

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) ACT 2007

EXPLANATORY NOTES

INTRODUCTION

Part 1 - Bail

Section 1 – Determination of questions of bail

4. This section inserts into the 1995 Act three new sections setting out the legislative framework for bail decisions. At present, the substantive law on bail is still largely common law. Statute determines whether a crime is bailable, when bail may be applied for and the standard conditions on which bail may be granted but not the general right to bail or the reasons for refusal (the Lord Justice-Clerk Wheatley in *Smith v M* 1982 JC 67).
5. The provisions set out in statute the current common law by setting out a general entitlement to bail, the circumstances in which bail may be refused and a non-exhaustive list of the considerations that will be relevant to the court in its assessment of whether the circumstances in which bail may be refused are applicable in any particular case.

New Section 23B

6. New section 23B relates to the role of the court in determining questions of bail for an accused person at the pre-conviction stage.
7. Subsection (1) makes it clear that bail is to be granted except where certain grounds for refusing bail (set out in more detail in new section 23C and section 23D) apply and where the court having regard to the public interest considers there is good reason to refuse bail. This reflects the position in relation to detention of an accused person set out in Article 5 of the European Convention on Human Rights, the general principles of Scots common law and the case law of the European Court of Human Rights. For example, *McIntosh v McGlinchey* 1921 JC 75 provides that bail must be granted unless “in the exercise of its discretionary right of refusal and looking to the public interest and securing the ends of justice, there is good reason why bail should not be granted”. See also *Young v HMA*, 1988 SCCR 517 and *Smirnova v Russia application No 46133/99 and 48183/99* July 24th 2003.
8. Subsection (2) makes it clear that in determining the question of bail, the court must consider whether the public interest could be secured by the imposition of bail conditions rather than detention. In applying the ‘public interest’ test the court will take into account the interests of justice, since it must be in the broader public interest that individual court decisions reflect the interests of justice.
9. Subsection (3) makes it clear that references to the public interest include reference to the interests of public safety.

10. Subsection (4) provides that the prosecutor and the accused have the right to make submissions to the court on the question of bail pre-conviction.
11. Subsection (5) makes clear that the decision on bail (and the imposition of bail conditions) is for the court and the court alone, and that the attitude of the prosecutor (who has a right to be heard and who can oppose bail) does not restrict the exercise of the court's discretion. This provision reverses the currently understood position in Scots law set out in *Spiers v Maxwell 1989 SLT (N) 282* and the more recent decision by the High Court of Justiciary in *M.A.R v Dyer, 4 November 2005* where the court concluded that if the prosecutor did not oppose bail it should be granted.
12. If the prosecutor does not oppose bail the court will have only limited information about the accused recorded on the petition or complaint, although they will be able to see from the terms of the complaint alleged bail aggravations and any bail breaches with which the accused is charged. Subsections (6) and (7) therefore place beyond doubt the right of the court to seek information relevant to the bail decision of the prosecutor or the accused's legal representative. Examples of relevant information might be the accused's previous convictions, which would show whether s/he has previously breached bail. Subsection (7) gives those parties the right to decide whether or not to offer any opinion on the risks attached to the bail decision. This is designed to give them discretion where they wish to express an opinion, but to ensure that they cannot be pressed into giving one where they do not wish to do so, risk being a matter for the court to determine.

New Section 23C

13. New section 23C sets out the grounds for refusal of bail. These reflect the grounds recognised under Scots common law and ECHR case law. In each case the grounds for refusal apply only where there is a 'substantial risk' of an adverse outcome; the ECHR case law makes clear that a risk must be identifiable and supported by evidence (for example, evidence relating to the previous conduct of the accused).
14. The grounds listed are that a person might, if granted bail;
 - Abscond;
 - Fail to appear at a future court hearing;
 - Commit further offences;
 - Interfere with witnesses or otherwise obstruct the course of justice.
15. Subsection (1)(d) gives the court the right to refuse bail on the grounds of 'any other substantial factor which appears to the court to justify keeping the person in custody.' This is designed to ensure that the court has sufficiently flexible discretion, but exercise of that discretion will be constrained (as it already is) by ECHR case law. Other factors recognised by ECHR case law, although they will rarely be applicable, include the preservation of public order and the protection of the accused. These factors might, for example, apply where individuals on serious terrorism charges appear before the court.
16. Subsection (2) gives an illustrative and non – exhaustive list of material considerations to which the court must, where they exist and are relevant, have regard when taking the bail decision. The considerations identified are;
 - The nature and seriousness of the alleged offences;
 - The probable disposal of the case if the individual were convicted (a strong likelihood of a serious custodial sentence, for example, would be relevant here);
 - Whether the individual was on bail, or was subject to other court orders or sentences, when the offences with which they are charged were allegedly committed;

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- The individual's character and antecedents, including the nature of any previous convictions (including convictions from outside Scotland) and of any previous breaches of court orders or the terms of any release on licence or parole; and
 - The individual's associations and community ties (for example whether there is a secure potential bail address and family support for the accused).
17. These reflect the considerations already taken into account under Scots common law. The subsection makes it clear that the court can also take any other material considerations which it identifies into account.

New Section 23D

18. **Section 23D** sets out particular serious types of cases in relation to which bail is to be granted only in exceptional circumstances. A similar exceptional circumstances test operates in England and Wales under section 25 of the Criminal Justice and Public Order Act 1994. Section 23D reflects the fact that under article 5(3) of the ECHR, detention would usually be justified when someone with a previous conviction for a grave offence is charged with a second such crime on the basis that this demonstrates a need to prevent further offences whilst on bail. It would therefore only be exceptionally that detention was not justified under the Convention. Subsections (2) and (3) apply:
- Where an individual is on a serious charge (to be heard before a jury) of a violent or sexual offence and has a previous serious conviction for a violent or sexual offence; and
 - Where an individual is on a serious charge of drug trafficking and has a previous serious conviction for drug trafficking.
19. The section also defines the terms 'drug trafficking offence' 'sexual offence' and 'violent offence'. The definition of drug trafficking covers a wide range of drug related offences, including production and supply of controlled drugs, and any involvement in or offer to supply and possession with intent to supply such drugs. Sexual offence is defined by reference to section 210A(10) and (11) of the 1995 Act which does not include prostitution.
20. The court is also entitled to take into account convictions for similar serious offences in England, Wales, Northern Ireland and any other state of the European Union. The court is specifically given discretion to determine whether a conviction in another jurisdiction is equivalent to a conviction on indictment in Scotland for one of the offence types listed.
21. Subsection (7) makes it clear that this section is without prejudice to the wider factors and considerations to be taken into account in relation to every bail decision which are set out in new Section 23C.