SECTION D - OTHER FACTORS

Chapter 36 - Extenuating circumstances

36.1 Policy

It is the policy of the Department to remove those persons found to have entered the United Kingdom unlawfully unless it would be a breach of Refugee Convention or ECHR or there are compelling reasons, usually of a compassionate nature, for not doing so in an individual case.

Compassionate factors must also be taken into account when detention is being considered (see chapter 38).

36.1.1Illegal entrants and persons subject to administrative removal action under section 10 of the 1999 Act

Full account must be taken of all relevant circumstances before initiating enforcement action in illegal entry and section 10 cases.

The factors to be considered are the same as those in paragraph 364 of the Immigration Rules (HC 395), which are outlined in 36.1.2 and described more fully from 36.2 to 36.10.

36.1.2Factors to be taken into account when deciding whether deportation or administrative removal is appropriate

Factors to be considered before a decision to deport is taken are set out in Paragraph 364 of the Immigration Rules (but see also Section C - Asylum and 36.10 - EC Association Agreements). The same factors must be taken into account for s.10 cases (para 395C of the

rules). As a matter of practice, these same factors are also taken into account when considering the removal of an illegal entrant. These are interpreted as follows:

- Age - A person will normally be considered for deportation if he is aged between 16 and 65 but the younger or older a person is, the more weight might be attached to age as a compassionate factor;

- Strength of connections with the UK - Family ties (including marriage and relationships akin to marriage – see 36.3 and 36.4) and other connections such as business or employment must be examined;

- Personal history - This includes character, conduct and employment record;

- Relationship - The parties should not be involved in a consanguineous relationship with one another.

- Domestic circumstances - Besides family ties as outlined above, this includes aspects such as housing, and whether anyone relies on the person for physical, financial or emotional support. Enforced removal will not normally be appropriate where there are minor dependent children in the family who have been living in the UK continuously for seven or more years; (See DP 5/96)

- Criminal record - A previous unspent conviction will be considered but the seriousness of the offence (e.g. offences involving drugs, violence against the person or immigration offences) will be balanced against any mitigating factors

- Compassionate circumstances - Any compelling or compassionate circumstances will be considered, with the gravity of the circumstances being given due weight;

- Representations - Must always be considered.

36.2Long residence

Where a person has accumulated a period of 10 years continuous lawful residence or 14 years continuous residence (whether lawful or not), ILR should normally be granted by the relevant casework section. Factors to be taken into consideration include:

- age;
- strength of connections in the UK;
- personal history, including contracting a sham marriage to evade immigration control.

Less weight should be attached to these factors with the passage of time.

In calculating continuous residence, short absences abroad of up to around 6 months may be ignored, as ties with the United Kingdom will not have been severed.

36.2.1 Procedures when detecting an offender with long residence

Interview under caution to establish the person is an illegal entrant or subject to administrative removal action. (The last entry into the United Kingdom is the appropriate one; however, long residence is calculated from the first entry).

In the interview, ascertain:

- any close ties with the United Kingdom;
- immigration history including any absconding, overstaying, false identity, false papers;
- periods of absence from the country - why and where they were taken;
- whether residence has been lawful or unlawful;

- any criminal record;
- family ties including settled spouse, children;
- any sham marriages entered into to evade immigration control;
- property owned;
- domestic circumstances;
- whether the person is involved in a consanguineous relationship;
- employment history.

Follow instructions for service of notice of illegal entry (Chapter 7) or notice of administrative removal (Chapter 11).

It has been established in the Courts in the case of ***Fadeyi*** that service of illegal entry notices "stops the clock" for the purposes of calculating the amount of time present in the UK in illegal entry cases. The length of residence should therefore be calculated only up to the date of service of notices.

NB Refer all long residence cases to the relevant casework section to assess the circumstances and to decide if removal is proportionate

36.3 Marriage to a British citizen or a person settled her

The policy guideline DP3/96 for such marriages came into force on 13 March 1996 (see 36.3.2). Unlike the previous policy, DP2/93, it does not provide for the consideration of common-law relationships akin to marriage.

Any relationship that was made known to the Department **on or before** 13 March 1996 must be considered under the previous policy DP2/93 (see 36.3.1).

In either case, a relationship that post-dates initial enforcement action should not avail the person, except in the most exceptional compassionate circumstances. Detailed enquiries in order to ascertain whether the marriage is genuine and subsisting should not normally be undertaken when marriage post-dates initial enforcement action. The onus is on the subject to advance any compelling compassionate factors that he wishes to be considered, including why the settled spouse could not live outside the United Kingdom, which must be supported by documentary evidence. Initial enforcement action includes previous removal as an illegal entrant, person subject to administrative removal or deportee, and voluntary or supervised departures.

After the ***Urmaza*** judgement, in the case of a seaman deserter, initial enforcement action means after notices have been served and not after deserting ship.

Current legal advice (being updated as of June 2005) is that the decision to remove an illegal entrant who has failed to meet the criteria of DP 3/96 should not contravene Article 8 of the ECHR (the right to respect for family life). Moreover the Court of Appeal considers DP3/96 to be badly drafted as it only deals with deportation and excludes mention of illegal entrants and sec 10 offenders. In all cases the spouse should be given the opportunity to accompany the subject (at public expense if the family intend making their home abroad). If it is clear, however, that the illegal entrant intends to apply from abroad for an entry clearance to return to the United Kingdom, he may be removed alone. The position for deportation cases is different, as a person who is deported cannot seek to return until the deportation order is revoked. For these cases we need to weigh up the reasons for the deportation against the Breach of Articles to see if deportation action is appropriate.

36.3.2 Procedures when dealing with an offender whose marriage (or common-law relationship akin to marriage) is to be considered under DP2/93

- The relationship must have been made known to the Department on or before 13 March 1996. Establish if the relationship post-dates initial enforcement action. If it does, it should not in itself and in the absence of the most exceptional compassionate circumstances, avail the offender. Report the circumstances on form IS126 and send to the relevant casework section for authority to remove.

- If the relationship pre-dates initial enforcement action, establish if it is genuine and subsisting, using either a home visit or an office interview, and by undertaking any necessary checks. If a home visit does not establish whether the relationship is genuine, an office interview will be necessary and vice versa. If satisfied that it is genuine and subsisting, it is not appropriate to serve notices. Report the circumstances on IS126 and send to the relevant casework section.

- If the relationship is not genuine and subsisting, interview the person under caution and serve notices if appropriate. (The settled partner should not be interviewed under caution unless suspected of an offence). Establish the circumstances, including any other compassionate factors to be considered and send a comprehensive report to the relevant casework section on form IS126e for authority to remove.

NB If a person is an offender, the relationship pre-dates initial enforcement action and falls to be considered under DP2/93, it <u>must</u> be established satisfactorily whether or not it is genuine and subsisting as the removal of the offender can only take place once the relationship has been considered.

An illegal entrant or person served with notice of administrative removal has no entitlement to make an application for leave to remain under the Immigration Rules but they can make an HR application, which must be considered and addressed. Thus,

where the marriage does not avail, it may be appropriate for a letter to be sent to the representatives by the relevant casework section.

36.3.3 Procedures when dealing with an offender whose marriage falls to be considered under DP3/96

- Establish if the marriage post-dates initial enforcement action. If it does, it should not in itself and in the absence of the most exceptional compassionate circumstances, avail the offender. Report the circumstances on form IS126 and send to the relevant casework section for authority to remove.

- Where marriage pre-dates enforcement action, establish whether the marriage is genuine and subsisting; (whilst the marriage in itself does not avail the person under DP3/96, policy requires that all relevant circumstances are considered. If the case is challenged at a judicial review hearing, it must be shown that the marriage has been fully considered);

- Establish the circumstances of the settled spouse, the length of time in the UK and any close ties (and whether undue hardship would be caused if accompanying the offender on removal);

- Establish the presence here of any children of either partner, their ages, the length of time they have lived in the UK and whether another parent has regular access to them;

- Take note of any other information that the couple provides as evidence of compassionate factors to be considered, such as ill health;

- Take note of any criminal convictions;

- If the relationship is not genuine and subsisting, interview under caution and serve notices if appropriate. Report all the circumstances to the relevant casework section for authority to remove.

Where the person has a genuine and subsisting marriage with someone settled here and the couple have lived together in this country continuously since their marriage for at least two years before the commencement of enforcement action and it is unreasonable to expect the settled spouse to accompany him on removal, the marriage may avail him, as may the presence of children with the right of abode, or serious health problems in the family. Report the circumstances on IS126 and send to the relevant casework section.

The commencement of enforcement action "stops the clock" in terms of the two-year qualifying period. No further time may then be accrued to meet this criterion. It is important, therefore, to serve notice as soon as possible after notification of a marriage.

36.3.4 Procedures when a British spouse exercises Treaty rights in another EU country

The European Court of Justice ruling in the case of ***Akrich***, supports the UK`s view that third country nationals who are illegally in the UK, and marry British citizens (who are not dual nationals of another EEA state), should not be able to use EC law to remain here. It will allow the UK to continue to apply its national immigration legislation in such cases.

If the British spouse of an offender states an intention to exercise EU Treaty rights in another Member State, and the offender intends to accompany, he should be given every opportunity to apply for entry to that country. This may entail returning his passport and deferring removal directions.

Report the circumstances to the relevant casework section and monitor the progress of the visa application, which can take several months (although, in non-detained cases, removal directions should only be deferred for a month at a time).

Review detention, although the situation does not preclude detention. Each case should be assessed on its individual merits.

36.3.5 Non-EEA spouses of UK nationals who have exercised Treaty rights in another Member State

As the result of the judgement of the European Court of Justice in the case of ***Surinder Singh***, the non-EEA spouse (or other family member) of a British citizen who returns to the UK after exercising a Treaty right in another EEA state as a worker may be entitled to enter the UK under European Community law rather than the Immigration Rules. Non EEA applicants who benefit from ***Surinder Singh*** are issued with a family permit endorsed "Family member of EEA national", valid for 12 months and their passport endorsed with an open date stamp. They are then advised to apply to the relevant casework section for a residence document.

If such a person is encountered and there are doubts as to his status, refer to the European casework group.

36.4 Common-law relationships

Marriage policy in DP2/93 applied equally to common-law relationships akin to marriage. Any common law relationship that was brought to the notice of the Department on or before 13 March 1996 should be considered under policy DP2/93 (see 36.3 and 36.3.1). Its successor, DP3/96, did not extend consideration to common-law relationships akin to marriage and such relationships, if they came to notice after 13 March 1996, no longer availed offenders.

36.4.1 Procedures when dealing with an offender who is the unmarried partner of a person present and settled in the UK

Enforcement action should not normally be initiated in the following circumstances:

Where the subject has a genuine and subsisting relationship akin to marriage with a person who is present and settled here and the couple have lived together in this country for at least two years before the commencement of enforcement action

and

any previous marriage (or similar relationship) by either partner has permanently broken down

and

it is unreasonable to expect the settled partner to accompany the subject on removal

and

the couple are not involved in a consanguineous relationship with one another.

Where a person makes representations after the commencement of enforcement action, on the basis of a common law or same sex relationship, the normal course will be to proceed to enforcement action unless it is clear that the couple had lived together for 2 years or more before enforcement action commenced and that the parties are not involved in a consanguineous relationship with one another.

As with cases involving marriage any compelling or compassionate circumstances advanced by the couple must be considered. Similarly, the commencement of enforcement action "stops the clock" in terms of the two-year qualifying period (see 36.3.2).

36.5 Marriage to an EEA national

Austria, Ireland (Eire), Belgium, Luxembourg, Denmark, The Netherlands, Finland,
Portugal, France, Spain, Germany, Sweden, Greece, United Kingdom, Italy,
Iceland, Norway, Liechtenstein, Cyprus, Czech Republic, Estonia, Hungary,
Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia.

Marriage to an EEA national who is exercising Community law rights gives a family member such as a spouse the same rights to live and work in the United Kingdom as the

EEA national. This right to residence exists as a right; it is not necessary to hold a residence permit to prove this right.

The ***Diatta*** judgement held that a family member only loses this right to residence if the EEA national leaves the country permanently, or the EEA national no longer has a right of residence in the United Kingdom, or on divorce (not just separation).

The ***Baumbast*** judgement found that where children of EEA nationals have a right to remain in the Member State for the purpose of continuing their education, their third country national parent/carer also has a right to remain if that is necessary for the exercise by the children of their rights. This means that the third country national spouses of EEA national workers in the UK would have the right to remain here following their divorce from the EEA national or if the EEA national ceased work here, provided that they were the principal carer of the EEA national's children in education here. That right would last until the end of the children's studies at secondary level

A non-EEA spouse who is party to a marriage of convenience has no right to be treated as a family member. A marriage of convenience is a sham marriage undertaken solely for immigration purposes. The couple have no intention from the outset of the marriage of living together as man and wife in a settled and genuine relationship. It is not enough to say that the couple are not living together at any given time, it must be proved that they **never lived or intended to live together**.

The right to residency should not be confused with leave to enter or remain. It is an automatic right upon marriage to an EEA national.

36.5.1 Procedures when dealing with an offender who has married an EEA national

If an offender who has already had notices served marries an EEA national, refer to the European casework group . Do not initiate removal action.

If it is suspected that the marriage is one of convenience, do not arrange a home visit or office interview unless requested by the European casework group.

The European casework group generally undertakes any marriage interview, but if a person attends an Enforcement Office for interview, or is encountered at a police station, marriage enquiries may be made of the person and the spouse, if present, if they are willing to be interviewed. (Notice of illegal entry/administrative removal may be served if the marriage is one of convenience, but refer to the European casework group).

We are unable to restrict the movement of the family member of a genuinely married EEA national by detaining them or requiring them to live at a given address.

In most cases it will be appropriate to release the subject from detention. Temporary release should not be authorised and reporting instructions should not be amended in this way unless we have seen:

- Evidence of EEA sponsor's nationality
- Evidence of relationship (e.g. marriage certificate, birth certificate etc)
- Evidence that the EEA sponsor is exercising a Treaty right

If any doubts exist as to what action to take, refer to the European casework Group.

36.6 Procedures when dealing with an offender who has married a person with ELTR/HP/DL/LOTR*.

- ELTR – Exceptional leave to remain
- HP – Humanitarian Protection
- DL – Discretionary Leave
- LOTR – Leave Outside the Rules

There is a "family reunion" policy whereby an existing spouse can come to the United Kingdom to join his/her partner who is settled in the United Kingdom .

The "family reunion" policy does not apply to new spouses, i.e. the marriage must have taken place before the person granted asylum left the country of his/her former habitual residence in order to seek asylum, nor do they fall to be considered under the terms of DP3/96 or DP2/93 as these apply to persons settled in the UK.

If the spouse of a person with leave is detected as a suspected illegal entrant or person subject to administrative removal action:

- Interview under caution. Serve notice if appropriate (IS151a);
- Establish when the couple met and when they married;
- Establish if there are any other compassionate circumstances to consider;
- Report the circumstances to the relevant casework section on form IS126e for authority to remove. Caseworkers will consider any Article 8 issues arising.

If the spouse of a person with leave is detected in another capacity, or the spouse has ILR following the grant of leave, report the circumstances to the relevant casework section on IS126.

Try to establish the reasons behind the grant of leave. In cases where the marriage is genuine and subsisting, it is important to establish that further leave would not be granted if a further application were made. If it were likely further leave would be granted, then enforcement action against the spouse might not be appropriate. (However, this may be best considered by the relevant casework section).

36.7 Children

See also 3.14 and Chapter 14.

36.7.1 Children as dependants

The presence here of children of either the offender or his partner must be taken into account when deciding whether removal is appropriate. Removal will not normally be carried out where there are minor dependent children in the family who have been living in the UK continuously for seven or more years. (DP5/96 refers). Establish the following and report to the relevant casework section:

- the children's age;
- ties with the natural parent; how often the children see their natural parent; whether any maintenance is paid towards the children's upkeep;
- whether the children could easily adapt to a life abroad; whether such a move would cause hardship or put their health at risk;
- whether the children have the right of abode; the nationality of the children.

The above factors are balanced against the parents' immigration history and any criminal record.

Cases involving children who are British or have the right of abode here require the authority of a senior caseworker in the relevant casework section for removal.

36.8 Elderly persons

Policy has changed with regard to our ability to remove people aged 65 and over who otherwise have no basis of stay in the United Kingdom.

Previous policy was that, as a general rule, we did not enforce the departure of those aged 65 or over. This policy had been interpreted by many as a blanket "age concession". There is now no specified upper age limit.

Ministers have agreed that a person's age is not, by itself, a realistic or reliable indicator of a person's health, mobility or ability to care for him/herself. Many older people are able to enjoy active and independent lives. Cases must be assessed on their individual merits.

Age is just one of several factors to be taken into account when considering a person’s enforced removal from the United Kingdom. Other factors include length of residence in the UK, strength of connections, domestic and other compassionate circumstances.

The onus is on the applicant to show that there are extenuating circumstances, such as particularly poor health, close dependency on family members in the UK, coupled with a lack of family and care facilities in the country of origin, which might warrant a grant of leave.

36.9 Medical problems

If a person's medical condition is advanced as a reason for delaying or discontinuing removal:

- ascertain full details of the condition;
- obtain the person's signature on a consent form for access to his medical records if necessary;
- obtain a medical certificate;
- obtain a doctor's or hospital letter outlining the condition;
- ascertain from a doctor whether the person is fit to travel, or when he will be fit;
- ascertain if the person has anyone in his home country to provide any necessary care;
- check with the relevant country officer in CIPU to establish the likelihood of treatment being available in the person’s country of origin*;
- refer to the relevant casework section.

Other factors to consider are the availability of treatment in the person's home country and an assessment of any diminution of life expectancy if removal takes place.

Where a family member of the offender suffers from a medical condition and this is advanced as a reason for delaying or discontinuing with the offender's removal, ascertain the same information.

*A report or email to the country officer should include details of the specific medical condition(s) suffered by the person and the treatment he is being given or has been prescribed. A doctor’s letter would normally suffice for this purpose and should include the prognoses if treated or untreated. The country officer should then be able to advise whether the medication or treatment is available (and affordable) in the country of origin. The country officer may in some circumstances be in a position to provide immediate advice; alternatively enquiries will be made abroad via the FCO

36.9.1 AIDS/HIV positive cases

Cases involving persons with AIDS or who are HIV positive are particularly sensitive. However, the fact a person has AIDS or is HIV positive is not, in itself, a bar to removal. Representations should be dealt with in the same way as for any other medical condition, and enforcement action may be pursued unless medical evidence available is sufficient to satisfy the department that the person is not fit to travel.

If an offender who has AIDS or is HIV positive is detected, ask him to provide a letter from his consultant confirming:

- he has AIDS or is HIV positive;
- his life expectancy;
- the nature and location of the treatment he is receiving;
- his fitness to travel if required to leave the country.

The UK's obligations under Article 3 of the ECHR will be engaged in all medical cases where the following requirements are satisfied:

- the UK can be regarded as having assumed responsibility for a person's care,

and

- there is credible medical evidence that return, due to a complete absence of medical treatment in the country concerned, would significantly reduce the applicant's life expectancy

and

- subject them to acute physical and mental suffering

Case law has confirmed that the circumstances in which an individual can resist removal on Article 3 related medical grounds will be exceptional.

A person who is subject to removal cannot in principle claim any entitlement to remain in the UK in order to continue to benefit from medical, social or other forms of assistance provided. Where similar treatment may not be available to a person in their home country because of its cost, this does not amount to a claim of inhuman or degrading treatment. However, to attempt to remove someone to a country where there is a complete absence of treatment, facilities or social support which could result in an imminent and/or lingering death and cause acute physical and mental suffering would be very likely to engage our obligations under Article 3.

Each case is considered on its individual merits. Notices may be served if appropriate but then refer to the relevant casework section. Where a person is obviously very ill, it may not be appropriate to serve notices.

36.10 EC Association Agreements (ECAA)

EC Association Agreements with Poland and Hungary came into force on 1 February 1994. Agreements with Bulgaria, the Czech Republic, Romania and Slovakia came into force on 1

February 1995 and agreements with Lithuania, Latvia, Estonia and Slovenia provided establishment clauses which came into force on 31 December1999. Since the accession to the European Union of the other states on 1 May 2004, these agreements are now only relevant to Bulgaria and Romania. The agreements, provide for nationals of Bulgaria and Romania to be treated on par with EEA nationals for the purposes of establishing themselves in business in the member states i.e. becoming self employed as a company, sole trader or in partnership..

The EC agreements specify, however that these nationals may only benefit from the Agreements for the purposes of establishing themselves in business. Their entitlement may be limited on the grounds of public policy, public security or public health and they are still subject to control with the Immigration Acts and Rules. See Chapter 6 Section 2 of the IDIs.

A person seeking admission for the purpose of establishing himself in business or self-employment must hold a valid entry clearance for this purpose. . The European Court of Justice Judgement in Gloszczuk stated that –it was "compatible with Article 58(1) of the Association Agreement for the competent authorities of the Host Member State to reject an application made under Article 44(3) of that Agreement on the grounds that, when the application was made, the applicant residing illegally within its territory." Consequently the UK can maintain our position that those in the UK illegally cannot benefit from establishment provisions of the Association Agreements with the CEE countries.

Any applicants who are in the UK illegally should be served with either notice of illegal entry or administrative removal and their ECAA application can be refused, by the relevant casework section on the grounds that they are in the UK illegally.

Where a person claims on interview that he has established himself as a businessman in accordance with the ECAA, report the facts to a casworker in the EC Association Team. in Sheffield.

Take care when interviewing to ensure that this is not disguised employment. Section 10 (WIB) papers may be served on individuals engaging in PAYE work whether the

application to remain under ECAA is outstanding or not. However evidence of PAYE work must be clear and unambiguous. Report any possible PAYE work, whether papers are served or not, to the EC Association Team.

Chapter 37 – Delegated authority and designated Inspectors

37.1 Illegal entry cases

(See also 9.2.) The normal level of authority required for the removal of an illegal entrant is Inspector or Senior Caseworker. Such authority will come from the relevant casework section except for those cases where enforcement Inspectors have delegated authority (see 37.1.1 below) or those requiring ministerial authority (see 9.2.3).

37.1.1 Scope of delegated authority – illegal entry cases

All enforcement Inspectors may authorise the removal of illegal entrants where:

- the offender's length of stay is under ten years;
- the immigration history is not complicated;
- there are no known ties in the UK ;
- the spouse and children are not settled in the UK;
- there are no known compelling or compassionate circumstances; and
- the factors set out in paragraphs 364-367 of the Immigration Rules have been taken into account (these are outlined in 36.1.2).

In all other cases, the removal of an illegal entrant must be authorised by the relevant casework section.

37.1.2 Cases where delegated authority does not apply

- Where the person's home country is or is suspected of being a place of upheaval, report the circumstances to the relevant casework section;

- In cases where an offender is married with a spouse who is settled in the UK and the marriage is genuine and subsisting, report the circumstances to the relevant casework section;

- In cases where the offender has one or more children here who are settled or have the right of abode in the UK, report the circumstances to the relevant casework section;

- In cases where the illegal entrant has been in the UK for more than 10 years and the immigration history is not straightforward, report the circumstances to the relevant casework section;

- In cases where the offender is under 16, report the circumstances to the relevant casework section;

37.2 Section 10 administrative removal cases

Although the authority to remove a person under section 10 of the 1999 Act rests with an IO, in practice the levels of authority to be used in administrative removal cases reflect those set out for authorising the removal of illegal entrants. The guidance set out in 37.1 above should therefore be applied in all administrative removal cases.

37.3 Deportation cases

In 1990, the House of Lords decided that members of the Immigration Service could take decisions on behalf of the Secretary of State in what were then section 3(5)(a) deportation cases – i.e. overstayers and workers in breach. An Immigration Service instruction which

followed allowed for the Deputy Chief Inspector - Enforcement (a post which no longer exists) and certain designated Inspectors to make the following decisions:

- the service of a notice of intention to deport
- the detention or restriction of a person served with a notice of intention to deport
- the supervised departure of a person served with a notice of intention to deport.

Decisions could only be taken under devolved authority where there was clear evidence of overstaying or working in breach of conditions, there was no lengthy or complicated immigration history and there were no significant compassionate circumstances.

On 2 October 2000, administrative removal (section 10 of the 1999 Act) replaced deportation in all circumstances where Inspectors had devolved authority to serve an APP104 (now ICD 1070 series forms, see chapter 16). Therefore, enforcement offices will now only serve a notice of intention to deport when requested to do so by the relevant casework section following a decision taken in the relevant casework section (see chapter 16).

There may still be circumstances where decisions relating to the detention or restriction, or supervised departure of a person served with an APP104 under devolved authority can still be taken by designated Inspectors, and they are listed at 37.3.1 below. In addition to the designated Inspectors,such decisions may also be taken by Immigration Service Directors, Deputy Directors and Assistant Directors responsible for enforcement issues.

37.3.1 Designated Enforcement Inspectors

MR Terry DUFFY (Becket House)

MR Bob BENTLEY (Harwich)

MR Tony McCORMACK (Portsmouth)

Ministers have agreed that additional HMIs with a minimum of 12 months operational experience and suitable relevant training (to be arranged by IND College) can also take

decisions relating to the detention or restriction, or supervised departure of a person served with a notice of intention to deport.

Chapter 38 - Detention/Temporary Release

38.1 Policy

General

In the 1998 White Paper "Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum" 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.

These criteria, which were restricted in the 2002 White Paper "Secure Borders, Safe Haven", present the Government's stated policy on the use of detention. To be lawful, detention must only be based on one of the statutory powers but must also accord with this stated policy (for detention at Oakington, see 38.3.1).

Since the introduction of the Fast Track Process at Harmondsworth in March 2003, the former 'Oakington' detention criterion has been widened so as to be capable of applying to a fast track process at any removal centre. It now simply states the reason for detention as being 'as part of a fast track asylum process'.

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 routine use of prison accommodation to hold detainees ended in January 2002 in line with the Government's strategy of detaining in dedicated removal centres. Nevertheless, the Government also made clear that it will always be necessary to hold small numbers of detainees in prison for reasons of security and control.

38.1.1 Detention and the Human Rights Act

The Human Rights Act (HRA) came into force on 2 October 2000. We are satisfied 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 to prevent unauthorised entry or 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 preventing unauthorised entry or removal of the individual concerned is <u>not</u> compatible with Article 5.
b) Where detention is linked to removal 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 38.8.4 for detailed information on the detention of families.

38.2 Power to detain

The power to detain an illegal entrant, seaman deserter, persons 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 and section 62 of the Nationality, Immigration and Asylum Act 2002. Paragraph 16(2) 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 senior caseworker level in the Criminal Casework Team (CCT) (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).

38.3 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.
6. 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, 38.6- procedures and 38.8 – special cases

38.3.1 Oakington

Since March 2000 asylum applicants may be detained at Oakington where it appears that their claim is straightforward and capable of being decided quickly. Detention for this purpose is commonly referred to as being under the 'Oakington criteria'. Detention for a short period of time to enable a rapid decision to be taken on an asylum/human rights claim has been upheld as lawful by the House of Lords [*Saadi et al*]

Oakington is a designated place of detention and any person could be detained there under Immigration powers for any of the published reasons for detention. Detention other than for fast track processing must be arranged via the normal process.

When officers come across a person who makes an application for asylum, they should consider whether he or she meets the Oakington criteria. All potentially suitable applicants

must be referred to the Oakington co-ordinator. The principal purpose of Oakington is to enable IND to deal quickly with straightforward asylum applications. People are detained in Oakington for about 7-10 days while their asylum application is considered. If the claim is determined as unfounded, some applicants will receive a non-suspensive appeal decision (ie certified as clearly unfounded) and will immediately be removed from the country. Of those with suspensive appeal rights, some might continue to be detained at Oakington, moved to a removal centre or granted temporary admission/release.

Those accepted into Oakington for a fast track decision will usually be from the one of the countries listed in regular instructions to staff, commonly referred to as the 'Oakington list'. There may also be certain types of claim form specific countries which are not considered straightforward and capable of being decided in the fast track timescales. Where this is so, the 'Oakington list' will state the exceptions. The following will usually be unsuitable for fast track decision making at Oakington, regardless of nationality.

- Any case which does not appear to be one in which a quick decision can be reached;
- Unaccompanied minors;
- Age dispute cases, other than those where their appearance **strongly** suggests that they are over 18 years. If assessed as over 18 by a CIO, form IS97M must served on the applicant and copied
- Disabled applicants, save for the most easily manageable;
- Pregnant females of 26 weeks and above;
- Any person with a medical condition which requires 24 hours nursing or medical intervention;
- Anybody identified as having an infectious/contagious disease;

- Anybody with physical and/or learning disabilities requiring 24-hou nursing care;

- Violent or uncooperative cases; for non-suspensive appeal nationalities, local enforcement offices (LEOs) should try and secure detention accommodation at an alternative removal centre and then refer to Oakington for them to be processed as a 'remote case';

- Those with criminal convictions, except where specifically authorised.

- Where detention would be contrary to published criteria.

38.4 Levels of authority for detention

Although the power in law to detain an illegal entrant rests with the IO, or the relevant immigration caseworker, in practice, an officer of at least CIO rank, or a senior caseworker, must give authority. Detention must then be reviewed at regular intervals (see 38.7).

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

The decision as to whether a person subject to deportation action should be detained under Immigration Act powers is taken at senior casework level in CCT. 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 at senior caseworker level in CCT. It should be noted that there is no concept of dual detention in deportation cases (see 38.10.3).

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 38.8.1);

- **Spouses**: initially, an Inspector, but if strong representations are made, Assistant Director (see 38.8.2);

- **Unaccompanied young persons, under 18 (whilst alternative care arrangements are made)**: initially, an Inspector/senior immigration caseworker 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 38.8.3;

- **Children of illegal entrants/deportees to be detained with their parent(s):**

either an Inspector or Assistant Director, preferably in advice of their detention see 38.8.4;

- **Detention in police cells for longer than two nights**: Inspector.

38.5 Detention forms

The Government stated in the 1998 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.

The forms IS 91RA "Risk Assessment" (see 38.5.1), IS91 “Detention Authority“ (see 38.5.2), IS91R "Reasons for detention" (see 38.5.3) and IS91M "Movement notification" (see 38.5.4) 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 IS91RA Risk Assessment

Once it has been identified that the person is one who should be detained, consideration should be given as to what, if any, level of risk that person may present whilst in detention. IOs should undertake the checks detailed on form IS91RA part A ‘Risk Factors’ (in advance, as far as possible, in a planned operation/visit when it is anticipated detention will be required).

The results of these checks should be considered by the IO along with information available regarding other aspects of behaviour (as detailed on the form) which may present a risk, and the conclusions regarding each aspect identified.

It is vital to the integrity of the detention estate that all potential risk factors detailed on this form are addressed, with the form being annotated appropriately. Conclusions should be recorded as to whether or not the individual circumstances may present a potential area of risk. Amplifying notes must be added in the ‘comments’ section as appropriate and the form must be signed and dated.

Once detention space is required the IS91RA must be faxed to the Detainee Escorting and Population Management Unit (DEPMU) (in the case of single adults) or the Management of Detained Cases Unit (MODCU) (for all other cases). The appropriate Unit will assess risk based upon the information provided on the IS91RA part A and decide on the detention location appropriate for someone presenting those risks and/or needs. The issue of an IS91

‘Detention Authority’ will be authorised with the identified risks recorded in the ‘risk factors’ section of this form. Risk assessments should also be completed on the appropriate forms for fast track cases.

In cases where the potential risk factors cannot be addressed in advance they should be undertaken immediately and the IS91RA part A despatched as above. However, it may not always be possible to do this if the potential detainee has, for example, been arrested by the police or picked up in the field and either an IO cannot immediately attend or the checks cannot be completed due to lateness of the hour. In such cases it will be appropriate to issue an IS91 to the police, as below, with the “risk factors” section of the form completed as far as possible. However, in such circumstances the IS91RA part A should be completed and forwarded to DEPMU as soon as possible and, in all cases, no later than 24 hours after entry into detention at the police station and always before entry into the IS detention estate is sought.

Risk assessment is an ongoing process. Should further information become available to the LEO which impacts upon potential risk (either increasing or decreasing risk) during a detainee’s detention, that information should be forwarded to DEPMU using form IS91RA part C. On receipt of this form (which can also be completed by other IS or removal centre management/medical staff) DEPMU will reassess risk and reallocate detention location as appropriate. Any alteration in their assessment of risk will require a new IS91 to be issued on which up-to-date risk factors will be identified. The LEO must fax this new IS91 to the detention location on receiving DEPMU’s reassessment of alteration in potential risk.

38.5.2 Form IS91 Detention Authority

Once DEPMU has decided on detention location they will forward an IS91RA part B to the detaining office detailing the detention location and the assessment of risk. This must be attached to form IS91 and served by the IO on the detaining agent. This allows for the subject to be detained in their custody under Immigration Act powers. The IO must complete the first three sections of the form, transferring the assessment of risk as notified by DEPMU onto section 3, complete the first entry of section 4 transfer records and sign and date the form on page 1. The detaining agent completes the further entries on section 4 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 IS91 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. The exception to this is cases where there is alteration in risk factors when DEPMU will authorise the issue of a new IS91, which should be sent to the detention location to be attached to the original form. Where there is a change in the detaining agent, for example from the police to the escort contractor, 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.

IS91s are to be returned by the final detaining authority to the Detention Cost Recovery Unit (DCRU) of the Finance and Planning Group (FPG), 6th Floor, Green Park House. Any IS91s that are returned to an enforcement office at the end of a period of detention must be forwarded to DCRU without delay.

38.5.3 Form IS91R Reasons for Detention

This form is in three parts and is served on the person on detention. The IO must complete all three sections of the form. The IO must specify the power under which a person has been detained, the reasons for detention and the basis on which the decision to detain was made. The detainee must also be informed of his bail rights and the IO must sign, both and the bottom of the form and overleaf, to confirm the notice has been explained to the detainee (using an interpreter where necessary) 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 six 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
- I am satisfied that your application may be decided quickly using the fast track procedures

Fourteen factors are listed, which will 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
- On initial consideration, it appears that your application may be one which can be decided quickly
- You have used or attempted to use deception in away 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
- 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
- I consider this reasonably necessary in order to take your fingerprints because you have failed to provide them voluntarily

38.5.4 Form IS91M Movement Notification

This form will only be used in very few cases where neither the detention nor the movement of a detainee is being arranged via DEPMU – for example (in South East District) cases in Dover Harbour Board Police Station. The form must be completed and used to notify both the detaining agent and the escorting authority of the proposed move.

38.6 Detention procedures

38.6.1 Procedures when detaining an illegal entrant or person served with notice of administrative removal

- Obtain the appropriate authority to detain;
- issue IS 98 and 98A (bail forms) and advise the person of his right to apply for bail;
- conduct 'risk assessment' procedures as detailed in paragraph 38.5.1
- complete IS91 in full for the detaining authority;
- complete and serve form IS91R on the person being detained;
- confirm detention to DEPMU as soon as possible and they will allocate a reference number;
- complete IS93 for the port/local enforcement office casework file;

- always attach a ‘detained’ flag, securely stapled, to the port/local enforcement office casework file;

- fax IS158 (Notification of illegal Entrant to MODCU (Tracking Team)

- review detention as appropriate.

38.6.2 Procedures when detaining a person served with a notice of intention to deport (APP104/ICD 1070 series)

Follow procedures as outlined in 38.6.1 but use the following forms:

- DO2 is completed by the Duty Inspector and sent to the relevant immigration caseworker section and MODCU (Tracking Team) within 24 hours.

38.6.3 Changing place of detention

If DEPMU arrange for the transfer of a person in detention, DEPMU must inform the port/LEO, and in turn, the port/LEO must inform the relevant immigration caseworker of any changes in place of detention.

38.7 Detention reviews

Initial detention must be authorised by a CIO or Inspector (see section 38.4). Continued detention in all cases of 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 a 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. MODCU will request an application for long-term detention at day 20 prior to the Inspector 28 day* review. MODCU may override the decision to maintain detention if it is deemed

necessary based on the information contained in the detention application. If the case is accepted into long-term detention MODCU will take over responsibility for conducting the detention reviews and, in asylum and/or human rights cases will ask for the files to be transferred with casework responsibility also transferring to MODCU. In other cases the casework responsibility will remain with the detaining office.

The SEO in MODCU reviews detention at the one 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 the Deputy Director, and at 12 months and over by the Chief Inspector. These levels of authority are under review.

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 IS might be vulnerable.

*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 appraise 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.

38.8 Special cases

38.8.1 Detention of women

A woman may only be detained with the authority of an Inspector, because of the limited detention space available for women. This excludes females transferring to Oakington for the fast track process. Pregnant women should not normally be detained. The exception to this general rule are where removal is imminent and medical advice does not suggest confinement before then, or, for pregnant women for less than 26 weeks, at Oakington as part of the fast-track process.

38.8.2 Spouses of British citizens or EEA nationals

Immigration offenders who are living with their settled British spouses may only be detained with the authority of an Inspector/senior caseworker in the relevant caseworking 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.

If an offender is married to an EEA national, detention should not be considered unless there is strong evidence available that the EEA national spouse is no longer exercising treaty rights in the UK, or if it can be proved that the marriage was one of convenience and the parties had no intention of living together as man and wife **from the outset of the marriage.** For further guidance, refer to section 36.5 and 36.5.1.

38.8.3 Young Persons

Unaccompanied minors (ie persons under the age of 18) must only ever be detained in the most exceptional circumstances and then **only normally overnight**, with appropriate care, whilst alternative arrangements for their care and 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.

In all cases, unaccompanied young persons may only be detained with the authority of an Inspector/senior caseworker in the relevant caseworking 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 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 38.11).

38.8.3.1 Persons claiming to be under 18

Sometimes people over the age of 18 claim to be minors in order to prevent their detention or effect their release once detained. . 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 (see 38.8.3) 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, and the appropriate entry made is in section 1 of the IS91. In borderline cases it

will 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.

38.8.4 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). Families, including those with children, can be detained 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 must 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 detention accommodation should be pre-booked by arrangement with MODCU. Full details of all family members to be detained must be provided to MODCU. 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 authority's social services department will make this decision. In such cases, prior arrangement and authority will be required from MODCU

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).

No families should be detained simply because suitable accommodation is available.

38.9 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 38.8.3 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 (but see 38.3.1 above for the detention of women in the early stages of pregnancy at Oakington);
- 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. 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 initially be detailed on the IS91RA part A and entered on the 'risk factors' section of form IS91 served on the detaining agent (see 38.5).

Where IS accommodation is inappropriate, DEPMU will seek an appropriate alternative location, such as a prison, but it should be noted that such places are limited and are allocated by the Prison Service over which IS has no control.

All cases who have completed a prison sentence will be assessed by DEPMU on an individual basis as to whether they should remain in prison or be transferred to an IS removal centre. Any individual may request a transfer from prison to an IS removal centre and, if rejected by DEPMU, will be given reasons for this decision.

38.10 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 immigration offender who is detained on criminal charges may also 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.

38.10.1 Dual detention of illegal entrants & those subject to administrative removal

Whilst detention on criminal charges does not affect a person's liability to removal as an illegal entrant or as a person liable to administrative removal, it is not practice to remove the person 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 or person subject to administrative removal is convicted of a criminal offence and recommended for deportation, this should be considered by CCT before removal is enforced. In the event of an illegal entrant/person subject to administrative removal being convicted of a serious offence but not recommended for deportation by the Court, CCT may wish to consider non-conducive 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).

38.10.2 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 1971 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.

38.10.3 Immigration detention in deportation cases

Unlike cases involving illegal entrants and persons served with notice of administrative removal, **there is no concept for 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(1) of Schedule 3 to the 1971 Act concerns the detention of a person who has been court recommended for deportation in the period following the end of his sentence pending the decision by the Secretary of State whether to make a deportation order. Paragraph 2(2) of Schedule 3 defines the scope of the power to detain a person who has not been recommended for deportation by a court but who has been served with a notice of intention to deport (an appealable decision) in accordance with section 105 of the Nationality, Immigration and Asylum Act 2002, pending the making of a deportation order.

Both paragraph 2(1) and 2(2) make it clear that the Secretary of State's power to detain under those provisions is not available whether the person is "for the time being released on bail by a court having power to release him".

These words do not mean that immigration detention is prevented where any court has granted bail as this will include a grant for bail on a matter totally unrelated to the question of deportation.

In order for the grant of bail by a court to prevent immigration detention under paragraph 2(1) or 2(2) of Schedule 3 to the 1971 Act, the court which granted bail must have been seized of the question of deportation. Although the following is not an exhaustive list of examples, the most common situations where this would be the case are as follows:

- a court hearing an appeal against conviction or sentence (here that offence was the basis of the notice of intention do deport), or against the recommendation to deport;

- an adjudicator granting bail by virtue of paragraph 2(4A) of Schedule 3;

- an adjudicator granting bail on appeal against a notice intention to deport;

- the High Court granting bail under its inherent jurisdiction when seized with a JR relevant to the deportation.

Two examples of a situation where a court with power to grant bail is **not** seized of the question of deportation are as follows. (1) A court in extradition proceedings which is considering whether or not to grant bail in the context of those proceedings, but which is made aware at the bail hearing of the Secretary of State's intention to deport the person and to detain under immigration powers should the person be released on bail by the court in the extradition proceedings. (2) A court in criminal proceedings unrelated the question of deportation granting bail.

It is unclear whether there is an immigration power to detain where a person is already detained under an order or sentence of a court. Therefore the sensible course is for any immigration decision to detain to be expressed as taking effect once any existing detention ends.

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 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 1917 Act refers).

There is no bar to detaining a person under Immigration Act 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 Immigration Act Powers in practice, however, as he will no longer be eligible for such detention once charged.

38.11 Co-ordination of detention

Detention space is allocated through the detention co-ordinators based at DEPMU (single detainees) at Feltham which is staffed 24 hours a day and Gatekeepers at MODCU (family detainees) which is staffed 0700-2100 weekdays and weekends (responsibility reverts to DEPMU at other times).

The DEPMU CIO/MODCU Gatekeepers have the authority to:

- refuse to accept any person for detention in the IS detention estate;

In addition the DEPMU CIO has the authority to:

- refuse to accept any person for transfer by the in-country escorting contractor;
- arrange for a detainee to be moved in order to meet local demands or to provide more secure accommodation;
- decide on the priority of tasks to be handled by the in-country escorting contractor.

Ports/LEOs should initially approach the regional co-ordinator for approval to use one of the regional ring-fenced beds. When this approval has been given, DEPMU should be faxed the following information (MODCU only deals with the allocation of family beds and these are not included in the ring–fenced allocations – all requests for ring-fenced beds should be made to DEPMU):

- asylum status – this should be stated as **current, refused, withdrawn, third country** or **never claimed**;
- full name, with family name in CAPITAL LETTERS;
- all risk factors on form IS91RA, part A;
- any relevant references – port/LEO, Home Office, Prison, IAA, previous removal centre;

♦ a contact name and telephone number so that DEPMU can inform the port/LEO of where the detainee has been placed.

The same information should be supplied to MODCU when requesting a family bed.

38.11.1 Detention space allocation priorities

DEPMU is responsible for allocating cases to the most suitable accommodation.

MODCU has responsibility for reviewing all detained cases at 28 days. A proportion of the estate will be allocated to each operational Deputy Director and the detainee allocation managed by a central point of contact within the region. The Third Country Unit will also have an allocation of beds. MODCU will manage the remainder of the detention estate covering Oakington cases, charter flights and Special Operations. Any detention over the 28 days limit will need to be approved by MODCU and they should be on form MODCU 1. Once approved, the detainee will be removed from that region's allocation. If long-term detention is refused the detainee will remain in the local bed allocation until released

Detention allocation priorities are reviewed regularly and will change according to the business need, but the priority will always be to detain to remove.

N.B.

(i) Only in exceptional circumstances will MODCU allocate a detention place to an individual not meeting the current detention allocation priorities (but see note ii below). Where exceptional treatment is proposed, the application to MODCU should be supported by a written statement explaining the grounds for such treatment and authorised at AD level or above. On receipt in MODCU applications for exceptional treatment will be considered by the Gatekeeping Team. Where the Team is proposing to refuse such an application, it will be referred to the MODCU Inspector or, if unavailable, the MODCU Assistant Director.

(ii) In any case falling into one of the priorities above (or an exceptional case) where a detention space is not to be allocated, a written appeal authorised at AD level or

above may be submitted to MODCU. It is especially important to take advantage of this if it felt that rejection might result in embarrassment to the IS. Appeals will be considered by the most senior MODCU officer available. Where the appeal is rejected, the AD will be sent a written explanation by the MODCU Inspector or, if unavailable, the MODCU Assistant Director.

(iii) Individuals subject to a deportation order or notice of intention to deport will be treated outside the above categories on a case by case basis by MODCU. MODCU does not deal with individual subject to deportation proceedings or notice of intention to deport – CCT deals with these.

38.11.2 Detention after an appeal has been allowed

If a detainee wins an appeal, but IS wish to challenge the adjudicator's decision, it is sometimes considered necessary to maintain detention until the challenge is heard. While it may be justifiable to continue detention in the short term pending such a challenge, especially if there is considered to be a risk of the person absconding, care should be taken to ensure detention on this basis does not continue beyond a reasonable time period.

Detention after an appeal has been allowed is not automatic and temporary release should always be considered. Any decision on what constitutes a reasonable period of time should be on a case by case basis. As with any case, detention, and associated risk factors, should be reviewed regularly to decide whether the detainee's circumstances have changed, and whether the person still presents a risk of absconding.

38.12 Places of detention

Illegal entrants and persons subject to administrative removal may be detained in any place of detention named in the Immigration (Place of Detention) Directions 2001, as amended by the Immigration (Place of Detention) Direction Variations 1 and 2, 2002. This includes police cells, IS removal centres, prisons or hospitals.

Some facilities, such as police cells (but see 38.12.2) are only suitable for detention for up to 5 nights continuously, (7 if removal directions are set for within 48 hours). The Immigration (Place of Detention) Direction 2001 does not prevent a person already detained for the specific period in time-limited accommodation from being re-detained, but this must never be used as a device to circumvent the time limits on the use of short-term holding facilities

38.12.1 Present accommodation The current IS detention estate* currently comprises places at the following locations:

Unit	Capacity	Detainees
Campsfield	184	Males
Colnbrook	306 including 40 in STHF	Males
Dover	314	Males
Dungavel	148 plus an additional 42 bed unit	Males/Females/Families
Harmondsworth	501	Males
Haslar	160	Males
Lindholme	112	Males
Oakington	400	Males/Females/Families
Tinsley	148	Males/Females/Families
Yarl`s Wood	240 (120 female + 120 family beds in 60 rooms)	Females/Families

Short term holding facilities are located at:

Manchester

Port of Dover

Felixstowe (no overnight accommodation available)

Harwich

There are 15 places for immigration detainees (including women) at Maghaberry prison in Northern Ireland.

* ‘detention estate’ is a general term covering removal centres, short term holding facilities and holding rooms at ports and airports.

Very limited space is also available in other Prison Service accommodation for control and security purposes but only after reference by DEPMU to Prison Service Headquarter

38.12.2 Detention in police cells

Detainees should preferably only spend one night in police cells, with a normal maximum of two nights. In exceptional cases, a detainee may spend up to 5 nights continuously in a police cell (7 nights if removal directions have been set for within 48 hours) if, for instance, he is awaiting transfer to more suitable IS or Prison Service accommodation and the police are content to maintain detention. Such detention must be authorised by an HMI, who must take into account the IS duty of care for detainees and the likelihood that police cells do not provide adequate facilities for this purpose in the long term.

38.13 For the purpose of removal

Following the death in 1993 of Joy Gardner while being detained for deportation, the then Home Secretary instituted a review of procedures in cases where the police are involved in assisting the IS with the removal of people under Immigration Act powers (the Joint Review of Procedures in Immigration Removal Cases). One of the provisions introduced immediately after the report of the Joint Review was issued was that there should be a period of at least one to two days between detention and the proposed removal of an offender. Only in exceptional cases will removal proceed on the day of arrest and this must be authorised by an Assistant Director.

38.15 Incidents in the Detention Estate

Detention Services Operational Support Unit (DSOSU) must be kept informed of all serious incidents in any removal centre, short-term holding facility holding room or under escort, such as deaths, incidences of self harm, escapes, attempted escapes, food/fluid refusals and any other potentially high-profile occurrence. IS staff at all removal centres

are responsible for reporting such incidents to DSOSU. DEPMU staff are responsible for providing reports in respect of incidents which take place whilst under escort, at short term holding facilities and holding rooms.

Detailed instruction on the reporting of incidents to DSOSU are issued separately to staff at DEPMU and at all removal centres.

Additionally consideration should be given as to whether such actions may prompt reassessment of potential risk in which case form IS91RA part C should be sent to DEPMU/MODCU as under 38.5.1 above.

38.16 Bed Guards

All requests for bed guards must be made to the DEPMU CIO.

38.17 Notification of detention to Consulates and High Commissions

All persons who are detained should be asked if they wish to contact their High Commission or Consulate. Those who wish to do so should be given the appropriate telephone number. When a person is likely to be detained for more than 24 hours he should be asked if he wishes his High Commission or Consulate to be notified of his detention. If he does, then form IS94 should be sent by first class post to the appropriate representative of the High Commission or Consulate. A case requiring urgent attention should be notified by telephone or fax to the High Commission or Consulate, in addition to the written notification.

The UK has a bilateral consular convention relating to detention with a number of countries (listed below). The convention imposes an obligation on detaining authorities to notify the consular representative of a detainee even if the detainee has not requested this. When a national of such a country is likely to be detained for more than 24 hours, **and there is or has been no asylum claim or suggestion a claim might be forthcoming**, the

appropriate High Commission or Consulate must be notified by the IO, on form IS94 sent by first class post. The detainee must be notified of this disclosure.

A consular representative should, if the person detained agrees, be permitted to visit, converse privately with and arrange legal representation for him. A case requiring urgent attention should be notified to the High Commission or Consulate by telephone or fax, in addition to the written notification.

Communications from the person detained to his High Commission or Consulate should be forwarded without delay.

38.17.1 List of countries with which the United Kingdom has bilateral consular conventions relating to detention

Armenia
Austria
Azerbaijan
Belarus
Belgium
Bosnia-Herzegovina
Bulgaria
China*
Croatia
Cuba
Czech Republic
Denmark
Egypt
France
Georgia
Germany
Greece
Hungary
Kirgizstan (Kyrgystan)
Macedonia
Mexico
Moldova
Mongolia
Norway
Poland
Romania
Russia
Serbia
Slovak Republic
Slovenia
Spain
Sweden
Tajikistan
Turkmenistan
Ukraine
USA

Kazakhstan Uzbekistan

*The Chinese authorities need be contacted only if the person is detained in the Manchester consular district. This comprises Derbyshire, Durham, Greater Manchester, Lancashire, Merseyside, North, South and West Yorkshire and Tyne & Wear.

38.18 Home leave for prisoners subject to removal action

The grant of home leave for a person serving a custodial sentence is normally at the discretion of the Prison Governor.

When a Governor wishes to allow a prisoner home leave, but the detainee is also detained under Schedule 2 of the 1971 Act, he should contact a CIO at the enforcement office that authorised detention.

The presumption should be for temporary release to be granted provided:

- the detainee is serving a sentence of imprisonment;
- the length of sentence left to serve exceeds four weeks: and
- the expectation is that removal (if appropriate) will be effected under deportation rather than Schedule 2 powers. This includes cases where recommendation for deportation has been made by a court or where the detainee has been served with notice of intention to deport.

When the criteria at the second and third bullets above are not met, requests for release from detention should be considered on their merits and may be agreed in suitable cases.

In cases where dual detention does not apply, the decision rests with the Governor where the offender is serving a custodial sentence. However, instructions to Governors issued by the Prison Service make it clear that in cases where the prisoner is the subject of a deportation

order home leave should only be granted in the most exceptional circumstances and with the prior agreement of the relevant immigration caseworker.

38.19 Temporary release/release on restrictions

The terms temporary admission, temporary release and release on restrictions apply variously to on-entry, illegal entry and deportation cases. For the purposes of this section, temporary release (TR) is intended to cover all categories.

Whilst a person who is served with a notice of illegal entry, notice of administrative removal, or is the subject of deportation action is liable to detention, such a person may, as an alternative to detention, be granted TR. The policy is that detention is used sparingly, and there is a presumption in favour of granting TR. (Another alternative to detention is the granting of bail, which is covered separately in Chapter 39. The fundamental difference between TR and bail is that the former can be granted without the person concerned having to be detained, while the latter can only be granted once an individual has been detained and has applied for bail.)

The power to grant TR to an illegal entrant or person served with notice of administrative removal is set out in paragraph 21(2) to Schedule 2 of the Immigration Act 1971 (and as amended by the 1988 Act). This provides that the grant of TR in illegal entry or administrative removal cases may be subject to such restrictions (on residence, employment and reporting to the police or an IO) as may be notified to him in writing by an IO. It follows that IOs, with the authority of a CIO, are able to grant TR in all illegal entry and administrative removal cases.
S.62 of the Nationality and Immigration Act 2002 extended the power to detain and the corresponding power to place a person on TR and to vary any existing restrictions to the Secretary of State. This means that caseworkers can set or vary reporting conditions.

A person who is the subject of deportation action who is detained or liable to detention may be placed under a restriction order, under paragraph 2(5) of Schedule 3 to the 1971 Act. This provides for similar conditions to be attached to the grant of TR in deportation cases to those

in illegal entry and administrative removal cases, with the exception that it is for the Secretary of State to notify in writing any conditions attached to their release.

IOs may, under the authority of a designated Inspector, serve papers granting TR to a person who has been served with a notice of intention to deport by an enforcement office at the request of the relevant caseworking section However only a esignated Inspectors (see chapter 37) may sign any restriction order or amendment to a restriction order.

Caseworkers in the relevant section (who act on behalf of the Secretary of State) may grant temporary release to all those served with a notice of intention to deport under section 3(5) or who have been recommended for deportation by a court or who are the subject of a deportation order.

The LEO that deals with variations to the conditions attached to the grant of temporary release in illegal entry and administrative removal cases should ensure that all relevant parties are informed and all information systems accurately updated. In deportation cases variations should be notified by caseworkers in the relevant section. This is irrespective of whether or not the notice of intention to deport was served by an IO under the delegated authority arrangements.

38.19.1 Guidance when a request is received for permission to work

The power to impose a restriction as to employment or occupation is no longer discretionary on the IS 96 except in exceptional cases and is dependant on whether it is an asylum or non asylum case. Forms IS96ENF or IS164/DO40 apply and are in CID.

38.19.1.2 Asylum Seekers

Requests for permission to work (PTW) from asylum seekers who have not yet received an initial decision should be referred for consideration to Asylum Casework Directorate's ACU1 in Croydon or ACU11 in Liverpool.

I Asylum seeker given PTW under the previous employment concession, and who are not all rights exhausted, may retain PTW . Such persons should hold an employment permitted ARC which they may retain.. If a person only has an IS96W and wishes to change employment, do not withdraw the IS96W but recommend that the person applies to the Central Events Booking Unit (CEBU) to arrange an appointment with an

ARC issuing centre. CEBU can be contacted on tel: 0151 237 6375 or fax: 0151 237 6391.

If there is evidence that an IS96NW was issued in error to a person who should have had continuing PTW and the person asks for permission to be re-instated, update CID (notes) and advise the person to contact CEBU to arrange an appointment with an ARC issuing centre.

Generally asylum seekers will only be granted permission to work if they have not had an initial decision on their asylum claim within 12 months of its being lodged and the delay cannot be attributed to the applicant himself. If a caseworker or immigration officer is presented with other very exceptional circumstances which they think they may merit further consideration they should contact Karen Milne 020 8604 6868 or Amanda Wood 020 8604 6855 from the Central Information and Advice Unit in NASS.

39.19.1.3 Non asylum cases

NASS policy on PTW does not extend to non asylum seekers and there is no equivalent provision to paragraph 360 within the Immigration Rules for this category of applicant. IOs may grant PTW to non asylum seekers only in **exceptional** circumstances. (i.e. an overstayer or illegal entrant who makes a HR claim on the basis of marriage to a person settled here, should only be granted PTW where his spouse is unable to provide for them and there is no other support available to them).

Presently an IS96W is not regarded as a legal document giving PTW so cannot be used as a statutory defence under Section 8. However, if it is clear that the IS96W has been genuinely issued no offence has been committed and we have a duty to assist both applicants and their prospective employers. In order to do this it is essential that any permission granted by IS staff is clearly recorded on both CID and the file including date issued, name of the authorising officer and the basis for the grant as a minimum.   The applicant should also be informed that prospective employer(s) may verify his PTW by contacting the relevant LEO.
The employer should not be given any other information relating to the person's immigration status.

38.19.2 Reporting restrictions

Persons on temporary release should not be required to report to police stations if they could report to an immigration reporting centre instead. Immigration Service Reporting Centres which contain holding rooms are currently established at Becket House (London), Communications House (London), Dallas Court (Manchester), Eaton House (Heathrow),

Electric House (Croydon), Frontier House (Folkestone), Reliance House (Liverpool) and Waterside Court (Leeds).

Where reporting to a police station is considered essential, this should not be more frequently than monthly (unless authorised by an Inspector in exceptional circumstances) **and the police station must be informed;** if the case remains unresolved after 3 years and the offender has abided by the terms of his TR, lift reporting restrictions (unless removal is imminent). A failure to attend by an offender will be reported by the police to the enforcement office for appropriate action. **When a case has been resolved, the appropriate police station must be informed.**

It is possible to impose reporting restrictions on unaccompanied minors, however reference should be made to Section 30.2 before doing so.

38.19.3 Failing to comply with the terms attached to a grant of TR

A person who fails to comply with the terms attached to the grant of TR commits an offence under section 24(1)(e) of the Immigration Act 1971. A decision on whether to charge a person or prosecute currently rests with the Police or Crown Prosecution Service.

38.19.4 Procedures when granting temporary release to an illegal entrant or person served with notice of administrative removal

- serve form IS96ENF, informing the subject of his release and the restrictions imposed upon him;
- serve form IS106, the release order, on the detaining agent ;
- advise the Detention Co-ordinator of release where they have been notified of the initial detention and MODCU if the person has been detained for 28 days or more.

38.19.5 Procedures when releasing on restrictions a person served with a notice of intention to deport (APP104) or ICD equivalent mentioned in section B

- serve form IS164 on the subject, notifying him of his release on restrictions;

- DO4 is completed by the Duty Inspector and sent to the relevant caseworking section and MODCU within 24 hours;

- advise Detention Co-ordinator of release where they have been notified of initial detention;

- serve form IS106, the release order, on the detaining agent.

Serve a copy of the restriction order as soon as possible so that the person is informed of his responsibility to obtain approval for any proposed change of address and of his liability to prosecution for failing to comply with the order.

Chapter 39- Bail

As explained in chapter 38, Ministers have given a commitment that detention will only be used as a last resort. The presumption is to grant temporary release wherever possible but there will be occasions when temporary release is not considered appropriate. Whilst detention may be warranted, there is also the alternative of granting CIO's or Secretary of State's bail upon application by those in detention. The advantages of granting bail are that:

- the forfeiture of recognizance (or, in Scotland, bail bond) if bail is broken provides a disincentive to abscond;

- conditions can be attached to bail such as surrendering a passport (but such conditions are limited to those which are necessary to ensure that the applicant answers to bail);

- used as an alternative to adjudicator's bail, it enables the IS to set the conditions, and may free an adjudicator's time to hear more appeals rather than bail hearings.

39.1 Who is eligible for bail?

39.1.1 Illegal Entrants and persons served with notice of administrative removal

Illegal entrants and persons served with notice of administrative removal are eligible to seek bail at all stages of the detention process. There is no requirement that they must have an appeal pending.

- **When detained pending the giving of removal directions**

[Paragraph 22(1)(b) of Schedule 2 to the 1971 Act as amended by paragraph 11 of Schedule 2 to the 1996 Act]

Such a person may apply for bail to an IO not below the rank of **CIO** or an **adjudicator.**

- **When detained pending removal after removal directions have been set**

[Paragraph 34 of Schedule 2 to the 1971 Act as inserted by paragraph 12 of Schedule 2 to the 1996 Act]

Such a person may apply for bail to an IO not below the rank of **CIO** or an **adjudicator**.

- **When detained pending an appeal to an adjudicator or to the Tribunal**

[Paragraph 29 of Schedule 2 to the 1971 Act as amended by Paragraph 9 of Schedule 2 to the 1993 Act]

Such a person may apply for bail to:

- an IO not below the rank of **CIO;**

- **a police officer** of the rank of Inspector or above at any time while the appellant is detained in police custody (the police will normally refer such applications to the immigration office concerned);

- an **adjudicator**, either:

  - before he hears the appeal, provided that notice of appeal has been duly given and has not subsequently been withdrawn; or

  - when he adjourns a hearing; or

  - after he has dismissed an appeal, where he grants leave to appeal to the Tribunal or where leave to appeal to the Tribunal is not required, provided that notice of appeal has not subsequently been withdrawn;

the **Tribunal**, either:

- before the hearing of an appeal by the Tribunal, if an application for leave to appeal to the Tribunal has been granted (or, where leave to appeal is not required, if notice of appeal to the Tribunal has been given), provided that notice of appeal has not subsequently been withdrawn;

or

- when the Tribunal adjourns a hearing.

- **When detained pending an appeal to the Court of Appeal (or Court of Session)**

Paragraph 9A of the 1993 Act [as inserted by paragraph 3 of Schedule 3 to the 1996 Act]

Where the Tribunal has made a final determination of an appeal, either party to the appeal may apply to the Tribunal or, if the Tribunal refuses leave, to the Court of Appeal (Court of Session in Scotland) for leave to bring a further appeal to the Court of Appeal (Court of Session).

Such a person may apply for bail to:

- an **adjudicator;**
- an IO not below the rank of **CIO;**
- a **police officer** of the rank of Inspector or above at any time while the appellant is detained in police custody (the police will normally refer such an application to the immigration office concerned); or
- the **Tribunal**.

Where such a person applies for bail, the Tribunal may grant bail on application if:

- the application for leave to appeal to the Court of Appeal is made by the Secretary of State; or
- the appellant is granted leave to appeal to the Court of Appeal.

39.1.2 Deportation cases

Until February 2003 persons served with notice of intention to deport (APP104/ ICD 1070 series notice) and detained in accordance with paragraph 2(2) of Schedule 3 to the Act became eligible for bail when they lodge an appeal. With effect from 10 February 2003 Section 54 of the Immigration & Asylum Act 1999 extended paragraph 2(1) of Schedule 3

of the Immigration Act 1971 to allow bail in these circumstances under paragraph 22 of Schedule 2 to the Immigration Act 1971 even where no appeal is lodged.

Once a DO has been signed there is no entitlement to apply for bail if the individual was detained prior to the making of the deportation order. From 10 February 2003 Section 54 of the Immigration & Asylum Act 1999 extended paragraph 2(3) of Schedule 3 of the Immigration Act 1971 to allow bail under paragraph 22 of Schedule 2 to the 1971 Act.

- **When detained following recommendation for deportation by a court following criminal conviction**

[Paragraphs 22 to 25 of the IA 1971 by virtue of paragraph 2 (4A) of schedule 3 and section 54 of the Immigration and Asylum Act 1999]

Such a person may apply for bail to an IO not below the rank of **CIO** or an **adjudicator.**

(**When detained having been notified of a decision to make a deportation order against them**

[Paragraphs 22 to 25 of the IA 1971 by virtue of paragraph 2(4A) of Schedule 3 and Section 54 of the Immigration & Asylum Act 1999]

Such a person may apply for bail to an IO not below the rank of **CIO** or an **adjudicator**

(**When subject of a deportation order and detained pending removal or voluntary departure**

[Paragraphs 22 to 25 of the IA 1971 by virtue of paragraph 2(4A) of Schedule 54 of the Immigration and Asylum Act 1999]

Such a person may apply for bail to an IO not below the rank of **CIO** or an **adjudicator**

- **When detained pending an appeal to an adjudicator or to the Tribunal**

[Paragraph 29 of Schedule 2 and paragraph 3 of Schedule 3 to the 1971 Act as amended by paragraphs 66 and 69 of Schedule 14 to the 1999 Act]

Such a person may apply for bail to:

- an IO not below the rank of **CIO**;
- a **police officer** of the rank of Inspector or above at any time while the appellant is detained in police custody (the police will normally refer such an application to the immigration office concerned);
- an adjudicator; either
- before he hears the appeal, provided that notice of appeal has been duly given and has not subsequently been withdrawn; or
- when he adjourns a hearing; or
- after he has dismissed an appeal, where he grants leave to appeal to the Tribunal or where leave to appeal to the Tribunal is not required, provided that notice of appeal has not subsequently been withdrawn
- the **Tribunal**, either:
- before the hearing of an appeal by the Tribunal, if an application for leave to appeal to the Tribunal has been granted (or, where leave to appeal is not required, if notice of appeal to the Tribunal has been given), provided that notice of appeal has not subsequently been withdrawn; or
- when the Tribunal adjourns a hearing.
- **When detained pending an appeal to the Court of Appeal (or Court of Session)**

Paragraph 9A of the 1993 Act [as inserted by paragraph 3 of Schedule 3 to the 1996 Act and amended by paragraphs 105 and 106 of Schedule 14 to the 1999 Act]

Where the Tribunal has made a final determination of an appeal, either party to the appeal may apply to the Tribunal or, if the Tribunal refuses leave, to the Court of Appeal (Court of Session in Scotland) for leave to bring a further appeal to the Court of Appeal (Court of Session).

Such a person may apply for bail to:

- an **adjudicator;**
- an IO not below the rank of **CIO;**
- a **police officer** of the rank of Inspector or above at any time while the appellant is detained in police custody (the police will normally refer such an application to the immigration office concerned); or
- the **Tribunal**.

Where such a person applies for bail, the Tribunal may grant bail, on application if:

- the application for leave to appeal to the Court of Appeal is made by the Secretary of State; or
- the appellant is granted leave to appeal to the Court of Appeal.

39.2 Secretary of State's bail

Section 68 of the Nationality and Immigration & Asylum Act 2002 amends the 1971 Act. In all the above circumstances, where an application for bail is instituted after the expiry of a

period of 8 days from the beginning of detention, then the power to release on bail lies with the Secretary of State.
After 8 days the power is not exercisable by a CIO unless acting on behalf of the Secretary of State.

39.3 Advising a person of his bail rights

When a person is eligible for bail, notify him and/or his representative that he has the right to apply for bail and give the bail information and application forms (IS98 and IS98A for CIO or SoS bail, B1 for adjudicators bail).

It is only necessary to notify a person once of his bail rights. You do not need to inform him every time his circumstances change.

A person may apply only in writing for bail. An application in writing shall contain the following:

- the full name and date of birth of the applicant;
- date of arrival in the United Kingdom
- the address where the applicant is detained at the time the application is made;
- whether an appeal is pending at the time of application;
- the address where the applicant would reside if his application for bail were to be granted; or, if he is unable to give such an address, the reason why an address is not given. If the applicant is unable to obtain a bail address but is entitled to NASS support, then the applicant does not have to state his proposed address as a NASS address will only be arranged after release from detention.
- the amount of the recognizance in which he would agree to be bound;

- the full names, addresses, occupations and dates of birth of any persons who have agreed to act as sureties for the applicant if his application for bail were to be granted and the amounts of the recognizance in which those persons will agree to be bound;

- the grounds on which the application is made and where a previous application has been refused, full particulars of any change in circumstances which have arisen since the refusal.

- whether (in the case of adjudicator's bail) an interpreter will be required at the hearing.

The application must be signed by the applicant or his representative.

[*The Immigration & Asylum Appeals (Procedure) Rules 2003*]

39.4 Restrictions on the grant of bail

There are occasions when the adjudicator or the Tribunal is obliged to grant bail (paras. 29(3) and (4) of Schedule 2 to the 1971 Act). However, this is subject to the provisions of paragraph 30(2) of Schedule 2 to the 1971 Act.

Under paragraph 30(2), an adjudicator or the Tribunal is not obliged to grant bail unless the appellant enters into a proper recognizance (or, in Scotland, bail bond), with sufficient and satisfactory sureties if required, **or** where it appears to the adjudicator or the Tribunal that:

- the appellant has previously failed to comply with the conditions of any recognizance or bail bond;

- the appellant is likely to commit an offence if released;

- the release of the appellant is likely to cause danger to public health;

- the appellant is suffering from mental disorder and should be detained in his own interests or for the protection of any other person; or

- the appellant is under 17 and that no arrangements exist for his care, if released.

39.5 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;

- the diligence, speed and effectiveness of the steps taken by the Immigration Service to effect removal;

- 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 therelevant casework section.

39.5.1 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 or the Secretary of State may grant bail where sufficient and satisfactory sureties are produced.

39.6 Recognizances and Sureties

39.6.1 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 £2,000 and £5,000 per surety will normally be appropriate. Where there is a strong financial incentive to remain here, it is justifiable to fix bail (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 sureties who are willing to enter into recognizances for the payment of sums which satisfy the above criteria. The Procedure Rules 2003 require that any application for bail shall include the names of any persons who have agreed to act as sureties. Although sureties are not required under the Act, any decision to grant bail will normally be dependent upon the availability of nominated sureties.

39.6.2 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 or Secretary of State. 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.

39.6.3 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.

39.6.4 The taking of recognizance

In England and Wales, neither CIOs nor the Secretary of State may 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 or the Secretary of State 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). In paragraph 29 bail cases, the adjudicator does not have the power to insist that the recognizance is lodged with a Solicitor, but if it would secure a person’s release, there is nothing in the Act to prevent it.

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.

39.7 Procedures once a decision has been taken on bail

39.7.1.1 CIO's or Secretary of State's bail - granting

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 bail, they should consider inviting an application, if appropriate stipulating the level of sureties which would be acceptable.

If a CIO or the Secretary of State grants bail, complete and sign two copies of the sureties recognizance (or bail bond) (IS99), which should be signed by each of the sureties. An IS99A (applicant's recognizance or bail bond) should also be completed, explained to the applicant and then signed by the applicant. Once a copy of both these forms are signed and returned, an IS100 should be completed authorising release.

- Give one copy to the person who enters into the recognizance (or bail bond);
- place the original on the local file; and
- make and send an additional 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 or the Secretary of State 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.

39.7.1.2 Completing the bail summary 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 relevant casework section.

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 must be returned to the POU in time for it to be filed with the IAA no later than 2.00pm on the day before the hearing. If the IAA has given the POU less than 24 hours notice of the hearing then the summary must be filed as soon as is practicable. The bail summary is fully disclosable and indeed a copy of the summary part is sent to the applicant's representatives the day before the hearing. In the event of the applicant not being represented at the bail hearing, the bail summary must be served on the applicant at their place of detention before 2.00pm. This task is carried out by the POU. In these circumstances the IOs at the detention centre should be notified 24 hours prior to the bail

summary being served, so that they have sufficient time to schedule a visit with the applicant to advise them of procedures.

39.7.1.3 CIO's or Secretary of State's bail - refusing

A CIO or the Secretary of State can refuse bail orally or by means of a brief, written explanation, similar to that used when temporary release is refused. The CIO or Secretary of State must be able to provide reasons for refusing bail. If a CIO or Secretary of State is not prepared to grant bail, he should advise the appellant that he may apply to the IAA.

A CIO or the Secretary of State could justifiably use the exceptions in paragraph 30 to Schedule 2 of the 1971 Act (which apply to adjudicators) as reasons for not granting bail:

- that the applicant has previously failed to comply with bail;
- that he is likely to commit an offence unless retained in detention;
- that his release is likely to cause a danger to public health;
- that the appellant is suffering from a mental disorder and that his continued detention is necessary in his own interests or for the protection of any other person.

39.7.1.4 Repeat applications

The applicant can make as many applications as he chooses. The CIO and Adjudicator must consider each one, even if there is no change in circumstances. Any repeat application must be considered fully, however it may be refused for exactly the same reasons as before.

The Adjudicator will hear the first repeat application, where there are no change in circumstances, subsequent repeat applications will be refused if there are no change in circumstances.

39.7.2 Adjudicator's bail

Adjudicators bail hearings cannot be adjourned. If the matter cannot be resolved it must be refused and re-listed. 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 recognizance’s 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 recognizance.

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 conditions attached to the grant of bail, arrest him and take him before an adjudicator within 24 hours. However, if a person has failed to appear at the required time and place at the end of his bail, he will be liable to detention

NB. Please note that bail is only breached when an applicant fails to comply with the primary conditions. A breach of secondary conditions (which is any other condition that will reasonably cause the person to comply with the primary condition) is not a breach of bail.

39.7.3 Police bail

If an application made to the police is granted, ask them to complete their own forms and send two copies to the immigration office.

39.7.4 Notifying interested parties

Once bail has been granted, notify all interested parties:

- Detention co-ordinator;
- The relevant casework section and MODCU if appropriate;
- the police station to which the applicant is to report. (Fax IS100A to the police station and notify them immediately of any changes to the reporting restrictions on IS100C);
- IAA via the clerk to the adjudicator or Tribunal where bail is granted under paragraph 29 of Schedule 2 to the 1971 Act. Send copies of IS99, IS99A and IS100 to the appropriate office with a letter of explanation (or fax if the hearing is within 5 days);
- POU where bail is granted under paragraph 29 of Schedule 2 to the 1971 Act. Provide all copies of the same documents as submitted to the IAA above.

39.7.5 Varying bail

Bail can be varied under paragraph 22(1A) of the 1971 Act (as amended by the 1996 Act) whether granted by an Adjudicator, CIO, Police Inspector or the Secretary of State. However, we may not vary paragraph 29: bail granted by an Adjudicator where an appeal is extant.

The power to vary Adjudicator's bail is not unlimited and should not be used to overturn a decision because it is disagreed with. However, a change in circumstances, such as the setting of removal directions which were not in place at the time the grant of bail was made, may justify the variation of bail.

There is no power to vary secondary conditions alone. The power does however exist to vary the primary condition and if this is done, new secondary conditions may also be set.

If it is decided to vary bail, the sureties must be contacted as they need to sign again to accept the new conditions **before** they are put into effect. If this does not happen, the sureties will not be subject to forfeiture proceedings if the person absconds.

When police bail has been varied, notify all sureties and the bailed person using form IS100B and the police/reporting centre using form IS100C.

39.7.6 Re-detention of immigration offenders released on bail

When a person is granted bail under the 1971 Act, either by an adjudicator or a CIO, bail is only satisfied when the person reports to an IO (with the exception of those subject to deportation action who have an appeal outstanding, when the requirement is to report to an adjudicator or the Tribunal). Where it is decided to re-detain a person who has been released on bail and is reporting regularly to the police, normally because that person has become removable, this can be done using powers contained in paragraph 22(1A) of Schedule 2 to the 1971 Act as amended by the 1996 Act:

> "An immigration officer not below the rank of chief immigration officer or an adjudicator may release a person so detained on his entering into a recognizance or, in Scotland, bail bond conditioned for his appearance before an immigration officer at a time and place named in the recognizance or bail bond or at such other time and place as may in the meantime be notified to him in writing by an immigration officer".

When the person next reports to the police, notify him in writing that the conditions of his bail have been varied and he is required to report to an IO at that police station and on that date and re-detain him immediately. The following wording should be used:

"You were granted bail by an adjudicator [or CIO or Secretary of State] and under paragraph 22(1A) of Schedule 2 to the Immigration Act 1971 as amended by the 1996 Asylum and Immigration Act the conditions of your bail are hereby varied and you are required to report to an immigration officer at...on..."

NB It is not possible to ask a police officer to detain a person in these circumstances under paragraph 22 since bail is not ended until the person has reported to an IO.

Where the police station is some distance from the detaining port or local enforcement office, staff should contact the nearest port/LEO and ask that an IO attend the police station as required. As IS reporting centres are set up throughout the country, the need to require bailees to report to the police should become increasingly infrequent.

Police officers *can* arrest a bailee (as can IOs*) under para 24(1) of Schedule 2 to the 1971 Act if the person has breached conditions of his bail or if there are reasonable grounds for believing he is likely to do so (see 39.9).

*but see 46.1

39.8 Surrendering to bail

Upon surrendering to bail by appearing before an IO at a required time and place, the person returns to IS custody. When a person surrenders to bail granted by an adjudicator or by the Tribunal by appearing, as required, before them, provided that they still have the jurisdiction to do so, the adjudicator or the Tribunal will normally consider extending bail. Where the court's jurisdiction ends, or where bail is refused, the person may be returned to IS custody.

39.8 Appellant fails to surrender to bail

On any occasion on which an appellant released on bail is due to appear before an adjudicator, the presenting officer should bring copies of the relevant recognizances (or, in Scotland, bail bonds) so that if the applicant fails to appear, these copies can be produced to an adjudicator who can then be invited to exercise his power under paragraph 23 (applies to paragraph 22 bail) or 31 (applies to paragraph 29 bail) of Schedule 2 to the 1971 Act to declare the recognizances (or bail bonds) forfeited. WICU and the police in the area where the person is thought to have gone to ground should be notified.

A claim that a person on bail has embarked should never be accepted as a reason for his not appearing at the time and place required unless there is firm evidence to show he has left the country. The IAA should be informed but in the absence of firm evidence indicating embarkation the presenting officer should make the point that the appellant has failed to surrender to his bail and ask that recognizances (or bail bonds) be forfeited.

In cases where a CIO or Secretary of State has granted bail and the applicant has broken bail, to obtain forfeiture of the recognizances (or bail bonds), the CIO or Secretary of State must advise the IAA that the applicant has failed to report; the adjudicator then issues an order to present to a magistrate (or, in Scotland, a sheriff) for enforcement under paragraphs 23(1) and 31(1) of Schedule 2 to the 1971 Act.

Where a person fails to answer bail i.e. failing to report to the Adjudicator or CIO at the time and place specified at the end of the bail (not failing to report to IS/police or comply with conditions), write to the adjudicator requesting a forfeiture hearing. Outline the circumstances and include copies of the forms signed by sureties and applicant. The adjudicator will decide if a hearing is appropriate and will then summon the sureties and assess whether any or all of the money should be forfeit.

Consideration will be given to:

- their level of responsibility for the bailee’s failure to comply and the steps taken to

ensure compliance;

- any steps taken by them to report concerns to the IS;

- if the bailee had failed to comply with other conditions, what steps had been taken to ensure compliance;

- any other excuses/explanations.

If the sureties failed to appear for the hearing they would lose their money in its entirety. The adjudicator would make a forfeiture order and remit to the local Magistrates Court for them to arrange collection with any other fines.

39.10 Powers to arrest a person who is likely to break bail or has done so

Persons who have absconded from bail granted by an adjudicator, a CIO,or the Secretary of State (i.e. those who have actually absconded from bail by failing to report at the end of the bail) are no longer subject to a grant of bail and will be liable to detention and arrest under paragraph 17 of Schedule 2 to the 1971 Act.

A person who an IO has reasonable grounds to suspect is likely to break or has broken any condition of bail (i.e. has failed to report or has not yet failed to report, but it is suspected that he will), or whom there are reasonable grounds to suspect is likely to fail to appear at the time and place required, i.e. at the end of his bail, is also liable to be arrested under paragraphs 24(1)(a) or 33(1)(a) of Schedule 2 to the 1971 Act.

Such persons **must** be brought before an adjudicator within 24 hours, or, if that is not possible, before a JP acting for the petty sessions area in which he was arrested or, in Scotland, the sheriff.* The adjudicator or JP must then decide whether to sanction re-detention or order release on the original or a new bail.

*unless a condition of his bail is to appear before an IO within 24 hours of his arrest, in which case he should be brought before that officer. Para.24(2)(b) of Schedule 2 refers.

Chapter 40 - Overseas escorts

40.1 Overseas escorts

Where an offender shows violent tendencies or a determination not to be removed, a discipline escort may be required and where an offender has a medical condition and requires medical supervision on the flight, a medical escort may be required. In the latter case, account should be taken of the views of the medical practitioner who has responsibility for the care of the person.

Where more than two escorts are felt to be necessary, and in particularly disruptive cases, a prior planning meeting between all those agencies likely to be involved should be arranged to discuss the case, e.g. the escorts, IS representatives, perhaps police officers, Social Services and/or Community liaison officers and the carrier. Where such a meeting is necessary, the IS will supply a case summary.

40.1.1 Paragraph 9 (carrier's Expense) removals-escorts

If the IS feel an escort is necessary, all the known facts must be brought to the attention of the carrier in writing e.g., by telling them of medical advice given. Serve directions for removal on the carrier (in accordance with paragraph 9, of Schedule 2 to the 1971 Act), plus written confirmation that an escort is necessary, giving the reasons. In cases where a discipline escort is considered necessary or it is believed an offender could be disruptive and a potential danger to the safety of the aircraft, inform a responsible official of the carrier and note his name on the port file.

The carrier should then arrange the removal, including the provision of any escort. Carriers are free to use whichever escorting company they choose. However, in paragraph 8 and 9 escorted removals, only the in-country Escorting Contractor (currently Wackenhut UK Limited), and, in exceptional circumstances the police or Prison Service,

may transport detainees within the UK, transferring responsibility for the removal overseas to the carrier's escorts at the door of the aircraft or steps of the ship.

Section 14 of the 1999 Act came into force on 1 March 2000, and allows removal directions to include provision for escorts to accompany the person who is being removed. It also allows the Secretary of State, by regulations, to make supplementary provision about escorts, including a requirement for the carrier to pay the costs of escort in certain circumstances.

As yet no regulations have been made under section 14. It is therefore not possible to rely on section 14 in order to compel the carrier to meet the costs of providing escorts in addition to the cost of removing the individual concerned. **[Note - there is an argument that paragraphs 19 and 20 of Schedule 2 to the 1971 Act can be relied upon to recover the cost of an escort (being a "custody" cost), where removal takes place within 14 days of the person's arrival.]**

If the carrier refuses to provide an escort, however, this may amount to a refusal to carry out directions; in this case, serve the directions and a copy of the advice on the registered office of the carrier or his agent. If the carrier persists in refusing to provide an escort and removal is thereby frustrated, seek authority from either the relevant casework section or the local Port/LEO HMI for removal with escort under paragraph 10 of Schedule 2 to the 1971 Act. In these cases it is not necessary to obtain the authority of DEPMU for the provision of the escorts, and Ports/LEOs may contact Loss Prevention International (LPI) (the only contractor with whom IS/IND may deal) directly to make the necessary arrangements.

If the carrier fails to provide an escort or tickets for an escort, follow the above procedure. If a paragraph 10 escort is arranged in what is otherwise a paragraph 9 (carrier's expense) removal, the in-country escorting contractor (currently Wackenhut UK Limited), will collect the detainee from the place of detention and deliver them to the overseas escorting contractor at the door of the aircraft or steps of the ship.

40.1.2 Paragraph 10 (public expense) removals-escorts

The costs of an escort for a removal removed under paragraph 10 of Schedule 2 to the 1971 Act will be met by the Secretary of State. (For guidance on procedures refer to 9.4 - Procedures for Paragraph 10 Removals.)

In public expense removal (PER) cases escorts will be provided by Securicor (and a list of approved contractors) who have been contracted by the Home Office for this purpose. Securicor are also able to provide medical escorts when necessary.

The authority of an Inspector is required for the provision of escorts. To authorise escorts in PER cases, an initial assessment will be made by the Port/LEO Inspector following which the DEPMU Duty CIO will process the request further, considering also any additional information available from the place(s) of detention.

To ensure minimal disruption to the flight on which the removal is to take place, Carlson Wagonlit request seats at the rear of the aircraft for the detainee and escorts, and LPI always endeavour to board the aircraft before the rest of the passengers.

40.1.3 Escorts in deportation cases

The costs of an escort in deportation cases are met by the Secretary of State and it is the responsibility of the casework IO to ensure the carrier is aware of any potentially disruptive person aboard a flight, regardless of whether the person is to be escorted.

40.1.4 Police escorts

In the past the police have on occasion provided overseas escorts for immigration detainees. However, since the commencement of the current overseas escorting contract, the

assumption should be that LPI will be used for every case. Any requests for the police to escort detainees overseas should be directed to the DEPMU HMI.

40.2 Use of mechanical restraints

Authority for the use of mechanical restraints is vested in DEPMU. Only two types of mechanical restraint may be used when immigration detainees are being escorted: handcuffs and/or, in wholly exceptional cases, leg restraints. **Under no circumstances may any other type of restraint be used.**

The use of such restraints is authorised only according to strict guidelines. In using restraints, the safety and security of the detainee and the safety of the escort and the public are the foremost considerations. **Only escorts who have had training in their use and who have undergone an approved first aid course may use mechanical restraints, and under no circumstances may any restraints be applied to the upper body, neck or head of the detainee.** In considering whether to obtain authority to use restraints, escorts must consider whether there are reasonable grounds for believing that an unrestrained detainee may use violence or seek to abscond, taking his history into account. Escorts must also ensure that there are no medical reasons why restraints should not be used.

Whilst on board a ship or aircraft the escort will be acting under the authority of the master/mommander of the vessel and the use of any form of restraint must be with his explicit agreement, although once again under no circumstances may any restraints be applied to the upper body, neck or head of the detainee.

40.2.1 Handcuffs

To use handcuffs, the escort must obtain prior authority from DEPMU. **In exceptional circumstances only**, e.g. where a detainee has not previously shown any propensity to violence or to abscond, the escort team leader may decide, at the contractor's risk, to use handcuffs without having obtained prior authority. Their use in such circumstances may only be justified in the interests of safety and/or security in an emergency situation.

40.2.2 Leg restraints

To use leg restraints, the escort **must** obtain **prior** authority from the Deputy Director with responsibility for detention, or his alternate. There would have to be particularly compelling reasons for leg restraints to be used other than on board or immediately before boarding and they may be used on board only if authorised by the Deputy Director with responsibility for detention (or his alternate) and if the master/commander of the vessel explicitly consents. The escort should keep a record of this decision.

Chapter 41 - Retrieval of personal effects

Inform persons to be removed/deported in advance, using the appropriate forms, of the baggage allowance (approx. 20-22 kg,) and that the IS has no responsibility for arranging or paying for the returnees excess baggage. **BAA airports will enforce a maximum weight limit of 32kg for any single item of baggage.**

If the returnee has a large amount of baggage, he must make his own arrangements for separate shipping.

When someone is detained in IS detention accommodation, ideally the baggage should be delivered there. Prisons and the majority of police stations, however, will not accept the delivery of baggage. Therefore, in the first instance the caseworking port should check with the individual place of detention concerned to ascertain whether the delivery of baggage is acceptable. In establishments where this is refused, it has been agreed that, where removal is to be effected through Heathrow, Gatwick or Stansted only, friends or relatives of the person concerned may leave one suitcase at Harmondsworth between 1400 and 2100 hrs not later than 24 hours before removal. The suitcase will be searched in the presence of the person delivering it. It will not be possible for that person to leave money for the detainee. All these arrangements must be confirmed with DEPMU in advance, so that acceptance procedures can be put into action. DEPMU will then arrange for the baggage to be collected and taken to the departure port in time for the removal. Where removal is **not** to be effected through Heathrow, Gatwick or Stansted, or where the arrangements above are not practical, it is the responsibility of the caseworking port to liaise with the departure port regarding arrangements for baggage delivery.

If the person wishes to take his baggage with him, then he must be responsible for its handling en route to the airport, not Wackenhut UK Ltd.

Although adequate time should be allowed for the person to obtain his baggage, do not delay removal unduly because of this.

Where a person wishes to withdraw funds before removal, he should arrange for a friend to do this on his behalf. If this is not possible, arrangements should be made to have his funds available for collection at the airport bank at his port of departure.

See also 9.11.4 for handling of baggage when removal is via a second port.

Chapter 42

Moved to chapter 26

Chapter 43 - MP's representations

43.1 Deportation cases

Once a DO has been signed, requests by an MP for deferral of removal will only be granted exceptionally and if there is new and compelling information which was not available at the time the order was signed.

43.2 Illegal entry and administrative removal cases where there has been a right of appeal before removal

Cases in this category will normally involve unsuccessful asylum applications or human rights allegations. In such cases removal will only be deferred when there is new and compelling information to take into account.

43.3 Making representations

In both categories, where MPs consider that new and compelling information has emerged, they may contact the Casework CIO or the Minister's Private Office. In some cases, representations made to a CIO and rejected might be repeated to Private Office. In such instances, and those where an MP chooses to contact Private Office direct, a decision on removal will be taken by Private Office only after consultation with the appropriate caseworker and considerations as to whether the information provided by the MP is both new and compelling. Enforcement offices should handle all MPs cases urgently and deal directly with Private Office to ensure that no delays occur. Written requests for review or deferral from MPs received by LEOs should be answered by telephone in the first instance. If the MP requests a written reply, however, this **must be replied to by OSCU.**

In deportation and non-delegated authority illegal entry cases, the CIO should not make a decision on the representations before consulting the senior caseworker in the appropriate Removals casework team responsible for the case. In delegated authority cases, where there

is no new and compelling information, there will normally be no need to refer to the relevant casework section, unless a written reply is required.

43.4 MPs representations received during weekends, public holidays and out of office hours

MPs representations received at LEOs during weekends, public holidays and out of office hours should be brought to the attention of an Inspector at the earliest opportunity. The Inspector may be able to reject a request for deferral in delegated and straightforward non-delegated illegal entry cases, but deportation cases must always be referred to the relevant casework section (OSCU). Where consultation with other units and/or a written reply is required (see 42.3), any removal action should normally be deferred, and urgent contact made with the relevant casework section on the next working day.

If a non-delegated illegal entry case was being removed over the weekend it would be advisable, where possible, for the LEO to contact the relevant casework section on the Friday before to ensure that staff at the LEO are aware of the necessary facts.

43.5 Illegal entry cases - no right of appeal

In cases of illegal entry where no right of appeal before removal exists and the MP considers that there is new and compelling information to be taken into account, he should be advised to contact Private Office. Removal will **normally**, but not **automatically**, be deferred for 5 working days for the MP to make written representations.

43.6 Time Limits and Detention

Ministers are keen that no one should be detained longer than necessary. MPs should be advised that if removal is deferred, 5 working days will be given to make written representations but where the individual is detained, tighter deadlines will need to be set. In practice, this will mean exchanges by fax between enforcement offices and Private

Office to enable the representations to be considered quickly, which in some cases may enable the removal to proceed without deferral.

Chapter 44 - Judicial review

Judicial review (JR) is the legal process whereby the lawfulness of a decision or action of central or local government or a public body can be challenged. The generic term for the law which the courts apply in such cases is "administrative law".

Normally the court will not hear a case unless satisfied that all statutory remedies open to an applicant have first been exhausted. Immigration cases should not therefore reach the stage of JR until they have been through the entire appeals system. However, the courts are sometimes prepared to hear direct challenges to executive decisions in cases where the applicant is in the UK and the right of appeal cannot be exercised until after removal, for example, clearly unfounded asylum or human rights claims.

While the Act provides for appeals against most decisions in immigration cases, any decision made by a Minister, an official or the appellate authorities may also be challenged by way of judicial review.

The Bowman Reforms were introduced on 2 October 2000 (but do not apply in Scotland - see 44.6). The reforms introduced several measures aimed at making the operation of the JR system more effective, including a simplification of the terminology used. The new terms are as follows:

Pre-Bowman	**Post Bowman**
Crown Office	Administrative Office
Applicant	Claimant
Respondent	Defendant
Grounds of Relief	Claim Form
Leave to move (for JR)	Permission (to apply for JR)

The most important changes to the way IND now handles JR cases are:

- the claimant (or his representative) must serve notice on the Defendant within 7 days that they have filed a claim for JR and must disclose the grounds on which his claim relies. Previously they were under no obligation to provide any information;

- once notice is served and the grounds disclosed, a summary defence must be submitted within 21 days. In some cases this is drafted by the IND and in other cases by Treasury Solicitors acting on behalf of IND. If this deadline is not met IND cannot take part in the permission hearing unless the court agrees exceptionally;

- most claims will be dealt with on papers in the first instance but the claimant may, if refused permission on the papers, request reconsideration at an oral hearing;

- if permission is granted, IND then has 35 days to submit a full defence. Treasury Solicitors act for IND and can appear at the substantive hearing but, in those cases where the 21 day deadline was missed, the court will take that into account when considering the awarding of costs.

44.1 Responsibility for case handling

In most enforcement cases, JR proceedings will be handled by the Operational Support & Certification Unit (OSCU) but cases will also be handled by TCU and MODCU.

In most cases, the OSCU have responsibility as the point of contact and will liaise with the enforcement office and Treasury Solicitors regarding the response to the challenge. TCU are the point of contact for third country cases.

MODCU will only be involved in the handling of JR proceedings if there is a challenge to the lawfulness of detention and the person has been detained for 28 days or more. They will be notified of any such challenges by OSCU or the Judicial Review Management Unit (JRMU). MODCU should, however, always be advised of any JR challenge relating to a person in detention for detention review purposes.

The procedures set out in 44.2 below must be adhered to by the enforcement office when notified by a subject or his representative of an intention to seek permission to move for JR, or that an application has already been lodged. **The enforcement office, once notified of such an intention, must ensure that such a person is not then removed without the authority of the appropriate unit (OSCU or TCU).**

44.2 Procedures in JR cases

These procedures apply equally to asylum and non-asylum cases, irrespective of appeal rights. "Urgent" cases, for the purposes of this chapter, are those with restricted returnability of three months or less. (For Third Country cases see 44.2.3 below.)

44.2.1 Detained and "urgent" cases

Upon being notified by a subject's legal representative of their intention to seek permission to move for JR, advise the appropriate unit immediately. If the person is detained advise MODCU **as well as** the ICD Removals Group or TCU. The normal procedure is then as follows:

Inform OSCU who will advise the representative in writing by fax that they are required to lodge their application (in complete form) with the Administrative Office within three working days and to notify the enforcement office of the lodging of the application, give the Administrative Office reference and **provide a copy of the Claim Form** (states the grounds on which the claim relies) within 24 hours of lodging the application. OSCU must be consulted immediately. They will then advise whether or not RDs should be deferred.

- on receipt of notification of the Administrative Office reference removal directions must be cancelled and the appropriate units informed (Removals Group or TCU **and MODCU if detained**). The relevant casework section will in turn notify Treasury Solicitors. IND must then instruct TSols on the grounds for defence. [It is important that IND ensure that TSols can obtain instructions or they cannot get the case before a judge

quickly] who will liaise with the Administrative Office to ensure the case is put before a judge at the earliest possible date;

- do not set further removal directions until the outcome of the application for permission to move is known and the appropriate unit have given their authority.

44.2.2 Non-detained, non-urgent cases

Upon being notified by a subject or his legal representative of an intention to seek permission to move for JR, advise the appropriate unit immediately. The normal procedure is then as follows:

- OSCU will advise the subject's representative in writing by fax that they are required to lodge their complete application and obtain a Administrative Office reference, notify the enforcement office of the reference and **provide a copy of the Claim Form** (states the grounds on which the claim relies) within five working days;

- on receipt of notification of the Administrative Office reference removal directions must be cancelled on guidance from OSCU and the appropriate units informed . The relevant casework sections will in turn notify Treasury Solicitors who will liaise with the Administrative Office to ensure the case is put before a judge at the earliest possible date;

- do not set further removal directions until the outcome of the application for permission to move is known and the appropriate unit have given their authority.

44.2.3 Third Country cases

Dublin Convention cases (and also Norway and Iceland)

Solicitors are required to institute judicial review proceedings by lodging papers in complete form with the Administrative Office and obtaining an Administrative Office

reference within 5 working days of the notification to the applicant of the intention to remove him to another Member State (i.e. at the "refusal" stage). A mere threat or expression of intent to seek JR does not count as instituting proceedings. Where proceedings are threatened or instituted after that time, removal directions will not normally be deferred, unless directed by the Court (by injunction) in a particular case.

ii. Non-Dublin cases – non-suspensive appeal

For Switzerland, Canada and the USA treat as detained/urgent cases (see 44.2.1).

iii Non-Dublin cases – suspensive appeal

Where return is to a non-EU/non designated state (except Iceland – see i above) guidance should be sought from the TCU.

44.2.4 Procedures in JR cases continued

The relevant casework section may send a letter of intervention ("*assertive letter")* to the representatives outlining the background to the case, including any compassionate circumstances and policy considerations that were taken into account when making the decision. A request will normally be included in the letter, that any relevant documentation is placed before the Court, including the letter itself.

If permission to move for judicial review is **refused**, action can be resumed on the decision. The appropriate unit (OSCU or TCU) will advise whether removal can proceed. [The first refusal of leave may not conclude the matter since, if the hearing was on the basis of the

documentary evidence before a judge sitting in private, (i.e. a "table application"), the applicant may then apply for a hearing in open court (i.e. an oral hearing). Applications may then proceed to the Court of Appeal - see 44.3]. *(Where an oral application was requested from the outset, a table application cannot be made at a later date).*

If permission to move is **granted**, the appropriate unit, in conjunction with the Treasury Solicitors, (litigation solicitors for the Home Office), will decide if the challenge should be resisted. They will then inform the enforcement office of the procedure to follow and the likely time scale involved - especially when detention is a consideration. **All enforcement action must be suspended immediately and should not be resumed until the application is resolved.**

44.3 Applications to the Court of Appeal/House of Lords

It is open to either party to seek leave to appeal against the decision of the Administrative Court by way of the **Court of Appeal** and thereafter, **The House of Lords**. Should a subject or his representative notify the enforcement office of an intention to seek leave to appeal to the Court of Appeal or the House of Lords, any removal directions in force must be suspended and the appropriate unit must be contacted immediately. Enforcement action should not continue until the time limit for appeal has expired.

44.4 Abusive JR threats

In all cases where a threat of JR has been received, the agreed arrangements are that a stay of 3 days should be granted. If the case is one that could be expedited, we would invite the court to deal quickly. Legal Advisors Branch should be contacted in every case where the concordat is likely to be breached.

The same criteria should be applied to threats made by uninstructed/new representatives.

44.5 Threats of JR outside headquarters office hours

Where an application is first notified to an enforcement office outside headquarters office hours (OSCU are available 7 days a week), subject to what is said above about abusive applications, it may be necessary for the enforcement office to defer removal. In these cases, the duty CIO will agree a deferral to allow the appropriate unit (OSCU or TCU) to be contacted and advise the applicant to lodge papers, obtain an Administrative Office reference and provide a copy of the Claim Form within the time limits as outlined in 44.2.1, 44.2.2 and 44.2.3. The file must be minuted to this effect and the appropriate unit informed as soon as possible, usually the morning of the next working day. They will then confirm the exact duration of the deferral with the representatives in writing, having referred to the Treasury Solicitors if necessary.

In cases where a deferral had already been granted to allow papers to be lodged and a Administrative Office reference to be obtained but no application was subsequently made, and there is reason to believe that a further unfounded threat to lodge an application will be made in order to frustrate removal, enforcement offices should attempt to re-set removal directions during normal office hours. If this cannot be arranged, however, the duty CIO at the enforcement office must liaise with the relevant OSCU or TCU senior caseworker in the appropriate unit prior to the proposed removal time and agree a course of action should a further threat to pursue JR be made. Whether a further deferral may be granted, or removal is to proceed unless a court order is obtained, is a decision for the senior caseworker in the appropriate unit based on the merits of the case and advice from Treasury Solicitors.

44.6 Judicial Review in Scotland

Judicial review in Scotland is pursued by means of a petition to the Court of Session in Edinburgh. There are several differences in the way cases are handled in Scotland, not the least of which is the fact that there is no permission to move stage. Applications for judicial review in Scotland should be brought to the attention of the Scottish Solicitors Office who act on our behalf in these cases, and who can provide advice on how to proceed. (For further

advice, refer to IDIs Chapter 27 Section 3). New judicial cases in Scotland should be notified to:

The Solicitor's Office
Division 7
Victoria Quay
EDINBURGH EH6 6QQ
0131 244 1631 Fax: 0131 244 1640

44.7 Applications to the European Court of Human Rights

The Human Rights Act 1998 came into force on 2 October 2000, giving further effect to rights and freedoms guaranteed under the European Convention on Human Rights in domestic law. An immigration decision that under section 82 of the NIA Act 2002 can be appealed on human rights grounds.

It is still possible for an application to be made to the European Court of Human Rights (ECtHR) in Strasbourg, although it is now more likely to be made only when appeal rights have been exhausted.

An application made to ECtHR does not in itself require the suspension of removal. However a person may apply to the ECtHR for a Rule 39 indication, which acts in a similar way to an injunction. If the ECtHR agrees to make a Rule 39 indication it will ask the Government to defer any removal. Such a request from the ECtHR would be made to the Home Office via the Foreign and Commonwealth Office.

The Grand Chamber of the European Court of Human Rights has recently confirmed the decision of the Chamber in the case of Mamatkulov etc v Turkey. It t found that a deliberate failure to follow a rule 39 indication by Turkey amounted to a breach of Art 34 ECHR (violation of the obligation not to hinder the right of individual petition). Where a Rule 39 indication is obtained it is therefore our practice to comply with the request and defer any removal. If removal directions have been set and you become aware of an application to the ECtHR, or a Rule 39 indication you should inform OSCU. They will advise whether removal should be deferred, having consulted the Legal Adviser's Branch (LAB) of the

Chapter 45 – Assisting Illegal Immigration

45.1 Time Limit for Prosecutions

Prosecutions for offences under sections 24-27 of the 1971 Act, are a matter for the police and the CPS (but see 49.1). The normal time limit for summary offences is six months. However under section 28 of the 1971 Act an extended limit of three years applies to certain offences if a chief of police (at least Chief Superintendent rank, Assistant Chief Constable in Northern Ireland) certifies that evidence sufficient to justify proceeding came to the notice of a relevant police officer only within the last 2 months.

There is no time limit for offences which can be tried on indictment (sections 24A, 25, 25B, 26A and 26B).
The offences to which the extended time limit applies are those under the "old" section 25(2) ("harbouring"), which applies where the offence was committed before 10 February 2003, and section 8 of the Asylum and Immigration Act 1996.

45.2 Harbouring

Before it was substituted by section 143 of the Nationality, Immigration and Asylum Act 2002 (which came into force on 10 February 2003), section 25(2) of the 1971 Act stated that "a person knowingly harbouring anyone whom he knows or has reasonable cause for believing to be either an illegal entrant or a person who has committed an offence under section 24(1)(b) or (c)"... (i.e. an overstayer or worker/claimant in breach) "...shall be guilty of an offence, punishable on summary conviction with a fine. of not more than £5,000..or with imprisonment for not more than six months or with both." The offence of harbouring has now been subsumed into sections 25 and 25B of the 1971 Act as substituted, but an act committed before 10 February 2003 which constitutes an offence under the old section

25(2) might still be the subject of a prosecution up until February 2006 if the extended time limit (see above) applies, and a person who is suspected of having committed an offence under the old section before 10 February 2003 may still be arrested without a warrant (under section 28A) and an immigration officer may still apply for a warrant under section 28B in order to enter premises to search for and arrest a suspect.

45.3 Facilitation

The former offences of knowingly being concerned in making arrangements for securing or facilitating the entry of an illegal entrant or asylum seeker or obtaining leave to remain for someone by deception which were contained in section 25(1) of the 1971 Act (as amended), have been replaced by the offences contained in sections 25-25B of the Act, as inserted by section 143 of the Nationality, Immigration and Asylum Act 2002. The provisions of the former section 25(1) will continue to apply in respect of things done before section143 of the 2002 Act took effect. **Guidance on this is contained Chapter 45.4 below.**

The relevant provisions of the 1971 Act (as substituted)are; (1) section 25 (assisting unlawful immigration to EU member state) ; (2) section 25A (helping asylum-seekers to enter the UK); (3) section 25B (assisting entry to the UK in breach of a deportation or exclusion order); (4) section 25C (forfeiture of vehicles, ships or aircraft); and (5) section 25D (by a British subject by virtue of the British Nationality Act 1965).

45.3.1 Section 25- assisting unlawful immigration to member state

New section 25 makes it an offence to do an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of a member state, where the individual knows or has reasonable cause to believe that: (1) his act facilitates the commission of a breach of immigration law, and (2) the individual is not a citizen of the EU. “Immigration Law” is defined as a law which has effect in an EU member state and which controls entitlement to enter, transit across or be in the State. . The offence can be committed outside the UK by (1) British citizens (or any other persons falling within section 25(5)), and (2) bodies incorporated in the UK. . Under section 25(7) of the

Asylum and Immigration (Treatment of Claimants, etc) Act 2004 Norway and Iceland are to be regarded as member States for the purposes of section 25 (and citizens of those States will be regarded as EU citizens for those purposes).

The maximum penalty for the offence is 14 years' imprisonment and/or an unlimited fine.

Section 1 of the 2004 Act inserted section 25(7)&(8) into the 1971 Act and empowers the Secretary of State to prescribe a list of additional States, such as Norway and Iceland, which are to be regarded as member States for the purposes of section 25 of the1971 Act. The list is implemented separately by way of an order. Such an Order (the "Immigration (Assisting Unlawful Immigration) (Section 25 List of Schengen Acquis States) Order 2004" (the "2004 Order")) was made on 1 November 2004. Article 2 of this Order contains a list that includes Norway and Iceland. In the future the Secretary of State may add or take away from this list where necessary, without the need for additional primary legislation.

45.3.2 Helping asylum seekers enter the United Kingdom

New Section 25A makes it an offence to knowingly and for gain facilitate the arrival in the UK of an individual, where the accused knows or has reasonable cause to believe that the individual is an asylum-seeker. As with the section 25 offence, this offence can be committed outside the UK by (1) British citizens (or any persons falling within section 25(5)), and (2) bodies incorporated in the UK. The maximum penalty for this offence is 14 years imprisonment and/or an unlimited fine.

45.3.3 Assisting entry to the United Kingdom in breach of a deportation or exclusion order

Under section 25B it is an offence to:

(a) do an act which facilitates the breach of a deportation order in force against an EU citizen, where the accused knows or has reasonable cause for believing that his act facilitates a breach of the order,
(b) do an act, in respect of an EU citizen who the Secretary of State has excluded from the UK on the grounds that his exclusion is conducive to the public good, which assists the individual arrive in, enter or remain in the UK, and (2) the Secretary of State has directed that the individual's exclusion is conducive to the public good.
As with the section 25 and 25A offences, these offences can be committed outside the UK by (1) British citizens (or any other persons falling within section 25(5)), and (2) bodies incorporated in the UK. The maximum penalty for this offence is 14 years imprisonment and/or unlimited fine.

45.3.4 Forfeiture of vehicles, ships or aircraft

Section 25C allows a court in certain circumstances to order the forfeiture of ships, aircraft and vehicles used or intended to be used in connection with an offence under 25,25A, 25B or 25D.

45.3.5 Powers of arrest

The powers allowing an immigration officer to arrest without warrant - and to enter premises without warrant in order to arrest - a person who has committed an offence under the old section 25(1) or who is suspected of committing an offence under that section continue to apply. In practice, however, any arrest under section 25(1) will continue to be exercised by a police officer (under section 24(1) (b) of PACE).

45.4 Facilitation Pre-10 February 2003

This section applies **only** to acts done before 10 February 3003.
The offences in this section are only relevant for acts done before 10February 2003.
Prior to 10 February 2003, section 25(1) of the 1971 Act (as amended) stated: "Any person knowingly concerned in making or carrying out arrangements for securing or facilitating:

a) the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an illegal entrant;

b) the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an asylum claimant; or

c) the obtaining by anyone of leave to remain in the United Kingdom by means which he knows or has reasonable cause for believing to include deception,

shall be guilty of an offence punishable on summary conviction with a fine of no more than £5,000 or with imprisonment for not more than six months or with both or, on conviction on indictment, with a fine or with imprisonment for not more than ten years or with both."

*see 49.2

45.4.1 Facilitating the entry of an illegal entrant

Under section 25(1)(a) (as inserted by section 5 of the 1996 Act) it was an offence to facilitate the entry into the UK of anyone the accused knew or had reasonable cause to believe to be an illegal entrant. Notice of illegal entry (IS151a) should normally be served before arrest/charges are laid.

Section 25(5) set out the extent to which facilitation activities carried out outside the UK could be regarded as offences, and section 25(6) t set out the powers of Court powers to order forfeiture of ships and aircraft and vehicles used or intended to be used in relation to the offence.. These also continue to apply in respect of offences committed before 10 February 2003.

45.4.2 Facilitating the entry of an asylum applicant

Under section 25(1)(b) (as inserted by section 5 of the 1996 Act), it was an offence to facilitate the entry of anyone who the accused knew or had reasonable grounds to believe to be an asylum applicant. Section 25(5) and 25(6) of the 1971 Act applied to this offence.

Section 25(1A) (as inserted by section 5(2) of the 1996 Act and amended by section 29 of the 1999 Act) provided that nothing in section 25(1)(b) applied to anything done in relation to a person who:

- had been detained under paragraph 16 of Schedule 2 to the 1971 Act; or
- had been granted temporary admission under paragraph 21 of Schedule 2 to the 1971 Act.

Section 25(1B) (as inserted by section 29 of the 1999 Act) provided that nothing in section 25(1)(b) applied to anything done by a person "otherwise than for gain".

Section 25(1C) (as inserted by section 29 of the 1999 Act) provided that nothing in section 25(1)(b) applied to anything done to assist an asylum claimant by a person in the course of duties on behalf of a *bona fide* refugee organisation, if the purposes of that organisation include assistance to persons in the position of the asylum claimant.

45.4.3 Facilitating the obtaining of leave to remain by deception

Under section 25(1)(c) (as inserted by section 5 of the 1996 Act), it was an offence to facilitate the obtaining by anyone of leave to remain by means which include deception. (Sub-sections 25(5) and 25(6) of the 1971 Act did not apply to this offence).

45.5 Powers of arrest

The powers allowing an immigration officer to arrest without warrant - and to enter premises without warrant in order to arrest - a person who has committed an offence under the old section 25(1) or who is suspected of committing an offence under that section continue to apply in respect of the offences in sections 25, 25A and 25B. A police officer can exercise a similar of arrest (under section 24(1) (b) of PACE) to arrest for an offence under section 25(1).