

**Guidance on Immigration Bail for Judges of the First-tier Tribunal  
 (Immigration and Asylum Chamber)**

Implemented on 15 January 2018

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## **INTRODUCTION**

1. This Guidance Note replaces Bail Guidance Note No 1 of 2012 and its updates. The earlier guidance is being replaced to take account of changes introduced by the Immigration Act 2016.
2. This guidance is directed to First-tier Tribunal Judges. In response to requests from judges, the guidance seeks to be concise and to focus on practical issues. Judges should familiarise themselves with schedule 10 to the 2016 Act.
3. Of course, guidance can never be exhaustive. Judges are expected to adapt the principles and practices described below when deciding whether to grant immigration bail.

## **GENERAL PRINCIPLES**

4. Liberty is a fundamental right of all people and can only be restricted if there is no reasonable alternative. This principle applies to all people in the UK, including foreign nationals.
5. Immigration detention cannot be used as punishment, as a deterrent or for any coercive purpose. Immigration detention cannot be used to prevent or restrict the establishment of family or private life, or to prevent or restrict an applicant from pursuing lawful action to remain in the UK.
6. When considering whether to grant bail, judges are not deciding whether continued detention is lawful.
7. It is generally accepted that detention for three months would be considered a substantial period and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months.
8. Judges should be slow to interfere in cases where a person is detained for the expedited examination of an immigration application, such as a protection claim, where detention can be shown to be necessary and justified and there is no reasonable alternative. However, judges should not tolerate delays in such actions.

### **The power to grant immigration bail**

9. The power of the First-tier Tribunal to grant immigration bail is contained in paragraph 1(3) of schedule 10 to the Immigration Act 2016. A person detained under the provisions listed therein can be granted immigration bail either on application by that person or by reference (“auto-referral”) by the Secretary of State.<sup>1</sup>

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<sup>1</sup> The duty on the Secretary of State to arrange consideration of bail is contained in para 11 of schedule 10 to the Immigration Act 2016.

10. When exercising the power to grant immigration bail, the Tribunal must have regard to the matters listed in para 3(2) of schedule 10. These are:
  - a. The likelihood of the person failing to comply with a bail condition,
  - b. Whether the person has been convicted of an offence,
  - c. The likelihood of a person committing an offence while on immigration bail,
  - d. The likelihood of a person's presence in the UK while on immigration bail causing a danger to public health or being a threat to the maintenance of public order,
  - e. Whether the person's detention is necessary in that person's interests or for the protection of any other person, and
  - f. Such other matters as the Tribunal thinks relevant.
11. Judges must consider these matters when considering the two related issues listed in para 3(1):
  - a. Whether to grant immigration bail, and
  - b. The conditions of immigration bail.
12. The first specified matter in para 3(2) relates to the likelihood of a person failing to comply with a bail condition. Judges will need to take a preliminary view as to what bail conditions might be imposed. Judges are reminded they must always assess and impose the minimum conditions needed because to do more would be to act disproportionately; any bail condition is a restriction of liberty, albeit less restrictive than detention. A grant of bail cannot be unconditional. On granting bail at least one condition must be imposed.
13. Detailed guidance on how judges should approach these matters and issues is given below.

### **The conditions of immigration bail**

14. Where immigration bail is granted to a person, a judge must impose one or more conditions. These are listed in paragraphs 2(1), 2(3), 2(4) and 5 of schedule 10 to the Immigration Act 2016. These are:
  - a. An "*appearance date condition*", requiring the person to appear before the Secretary of State or the First-tier Tribunal at a specified time and place,
  - b. An "*activity condition*", restricting the person's work, occupation or studies in the UK,
  - c. A "*residence condition*", specifying where the person is to reside,
  - d. A "*reporting condition*", requiring the person to report to the Secretary of State or such other person as may be specified,
  - e. An "*electronic monitoring condition*" (meaning a condition requiring the person to co-operate with such arrangements as the Secretary of State may specify for detecting and recording by electronic means the location, presence or absence of the person at specified times or periods), which may be in place of a reporting

- condition and in some cases will be mandatory<sup>2</sup>,
- f. A “*financial condition*” (meaning a condition requiring the payment of a sum of money by the person to whom immigration bail is granted or another person in a case where the person granted bail fails to comply with another condition of bail), which will only be imposed if a judge thinks that it would be appropriate to do so with a view to ensuring that the person granted bail complies with the other bail conditions, or
  - g. Any other condition a judge granting immigration bail thinks fit.
15. Detailed guidance on how judges should decide what conditions to impose is given below.

#### **APPLICATION FOR IMMIGRATION BAIL**

16. An application for immigration bail should be made on form B1. This form is available at immigration removal centres, from the Tribunal and online. The bail application will be listed for hearing as soon as possible, normally within 3 working days.
17. The respondent (the Home Office) is required to provide a bail summary on the day prior to the hearing, in accordance with rule 40 of the 2014 Procedure Rules, which should include: (i) any concerns in relation to the factors listed in paragraph 3(2) of schedule 10 to the 2016 Act, (ii) the bail conditions being sought should bail be granted and (iii) whether removal directions are in place.
18. The applicant, especially if legally represented, is encouraged to focus on the same factors in the grounds for bail or in a skeleton argument.

#### **BAIL HEARINGS**

19. Considering the issues to be assessed, a bail hearing differs from an appeal hearing because it is a risk assessment. Although it remains an adversarial setting<sup>3</sup>, the narrow focus and the need for the parties to present their principal arguments in advance, means it is open to a judge to ask questions directly of those present to obtain clarification of evidence and information, and may often have the appearance of an inquisitorial hearing.
20. The applicant will usually attend a bail hearing using video-conferencing, which is provided at the immigration removal centre to link to the Tribunal. If an applicant is unwilling to participate in a bail hearing using such equipment, he/she may request to attend the bail hearing in person and a judge will decide whether the person should be produced at the hearing centre. The applicant may ask for the bail hearing to go ahead in his/her absence.

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<sup>2</sup> See para 2(2) of schedule 10 to the Immigration Act 2016 for when electronic monitoring is mandatory. Note that neither this sub-paragraph nor sub-paragraphs (3) and (5) to (10) have been commenced.

<sup>3</sup> See R (AR(Pakistan)) v SSHD [2016] EWCA Civ 807, at 11.

21. All those involved in an application, including any persons offering to support a financial condition (previously known as sureties/cautioners) should be present in the hearing room at the start and at the end of proceedings. In most cases they will stay throughout but, depending on the issues to be decided, it may be necessary to exclude such persons from parts of the hearing, but this will be a matter for the judge to decide.
22. The judge should ensure that any person offering to support a financial condition is present at the end of the hearing so they hear the decision and reasons.
23. A bail hearing should deal with the following elements.
  - a. Introduction of the proceedings and those present.
  - b. Practical checks that the video-conferencing equipment is working, that any interpreters are suitable and that both parties have the same documents as held by the Tribunal.
  - c. Confirmation each party has the grounds for bail and the bail summary, both of which should focus on the matters listed in para 3(2) of schedule 10 of the Immigration Act 2016.
  - d. Identification of the date the person seeking immigration bail entered immigration detention, if not obvious from the chronology set out in the bail summary.
  - e. Confirmation that the chronology in the bail summary is accurate, and if necessary its correction.
  - f. Removal directions, if applicable.
  - g. Consideration of any additional documentary evidence or argument, which may be admitted subject to the overriding objective.<sup>4</sup>
  - h. Time for each party to address the judge on:
    - i. the matters listed in para 3(2) of schedule 10 not already covered in the bail grounds and bail summary,
    - ii. any other matter the judge thinks relevant, and
    - iii. the minimum bail conditions they think are necessary in this case.
  - i. Where a person seeking bail does not have legal representation, a judge will ask them for their comments on each of the matters listed in para 3(2) of schedule 10 and in response to any other relevant matter identified by the judge.
  - j. If the judge decides a financial condition is appropriate with a view to ensuring the person granted bail will comply with other bail conditions, documentary evidence will normally have been provided. Where such evidence is inadequate, or questions remain, an examination of the proposed financial condition and any person supporting the financial condition may be necessary.
  - k. A decision on whether to grant bail.
  - l. If bail is granted, a decision on the condition or conditions that are to be imposed.
  - m. If bail is granted, and after an opportunity has been given to the bail party and any financial condition supporters to make representations, a decision on the

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<sup>4</sup> Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

transfer of management of bail to the Home Office.

24. A grant of bail will be prepared and issued immediately after the hearing. The parties will be asked to check the details and advise the judge of any errors before leaving the hearing centre.
25. Refusals of bail will usually be prepared after the judge has completed all bail hearings and will be sent to the parties.
26. Because of the narrow issues to be considered, in most cases it will be unnecessary for examination-in-chief or cross-examination to be undertaken of the applicant or other persons present. Nor will there be a need for closing submissions. The nature of a bail hearing means the judge will take the lead and will expect the parties to co-operate to promote the overriding objective.

#### **DETERMINING WHETHER TO GRANT IMMIGRATION BAIL**

27. A judge can only grant immigration bail after considering all the matters listed in para 3(2) of schedule 10 to the Immigration Act 2016.
28. There is no obvious priority to the matters listed and a judge will reach a decision based on the matters in the round. To grant bail, judges must be satisfied that no one matter is sufficient to refuse bail and that when taken cumulatively the matters are not sufficient to refuse bail.
29. It is for the immigration authorities<sup>5</sup> to show it is more likely than not that there is no reasonable alternative to detention. In all cases involving people detained under immigration powers, the first reason for detention is to enable the immigration authorities to carry out their functions. Safeguarding is a secondary purpose of detention, and includes preventing a person absconding if released.
30. Where immigration detention is no longer justified, bail should be granted.
31. The following points provide guidance on how the risks of the five specific matters listed in para 3(2) may be assessed. Similar principles should be applied to any other matter the judge thinks relevant.

#### **The likelihood of the person failing to comply with a bail condition**

32. The first matter listed requires a judge to assess the likelihood of the person failing to comply with a bail condition. This will be assessed in terms of the evidence provided and what is reasonably foreseeable.

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<sup>5</sup> The term “immigration authorities” is used throughout this guidance to refer generically to Immigration Officers and the Secretary of State for the Home Department, each of whom can exercise the power to detain foreign nationals.

33. A judge will consider the evidence and arguments presented in each individual case. Judges will often face a mixture of factors and it will be for them to decide the weight to give the various factors and balance them.
34. Although not required by legislation, it has long been the practice of the Tribunal to set as the minimum conditions of bail an appearance date condition, a residence condition and (where the appearance date is more than seven days ahead) a reporting condition. An appearance date condition is unlikely to be appropriate where management of bail is being transferred to the Home Office and a residence condition should only be used where a person is required to reside at a particular address for bail monitoring purposes. Consequently, the minimum under the new regime is likely to be a reporting condition. (see also paragraph 54 below).
35. The risk of absconding, by which is meant a failure to appear or report as required, is likely to be low if the person seeking bail proposes to reside at a stable address, has active support from friends or relatives, and there are good reasons to keep in contact with the Tribunal or the immigration authorities, such as a pending immigration application, appeal or judicial review.
36. The risk of absconding is also likely to be low where there is no imminent prospect of removal. Removal will always be treated as being imminent if scheduled within 14 days of the bail hearing, which coincides with para 3(4) of schedule 10. A judge may consider removal as being imminent where removal directions have been set, even if longer than 14 days hence, and where there is evidence removal action is actively being sought.
37. Where it exists, a person's previous conduct with the immigration authorities, the police, probation, courts or other agencies may be useful indicators of the risk of non-compliance. A positive history of interaction with such authorities may be a good indication that the risk of absconding is low.
38. The more stable a proposed bail address, the lower the risk of absconding. An address is likely be more stable where there is reliable evidence the person has lived there before, where the person has permission to live at the address, and where other people in the property have an interest in ensuring the person complies with the residence condition. The absence of these factors does not mean the address is not suitable. Each case must be decided on its own merits.
39. Where the release of a person would pose safeguarding concerns, a judge may consider imposing an activities condition, an electronic monitoring condition or some other condition, such as a curfew. These additional/alternative bail conditions are discussed in more detail below.
40. Such conditions will be appropriate only if there is evidence that there is a safeguarding concern, usually identified from a person's previous conduct in the UK or elsewhere. The likelihood of compliance should be assessed in terms of the person's conduct to date, including any rehabilitation that might address the

safeguarding issue.

41. In all cases, a judge can impose a financial condition but should only do so where it is considered appropriate to ensure that the person released on immigration bail complies with one or more of the other bail conditions. As such, a financial condition is a mechanism to reduce the risk of non-compliance to an acceptable level, which means a level where a judge is satisfied it is more likely than not that the person will comply with the other bail conditions.

#### **Whether the person has been convicted of an offence**

42. This is the second factor listed in para 3 of schedule 10 to the Immigration Act 2016. Whether a person has been convicted of an offence will be a matter of fact. In the absence of any other evidence, a Police National Computer (PNC) printout will usually be sufficient to establish that a person has been convicted.<sup>6</sup>
43. A PNC printout may record convictions in other EU member states but may be incomplete. It will not include convictions elsewhere. The immigration authorities may rely on other evidence, or on a person's admissions, regarding convictions elsewhere when raising any safeguarding issues.
44. The fact a person has been convicted of an offence may raise a safeguarding issue. It will be for a judge to decide the weight to give any safeguarding concern, and may include the date of the last conviction(s), behaviour since, the impact on the public, and any risk assessments undertaken by professionals, such as the Probation Service.
45. Where the evidence shows the risk of further offending is low, either because of a professional assessment or because the offence relied upon by the immigration authorities is historic, then a judge is likely to find there is little or no safeguarding risk.

#### **The likelihood of a person committing an offence while on immigration bail**

46. This is the third matter to be considered when determining whether to grant immigration bail. The likelihood will relate directly to the person's criminal history and any professional risk assessments should be produced. In the absence of such assessments, a judge is likely to decide that the risk a person may commit an offence while on immigration bail will be higher where the person has a history of offending, where the history of offending is recent, and where the person does not have support or guidance available to reduce the risk of offending. When present, these same factors will reduce the risk.

#### **The likelihood of the person's presence in the UK on bail causing a danger to public health or being a threat to the maintenance of public order**

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<sup>6</sup> The National Police Chiefs Council (NPCC) has confirmed the immigration authorities can provide PNC printouts to the Tribunal when relevant for immigration bail hearings.



47. This is the fourth matter in para 3(2). It is for the immigration authorities to prove that it is more likely than not that a person poses a danger to public health or to the maintenance of public order. In the absence of reliable evidence, judges will find the likelihood of such matters is low and this alone will not be a reason for refusing bail.
48. Where evidence is provided, it will be assessed in ways analogous to the examples already given. Where evidence is considered sensitive, either party may apply for a direction under rule 13 of the 2014 Tribunal Procedure rules prohibiting disclosure, but the Tribunal will be slow to restrict the evidence available to the other party.

**Whether the person's detention is necessary in that person's interests or for the protection of any other person**

49. This is the last specific matter listed in para 3(2). Judges will adopt the same safeguarding approach already discussed.
50. Judges should avoid immigration detention being used in place of other powers of detention, such as on remand or under the Mental Health Acts but it is possible for a person to be "dual detained", by which is meant that they may be detained by more than one authority and for more than one purpose.
51. Where a person is dual detained, if the judge decides immigration bail should be granted (for example, there is no longer justification for continuing immigration detention), the person will not be released because they will remain detained by the other authority. In such circumstances, the bail address may be the place of detention.

**DETERMINING THE CONDITIONS OF IMMIGRATION BAIL**

52. Immigration bail is an alternative to immigration detention and the conditions of immigration bail must provide sufficient reassurance to the judge that the person released will maintain contact and cooperate with the immigration authorities and Tribunal as required.

***Appearance date condition***

53. It has long been the practice of the Tribunal to set as the minimum conditions of bail an appearance date condition, a residence condition and (where the appearance date is more than seven days ahead) a reporting condition because these were necessary to monitor a grant of bail and the risk of absconding.
54. There is no need to continue the practice of imposing an appearance date condition in most cases. An appearance date is no longer a surrender date and does not bring immigration bail to an end (see para 1(8) of schedule 10 to the Immigration Act 2016 to identify when immigration bail ends). It will not be appropriate to set an appearance date in a case where management of bail is transferred to the Secretary

of State. This is discussed in more detail in paragraph 107 below.

55. An appearance date condition will be a date when the bail conditions and terms can be reviewed. It differs from a reporting condition because it is an opportunity for the Tribunal and the parties to consider whether the circumstances surrounding immigration bail have materially changed. For example, if a person has been on bail for a long period and has been complying with conditions, then it might be appropriate to relax the conditions that have been imposed. A judge will only have jurisdiction over such matters where the Tribunal maintains management of a person's bail. Where bail is transferred to the Secretary of State, a judge should not impose an appearance date condition because that will be a matter for the immigration authorities to arrange.

### ***Residence condition***

56. A residence condition may be imposed to ensure the person granted bail can be located. Judges should distinguish a 'bail address' from a 'residence condition', the Home Office position is that where a stable bail address is available a condition requiring the person to live at that address will not normally be appropriate.
57. The Home Office have advised that they will no longer seek residence conditions in most cases as long as a stable bail address is available. Therefore, Judges should not automatically impose a residence condition. This fits with the general principle that bail conditions should be the minimum necessary. Judges will remember that it is for an applicant to show that a proposed bail address is a stable address. The factors outlined in paragraph 38 may be relevant in deciding whether a bail address is stable.
58. Where a person cannot offer a bail address, a judge may consider whether they might be eligible for support under schedule 11 to the 2016 Act. If the applicant is so entitled, the judge can grant bail subject to such an address being provided within 14 days (or such other suitable period) and the applicant being released immediately the address is available.<sup>7</sup> The period can be extended on application, and by consent, if necessary. If the likelihood of a bail address becoming available within a reasonable period is low, then it will be appropriate to consider whether other conditions such as more frequent reporting can be applied in the meantime rather than refusing bail.
59. The Secretary of State must be notified of the proposed bail address as soon as possible to enable the immigration authorities to carry out checks so they can decide if they consider the address is suitable. If a proposed bail address is provided late, the immigration authorities may advise the Tribunal it has not had sufficient time to carry out the background checks. If a judge is satisfied that is the case, then it will be for a judge to decide whether there is sufficient other evidence about the suitability of the address to make a decision about a residence condition. If there is insufficient other

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<sup>7</sup> Paragraph 3(8) of schedule 10 to the Immigration Act 2016 permits a grant of immigration bail being conditional on arrangements being put in place.

evidence, then it will be unlikely a residence condition can be imposed and the judge should consider whether other bail conditions will be sufficient to address the risk of absconding before refusing bail

60. If the immigration authorities oppose a proposed bail address, they must provide evidence to substantiate their objection. Speculation or generic arguments will not be sufficient. Judges will examine concerns raised by the immigration authorities about the suitability of a bail address but should not make decisions based on suspicion or speculation.
61. In the absence of any evidence to the contrary, judges will assume:
  - a. landlords will give permission for an applicant to live in a property, and
  - b. where a person is subject to a licence that a probation officer will approve the bail address if the immigration authorities have no specific concerns about that address other than the absence of express approval from a probation officer.

### ***Reporting condition***

62. A reporting condition is imposed to ensure the person granted bail maintains regular contact with the immigration authorities or the Tribunal. This serves to remind the person that they remain subject to immigration control. It is likely that this will be the normal minimum bail condition.

### ***Activities condition***

63. A judge can impose a condition restricting the person's work, occupation or studies in the UK. Judges should not impose such conditions where the law already restricts such activities, such as where the person has no right to work, because a judge should impose the minimum bail conditions necessary, and if a person's activities are already restricted by law, there can be no need for such a bail condition (cf *Lauzikas v SSHD* [2016] EWHC 3215 (Admin)).
64. Where a person's activities would not be restricted upon release, a judge may impose an activities condition where there is a safeguarding issue. An activities condition restricts a person's liberty beyond what would normally be expected.
65. A judge may wish to bear in mind that employment and studying may be factors that establish that a person is unlikely to abscond.

### ***Electronic monitoring condition and curfews***

66. An electronic monitoring condition can be imposed on any person granted bail and must be imposed where a person pending deportation is granted bail (see para 2(1)(e) and para 2(3) of schedule 10 to the Immigration Act 2016).  
**NB: Mandatory electronic monitoring will not be commenced until a further commencement order is made.**

67. Judges must not impose an electronic monitoring condition if informed by the Secretary of State that such a condition would be impractical or contrary to the person's protected human rights (see para 2(7) of schedule 10), even if the person is to be deported.
68. In cases where an electronic monitoring condition is not mandatory, before imposing such a condition, judges should consider the following factors.
  - a. Is such a condition necessary? Where there are no significant safeguarding concerns, which might include a serious risk of absconding or of future criminality, then such a condition will usually be unnecessary.
  - b. Is such a condition practical? Where the immigration authorities do not have facilities for electronic monitoring, then such a condition should be avoided. Similarly, if there is evidence that there is some other practical obstacle to electronic monitoring, for example access to the bail address by those who will have to install the monitoring equipment, then such a condition should be avoided.
  - c. Would such a condition be contrary to the person's protected human rights? Electronic monitoring is unlikely to be appropriate where such monitoring may aggravate a physical or mental health condition.
69. Para 4 of schedule 10 to the Immigration Act 2016 specifies the requirements that must be in place for an electronic monitoring condition. Paragraph 4(1) requires the person on whom an electronic monitoring condition is imposed to co-operate with such arrangements as the Secretary of State may specify for detecting and recording by electronic means the person's location, presence or absence from a location during or at specified times and locations.
70. The Court of Appeal considered similar matters in *R (Gedi) v SSHD* [2016] EWCA Civ 409 and concluded that the conditions attaching to an electronic monitoring condition amounted to a curfew. The Court also ruled that the statutory provisions relating to bail do not permit the Secretary of State to impose a curfew although a judge may do so. Under the new regime it is possible for the authority having management of bail to impose any condition considered appropriate.
71. The consequence of this judgment means that where a judge is considering exercising discretion about whether to impose an electronic monitoring condition (i.e. under para 2(1)(e) of schedule 10 to the Immigration Act 2016, a judge should always first consider whether there is need for the person to comply with a curfew to secure immigration bail.
72. Even though a curfew condition is not specified in the list in para 2(1), a judge has power to impose a such a condition under para 2(1)(f). A curfew condition is a significant restriction on liberty and must only be imposed where there is evidence that such a condition is necessary for the safety of the person to be released or other persons. The fact the immigration authorities request an electronic monitoring condition is not a reason to impose a curfew condition. The immigration authorities must explicitly request a curfew condition and the Judge will consider this separately

from any electronic monitoring condition.

73. If a curfew condition is imposed, a judge should ensure it is for the shortest necessary period. The immigration authorities must specify the specific time during which the person will be electronically monitored and generic conditions, such as “between the hours of 8 p.m. and 8 a.m.”, should not be used. If the immigration authorities cannot provide such information, a judge will either specify a time or short period themselves, or may decide the immigration authorities have failed to demonstrate that a curfew is necessary because they have failed to consider the specific circumstances of the individual case.
74. The situation is different where there is a mandatory requirement to impose an electronic monitoring condition (i.e. under para 2(3) of schedule 10). A judge must consider the separate question of whether to impose a curfew condition in the same way as in a discretionary situation.
75. Although in all mandatory cases a judge must impose an electronic monitoring condition (unless the Secretary of State confirms it would be impractical or contrary to the person’s protected human rights), there is no mandatory requirement to impose a curfew. If a judge decides there is no need for a curfew then a curfew condition should not be imposed. In such circumstances, the immigration authorities may decide it is impractical or impossible to effect electronic monitoring. It may be appropriate, therefore, for a judge to give alternative immigration bail conditions to ensure the person can be released.

### ***Financial condition***

76. Paragraph 5 of schedule 10 to the Immigration Act 2016 permits the Tribunal to impose a financial condition. Paragraph 5(2) states that a financial condition “may be imposed on the person to be granted immigration bail only if the person imposing the condition thinks that it would be appropriate to do so with a view to ensuring that the person complies with the other bail conditions”.
77. Paragraph 5(1) explains that a financial condition is a condition requiring the payment of a sum of money by the person to whom bail is granted or another person in a case where the person granted bail fails to comply with another condition to which their immigration bail is subject.
78. A financial condition is not a pre-requisite of immigration bail. In each case, if a judge is satisfied that a person will comply with the conditions of bail, a financial condition will not be required. Where there is some doubt that a person will comply with the bail conditions, a financial condition might provide additional weight to permit the judge to be satisfied the person is more likely than not to comply with the other bail conditions.
79. Judges will bear in mind that it is rarely appropriate to impose a financial condition on the person to be released on bail because they will rarely have the means to pay

anything but a notional sum.

80. Where a judge decides that a financial condition is necessary to reduce to an acceptable level the risk of non-compliance with the other bail conditions, they will evaluate the level of the financial condition and the ability of the person supporting the financial condition to meet that sum.
81. Because the financial condition is an additional mechanism for reducing the risk of non-compliance, it will rarely be necessary to question the person supporting the financial condition about whether they have any influence over the person to be released on immigration bail. Their suitability will depend on any adverse evidence about their character, such as a criminal record, and whether there is reliable evidence they would be able to cover the financial condition or their part thereof.
82. In all cases, judges must be cautious about imposing a financial condition simply because one is offered. A judge must only impose the minimum bail conditions necessary and do no more because bail conditions are themselves a restriction of liberty.

#### **Payment Liability (formerly known as forfeiture)**

83. Liability to pay Financial Conditions will be dealt with by the Tribunal except where the management of bail has been transferred to the Secretary of State.
84. When considering any question of liability, the Tribunal has power to order the whole sum to be paid or a part thereof. This is implicit in the provisions of paragraph 5(6) of schedule 10, which require the person who is liable to make a payment to be given an opportunity to make representations. It is also possible for the Tribunal under para 6, if it retains management of the bail conditions, to vary the financial condition at any time, including in relation to a question of liability to pay.

#### **Other common issues relating to bail conditions**

85. Judges should ensure they do not impose an immigration bail condition that conflicts with other restrictions on an applicant, such as those of a criminal licence. Similarly, where an applicant is already subject to restrictions as a matter of law, for example relating to their permission to work, there will be no need for a judge to impose such a condition.
86. Because judges must impose the minimum bail conditions, they should not adopt the restrictions imposed by another authority as bail conditions. To do so will be unnecessary since the applicant is already subject to those conditions. In addition, imposing such restrictions as immigration bail conditions might introduce confusion as to who is responsible for monitoring compliance and the consequence of any failure.
87. Judges may remind parties that the decision not to impose such restrictions as bail

conditions does not remove the duty on the applicant to comply with the other restrictions.

## **FURTHER MATTERS**

88. There are four further matters on which guidance is appropriate.
  - a. Bail decisions (including withdrawals).
  - b. Auto-referral.
  - c. Transfer of bail conditions to the Secretary of State.
  - d. Consent of Secretary of State where removal directions are in force.

### **Bail decisions (including withdrawals)**

89. As in all judicial decisions, the parties are entitled to know not only the judge's decision but the reasons for that decision. A record of the decision and reasons also assists the Tribunal in relation to any subsequent application or other matter related to bail.
90. To ensure clarity, any written reasons, including reasons for accepting an application is withdrawn, must be typed.
91. Where immigration bail is granted, written reasons are not usually issued to the parties. A judge should, however, explain to the parties why bail has been granted and should record brief typewritten reasons in – or attached to – the record of proceedings.
92. Typewritten reasons for proposing to grant immigration bail must be given where directions are in place for the applicant's removal from the UK within 14 days. This is to ensure the Secretary of State can consider whether to consent to grant immigration bail (see para 3(4) of schedule 10 to the Immigration Act 2016).
93. Typewritten reasons for refusing immigration bail must be given in all cases.
94. An applicant or their legal representative can withdraw an application but judges will be alert to the principles elucidated in *TPN (FtT appeals – withdrawal) Vietnam* [2017] UKUT 295 (IAC) as to the need for judicial oversight of withdrawals.
95. Judges should not encourage withdrawal of bail applications as an alternative to refusing bail. The giving of any preliminary view should be for the purpose of crystallising a decision, enabling the parties to provide any counter evidence or argument. In other words, the giving of a preliminary view must not be used as an alternative to deciding the application.
96. These principles are needed because the provisions relating to repeat bail applications (see para 12 of schedule 10) can only be effective if the Tribunal is robust in its handling of bail applications. Written reasons for refusing bail will assist a person to focus a fresh application; and will help the Tribunal, where applicable, to decide

whether there has been a material change in circumstances since a previous application. Addressing the reasons for refusal will almost always be evidence of a material change.

97. Where an applicant seeks to withdraw an application on the day of the hearing, either prior to the bail hearing commencing or during the hearing, judges may have more regard to the above principles because it is likely at that stage in the proceedings that it will be in the interests of justice to refuse bail rather than accept the withdrawal.
98. Where the immigration authorities release a person prior to a bail hearing, the Tribunal has no jurisdiction to entertain a bail application because the person is no longer detained and such situations must not be treated or recorded as a “deemed withdrawal”.
99. In all cases, reasons should be succinct and objective, and must be based on the individual circumstances of the person’s bail application. The reasons should be brief and address as far as necessary the issues specified in paragraphs 3(1) and 3(2) of schedule 10 to the Immigration Act 2016.

#### **Auto-referral**

100. Judges should be alert to the fact that the Secretary of State in certain circumstances has a duty to arrange consideration of bail and must arrange a reference to the Tribunal to decide whether to grant bail (see paragraph 11 of schedule 10 to the Immigration Act 2016).
101. Judges should approach such cases in the same way as if a person applied for immigration bail. Judges will have special regard, however, to the length of detention since such the duty on the Secretary of State is only engaged after a period of four-months detention. 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.

#### **Transfer of bail to the Secretary of State**

102. Paragraph 6(3) of schedule 10 permits the Tribunal to direct that the Secretary of State exercises the power to amend, remove or impose new conditions of bail. Where the Tribunal so directs, bail is transferred from the Tribunal to the Secretary of State. Transfer of bail can be directed in all cases, even if an appeal is pending.
103. Judges must consider the overriding objective when deciding whether to direct bail to be transferred to the Secretary of State. A judge must balance issues relating to justice with those of efficiency.
104. The Tribunal may not give a direction to transfer bail without first giving the bail party and any other person subject to a financial condition an opportunity to make



representations.

105. The fact that a person opposes bail being transferred to the Secretary of State is not sufficient reason not to transfer bail. It is for a judge to decide what is in the interests of justice, having regard to the overriding objective.
106. In general, where a judge imposes bail conditions equivalent to those requested by the immigration authorities, it will be appropriate for a judge to direct that bail is transferred to the Secretary of State. This is because there will be no realistic prospect of the Secretary of State imposing more stringent conditions.
107. Where a judge directs that bail is to be transferred to the Secretary of State, there is no need to impose an appearance date condition in addition to a reporting condition because the reporting condition will remain in force after bail is transferred. In such cases, it will be for the Secretary of State to decide whether an appearance date is necessary in addition to the reporting condition.
108. Where bail is not transferred, it is likely that at least a reporting condition and an appearance date will need to be imposed. The appearance date will be in place for the Tribunal to monitor bail from time to time. If an appeal is pending, then it will be usual to set an appearance date as the date of any hearing. If an appeal is not pending, then it will be for a judge to decide the duration of any appearance date. In general, a period of three months may be appropriate.
109. At an appearance date, the Tribunal can review the conditions of bail and whether bail should be transferred to the Secretary of State. A person on bail may apply to vary bail conditions at any other time.
110. Where bail is not transferred, it will be appropriate for the Tribunal to set an appearance date condition, at which bail can be reviewed. It would be appropriate to set the appearance date condition at three monthly intervals. If immigration bail ends earlier, then the appearance date condition will lapse.
111. Judges will remember that an appearance date is not a surrender date and immigration bail only ends if one of the conditions in para 1(8) of schedule 10 applies.

#### **Consent of Secretary of State where removal directions are in force**

112. Under the Immigration Act 2014 a requirement was introduced for the consent of the Secretary of State for the release of a person on bail if the person was subject to directions for their removal within 14 days. Under sub-paragraph 3(4) of Schedule 10 a person must not be granted immigration bail by the Tribunal without the consent of the Secretary of State if directions for the person's removal within 14 days are in force. This is a significant change of wording from the 2014 Act, which referred to the Secretary of State's consent to release on bail rather than consent to the granting of bail.

113. It is understood that it was not intended when the new provision was enacted to make any substantive change in the law. The change was seen as part of tidying up the statutory language to refer consistently to the granting of bail rather than to either release on bail or granting of bail. However there is a significant difference in principle between the Secretary of State's consent being required for a grant of bail by the Tribunal and the Secretary of State's consent being required for release on bail.
114. Under the 2014 Act the procedure which was adopted was for the judge to make a decision on the granting of bail. Written reasons for this decision would then be considered by an official of the Secretary of State, who would then decide whether consent to release should be granted.
115. Where an application for bail is made, the Tribunal is required under the Procedure Rules to list and hear the application. If the Tribunal decides to refuse bail, then a refusal decision can be made and the Secretary of State's consent is not required. If, however, the Tribunal considers that bail should be granted the judge should immediately prepare and issue a typed note setting out reasons bail should be granted. The Home Office Presenting Officer will pass on the contents of this typed note to an official of the Secretary of State who will decide whether to consent to the grant of bail. A copy will also be provided to the bail applicant. If consent to the granting of bail is refused, the Tribunal will then issue a decision to this effect, indicating that bail is refused because the consent of the Secretary of State has been refused. If the Secretary of State delays in responding to the note it should be assumed that consent is refused and this should be noted in the refusal decision.
116. The refusal decision in these circumstances should state both the reasons why the judge would have granted bail and also that refusal of bail is a mandatory requirement under the legislation (Schedule 10, para 3(4)) because the Secretary of State has refused consent.
117. If the Secretary of State gives consent then the Tribunal may proceed to issue a notice granting bail in the usual way. The grant decision notice will not contain reasons and there will not be any need to reference the consent of the Secretary of State.
118. Care should also be taken in ascertaining whether a person is subject to directions for their removal. There are specific powers to give removal directions at paragraphs 8-10A and 12-14 of Schedule 2 to the Immigration Act 1971. It would seem questionable whether all removal arrangements made by the Home Office involve the use of removal directions. The judge must be satisfied that removal directions are in place for removal within the next 14 days and can expect to see evidence of those directions.
119. This is an important point because where individual liberty is affected the extent of any statutory powers being exercised should be precisely observed. The Home Office may not wish to produce removal directions before the Tribunal, or may have none to produce, and if this is the case the Home Office will not be able to show that the person applying for bail is subject to directions for their removal within 14 days. The

restriction on granting bail will then have no effect. The Tribunal's decision should make a finding to this effect.