



TRIBUTUNALS  
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**Presidential Guidance Note No 1 of 2012.**

**BAIL GUIDANCE FOR JUDGES PRESIDING  
OVER IMMIGRATION AND ASYLUM HEARINGS**

Implemented on Monday 11 June 2012.

(IMMIGRATION AND ASYLUM CHAMBER)

## FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

### **BAIL GUIDANCE FOR FIRST-TIER TRIBUNAL JUDGES**

#### **SAFEGUARDING LIBERTY**

1. The right to liberty is a fundamental right enjoyed by all people in the United Kingdom, whether British citizens or subject to immigration control. It is a right established in common law as well as protected by the European Convention on Human Rights.<sup>1</sup> There are occasions where a person may be legitimately deprived of their liberty including when the immigration authorities<sup>2</sup> are investigating whether a person who is not a citizen is entitled to enter or stay in the United Kingdom or where a decision has been made to remove a person from the country.<sup>3</sup>
2. British immigration laws set out the powers of the immigration authorities to detain those who are subject to immigration control.<sup>4</sup> The laws provide safeguards to prevent the powers of detention from being used disproportionately or excessively. Most of the safeguards (temporary release, temporary admission and Chief Immigration Officer bail) are available to the immigration authorities themselves. In addition, the laws provide that any person held in immigration detention may apply to the First-tier Tribunal (Immigration and Asylum Chamber) (hereafter the Tribunal) for immigration bail. Such applications will be decided by a First-tier Tribunal Judge. When judges of the Upper Tribunal (IAC) consider bail they do so as judges of the First-tier Tribunal.<sup>5</sup>
3. This guidance note sets out when and how a First-tier Tribunal 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 First-tier Tribunal Judges must apply the law and, if there is any divergence between the law and this guidance, the law will always be preferred. Nevertheless, First-tier Tribunal 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.

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<sup>1</sup> E.g. chapter 29 Magna Carta, Art. 5 ECHR.

<sup>2</sup> The term “immigration authorities” is used throughout this guidance to refer to Immigration Officers and the Secretary of State for the Home Department, each of which can exercise the power to detain foreign nationals (see paras. 16 and 21 of sch. 2 to the [Immigration Act 1971](#) and ss. 62 and 67 of the [Nationality, Immigration and Asylum Act 2002](#)).

<sup>3</sup> Art. 5(1)(f) ECHR

<sup>4</sup> The sources of law are set out in Annex 1.

<sup>5</sup> See para. 13.3 of the [Practice Directions of the Immigration and Asylum Chambers, 10 February 2010](#).

## WHEN IS A FIRST-TIER TRIBUNAL JUDGE LIKELY TO GRANT BAIL?

4. In essence, a First-tier Tribunal Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control. A First-tier Tribunal Judge will focus in particular on the following five criteria (which are in no particular order) when deciding whether to grant immigration bail.
  - a. The reason or reasons why the person has been detained.
  - b. The length of the detention to date and its likely future duration.
  - c. The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable.
  - d. The effect of detention upon the person and his/her family (see para 20 below).
  - e. The likelihood of the person complying with conditions of bail.

In practice it is often not possible to separate one issue from the others and First-tier Tribunal Judges will need to look at all the information in the round.

5. A First-tier Tribunal Judge's power is simply to grant bail, which is itself a restriction of liberty. The judge has no power to declare the detention unlawful and give any relief if it is considered to be; such matters need to be decided in the Administrative Court or in a claim for damages. Given the wide ranging powers of the immigration authorities in relation to the detention of non-nationals, First-tier Tribunal Judges should normally assume that a person applying for immigration bail has been detained in accordance with the immigration laws. However, it will be a good reason to grant bail if for one reason or another continued detention might well be successfully challenged elsewhere.

### **(a) The reason(s) why the person has been detained**

6. The reasons for detention must be set out in the bail summary which should be available to the applicant and the First-tier Tribunal Judge before the hearing. Where the bail summary is absent, the judge may be able to infer the reasons for detention from other available information. The absence of the bail summary is not of itself a reason to grant or refuse bail or to invite withdrawal of the application.
7. The judge must consider the weight to be given to the reasons why a person is detained. The judge will be considering whether in totality the reasons given are proportionate to the need to continue to detain. The judge may also want to consider whether the reasons given are consistent with any UK Border Agency instructions governing the use of detention, as a failure to follow policy may seriously undermine the case for detention.
8. If the reasons for detention are not supported by sufficient evidence, then they will be given less weight by the judge when deciding whether it is proportionate to maintain detention. For example, a judge is unlikely to give significant weight to a claim by the immigration authorities that continued detention is necessary where there is little or no evidence that consideration has been given to the applicant's specific circumstances rather than to general and/or generic policy statements.

9. On the other hand, where the immigration authorities provide clear and evidentially supported reasons why a person needs to be detained, then the judge should give appropriate weight to the claim that continued detention is necessary for the immigration authorities to carry out their functions.
10. The failure of the Secretary of State to file and serve a bail summary will be taken seriously and on the basis that the application may be regarded as unopposed. However, before making a final decision, the First-tier Tribunal Judge must have regard to all the circumstances, particularly any public interest factors which may be relevant to the individual application.
11. A person cannot be subject to immigration detention merely because they pose a risk of harm to the public or because there may be a risk of re-offending. However, where a person subject to immigration control has been detained pending investigation or expulsion, and that person has a history of criminality, then when considering whether detention is justified, a First-tier Tribunal Judge will have to assess the risk of that person re-offending and the consequences of such re-offending if there is such a risk. If the risk is high and the consequences grave then it is unlikely that bail will be granted. It is clearly not in the public interest for a person to be released where there is a significant risk of serious harm to the public resulting from release.
12. The immigration authorities must substantiate (in the bail summary or elsewhere) any allegation that a person poses a risk of harm to the public or a risk of reoffending. In the case of foreign national prisoners an Annex A/NOMS 1 report should be made available by UKBA (see Annex 3). It is for the immigration authorities to justify the need for detention.
13. The judge may require the immigration authorities to provide details of the person's criminal record, recent risk assessments by the Probation authorities and/or licence conditions.<sup>6</sup> The Tribunal is a judicial body dealing with the liberty of the subject and this is a sufficient reason to justify the receipt of personal data otherwise exempt from disclosure.<sup>7</sup> However, short of a witness summons the Tribunal may have no power to require third parties to produce such material and will have to direct the respondent to produce it (AIT Rules 2005 (rule 45 (1), 50(1))).
14. The judge can deal with such sensitive information confidentially if necessary in the interest of justice or privacy. Thus the judge may exclude members of the public including sureties where there are good reasons to do so.<sup>8</sup> This might include preventing a release address being disclosed. Of course, the judge cannot hear reasons for opposing bail in the absence of the applicant and/or their representative.<sup>9</sup>
15. Where an applicant for immigration bail has recently completed a prison sentence, there may be licence conditions applicable. The judge should be aware of such licence conditions before imposing bail conditions. It would be unfair if the judge imposed conditions which were inconsistent with those imposed by the licence. Stringent bail conditions may not be necessary if there is already an obligation to report to a probation officer regularly.

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<sup>6</sup> Protocols relating to the provision of this information are set out in Annex 3.

<sup>7</sup> [Data Protection Act 1998, s.35](#)

<sup>8</sup> [The Asylum and Immigration Tribunal \(Procedure\) Rules 2005](#), rule 50(3).

<sup>9</sup> *Ibid*, rule 51(7).

**(b) The length of the detention to date and its likely future duration**

16. There is no pre-determined limit in the immigration laws as to how long the immigration authorities can detain a person pending the making or execution of the relevant immigration decision.
17. Although a First-tier Tribunal Judge does not have the power to decide whether the length of detention in a particular case is excessive (and therefore unlawful), 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.<sup>10</sup>
18. The immigration authorities will have to show that the reasons for detention remain connected to the pending investigation and/or removal.<sup>11</sup> If the immigration authorities cannot demonstrate this connection, then a First-tier Tribunal Judge should grant bail as continued detention may well be unlawful. Where there is some continued connection but the detention has become prolonged the weight that would otherwise be given to the allegation that detention is necessary in the interests of immigration control should diminish when assessing whether detention remains proportionate.
19. The senior courts have been reluctant to specify a period of time after which the length of detention will be deemed excessive and as a result that bail should be granted. Each case turns on its own facts and must be decided in light of its particular circumstances. However, it is generally accepted that detention for three months would be considered a substantial period of time and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months.
20. When considering the length of immigration detention, a First-tier Tribunal Judge will take into consideration any periods where a person has obstructed the reasonable inquiries of the immigration authorities or during an appeal or other legal proceedings which have the effect of preventing further investigation or the intended removal. These factors may help explain why in many cases immigration detention remains connected to the issues of investigation and removal, but a First-tier Tribunal Judge must continue to consider what alternatives there are to detention, that will not interfere unreasonably with the functions of the immigration authorities, in order to reach a proportionate decision regarding bail.

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<sup>10</sup> Some key extracts from Senior Court judgments reviewing the lawfulness of detention are set out in Annex 2. They are informative in respect of the issues that might be taken into account in a bail application when assessing the significance of length of detention.

<sup>11</sup> It should be remembered that, as per para. 22(1B) of Sch. 2 to the [Immigration Act 1971](#), an application for immigration bail cannot be made until seven days have passed since the person arrived in the United Kingdom and as such there will be no need for the immigration authorities to demonstrate the connection between detention and a pending investigation and/or removal. However, this restriction would appear to only apply in circumstances where an appeal is not pending since there is no such restriction in para. 29 of Sch. 2.

21. Detention of over a year has been held to be proportionate where there is a high risk of the applicant causing serious harm to the public. On the other hand, a period of weeks might be disproportionate where one of the effects of detention is to keep a parent apart from young children.<sup>12</sup> In family cases detention would have to be compatible both with the right to respect for family and private life and the best interests of the child principle recognised by UN Convention on the Rights of the Child (November, 1990)<sup>13</sup> and s. 55 of the [Borders, Citizenship and Immigration Act 2009](#).

**(c) The likelihood of the person complying with conditions of bail**

22. First-tier Tribunal Judges should grant bail where a less intrusive alternative to immigration detention is sufficient to protect the relevant public interest. Detention will be neither necessary nor proportionate if release on bail is likely to be sufficient to ensure that the person concerned attends hearings, reports when required, and does not commit offences.
23. When deciding if there is a reasonable alternative to detention, First-tier Tribunal Judges will consider an applicant's personal circumstances, including their incentives for keeping in contact with the immigration authorities together with what conditions might be imposed to ensure reasonable control of the person granted bail.<sup>14</sup>
24. A First-tier Tribunal Judge is likely to give significant weight to a person's previously good record of complying with immigration control and maintaining contact with the immigration authorities because this history will provide a reasonable ground for believing that the person is likely to comply with bail conditions.
25. The judge will need to look at all the available information in a particular case in the round before reaching a decision whether to grant bail. It may be reasonable to conclude that a person's incentive to comply with bail will be low where removal is imminent even if there has been a good previous history of compliance.
26. 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.

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<sup>12</sup> [MXL and others \[2010\] EWHC 2397 \(Admin\), para. 45ff.](#)

<sup>13</sup> R (on the application of Reece-Davis) v SSHD [2011] EWHC 561 (Admin) (See Lexis).

<sup>14</sup> The conditions that a First-tier Tribunal Judge can impose are set out in para. 31ff below.

## REACHING A DECISION

27. The primary function of a First-tier Tribunal Judge at a bail hearing is to undertake a risk assessment to decide whether bail is appropriate. A First-tier Tribunal Judge will consider all the evidence provided in order to decide whether maintaining detention is proportionate in the applicant's circumstances. By contrast with criminal proceedings, there is no statutory presumption in favour of release in immigration detention cases.<sup>15</sup> Nevertheless, 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.
28. A bail hearing takes the form of a risk assessment and attempts to apply strict burdens of proof may be misleading. Either party may need to provide relevant evidence to support their case. It is for the immigration authorities to provide the evidence on which they rely to say that it is reasonable for detention to continue. It is necessary for the applicant to provide the evidence to challenge this case and show that it is reasonable to grant bail. Failure by one side or the other to provide relevant evidence that is reasonably available should result in a First-tier Tribunal Judge giving less weight to that party's arguments.
29. Both parties have a duty to bring to the judge's attention any relevant evidence in their possession. For example, 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.
30. As the judge will be considering future events the standard of proof might be described as whether there are substantial grounds for believing that detention should be maintained. For example, if there is a reasonable likelihood of the applicant complying with any bail conditions imposed, there are unlikely to be substantial grounds for believing that detention would be appropriate. On the other hand, if there is a real risk to the public, there will be substantial grounds for believing that detention should be continued.
31. Where there are substantial grounds for both granting and refusing bail, regard must be had to whether bail conditions may assist to make release appropriate.

## BAIL CONDITIONS THAT CAN BE IMPOSED BY FIRST-TIER TRIBUNAL JUDGES

32. The Tribunal will always set some conditions when granting bail to ensure that the person concerned answers when required to do so. However, the stringency of the conditions set will vary according to the circumstances and the level of monitoring of the applicant that may be required.
33. The first condition is to specify when bail will end. Where no immigration appeal is pending, a First-tier Tribunal Judge should grant bail with a condition that the applicant surrenders to an Immigration Officer at a time and place to be specified either in the bail decision itself or in any subsequent variation.

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<sup>15</sup> The presumption in favour of bail in criminal matters can be found in s.4 of the [Bail Act 1976](#). The immigration authorities have a policy stating that there is a presumption in favour of release (see [UKBA Enforcement Instructions and Guidance ch. 55 Detention and Temporary Release](#)) although not binding on a First-tier Tribunal Judge a UKBA policy in favour of release would be a persuasive reason to grant bail.

34. The Judge will usually specify the immigration reporting centre nearest to where the applicant is to reside when released and will often specify that the applicant should answer to an Immigration Officer within seven days.
35. Once the applicant has answered to an Immigration Officer in accordance with that primary condition, the duration of any further grant of bail will be made by a Chief Immigration Officer rather than the Tribunal. It is to be expected that the Tribunal's decision as to the principle of release will be followed in the absence of a change of circumstances. If a person does not answer as directed, then forfeiture proceedings are likely to commence in the Tribunal.
36. Where an immigration appeal is pending<sup>16</sup>, the primary condition for bail will be as follows:-
  - i. to attend the next and every subsequent hearing of the appeal at such places and times as shall be notified or as otherwise varied in writing by the Tribunal; and
  - ii. following final determination of the appeal, unless bail is revoked by the Tribunal or by operation of law, to appear before an Immigration Officer at such time and place as directed by the Tribunal; and
  - iii. the terms of bail may be varied at any time during their currency by application or at the Tribunal's own motion.
37. To enable the Tribunal to promote the achievement of the primary condition, a First-tier Tribunal Judge is likely to impose a secondary condition. Secondary conditions usually relate to the place of residence of the person to be released on bail and how the person released on bail should maintain contact with the immigration authorities.
38. First-tier Tribunal Judges will take into account the following points when deciding whether bail can be granted. In certain circumstances, bail in principle might be granted where the conditions for release cannot be immediately met. Bail in principle is discussed in the next section.
  - i. The proposed place of residence must be set out clearly in the application for bail so that the immigration authorities can consider its suitability and make representations if they believe it is not suitable.
  - ii. A late change of proposed address is likely to result in bail being refused because it is unlikely there will be sufficient time for the immigration authorities to take a view as to whether they can maintain reasonable control of the person at that address.
  - iii. There are circumstances where an applicant will not have a release address. Protocols exist between the Tribunal and NASS regarding the provision of addresses in certain circumstances. A First-tier Tribunal Judge will have regard to these protocols (which are contained in Annex 4).
  - iv. A First-tier Tribunal Judge will take into account any licence conditions that apply to a person to be released on immigration detention. A First-tier Tribunal Judge should not grant bail with bail conditions that are contrary to any licence conditions. Details of the licence will be held by the Criminal

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<sup>16</sup> Pending appeal has the same meaning as in the Immigration Acts.



Casework Directorate and should be provided by the presenting officer (as per the Probation Guidance contained in Annex 3).

- v. As immigration bail is an alternative to immigration detention, a person granted bail will be made subject to a condition to ensure they maintain regular contact with the immigration authorities. Such contact can take a number of forms. The most common is a requirement for the person granted bail to report weekly to a Reporting Centre maintained by the immigration authorities. However, it is for a First-tier Tribunal Judge to decide on the frequency of such reporting. A failure to maintain contact might be taken by the immigration authorities as reasonable grounds for believing that the person should be re-detained (as per para. 24 of sch. 2 to the [Immigration Act 1971](#)).
  - vi. In addition to such reporting conditions, a First-tier Tribunal Judge can direct that a person be subject to electronic monitoring (“tagging”). The relevant provisions for electronic monitoring are set out in s.36(4) of the [Asylum and Immigration \(Treatment of Claimants, etc\) Act 2004](#). This condition is most likely to be imposed if bail is to be granted to a person who has previously committed a criminal offence where the immigration authorities have requested it as an additional safeguard for the protection of the public. However, it remains for a First-tier Tribunal Judge to consider if such additional safeguards are required and the immigration authorities must substantiate such a request. Judges will also take into account the guidance in Annexes 5 and 8 regarding the terms of the bail conditions that should be imposed if electronic monitoring is deemed necessary.
39. A First-tier Tribunal Judge may require an applicant for bail to produce sureties. This should not be an automatic requirement and the Judge must have due regard to the fact that people recently arrived in the country may have nobody to whom they could expect to stand surety for them. The purpose of requiring a surety in an appropriate case is to reduce the risk of a breach of bail conditions and increase confidence that the applicant will comply with all the conditions of bail. If there are no reasonable grounds for concluding that the applicant will abscond, a surety may well be unnecessary.
40. A surety’s principal obligation is to ensure that the applicant attends when required to do so. If the applicant fails to attend the surety risks losing all or some of the recognisance pledged to ensure that duty. A surety has no other obligations in law under the bail conditions. A surety need not reside at the same address as the applicant, and the degree of supervision that the surety may seek to exercise to ensure that the applicant attends when required is a matter for the surety in the light of the risk of the loss of the recognisance.
41. A judge’s confidence that bail conditions will be met may be increased where there is positive evidence that the surety is in a position to influence the actions of the person seeking bail and to be able to monitor the person’s activities should bail be granted. Confidence in a surety may be increased by the amount of the recognisance offered that should remind the surety of the principal duty.
42. A surety who has no immigration status, regular address, means of subsistence or knowledge of the applicant may well be unsuitable to act as such, as will a surety who has criminal convictions that are not spent. Details of sureties offered should be supplied in advance to the respondent who may well make background checks.

43. If there are doubts as to identity or suitability of a proposed surety the judge will need to explore the facts and decide an amount (the recognisance) that will clearly focus his or her mind on the duties of a surety. A judge will need to verify the identity and residence of the proposed surety and their ability to stand in the sum offered. A surety should have been informed to bring some evidence of their ability to pay the recognisance if required to do so. What constitutes sufficient proof may depend on the size of the recognisance and other circumstances of the case. There is no inflexible rule. Bank statements for three months before the hearing date, a building society or other savings account of similar duration may be sufficient. Where a person offers wage slips as evidence of means some inquiry may be needed as to outgoings.
44. Some examples of standard bail conditions are set out in Annex 8.

#### **BAIL IN PRINCIPLE**

45. Where the bail application has been properly prepared in advance and the judge has the relevant information required, a decision on most bail applications can usually be reached on a single occasion. Having assessed the relevant risks, if the judge decides that bail should be granted and the conditions of bail can be ascertained immediately, the applicant can be released without delay.
46. However, there may be occasions where although a First-tier Tribunal Judge can fully assess the risks and decide that bail should be granted in principle, release cannot be immediate because information is missing to complete the conditions to be imposed. It is undesirable that bail should be refused in these circumstances or that hearing time is spent on repeat applications on the same point. In appropriate cases therefore bail can be granted in principle and the applicant detained until such time as the information is provided to the Judge's satisfaction when release can be effected.
47. Where bail has been granted in principle, the reasons for so doing and what information is needed to make the decision absolute should be carefully recorded by the judge in the bail file and notified in writing to both parties so that others can understand what has occurred.
48. Where a First-tier Tribunal Judge would grant bail and order release but for the fact that a relevant document is not available, the judge may grant bail in principle and order that release should be delayed for 48 hours for the document to be produced. If the document is produced to the Tribunal within the set period, and is satisfactory, the order for release can be completed without any further hearing. The grant of bail may be signed by the same or by a different judge.
49. First-tier Tribunal Judges are referred to Annex 7 paras. 6 and 7 which provide guidance about granting bail in principle where an application involves people in Scotland and England and Wales (see Cross-border issues).
50. If the information required is not provided within the set period, or is not satisfactory, bail will be treated as having been refused and it will be for the applicant to make a fresh bail application. If the information becomes available later, a fresh application for bail will have to be made. In such circumstances the provision of the new information will be treated as a change of circumstances because there will be fresh evidence to examine.

51. Bail in principle should only be granted where all risk factors can and have been considered but where the actual mechanics of release cannot be met immediately. If a First-tier Tribunal Judge is unable to consider all risk factors relevant to a bail application, then bail should be refused.
52. There are already protocols in place that cover common situations regarding the conditions that need to be met for release. These are contained in the annexes. They relate to (i) where there is need for an applicant to be provided with a place of residence by NASS, and (ii) where there is an imposition of electronic monitoring (“tagging”). In such circumstances it will not be necessary for a further bail hearing to confirm the conditions on which bail is granted.
53. Where, before release has been effected, there is a request to vary the conditions imposed (for example a change of place of reporting) such a request is likely to be dealt with without a hearing, by either the same judge who granted bail in principle or by a different judge.
54. In such circumstances a First-tier Tribunal Judge considering the application (whether the original judge who granted bail in principle or another judge) may make enquiries of the applicant and immigration authorities as appropriate to see if the proposed variation is opposed. If it is not opposed, then release can be ordered subject to the variation without a further hearing.

#### **VARIATION OF BAIL CONDITIONS**

55. It may be necessary to vary bail conditions particularly where bail has continued for some time. Responsibility for considering such variation lies: (a) with the Tribunal while an appeal is pending; (b) with an Immigration Officer in all other circumstances.
56. The standard conditions of bail set out in para. 35 above enable the Tribunal to vary the conditions of bail on its own motion or on application wherever it is considered appropriate to do so. The following points apply only where the Tribunal is responsible for considering a variation request.
57. The Tribunal will consider variation requests without a hearing, where possible. A request to vary the residence address, reporting conditions or electronic monitoring will require confirmation from the immigration authorities that the change is acceptable. Therefore the person on bail should seek the consent of those authorities before applying for such a variation. If the person on bail does not seek such consent, then the Tribunal will contact the immigration authorities. This is likely to delay the consideration of a variation request.
58. In cases where the consent of the immigration authorities is withheld, the Tribunal may arrange a bail variation hearing but will not always do so.
59. Where the variation request involves a proposed change of surety, the Tribunal should arrange a bail variation hearing. This is so a First-tier Tribunal Judge can consider the new surety, and release the previous surety from the previous obligations.

## WHEN DOES BAIL END?

60. Immigration bail can end in one of three ways:
- the person is no longer subject to immigration detention (having been granted a period of leave to enter or remain or having left the United Kingdom); or
  - the person has been taken back into immigration detention; or
  - the period of immigration bail granted by a First-tier Tribunal Judge or an appropriate Immigration Officer has come to an end.
61. The first situation needs no commentary. If the second situation arises, then the person who was previously on bail may make a fresh bail application if they are not brought back before the Tribunal (cf para. 24 and para. 33(3)(b) of sch. 2 to the [Immigration Act 1971](#)). If there is no material change in their circumstances, it is likely a First-tier Tribunal Judge will grant bail on the same conditions as before.
62. In the third situation, if an immigration appeal is pending and the usual primary condition was made (see para. 25 above), then the failure of a person on bail to appear in their appeal hearing will bring their bail to an end. Forfeiture proceedings may be commenced and show cause letters issued.
63. If bail was granted by an Immigration Officer, then it will be for an appropriate Immigration Officer to consider the person's circumstances at the surrender date and to decide whether to detain the person, grant temporary admission or temporary release or to grant immigration bail. Any conditions imposed will be the responsibility of the Immigration Officer.

## FORFEITURE

64. The Tribunal's jurisdiction in forfeiture proceedings is derived from paragraphs 23, 31 and 32 of Sch. 2 to the [1971 Act](#). Put simply, if the person released on bail fails to appear at the time and place named in the recognisance, then a First-tier Tribunal Judge can find that the recognisance of the person on bail and of any surety is forfeit. A First-tier Tribunal Judge has the power to decide if the person entering into a recognisance is bound in full or in part.
65. Failure to comply with secondary conditions of residence or reporting to a Police Station or Immigration Reporting Centre, on their own or in combination, does not justify the commencement of forfeiture proceedings. Only a failure to comply with the primary condition to appear before a First-tier Tribunal Judge or an Immigration Officer can justify such proceedings.
66. When assessing whether or not there should be forfeiture of any recognisance and the amount to be forfeited, a First-tier Tribunal Judge will take account of the following matters in particular with regard to the sureties:
- the level of their responsibility for the applicant's failure and the steps taken by them to ensure compliance;
  - any steps taken by them to report any concerns to the Immigration Authorities;
  - whether the applicant failed to comply with any secondary conditions and any steps taken by the sureties to ensure compliance; and
  - any other explanations offered by the sureties.

## CONDUCTING BAIL HEARINGS

67. First-tier Tribunal Judges can decide how they conduct a hearing to best suit the circumstances of an application. Two particular circumstances should be noted.
- Most bail hearings are conducted by video link. Separate guidance exists as to the arrangements for such video link hearings (see Annex 6).
  - In the following situation the Tribunal will restrict the length of a bail hearing, the evidence that will be heard and the opportunity for an applicant to have a period of consultation over a video link prior to the hearing. The first condition is that immigration bail has previously been refused by a First-tier Tribunal Judge after a full hearing of the application within the previous 28 calendar days and the second is that the fresh application contains no new evidence and no new ground. The Tribunal will issue directions to the parties in such cases with the notice of hearing setting out the restrictions.
68. First-tier Tribunal 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 in addition to the record of proceedings, the reasons for refusal of bail should be set out in writing and with sufficient detail so that the applicant knows why they have not been granted bail.
69. A First-tier Tribunal 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.
70. First-tier Tribunal Judges are also referred to the guidance in para. 44ff above relating to “bail in principle”.

## ANNEXES

71. The above guidance sets out the general principles that will be applied by First-tier Tribunal Judges when deciding whether to grant bail. The following annexes deal with related issues and form part of this guidance.

- [Annex 1](#) Sources of law
- [Annex 2](#) Extracts from decisions of the Senior Courts
- [Annex 3](#) Foreign National Prisoners (FNPs)
- [Annex 4](#) NASS accommodation (s.4, Immigration and Asylum Act 1999)
- [Annex 5](#) Electronic monitoring (“tagging”)
- [Annex 6](#) **Revised** Guidance note to Judiciary about video link bail hearings
- [Annex 7](#) Adapting Bail Guidance for bail applications in Scotland and Cross-border issues
- [Annex 8](#) Examples of standard bail conditions.

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## **ANNEX 1**

### **SOURCES OF LAW RELATING TO IMMIGRATION BAIL**

*The following list sets out the principle legal materials relevant to immigration bail and summarises the key provisions.*

#### **GENERAL ACTS OF PARLIAMENT**

[Human Rights Act 1998](#)

##### **Schedule 1 Article 5 Right to liberty and security**

(NB Article 5(1)(f) has particular relevance to non-nationals).

#### **IMMIGRATION ACTS**

[Immigration Act 1971](#)

##### **Para. 22, Schedule 2**

Immigration bail may be granted by the First-tier Tribunal to a person in immigration detention, where seven days have elapsed since the person arrived in the United Kingdom and where there is no pending appeal, and the conditions that can be imposed to bail in such circumstances.

##### **Para.23, Schedule 2**

The First-tier Tribunal may by order declare a recognisance to be forfeited and the manner by which the order will be enforced.

##### **Para. 29, Schedule 2**

Immigration bail may be granted by the First-tier Tribunal to a person in immigration detention where an appeal is pending.

##### **Para. 30, Schedule 2**

Sets out the circumstances in which the Tribunal is not obliged to release a person on bail where an appeal is pending.

##### **Para. 31, Schedule 2**

Further powers regarding forfeiture, when an appeal is pending.

##### **Para. 34, Schedule 2**

Immigration bail may be granted by the First-tier Tribunal to a person in immigration detention where removal is pending.

##### **Para. 2(4A), Schedule 3**

The provisions relating to immigration bail apply to a person liable to deportation where no appeal is pending.

##### **Para. 3, Schedule 3**

The provisions relating to immigration bail apply to a person liable to deportation where an appeal is pending.

[Immigration and Asylum Act 1999](#)

**s. 53 Applications for bail in immigration cases**

The power of the Secretary of State to make new provisions in relation to applications for immigration bail (*NB No new provisions have been made as of 6 April 2011*).

[Asylum and Immigration \(Treatment of Claimants, etc\) Act 2004](#)

**s. 36 Electronic monitoring**

Governs the use of electronic monitoring as a bail condition.

**STATUTORY INSTRUMENTS**

[The Asylum and Immigration Tribunal \(Procedure\) Rules 2005 \(SI 2005/230\)](#)

**Part 4: Bail Rules 37 to 42**

**PRACTICE DIRECTIONS**

Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal

**PD 13 Bail Applications**

## ANNEX 2

### EXTRACTS FROM DECISIONS OF THE SENIOR COURTS

*The following extracts are provided because they are informative in respect of the issues that might be taken into account in a bail application when assessing the significance of length of detention. However, it must be remembered that the Senior Courts were looking at the lawfulness of detention which is not within a First-tier Tribunal Judge's jurisdiction.*

[R \(Mahfoud\) v SSHD \[2010\] EWHC 2057 \(Admin\)](#), Hickinbottom J said at para. 6:

"6. The jurisprudence has been built up through these cases, but consistently and upon firm foundations. I consider that the principles in respect of the lawfulness of administrative detention under Schedule 3 to the 1971 Act relevant to this claim are now well-settled, as follows:

- (i) The power of detention exists for the purpose of deporting the relevant person ("the deportee").
- (ii) The power exists until deportation is effected: but it can only be exercised to detain the deportee for a period that is reasonable in all the circumstances.
- (iii) Whilst in some cases a reasonable time will have expired already and immediate release will be inevitable, in most cases the crucial issue will be whether it is going to be possible in the future to remove the deportee within a reasonable time having regard to the period already spent in detention. In considering such prospects, it is necessary to consider by when the Secretary of State expects to be able to deport the deportee, and the basis and degree of certainty of that expectation. Where there is no prospect of removing the deportee within a reasonable time, then detention becomes arbitrary and consequently unlawful under Article 5, and the deportee must be released immediately.
- (iv) There is no red line, in terms of months or years, applicable to all cases, beyond which time for detention becomes unreasonable. What is a "reasonable time" will depend upon the circumstances of a particular case, taking into account all relevant factors.
- (v) Those factors include:
  - (a) The extent to which any delay is being or has been caused by the deportee's own lack of cooperation in, for example, obtaining an emergency travel document ("ETD") from his country of origin.
  - (b) The chances that the deportee may abscond (which may have the effect of defeating the deportation order).
  - (c) The chances that the deportee, if at large, may reoffend. If he may reoffend, of particular importance is, not simply the mathematical chances of reoffending, but the potential gravity of the consequences to the public of reoffending if it were to occur.
  - (d) The effect of detention on the deportee, particularly upon any psychiatric or other medical condition he may have. The conditions in which the deportee is detained may also be relevant, although less so if he is required to be detained in particular conditions (e.g. in prison estate as opposed to a detention centre) because of his own behaviour.



(e) The conduct of the Secretary of State, including the diligence and speed at which efforts have been made to enforce the deportation order including obtaining an ETD.

That list of factors is not, of course, exhaustive.

(vi) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative. There is no "trump card". Therefore, even where there is a high risk or even inevitability of reoffending and/or absconding, nevertheless there may still be circumstances in which Article 5 requires a deportee's release.

(vii) The burden of showing that detention is lawful lies upon the Secretary of State."

[R \(MH\) v SSHD \[2010\] EWCA Civ 1112](#) Richards LJ said at para. 65:

"Of course, if a finite time [for removal] can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effective within, say, two weeks, will weigh heavily in favour of continued detention pending such removal whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonable be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors."

### **ANNEX 3 FOREIGN NATIONAL PRISONERS (FNPs)**

Following the 2006 Foreign National Prisoner crisis, National Offender Management Service (NOMS) Prison & Probation, coordinated policies and practice to ensure the better management of FNPs between agencies with the improved exchange of information. One agreement was for Offender Managers to provide the UKBA Criminal Casework Directorate (CCD), when requested by their caseowners, a specifically devised risk report, Annex A/NOMS 1 (see Probation Circular 32 2007). This information is intended to assist parties at IAC bail hearings to assess the risks of re-offending in the community posed by ex-FNPs. The NOMS/UKBA agreement is that UKBA Presenting Officers provide Annex A reports to the First-tier Tribunal Judge and the applicant's representative at the bail hearing on behalf of NOMS. There is no agreement between NOMS & the UKBA to provide other information, such as an Offenders Assessment (OASys) report. In some circumstances an applicant's representative may present such a report as prisoners may be provided with a copy of their OASys in prison. Offender Managers have very limited time to complete an Annex A/NOMS 1 report, often 24-48 hours, but do so in most circumstances. Annex A/NOMS 1 reports contain important information to assist the IAC determination on bail and provides key information on licence conditions and whether and which addresses have been properly assessed and checked as being suitable for licence conditions to be met.

Probation Circular 32/2007: MANAGEMENT OF FOREIGN NATIONAL PRISONERS: LICENCES, BAIL HEARINGS, RELEASES FROM IMMIGRATION DETENTION AND DEPORTATION in place from 1 Oct 2007 and to expire on 30 Sep 2012 includes the following provisions.

#### SUMMARY

This Circular complements revised instructions which have been issued to caseworkers in the Border and Immigration Agency's Criminal Casework Directorate (CCD) setting out a requirement to inform offender managers in all cases in which FNPs, subject to a custodial sentence of 12 months or more; or where they were sentenced to shorter periods adding up to 12 months or more; or where they are a Young Adult Offender aged between 18 and 22 years and subject to supervision, are released from immigration detention in an Immigration Removal Centre or from detention in prison or directly from an AIT hearing.

Procedures for FNPs who are no longer subject to a licence are summarised in Section 4. Section 6, together with annexes A and B, provides a revised proforma and guidance for the provisions of information to immigration bail hearings at AITs (Note that when the proforma is received from CCD it will be AT compliant. Work is being done at the moment to make it so. This may mean the form received differs in appearance from the version attached to this PC – the content however will be the same). Section 10 outlines that CCD case workers are required to inform offender managers in all cases where an FNP is deported or removed from the UK.

## 6. Bail Hearings at AITs: Information from Offender Managers to the CCD

Interim guidance on the provision of information from offender managers to immigration bail hearings at AITs was included in PC24/2006. Further guidance was included in PC37/2006. This Probation Circular replaces both sets of guidance.

FNPs, on completion of the custodial element of their sentence, may continue to be detained under immigration powers on an IS91 (an immigration detention form). FNPs may apply for release on immigration bail to the AIT at any time during their continued detention under immigration powers (see section 5, above). The CCD is usually given between 24-72 hours notice of a pending bail application hearing during which time they prepare a bail summary for the use of the Presenting Officer.

In deciding whether to grant bail, the AIT considers whether the person is likely to abscond and if released, his/her likelihood of re-offending. Until PC 24/2006, there was no guidance to probation staff on responding to request from appellants and their solicitors, on the provision of reports to AIT's. PC24/2006 provided interim guidance which PC 37/2006 further clarified.

It is appropriate for an offender manager, on public protection grounds, to provide information to the CCD for inclusion in the bail summary which will be available both to the immigration judge [now First-tier Tribunal Judge] and to the appellant's representative. PC37/2006 set out a requirement that from 1 November 2006 the Probation Service [now Probation Trust] should provide information to the AIT – this is a continuing requirement under this Circular.

PC37/2006 provided a proforma for this purpose, an updated version of which is attached at Annex A. When preparing bail summary papers for an immigration bail hearing, the CCD will contact the offender manager stated on the licence by phone and email, requesting that updated and additional information is provided by completing the pro-forma, Annex A and return by email. Offender managers should ensure that the immigration bail conditions the CCD intend to request from the AIT do not conflict with the conditions inserted on to the licence in order to manage the offender, particularly in relation to electronic monitoring. It is important that offender managers return the pro-forma to the CCD by the date stated on the form. This will usually be within 3 days but may be less in cases where the CCD receive late notification of a bail application.

If at any time the offender manager should require any amendment to the licence conditions, all such requests should be made in accordance with post-release licence variation procedures.

Guidance to offender managers on completion of the pro-forma is attached at Annex B. CCD will inform both the named offender manager, and the SPOC, of the bail hearing result including any specific immigration bail conditions.

The pro-forma completed by offender managers will be available to the appellant's solicitors and to the immigration judge [now First-tier Tribunal Judge] via the CCD Presenting Officers. Offender managers should note that any information that might affect victim safety/confidentiality or compromise other agency risk management measures should not be disclosed on the pro-forma.

Since 1 November 2006 it has not been a requirement for Probation Areas [now the Probation Trust] to provide separate information to the appellant's representative. The appellant's solicitors, and appellants if representing themselves, will be provided with the pro-forma at the AIT. The standard procedure as with any offender, of personal information being given to representatives with the written permission of the offender, should continue in compliance with the Data Protection Act.

## ANNEX 4

### S.4 ACCOMMODATION

*NB in addition to the following protocols, Immigration Judges will have regard to the judgment in **Razai and others** [2010] EWHC 3151 (Admin) when considering a residence requirement as a condition of bail where there are stringent licence conditions imposed on a foreign national prisoner.*

#### MEMORANDUM

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**From: C M G Ockelton**  
**Deputy President, Asylum and Immigration Tribunal**

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It has been the custom that when there is an application for bail the applicant must provide to the Tribunal not merely an address, but an address at which there is some prospect that if bail is granted he will reside for an indefinite period. No particular difficulty arises in cases where it is for the applicant to secure his own accommodation, because if accommodation is available to him at all it is usually with a friend or relative and there is no reason to suppose that it will not be available indefinitely.

But the requirement has a substantial financial impact in cases where the Secretary of State is responsible for housing the appellant. In order to be able to say that accommodation is available she has to secure it and pay for it in good time before the hearing (usually two weeks); then, if bail is not granted the money is entirely wasted and even if bail is granted the costs before the hearing are wasted.

I have therefore agreed a new procedure for these cases. The Home Office will not secure permanent accommodation in advance of the hearing. The address provided will be one to which the applicant can be released and at which he can reside for at least 48 hours. If bail is refused there will of course be no further action. If bail is granted any residence condition will specify the named accommodation. In that case the Secretary of State will thereupon make arrangements for more permanent accommodation and, when such accommodation is available will approve an application by the appellant for a change of conditions. The Tribunal will deal with that application as a routine paper matter, not requiring the attendance of either party if the papers are in order. A sample form of application and approval will be circulated shortly.

It will be appreciated that the financial arguments for change are very strong. I shall be glad to know of any problems that arise with the new process, which is expected to come into effect quite soon.

## **OPERATING PROTOCOL FOR SECTION 4 BAIL CASES.**

### **AN AGREEMENT BETWEEN UK BORDER AGENCY AND THE ASYLUM AND IMMIGRATION TRIBUNAL.**

**Issued: 13 March 2009**

#### **Introduction**

- 1 This Protocol is between the UK Border Agency and the AIT. It sets out the process for UKBA to provide bail addresses to the AIT.
- 2 Current arrangements mean that for the period between bail accommodation being provided and when the hearing is held, commonly a two week period, the UK Border Agency is paying for unoccupied accommodation. This protocol will set out new arrangements to avoid unnecessary expense.
- 3 This Protocol will take immediate effect.

#### **The UK Border Agency process**

- 4 The UK Border Agency will:
  - Provide the AIT with an address prior to the bail hearing.
  - This bail address will be from a list of initial accommodation providers. The benefit of this will be that UKBA will not need to pay for accommodation that is not used.
  - Ensure that the successful bail applicant will stay in initial accommodation for at least 48 hours prior to dispersal.
  - UKBA will apply for a variance to bail conditions on paper by providing the AIT with a new address as soon as the applicant has been moved.

#### **The Asylum and Immigration Tribunal process**

- 5 The AIT will:
  - Ensure that UKBA provides an initial accommodation address prior to the bail hearing.
  - Renew bail conditions based on papers once a new address has been received.

## ANNEX 5

### ELECTRONIC MONITORING ("TAGGING")

*Revised policy issued to Immigration Judges by Miss E Arfon-Jones, Deputy President of the Asylum and Immigration Tribunal on 14 August 2008.*

Electronic tagging can be considered as a condition of bail if appropriate. Rule 38 of the 2005 rules sets out the details required in the application for electronic tagging under section 36 of the 2004 Act.

The revised B1 form - application to be released on bail, now contains the following words in section 3c which indicates that the applicant agrees to return to the detention centre whilst arrangements are made to carry out the tagging with UKBA. This section has been agreed between the President, MoJ lawyers and UKBA to ensure lawful detention until the tag has been fitted.

*".....if bail is granted and electronic monitoring is considered an appropriate condition of bail , the applicant will remain in detention until such time as UKBA have arranged for them to be electronically monitored , but not exceeding 2 working days **after the date on which bail is granted.** "*

You will also need to include the following information in the form by which bail is granted and the conditions are set out.

- (a) make the tagging a condition; and
- (b) set out what is to happen if tagging has not been arranged within 2 days (In such instances for the time being it has been agreed that the applicant should be released without tagging.)

There may be cases in which the HO/MoJ do not get round to putting the tags on in time, it is therefore important that the standard form, and the bail conditions imposed, deal with that. This will ensure applicants are not left in limbo, or released with fewer conditions than are appropriate.

## **ANNEX 6**

### **REVISED GUIDANCE NOTE TO JUDICIARY ABOUT VIDEO LINK BAIL HEARINGS**

#### **Procedure for Bail Hearings by Video Link for Immigration Removal Centres (IRCs) in England and Wales.**

#### **Guidance notes for Judiciary**

##### ***1. Introduction***

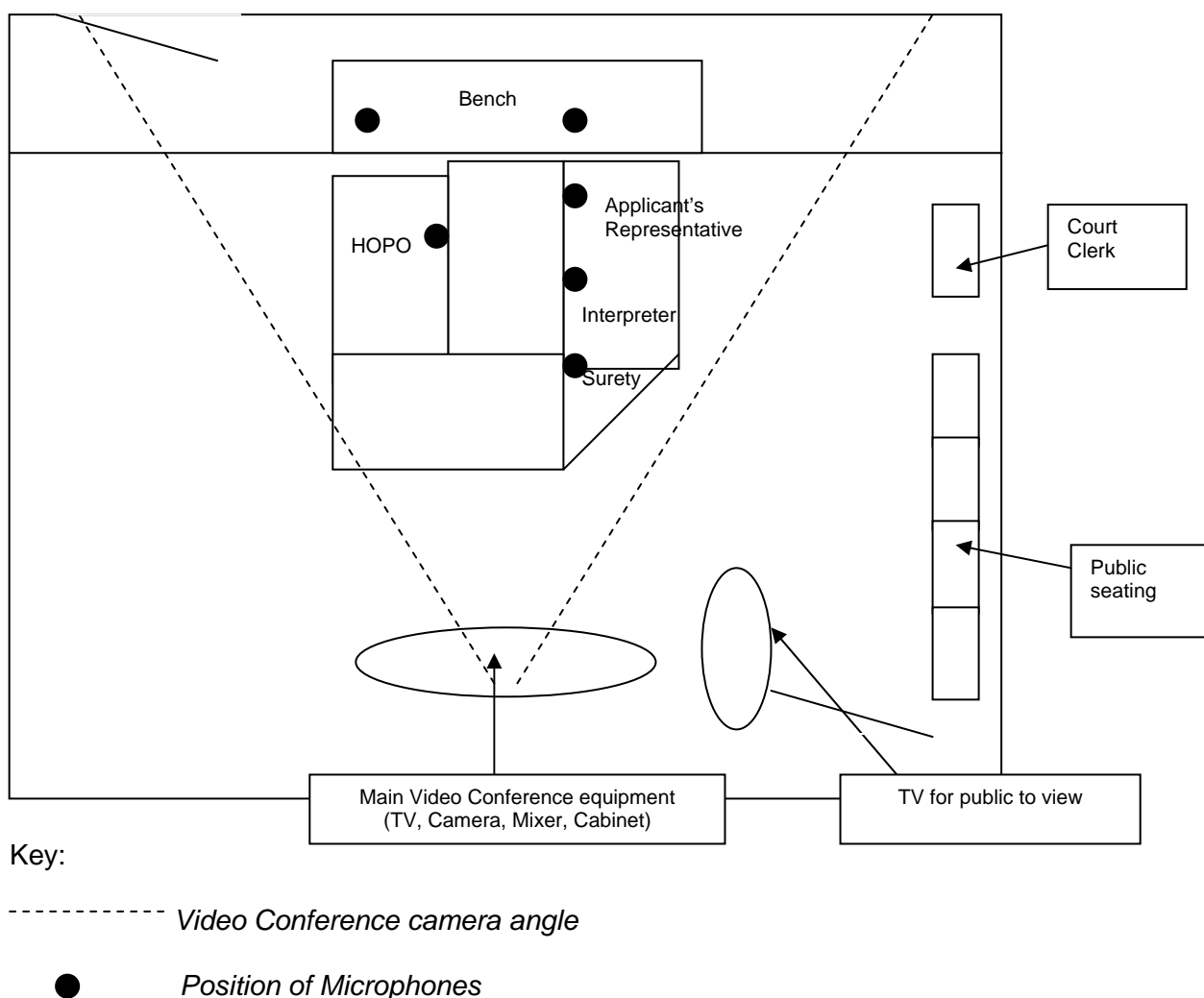
Video Conferencing is a cost-effective way of dealing with hearings. By utilising this technology the Applicant does not have to be produced at the Hearing Centre. There are currently 18 First-tier Tribunal (IAC) Hearing Centres, 12 of which have Video Conferencing (VC) equipment.

##### ***2. The Hearing Room Layout.***

On the next page is a typical lay out of the hearing room. This may vary at each Hearing Centre depending on the accommodation. The Surety(s), if present, will sit in the public seating area and be able to view proceedings on a TV screen provided for them. When the Surety is required to participate in the hearing they will move to a seat within the VC camera angle. All parties when participating in the hearing need to be in view of the Applicant.



## The Hearing Room Layout



### 3. Prior to the Day of the Hearing

First-tier Tribunal will issue all relevant notices, directions and letters to all parties.

- The Hearing Notice will state the hearing will be via Video Link.
- Specific directions which can be used for a Video Link hearing are shown in **Appendix A**.
- First-tier Tribunal Administration Team will inform the Court Clerk Manager and the Judiciary of the Video Link hearing.

#### **4. Day of the Hearing**

Prior to the start of the hearing the Court Clerk will:

- Liaise with IRC to agree time when they will connect with First-tier Tribunal Hearing Centre.
- Ensure that the Applicant can see and hear clearly prior to their 10 minute private consultation with the Representative.
- Notify the Representative their private consultation time has ended and bring the other parties in to the hearing room.
- Liaise with the Judiciary regarding attendees, and bring the First-tier Tribunal Judge to the hearing room.

#### **5. During the Hearing**

The hearing will continue as normal. Please note the following:

- A member of staff of the Immigration Removal Centre will be present; visibility of the Applicant will be through glass panels, at all time during the hearing.
- The First-tier Tribunal Judge commences the proceedings by advising all parties present of how the hearing will proceed (See **Appendix B** for points to be raised).
- Please allow for the fact that there may be a time delay in voice transmission and allowance may need to be made for people to finish what they are saying.
- Extra time may be needed by the Interpreter to translate to the Applicant.

#### **6. After the Hearing**

The Court Clerk will disconnect the Video Link unless there is a subsequent hearing with the same IRC.

##### **6.1 Bail Refused**

First-tier Tribunal Administration Team will photocopy the relevant papers and issue a copy to the representatives attending the hearing and fax a copy through to the Immigration Removal Centre for the Bail Applicant.

##### **6.2 Bail Granted**

First-tier Tribunal Administration Team will obtain all necessary signatures from the Parties attending the Hearing Centre, and fax a copy through to the Immigration Removal Centre for the Applicant to sign; the Immigration Removal Centre will then fax the form back to the First-tier Tribunal.

## **7. Request for “In-Person” Bail Hearing**

Where **exceptional circumstances** exist and it is considered that the Bail Applicant is unable to use the video link medium, an “Ex-Parte” application should be made in writing providing reasons to the Resident Judge at the relevant Hearing Centre. Following Judicial consideration, the Parties will be advised of the outcome.

## **Appendix A**

### **Directions**

Pursuant to the Asylum and Immigration Tribunal (Procedure) Rules 2005 including Rule 45

It is directed that:-

- (1) The hearing in respect of this Applicant’s application for bail shall be conducted by Video Link to the Applicant who will remain in the place of detention.
- (2) The Representatives shall attend the Hearing Centre half an hour prior to the commencement of the hearing, to ensure that outstanding administrative matters can be dealt with prior to the commencement of the hearing in the presence of the Applicant.
- (3) The Representative shall be allowed a private consultation of no more than 10 minutes by means of the Video Link, before the start of the hearing, provided that the Representative has arrived in accordance with direction (2) above.
- (4) The Applicant’s Representative shall no later than 2.00pm on the day before the hearing serve on the Tribunal and the Respondent copies of all documentary evidence on which the Applicant intends to rely.
- (5) The Respondent shall submit and serve on the Applicant’s Representative by 2.00pm on the day before the hearing a copy of the bail summary together with a copy of all documents relied on.
  
- (6) The Applicant’s Representative must ensure that the Applicant has a copy of any documents on which it is intended to rely and also a copy of the Respondent’s bundle (if any).
- (7) The Applicant’s Representative shall confirm to the Tribunal at the time of lodging the application whether an Interpreter is required and if so in what language.

## **Appendix B**

### **Introductory Points to Remember**

- Introduce all relevant parties so that the Applicant is aware of who they are and where they are sitting.
- Ensure that all Parties (particularly the Applicant where they are Un-represented) have the same documentation to refer to, if required, during the hearing.
- You may need to allow time for the Interpreter to translate to the Applicant.
- There may be a delay in voice transmission and allowance may need to be made for people to finish what they are saying.
- Ensure that Parties speak clearly so that the Applicant can hear the hearing in the court room.

During the hearing it is important to ensure the following:

- That all parties speak clearly so that the Applicant can hear what is being said.
- That time is given to the Interpreter to translate if required.

At the end of the hearing:

- Instruct all parties to leave the room to enable the Court Clerk to dial up for the next hearing if required.

## **ANNEX 7**

### **ADAPTING THIS GUIDANCE FOR BAIL APPLICATIONS IN SCOTLAND AND CROSS-BORDER ISSUES**

1. There is a significant difference between bail procedure in Scotland and the rest of the UK in that in Scotland bail money (known as “caution”) is normally deposited when bail is granted. Caution is subject to forfeiture if the applicant fails to answer to bail. The FtT (IAC) in Scotland, and its predecessors, have recognised that a number of implications for the practice of the Tribunal arise from the taking of caution.
2. The first of these is that the grant of bail in Scotland is for a specific period. In the past that period has been defined by reference to a specific date on which the applicant was required to answer to bail. With the adoption of the standard primary bail condition, those on bail and their cautioners will understand that the bail bond will be retained until the appeal is no longer pending. In other words, the caution will be deposited until a specific future event.
3. The second is that because the Tribunal has power to vary bail conditions, it has assumed the implied power to change or vary the amount of caution or the identity of the cautioner, and indeed the power to relieve the cautioner of his or her continuing obligation where an application is made for this. If the cautioner is relieved of his or her obligation the corollary is that the applicant is liable to be re-detained at any time, although in recent years this point may sometimes have escaped the notice of UKBA.
4. The third is that where in the exercise of its implied powers in Scotland the Tribunal has varied the conditions of bail, they have been varied either by consent or after an oral hearing where disputed.
5. The fourth is that the cautioner’s obligations are extinguished when the period specified in the grant of bail comes to an end, unless the cautioner consents. In Scotland UKBA has developed procedures to address this, for example by inviting the Tribunal to renew bail prior to its expiry, or by granting CIO bail for a short period of 3-4 weeks during the course of which the cautioner will have the caution returned by the Tribunal in order to be re-deposited as caution with UKBA.

### **CROSS-BORDER ISSUES**

6. A further issue arises in relation to the enforcement of recognisances. It has been recognised for some time that where bail is granted in English form and the surety resides in Scotland, the recognisance cannot be enforced without great practical difficulty. The available route, which has never been tested, would appear to be to obtain an order for payment from a Magistrates’ Court and register this in Scotland as a foreign judgment in order to do diligence upon it under Scots law.
7. The appropriate way to avoid this problem is to require that where the proposed sureties reside in Scotland, caution is taken by the Tribunal in Scotland, even where bail in principle is granted by the Tribunal in England (which may also set the amount of caution). On the other hand, if the applicant is detained in Scotland but the sureties reside in England, there seems to be no reason why bail should not be granted in English form by the Tribunal in England. If bail is granted by the Tribunal in Scotland, caution will normally be required even though the sureties reside in England.

## **ANNEX 8**

### **EXAMPLES OF STANDARD BAIL CONDITIONS**

#### **Primary conditions of bail**

*Where a First-tier Tribunal Judge grants bail but no appeal is pending:*

The appellant is to appear before an Immigration Officer at [INSERT ADDRESS] at [INSERT TIME] on [INSERT DATE] or any other place and on any other date and time that may be required by the UK Border Agency or an Immigration Officer.

*Where a First-tier Tribunal Judge grants bail and an appeal is pending:*

The appellant is:

- i. to attend the next and every subsequent hearing of the appeal at such places and times as shall be notified or as otherwise varied in writing by the Tribunal; and
- ii. following final determination of the appeal, unless bail is revoked by the Tribunal or by operation of law, to appear before an Immigration Officer at such time and place as directed by the Tribunal; and
- iii. the terms of bail may be varied at any time during their currency by application or at the Tribunal's own motion.

#### **Secondary conditions of bail**

*Where no permanent residential address is immediately available.*

Bail is granted subject to the applicant residing at the initial accommodation provided by NASS and subject to the applicant residing in other accommodation provided by NASS as long as the UK Border Agency notifies the Tribunal of the dispersal address as soon as the applicant is moved.

*Where tagging is required as a condition of bail.*

Bail is granted subject to (i) the applicant cooperating with the arrangement for electronic monitoring ("tagging") as set out in s. 36 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and (ii) the UK Border Agency arranging electronic monitoring within two working days of this grant of bail.

If electronic monitoring is not effected within two working days, then the applicant is to be released on condition that he/she reports each [INSERT TIME PERIOD] at [INSERT NEAREST REPORTING CENTRE TO RESIDENTIAL ADDRESS] starting on [INSERT START DATE WHICH MUST BE AT LEAST 2 WORKING DAYS AHEAD].

*Where bail conditions are to be linked to licence conditions.*

*Where the licence conditions provide sufficient monitoring and control:*

Bail is granted in the same terms as the licence.

*Where the licence conditions are more general or the licence is due to end in the near future:*

The applicant is also required to comply with the terms of his/her licence.