Practice note on Bail

Aims and purpose of this practice note

Section 83 of the Immigration and Asylum Act 1999 places a statutory duty on the Immigration Services Commissioner, requiring her to promote good practice. This note, which supports that duty, sets out the Commissioner's views regarding bail. The note should not be seen as definitive instructions but rather as a view on best practice.

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

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PRACTICE NOTE ON BAIL

1. The majority of people who enter the UK do so without any difficulty and are free to go about their day-to-day business. There are those, however, that the UK Border Agency (UKBA) sees fit to detain. Advisers regulated at the appropriate Advice Level may assist in getting such persons released from detention. This note concentrates on Chief Immigration Officer and First-tier Tribunal applications only. **Unless otherwise qualified OISC regulated advisers must not make applications for police bail or habeas corpus.**

The Immigration Officer's power to detain

2. Paragraphs 16 (1), (1A) and (2) of Schedule 2 to the Immigration Act 1971 give power to an Immigration Officer (IO) to authorise the detention of a person in the following circumstances: pending examination or further examination of a decision for the grant, refusal or cancellation of leave; pending the giving of removal directions; and pending the removal of the person from the UK.

Who is liable to be detained

3. The following persons are liable for to be detained:

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

4. All relevant factors must be taken into account when considering the need for initial or continued detention, including:

- 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? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? 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?
- Is there a risk of offending or harm to the public?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?

5. Chapter 55 of the UKBA's *Enforcement Instructions and Guidance* states that detention "must be used sparingly, and for the shortest period necessary". It also explains that a person who has an appeal or representations outstanding is more likely to comply with any conditions of release (and therefore be given bail), than one who is just awaiting

removal.

Bail

6. Bail is a means by which a person can be released from immigration detention. Bail can be granted either by a Chief Immigration Officer (CIO) or by an Immigration Judge at a hearing of the First-tier Tribunal (Immigration and Asylum Chamber). Anyone detained under immigration powers has the right to apply for bail if they have been in the UK for at least seven days.

7. There are four types of bail:

   - CIO granted bail;
   - Immigration Judge granted bail;
   - Police granted bail (see paragraph 25 below); and
   - A writ of Habeas Corpus which is an order to release the person held (see paragraph 26 below).

   This note concentrates on the first two types of bail mentioned above.

The Adviser's role

8. A few applicants may be in a position to apply for bail on their own behalf. However, most applicants will not be able to do so for a variety of reasons including language or emotional difficulties and/or not understanding the system. In such cases it is the adviser's responsibility to assist their client through this process.

Applications for CIO bail

9. Only Level 2 and 3 OISC regulated advisers are authorised to make applications for CIO bail.

10. Normally such applications require two sureties who are able to pledge significant sums of money to guarantee that the person will honour his bail conditions. Sureties are people who it is expected will keep in touch with the person if granted bail and will try to ensure that they do not break any conditions on which their bail is granted. Sureties should also

be prepared to offer an amount of money (called a recognisance) that may have to be paid into court if the person disappears. Anyone with valid immigration status can act as a surety. OISC regulated advisers must not act as surety under any circumstances as this could compromise their independence and present a potential conflict of interest, see *Code 15*.

11. There is no court hearing for CIO bail, and the decision on whether or not to grant the application is made by the CIO in his/her office.

12. The CIO can give their decision either orally or in a brief written statement. They must always both give reasons for their decision if they refuse the application and advise the applicant that they can apply to the First-tier Tribunal (Immigration and Asylum Chamber).

Applications for Immigration Judge Bail

13. Only Level 3 OISC regulated advisers are authorised to make bail applications to an immigration judge

14. This type of bail application must be made on the required application form which should be obtainable from staff at the prison or detention centre where the person is being held. Alternatively, it can be obtained by contacting the Immigration and Asylum Tribunal on 0300 123 1711 and asking for the form to be faxed to the place of detention or the adviser. At the same time the adviser can find out to which court the application form should be sent

15. Once the form has been completed it must be sent by fax or a hard copy handed in to the court which will hear the application. Note that the Tribunal does not currently accept e-mailed applications. Once the application is received by the court, the court within three working days will send the applicant notification of the date of their bail hearing.

16. While not legal requirements, for this type of bail application to have any chance of success the applicant usually needs to be able to provide an address where he/she can stay if released and have one or two people prepared to act as sureties for them (see paragraph 9 above and paragraphs 18 and 19 below).

17. In completing the bail application form the adviser must ensure that they explain why the detention is unreasonable and/or unnecessary, describe the applicant's ties to the UK, if any, and explain why the applicant will not abscond if granted bail. If applicable, the

adviser should emphasise in the application how the applicant has complied with the authorities in the past.

18. In addition, the following should also be included, as appropriate:

- the length of the detention;
- reasons why the applicant cannot be removed;
- the speed and effectiveness of steps taken by the UKBA to take enforcement action against the applicant
- the detrimental effect of detention upon the applicant and/or their family; and
- the risk or lack of any risk that the applicant will commit criminal offences, if released.

19. The bail application will be heard by an Immigration Judge. If there are sureties, they must come to the hearing. They should bring with them to the hearing suitable evidence of their identity, immigration status, income and assets (e.g. bank statements and/ or work payslips for the last three months to show that any money that they are offering is available). If the proposed surety only has limited leave to remain in the UK, they should bring evidence of when their leave expires. While the absence of such evidence is not fatal at a bail hearing, it may affect the weight an immigration judge attaches to their oral evidence.

20. Potential sureties should be interviewed in order to discover if a Home Office security check will reveal any adverse information that may jeopardise the bail application. It is unlikely, for example, that a surety with a criminal record would be acceptable or one suspected of involvement in helping immigration offenders. Also, it is important that sureties are made fully aware of the obligations that may be placed on them if the person is granted bail. As there is the potential for a conflict of interest between the applicant and the surety, advisers are strongly advised to suggest to the surety that they may wish to take independent legal advice before agreeing to act.

21. If the Home Office opposes bail, their Presenting Officer will produce a bail summary giving the reasons why. The adviser should be given a copy of that summary and be able to challenge anything in it which they think is incorrect or unreasonable. UKBA policy states that the bail summary should be faxed to the applicant and the applicant's representative the day before the hearing.

22. The judge may question anyone present and, when each side has put their case, will then decide whether or not to grant bail and, if so, on what conditions.

23. If bail is granted conditions will be attached to the applicant's release such as reporting regularly to the police or to an Immigration centre or living at a particular address. The applicant may be required as a condition of their release to agree to being electronically tagged to ensure that they comply with a curfew condition. If the applicant breaks any of their bail conditions they may immediately be detained.

24. If bail is refused the applicant will not be released. The adviser and the applicant should both receive a written statement giving the reasons why bail was refused. The applicant can make another bail application after 28 days. If the applicant's circumstances change before then because, for example, they acquire a confirmed address or a surety, they can apply immediately.

Breaches of reporting conditions

25. If bail is granted, but the person fails to comply with the conditions on which it has been given, both they and their sureties risk losing part, or all, of the monies they have pledged. The person bailed also runs the risk of being detained because an IO or a police officer has the power to arrest and detain any person that they reasonably believe to be in breach, or likely to breach, their bail conditions. If re-detained under these circumstances the chances of a successful fresh application for bail are greatly diminished.

Police bail

26. If the person is in police detention, an application for bail to the custody sergeant may be made under the Police and Criminal Evidence Act (PACE) 1984. Under PACE the police have power to release a person, who has not been charged, on bail. This is deemed to be a release on bail in accordance with sections 3, 3A, 5 and 5A of the Bail Act 1976. Such detention is generally through police investigations into criminal activity and outside the work of regulated immigration advisers.

Habeas corpus

27. Only those qualified to appear and with rights of audience under the Legal Services Act 2007 are allowed to make a Habeas corpus application to the High Court. OISC regulated advisers cannot make such an application. The application is for a judicial review of the Government's decision to detain a person or to ask the court to issue a writ of Habeas Corpus to end a person's detention. For more information on this subject can be found in the BID handbook, `How to Get out of Detention', and the BID/ILPA publication, 'Challenging Immigration Detention: Best Practice Guide''.

Other Methods - Temporary admission, temporary release and restriction orders

28. Temporary admission, temporary release and restriction orders are all methods of obtaining detainees their freedom. Temporary admission is a power that normally is exercised by an IO instead of detaining a person. Temporary release is a power exercised by an IO to release a person who is being detained. Those under restriction orders are those who would otherwise be detained under the authority of the Secretary of State (i.e. those liable to deportation) instead of an O.

29. It is always possible to apply to the UKBA to consider the temporary admission of a person who is being detained under immigration powers. Advisers, once instructed, should try to speak with the official dealing with the case, requesting the reasons for detention. Advisers should attempt to address the criteria for detention (see paragraph4 above) and explain why detention is inappropriate or explore alternatives. It is wise for advisers to ensure that suitable accommodation is available for the detainee as this is a factor that would make release more likely. If release is not secured through a telephone call, advisers should write to the official requesting temporary admission and asking for written reasons for the detention.

30. If temporary admission is granted, the applicant will be given an IS96 form setting out the conditions of admission. It is usual that the release will be subject to conditions such as residence at a particular address and regular reporting to the police or the UKBA.

31. Employment restrictions are also generally imposed, although this is usually not the case with illegal entrants and overstayers. Advisers must stress to their clients the need to

abide by the terms of their conditions, as failure to do so may lead to the withdrawal of temporary admission and re-detention. If the conditions imposed are found to be too onerous, advisers can apply, if instructed, to the same authority to change them.

Some useful links and guides are listed below that may assist in bail applications and aid those subject to immigration detention:

UKBA Enforcement Instructions and Guidance - Detention and Removals http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/

Immigration Directorates' instructions - detention and detention policy in port cases http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idichapter31detention/section1/sec1-detention-policy-port.pdf?view=Binary

UKBA instructions on detention services:

http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/detention-services-orders/

Operating standards for immigration removal centres

http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/immigrationremovalcentres/

Bail Guidance for Immigration Judges

http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/bail-guidance-immigration-judges.pdf

Information for Detainees - Useful forms and the BID bail handbook

http://www.biduk.org/433/how-to-get-out-of-detention/useful-forms-and-the-bid-bail-handbook.html

Challenging Immigration Detention – A best practice guide- ILPA/ Law Society/ BID (2003)

http://www.ilpa.org.uk/data/resources/13274/bpg_challenging_detention.pdf