

“Immigration Bail”: An overview of the new statutory scheme

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OUTLINE



- The pre-15 January 2018 position in outline
- The scheme under Schedule 10 of the Immigration Act 2016

SOURCES OF INFORMATION



- Immigration Act 2016, section 61 and Schedule 10 (not yet wholly in force)
- Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014/2604, as amended, Rules 37-43
- *Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration and Asylum Chamber)* (Presidential Guidance Note No 1 of 2018) ('FTT Guidance')
- *Immigration Bail* (Version 1.0, 12 January 2018) ('Home Office Guidance')
- *First-tier Tribunal Bail: completing the bail summary* (Version 2.0, 9 February 2018)
- See also the Immigration Act 2016 (Commencement No. 7 and Transitional Provisions) Regulations 2017

The pre-15 January 2018 position – mechanism for release



- Grant of Temporary Admission or Release (Home Office) (IA 1971, Sch 2, para 21)
 - Could be subject to restrictions re residence, employment or occupation and reporting;
 - Possibility of electronic monitoring (AIToCA 2014, s.36)

- Release under para 2 of Schedule 3 in a deportation case
 - Power to impose restrictions as to residence, employment or occupation and reporting;
 - Possibility of electronic monitoring (AIToCA 2014, s.36)

- Grant of bail (First-tier Tribunal or CIO) (IA 1971, Sch 2, paras 22, 29)
 - Subject to a recognisance and conditions appearing to the decision maker to be “*likely to result in the appearance of the person bailed at the required time and place*”, and sureties;
 - Possibility of electronic monitoring (AIToCA 2014, s.36)

The pre-15 January 2018 position – bail accommodation



- Section 4(1)(c) Immigration and Asylum Act 1999

The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons—

(c) released on bail from detention under any provision of the Immigration Acts.

IMMIGRATION BAIL : Immigration Act 2016, Schedule 10



- Schedule 10 IA 1971 introduces new concept of “immigration bail”
- In force 15 January 2018, save for the mandatory electronic monitoring provisions in paras, 2, 7 and 8, which are not yet in force
- Replaces all of the old release mechanisms.
- Those at large on 15 January 2018 on TA/TR, FTT bail, etc, fall to be treated from that date as having been granted immigration bail under para 1 of Schedule 10.

IMMIGRATION BAIL : Immigration Act 2016, Schedule 10



STRUCTURE OF SCHEDULE 10

- PART I: MAIN PROVISIONS
 - Para 1: Power to grant immigration bail
 - Para 2: Conditions
 - Para 3: Exercise of power (factors to be taken into account)
 - Para 4: Electronic monitoring
 - Para 5: Financial condition
 - Paras 6 - 8: Variation / amendment of conditions, including electronic monitoring
 - Para 9: Power of SSHD to “enable person to meet bail conditions”
 - Para 10: Arrest for breach of bail
 - Para 11: “Duty to arrange consideration of bail”
 - Para 12: Stipulations for the Tribunal Procedure Rules
 - Para 13: Transitional provisions

Schedule 10, Para 1: Power to grant immigration bail - SSHD



- SSHD may grant bail to a person detained under:
 - paras 1, 1A or 2 (**but not 1B**) of para 16, Sch 2, IA 1971 (para 1(a))
 - para 2, Sch 3, IA 1971 (detention pending deportation) (para 1(b))
 - s.62 NIAA 2002 (detention for examination or removal) (para 1(c)); or
 - S.36(1) UKBA 2007 (detention pending deportation) (para 1(d)).
- SSHD may also grant bail to a person “*liable to*” detention under any of the above provisions, if they are not in fact detained (para 2)

Schedule 10, Para 1: Power to grant immigration bail - FTT



- FTT may grant bail to people detained under the same powers:
 - paras 1, 1A or 2 (but not 1B) of para 16, Sch 2, IA 1971 (para 3(a))
 - para 2, Sch 3, IA 1971 (detention pending deportation) (para 3(b))
 - s.62 NIAA 2002 (detention for examination or removal) (para 3(c)); or
 - S.36(1) UKBA 2007 (detention pending deportation) (para 3(d)).
- But no power to grant bail to those liable to detention but not in detention

Schedule 10, Para 1: Power to grant immigration bail – other



- A person can be granted immigration bail even if that person can no longer be lawfully detained, if liable to detention under one of the provisions mentioned in para 1(1)
 - *Cf R (B) v SSHD* [2015] 3 WLR 1031, which held that, under the old bail regime, bail could not continue where detention could not be justified in law. Note also conceded position in *Jollah v SSHD* (curfew case).
 - Does not impact on *Khadir* [2005] UKHL 39. If no prospect of removal at all, a person is not liable to detention so not subject to release on conditions, etc.

Schedule 10, Para 1: Power to grant immigration bail – other



- Para 1(6): “A grant of immigration bail to a person does not prevent the person's subsequent detention under a provision mentioned in sub-paragraph (1).”
 - No statutory barrier to re-detention by SSHD following grant of bail.
 - ? Response to decision of Collins J in *Lucas v SSHD* [2016] 4 WLR 135 (currently under appeal), which held that, once a person had been released on bail they could only be re-detained where the provisions of para 24 of Sch 2 IA 1971 were satisfied (breached or likely to breach bail condition; specified procedure).

Schedule 10, Para 2(1): Conditions

- Bail must be subject to one or more of the conditions in para 2(1)
 - **NB, para 2(2), (3) and (5) – (10) not yet in force**
 - **When they are a different regime will apply to persons detained under Schedule 3 IA 1971 and s.36 UKBA 2007 (i.e. detained for deportation)**
 - **See addition slides to follow**

Schedule 10, Para 2(1): Conditions

- *(a) a condition requiring the person to appear before the Secretary of State or the First-tier Tribunal at a specified time and place*
 - FTT Guidance suggests such conditions be used when the Tribunal retains the power to alter bail conditions, to permit periodic review (paras 108-110). (See subsequent slide – Tribunal can transfer management of bail to SSHD)
 - Home Office Guidance suggests such conditions be used, *inter alia*, for self-check in returns, attending ETD or other interviews, or attending for return flights, but not for voluntary interviews with Embassies, *etc.*, for redocumentation (p.12/70)

Schedule 10, Para 2(1): Conditions

- *(b) a condition restricting the person's work, occupation or studies in the United Kingdom;*
 - FTT Guidance (paras 63-65)
 - Should not be imposed where activity already restricted by law
 - May be imposed where there is a safeguarding issue
 - Notes that employment and study may weigh against absconding
 - Home Office Guidance states appropriate to impose such conditions where person does not have LTE/LTR (p.13/70)

Schedule 10, Para 2(1): Conditions

- *(c) a condition about the person's residence*
 - Under previous scheme was routine to impose a residence condition. FTT and Home Office Guidance makes clear this will no longer be the case
 - SSHD will not normally seek a residence condition if a stable bail address is available
 - Raises issues re right to rent

Schedule 10, Para 2(1): Conditions

- *(d) a condition requiring the person to report to the Secretary of State or such other person as may be specified*
 - FTT Guidance – *“it is likely that this will be the normal minimum bail condition”* (para 62)

Schedule 10, Para 2(1): Conditions

- *(e) an electronic monitoring condition*
 - Presently discretionary in all cases
 - Will become mandatory in deportation cases when paras 2(2), (3) and (5) to (10) in force, subject to certain exceptions (see later slides)
 - Current form of EM used by SSHD means that to be effective a curfew must also be imposed. **That is a separate condition.** (FTT Guidance, paras 67-72)

Schedule 10, Para 2(1): Conditions

- *(f) such other conditions as the person granting the immigration bail thinks fit.*
 - May include, e.g.
 - Surrender of passport
 - Notify Home Office of change of circumstances

Schedule 10, Para 2(1): Conditions



(f) such other conditions as the person granting the immigration bail thinks fit.

Curfews?

- Necessary for imposition of EM
- FTT Guidance and Home Office Guidance this can include a curfew
- Likely this will be followed unless/until challenged
- Argument that words insufficiently clear to permit a deprivation of liberty resulting from a curfew (cf Tim Buley's talk on the curfew litigation).
- FTT Guidance cautions judges only to impose a curfew where there is "*evidence that such a condition is necessary for the safety of the person to be released or other persons.*"

Schedule 10, Para 2(3): Conditions – Deportation cases

- **NOT YET IN FORCE**
- Detention under Sch 3, para 2, IA 1971 or s.36 UKBA 2007;
- Different approach to apply
 - Duty to impose EM (para 2(3)), subject to paras 2(5) to (9)
 - Discretion to impose one or more of the other para 2(1) conditions
 - If EM not imposed, mandatory to impose another para 2(1) condition
 - Imposition of EM in a deportation case will not be permissible where:
 - Impractical; or
 - Contrary to person' Convention rights (para 2(5))
 - CONTD...

Schedule 10, Para 2(3): Conditions – Deportation cases



- FTT will have no discretion re imposition of EM in a deportation case:
 - Must impose unless SSHD considers impractical / breach of Convention rights
 - In which case, may not impose
- As to meaning of impractical, see para 2(8). SSHD must have regard to
 - Practical obstacles
 - Resources
 - Need to prioritise resources
 - The general considerations in para 3(2) (see subsequent slide)

Schedule 10, Para 2(4): Conditions – Financial condition



- Para 2(4) confirms that a financial condition may be imposed alongside the conditions identified in the previous slides. It cannot be imposed in isolation. This is addressed further in a subsequent slide.

Schedule 10, para 3: Exercise of the power



When deciding whether to grant bail and what conditions to impose, SSHD and FTT must have regard to matters listed in para 3(2)

Schedule 10, para 3: Exercise of the power – para 3(2) factors



(a) the likelihood of the person failing to comply with a bail condition

- FTT Guidance 32-41
 - Risk likely to be low where stable address, active support from friends or family, good reasons to keep in contact with FTT / authorities, no imminent prospect of removal
 - Previous contact with authorities may also be a useful indicator (positive or negative)

Schedule 10, para 3: Exercise of the power – para 3(2) factors



(b) whether the person has been convicted of an offence (whether in or outside the United Kingdom or before or after the coming into force of this paragraph)

- FTT Guidance 42-45
 - Suggests this is only a relevant factor insofar as it has a direct bearing on current safeguarding risk

Schedule 10, para 3: Exercise of the power – para 3(2) factors



(c) the likelihood of a person committing an offence while on immigration bail

- FTT Guidance, para 46
 - *“will relate directly to the person’s criminal history and any professional risk assessments should be produced.”*

Schedule 10, para 3: Exercise of the power – para 3(2) factors



(d) the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order

Schedule 10, para 3: Exercise of the power – para 3(2) factors



(e) whether the person's detention is necessary in that person's interests or for the protection of any other person

- Problematic, as suggests use of detention power for purpose other than deportation / removal.
- for a person's "own good" is not lawful under the *Hardial Singh* principles. See, e.g., *AA (Nigeria) v SSHD* [2010] EWHC 2265, at [40]
- Home Office Guidance suggests this factor in play where, e.g., "*a person is awaiting transfer to a mental health hospital*"

Schedule 10, para 3: Exercise of the power – para 3(2) factors



(f) such other matters as the Secretary of State or the First-tier Tribunal thinks relevant

Schedule 10, para 3: Prohibition on granting bail



- There is no power to grant bail to a person detained under para 16(1) of Schedule 2 until after 8 days have elapsed

Schedule 10, para 3: Consent required for grant of bail by FTT



- A person must not be granted immigration bail by the FTT without the consent of the SSHD where:
 - RDs “*are for the time being in force*”; and
 - The RDs require removal within 14 days
- Both the FTT and the Home Office Guidance suggest that this prohibition will only apply where the FTT is satisfied on the evidence that RDs are in fact in place (see paras 118 and 119 and p. 28, respectively). Not clear that is correct. If FTT purports to grant bail in ignorance of RDs and no consent given by SSHD is there a valid grant of bail? (Precedent fact?)

Schedule 10, para 3: Conditional bail

- The notion of “conditional bail”, previously only found in the earlier version of the FTT Guidance, has been put on a statutory footing in para 3(8):

The commencement of a grant of immigration bail may be specified to be conditional on arrangements specified in the notice being in place to ensure that the person is able to comply with the bail conditions.

- Potentially creates a mechanism for FTT to indicate that SSHD should consider exercise of discretion under para 9 to assist with accommodation.



Schedule 10, para 5: Financial Condition

Para 5 provides for the imposition of a financial condition on the person being granted immigration bail (previously known as a recognisance), or another person (previously referred to as a surety).

- May be imposed only if person imposing the condition *“thinks that it would be appropriate to do so with a view to ensuring that P complies with the other bail conditions.”*
- Home Office Guidance suggests that a separate financial condition can be applied to each immigration bail condition imposed under para 2 (see Home Office Guidance at p.24/70). Query whether that is correct. Not the view taken in the FTT Guidance (see paras 76-82).
- Para 5 includes provisions for recovering payment in event of a breach of bail.

Schedule 10, paras 6, 7, and 8: Variation of conditions

- Bail conditions can be varied, subject to the provisions of paras 6
- Paras 7 and 8 (**not yet in force**) address variation of EM conditions
- Power to vary exercised by the person / body that granted bail (para 6(2)), except...
- FTT, when granting bail, may direct that the power to vary bail conditions instead be exercised by the SSHD (para 6(3) and (4)).
- FTT has no power to “*amend*” an EM condition. Would appear to have a power to remove such a condition (para 6(1)(a) and (5)). *Does this make sense without mandatory EM regime being in force?*

Schedule 10, para 9: Power to enable person to meet conditions



- Paras 9(1) to (3) provide
 - (1) Sub-paragraph (2) applies where—
 - (a) a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and
 - (b) the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised.
 - (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.
 - (3) But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.

Schedule 10, para 9: Power to enable person to meet conditions



- Para 9(4) permits the SSHD to pay a person's travel expenses incurred in relation to complying with a bail condition, but only (para 9(5) in “exceptional circumstances”).

Schedule 10, para 10: Arrest for breach of bail

- Para 10 of Schedule 10 replaces para 24 of Schedule 2
- Para 10(1): provisions for arrest where there are reasonable grounds for believing that a person *“is likely to fail to comply with a bail condition”* or *“is failing, or has failed, to comply with a bail condition.”*
- Paras 10(2) to (8) make provisions for the grant of warrants to enter premises, etc
- Para 10(9)-(15) sets out procedure to be followed where a person arrested under para 10(1).

Schedule 10, para 11: Automatic bail hearings



- Para 11 provides for automatic bail hearings at four-monthly intervals in non-deportation cases.

Schedule 10, para 12: Tribunal Procedure Rules



- Para 12 requires that the First-tier Tribunal Procedure Rules require that bail applications be dismissed without a hearing where bail is sought within 28 days of an earlier bail refusal, absent a material change in the person's circumstances.