

Immigration Bail Hearings

1. This note accompanies a discussion with volunteers at a meeting to be hosted by the Bail Observation Project on 21st January 2011.
2. The purpose of the note is to provide general information concerning immigration bail hearings for participants, some of whom may have no prior experience of these hearings or the subject matter of these hearings.

What is an immigration bail hearing?

3. In short, this is a court hearing before an immigration judge, where the issue for the judge is whether or not the person asking for bail should be released from immigration detention, and if so on what conditions. This summarised answer raises several further questions. These questions are addressed in what follows.
4. This note does not set out the full range of relevant statutory provisions; and does not seek to provide precise legal explanations of the powers of detention and related matters. It gives only a general explanation or overview. It is not designed to prepare someone who wishes to advise or represent a person in relation to a bail application¹.

Immigration detention

5. The UK Border Agency is empowered to detain non-British citizens – either to prevent a person's unlawful entry to the UK, or in order to remove from the UK a person not entitled to be in the UK.

¹ Note that advice and representation in relation to bail is within the meaning of 'immigration services' for the purposes of Part V of the Immigration and Asylum Act 1999. This means that it is regulated such that the giving of advice or representation in relation to bail by a person in the course of a business (which includes charitable and other not for profit work) outside of the regulatory scheme is a criminal offence.

6. This general power is subject to UK Border Agency policy and guidance, which sets out constraints on its use and procedures that are to be followed. It is also constrained by a general requirement in law that the exercise of the power to detain must be done in a way that is lawful, and according to a lawful process.

7. Key points of principle in relation to the power to detain include:
 - Detention must be for one of the two purposes identified above.
 - Detention is a last resort. If it is not necessary to detain in order to achieve either of these purposes, a person should not be detained.
 - Detention is to be for the shortest possible time. There is no fixed time limit on immigration detention. Also, the key issue is not how long has a person been in detention, but how much longer may a person be in detention in order to achieve either of the two purposes identified above.²
 - Someone who is detained should be given written reasons for their detention.
 - A person's detention should be kept under review, and if detention is continued further written reasons should be supplied to explain why it is still considered necessary to continue detention.

8. UK Border Agency policy sets out factors that must be taken into account in considering whether to detain or whether to continue detention:
 - What is the likelihood of the person being removed and, if so, after what timescale?
 - Is there any evidence of previous absconding?

² However, the length of detention may be important. See the bail guidance for immigration judges, which states: "16. ...the judge must take into account the length of immigration detention because the period will be informative about why the person remains detained and whether they should continue to be."

- 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?
- Is there a previous history of complying with the requirements of immigration control?
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they rely heavily on public welfare services for their daily needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, and application for judicial review or representations which afford incentive to keep in touch?
- Is there a risk of offending or harm to the public?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?

9. In addition to the general principles outlined above, UK Border Agency policy sets out that certain people are normally considered unsuitable for detention³:

- Unaccompanied children
- The elderly
- Pregnant women
- Those suffering from serious medical conditions
- The mentally ill
- Torture survivors
- People with serious disabilities

³ In 2010, the UK Border Agency amended the policy such that certain of these categories became qualified by the phrase "*which cannot be satisfactorily managed within detention*" relating to care needs, illness and disability.

- Victims of trafficking
10. The UK Border Agency policy on detention is significantly more complex than what is set out here. The contents of the policy are relevant matters for the immigration judge in considering a bail application.⁴ The policy (65 pages) is available at:
<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary>

Immigration bail

11. A person in immigration detention may be released on bail by the UK Border Agency (by a chief immigration officer) or an immigration judge.
12. Immigration bail, if granted, will be subject to some (but not necessarily all) of the following conditions:
- That the person resides at a specified address
 - That the person reports regularly (e.g. to an immigration officer)
 - That the person comes back before an immigration judge after a fixed period of time (a bail renewal hearing)
 - That the person gives a recognizance (a sum of money that he or she may forfeit if breaching any condition of bail)
 - That another person (or other persons) stand surety (offer a sum of money that they may forfeit if the person breaches any condition of bail)

An immigration bail hearing

13. A person in immigration detention may apply to an immigration judge for bail. To do so, he or she must fill out and send a bail

⁴ See the bail guidance for immigration judges: “7. ...*The judge may also want to consider whether the reasons given are consistent with any UK Border Agency instruction governing the use of detention, as a failure to follow policy may seriously undermine the case for detention.*” (See also paragraph 5 of the bail guidance.)

application form. A date should then be set for the bail application to be heard.

14. Before the hearing, the UK Border Agency should supply a bail summary – unless it is decided that bail should not be opposed. A bail summary is a document setting out the reasons why the UK Border Agency opposes the application for bail. It will usually set out the person’s immigration history (i.e. such things as how and when the person entered the UK, whether he or she did so lawfully or not, whether he or she has previously been bailed, whether he or she has previously broken any conditions of bail or broken any conditions of being permitted to be in the UK, whether he or she has made any immigration applications or appeal, whether there are any applications or appeal outstanding and at what stage these are at). It should also explain why the UK Border Agency considers it appropriate to detain the person.
15. The bail summary is a critical document. If the bail summary does not justify continued detention, then it should normally follow that bail is granted.⁵ Bail summaries often contain errors. It is very important, therefore, that the bail summary is received by the detainee and any legal representative in good time before the bail hearing. This is important so that, firstly, any errors can be spotted; and, secondly, any evidence that is necessary to counter what is said in the bail summary can be obtained and presented. Bail summaries are often served late; and it is usually the case that the UK Border Agency does not produce any evidence to support the assertions in the bail summary.
16. A person applying for bail may be legally represented. Many people applying for bail are not represented.

⁵ See the bail guidance for immigration judges, which states: “11. *The immigration authorities must substantiate any allegation (in the bail summary or elsewhere) that a person poses a risk of harm to the public or a risk of reoffending where this is disputed. It is for the immigration authorities to justify the need for detention.*”

17. It is often the case that a person applying for bail is not produced at the bail hearing. He or she may 'attend' the hearing via video link from the centre where he or she is detained.
18. At the bail hearing, there may be the following people:
 - applicant (the person applying for bail), possibly via video link
 - immigration judge (and court clerk)
 - presenting officer (for the UK Border Agency)
 - legal representative (for applicant), though many applicants do not have a representative
 - interpreter
 - sureties
 - members of the public
 - others who are waiting for their own case to be heard
19. The procedure at the hearing is in the hands of the judge. Hence, what can be expected is explained in the next section dealing with the role of the immigration judge.

The role of the immigration judge

20. It is the responsibility of the immigration judge to ensure that the applicant receives a fair hearing; and ultimately it is for the judge to decide whether or not to grant bail. From 11 July 2011, there has been bail guidance for immigration judges. This is available at:
<http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/immigration-and-asylum/lower/bail-guidance-for-immigration-judges.pdf>
21. That guidance states:
"3. This guidance note sets out when and how an Immigration Judge should consider granting immigration bail. The guidance does not seek to be exhaustive and is able only to cover the most frequently occurring of situations. This guidance is not binding because Immigration Judges must apply the law and, if

there is any divergence between the law and this guidance, the law will always be preferred. Nevertheless, Immigration Judges should have regard to this guidance when considering bail applications and may need to give reasons if it cannot be applied in a particular situation.”

22. The role of the immigration judge in ensuring a fair hearing may depend on whether the applicant is legally represented. If the applicant is represented, the judge’s role may be more passive – i.e. ensuring that the hearing is conducted in a way that does not prejudice the applicant. If the applicant is not represented, the judge’s role may need to be more proactive – i.e. taking positive steps to ensure fairness. What follows would be appropriate if the applicant is not represented. If the applicant is represented, the role of the judge may be less proactive.

23. The judge should ensure that the applicant understands who is attending the hearing; and what procedure is to be followed. Given the importance of the bail summary, the judge ought to ensure that the applicant has received the bail summary and understands what it says. The judge should ensure that the applicant has an opportunity to say if there is anything inaccurate in the bail summary; and that opportunity should be clear – e.g. by the judge directly asking whether the applicant understands what is written there; and whether the applicant agrees that what is written there is correct. Whether or not the bail summary is correct, the judge should ensure that the applicant has an opportunity to explain why he or she says bail should be granted. Again that opportunity needs to be clear, so the judge may need to ask some direct questions – essentially directing the applicant’s mind to why he or she says bail should be granted.

24. The judge should also consider who else is present who may be able to help answer these points. If there are sureties, it would usually be appropriate to establish how the surety knows the applicant and why the surety considers the applicant will abide by

any conditions if bail is granted. If there are family members (or friends) present, it may be that they are in a position to give information as to why bail should be granted.

25. The judge will give the presenting officer an opportunity to speak; and may permit the presenting officer to ask questions of anyone who has given evidence at the hearing (including the applicant). However, the judge should ensure that the applicant hears and understands what the presenting officer says; and has an opportunity to answer any of the points the presenting officer makes (unless the judge makes clear that the point does not need answering because the judge thinks the point is a bad point or one that is already satisfactorily answered). These various responsibilities of the judge should be informed by the bail guidance, including for example:

“27. ...It is for the immigration authorities to provide the evidence on which they rely... Failure by one side or the other to provide relevant evidence that is reasonably available should result in the Immigration Judge giving less weight to that party’s argument.

“28. Both parties have a duty to bring to the judge’s attention any relevant evidence in their possession. For instance, the immigration authorities may have evidence that a person who has applied for immigration bail has a previously good record of maintaining contact with them.

“... ”

“67. Immigration Judges will keep a clear record of proceedings. Where bail is granted, it is good practice to identify the key reasons for that decision in the record of proceedings. Where bail is refused, the reasons should be set out legibly in the relevant bail document and with sufficient detail so that the applicant knows why they have not been granted bail.

“68. An Immigration Judge will have regard to existing guidance which is relevant to the conduct of hearings. In particular, judges will take account of the Joint Presidential Guidance Note No. 2 on Children, Vulnerable Adults and Sensitive Appellants since by definition a person lawfully detained is a vulnerable person.”

26. Immigration judges sometimes divide bail hearings into two parts. Firstly, considering whether bail should be granted or refused in principle. This is reflected in the bail guidance:

“37. ...In certain circumstances, bail in principle might be granted where the conditions for release cannot be immediately met...”⁶

27. Secondly, if in principle bail may be granted, asking questions of any surety to see whether the surety is satisfactory. Note, however, that a surety is not necessary for bail to be granted. See the bail guidance:

“25. Where it is concluded that the person is likely to comply with the grant of bail, bail should normally be granted and stringent conditions of bail may well be unnecessary.

“... ”

“38. An Immigration Judge may require an applicant for bail to produce sureties. This should not be an automatic requirement...”

28. Ultimately, bail is at the discretion of the immigration judge. The question for the judge is little more than whether he or she thinks bail should be granted, though it would be appropriate for the judge to approach that question having regard to the principles outlined earlier in this note. Moreover, as stated in the bail guidance:

“26. ...bail should not be refused unless there is good reason to do so, and it is for the respondent to show what those reasons are.”

29. The role of the immigration judge is not to rule on whether the detention of the applicant is lawful or unlawful. This does not mean, however, that matters relating to the lawfulness of the detention are not relevant for the judge. The bail guidance states:

“5. ...it will be good reason to grant bail if for one reason or another continued detention might well be successfully challenged elsewhere.”

Some key things to consider

30. The following bullet points summarise some key things that should be apparent in a fairly conducted bail hearing:

⁶ See also paragraph 45 of the bail guidance

- The bail summary has been made available to the applicant (and his or her legal representative) in good time before the hearing
- The applicant and his or her legal representative have had sufficient time to discuss the bail summary before the hearing starts
- It is clear that the applicant can hear and understand what is said and what is happening throughout
- The applicant (or his or her legal representative) is given sufficient opportunity to explain why bail should be granted and to answer any points in the bail summary and any other points made by the presenting officer
- The immigration judge has made clear the procedure he or she is adopting before the hearing progresses; and if there are any departures from that the immigration judge makes clear what is happening and why
- If the immigration judge decides to refuse bail, he or she explains why
- At all times, the immigration judge ensures that the hearing is conducted in a clear and courteous manner
- If the applicant is not represented, the immigration judge ensures that the applicant has a proper opportunity to make his or her case for a grant of bail.

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