 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 Sections 44 to 52, 53(5) and 55 of the Immigration and Asylum Act 1999 (the 1999 Act) have been repealed.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. These can be found in the Appendices to these Guidance Notes. 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 & 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 above.

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 Check List" (Appendix 8). 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 (Appendix 5) 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 you 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 (Appendix 8) 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 (Appendix 9) 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 iniative, 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. The 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 (Appendix 10). 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 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 the applicant and/or the sureties. Check and sign the Order for Forfeiture ADJ48 (Appendix 11) 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 Habeus 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.

His Honour Judge Henry Hodge OBE
Chief Adjudicator May 2003

APPENDICES TO BAIL GUIDANCE NOTES

1. Extract from Chapter 38 of the Immigration Service's Operation Enforcement Manual
2. UNHCR's Guidelines on the Detention of Asylum Seekers
3. Notice of Hearing (ADJ30)
4. Notice to Applicants, Representatives and Sureties (ADJ32)
5. Notice of Hearing of Bail Continuation/Variation (ADJ31)
6. Surety Check List
7. Grant/Continuation or Variation of Bail (ADJ42)
8. Refusal of Bail (ADJ50)
9. Notice to Show Cause (Forfeiture) (ADJ47)
10. Order for Forfeiture (ADJ48)
11. List of Hearing Centres and the areas covered by them