

IMMIGRATION AND ASYLUM ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part III: Bail

162. This part of the Act will introduce a greater judicial element into the detention process. It provides for the creation of up to two routine bail hearings, the first of which will take place about a week after initial detention, the second about a month later (if the person concerned is still detained). These will be in addition to the right to apply for bail under existing legislation (which will be replaced in due course by new arrangements made under section 53. It also introduces a statutory presumption in favour of bail.

Section 44: Bail hearings for detained persons

163. This section introduces routine bail hearings for those people detained solely under immigration legislation, with the exception of those whose deportation has been recommended by a court. It provides that detained persons will be entitled to a routine bail hearing within nine days of their initial detention and, where they remain in detention, a further hearing between 33 and 37 days following initial detention. Subsection (4) places a duty on the Secretary of State to secure a first reference no later than the eighth day following detention. If the person remains in detention, a second reference must be made no later than the thirty-sixth day following detention (subsection (5)). A person will be entitled to routine bail hearings if he is released and, then detained again at a later date. In such circumstances there will again be two routine bail hearings (assuming the person concerned is not released at the first hearing).
164. Subsection (7) ensures that the routine bail hearing will be limited to addressing the individual's suitability for release on bail. Subsections (10) and (11) ensure that if the Secretary of State fails to make a reference to the court, or the court fails to hear a routine bail hearing in time, arrangements will be put in place so as to ensure that the hearing will take place as soon as is reasonably practicable.
165. Subsection (12) provides that, except for those coming under the jurisdiction of the Special Immigration Appeals Commission (SIAC) under the Special Immigration Appeals Commission Act 1997 on national security grounds, the routine hearings in England, Wales and Northern Ireland will be before magistrates until such time as the Immigration Appellate Authority is dealing with an appeal. In this context the Immigration Appellate Authority will be regarded as dealing with an appeal after the relevant papers have been referred to it by the Home Office. Where the Immigration Appellate Authority is dealing with an appeal, the hearing will be before the court dealing with that appeal. Routine hearings will be held before SIAC in the case of any person whose bail application would be held before that body under current provisions. In Scotland, all routine bail hearings not held before SIAC will be before an Immigration Appellate Authority adjudicator (unless an appeal under the Immigration Acts is pending before another body, in which case that body shall hold the hearing).
166. Subsection (14) provides that the Secretary of State may by regulations make provision for the court to adjourn a routine bail hearing for the purpose of obtaining a medical or

other report or for any other reason. Subsection (15) provides that the regulations may, in particular, provide for the requirement to make a second reference not to apply in certain prescribed circumstances.

Section 45: Location of bail hearings

167. This section allows the Secretary of State to direct where, in relation to a particular case or class of case, routine bail hearings should be heard. These places may include courtrooms, detention centres, prisons, or Immigration Appellate Authority hearing centres. A direction by the Secretary of State under this clause will require the approval of the Lord Chancellor.

Section 46: General right to be released on bail

168. **Section 46** provides that the detained person must be released on bail unless one of the exceptions to the general right to be released on bail applies or the court has imposed a requirement under subsection (1) of section 47 which has not been met. The exceptions to the general right to be released on bail are set out in subsections (2), (3) and (4). Under subsection (2) the court need not grant bail if it is satisfied that there are substantial grounds for believing that one of the exceptions in that subsection applies. It will be for the Home Office to show, on the balance of probabilities, that there are substantial grounds for believing one or more of the exceptions apply. Subsection (4) provides an exception to the general right to be released on bail for those subject to deportation on conducive grounds in the interests of national security.

Section 47: Powers exercisable on granting bail

169. This section provides that a person may be released on bail by the court following a routine bail hearing. Subsection (1) specifies that the grant of bail may be subject to such conditions as appear likely to the court to result in the appearance of the person bailed at the required time and place. The conditions may require the person to enter into a recognizance (with or without sureties) or, in Scotland, a bail bond or a security to be given either by the person bailed or on his behalf. This is in contrast to bail granted under the Immigration Act 1971, which presently requires a recognizance or (in Scotland) bail bond to be given before bail can be granted. Subsection (2) makes it clear that the court may impose a requirement under subsection (1) only if it considers that its imposition is necessary to secure compliance with any condition to which bail will be subject. Under subsections (4) and (5), the court must impose a condition requiring any released person to report either to an immigration officer at a specified time and place, or at any such other time and place as may be notified in writing by an immigration officer, or to the court dealing with an appeal under the Immigration Acts. Subsection (9) allows the court, instead of releasing a person on bail immediately, to fix the amount and conditions of bail with a view to the bail being taken subsequently.

Section 48: Forfeiture

170. This section allows for the forfeiture of recognizances or, in Scotland, bail bonds entered into under section 47. If the court ordering forfeiture of a recognizance is not a magistrates' court, it must specify a magistrates' court which will, for the purposes of collection and enforcement of the sum forfeited, be treated as the court which ordered the forfeiture. In Scotland, any bail which has been forfeited will be treated as having been forfeited by the appropriate sheriff court. All forfeited sums must be paid to the Lord Chancellor and transmitted to the Consolidated Fund.

Section 49: Forfeiture of securities

171. This section allows for the forfeiture of a security where a bailed person has broken a mandatory condition of bail. A court can order either the value of the security, or a specified part of it, to be forfeited unless it appears that the bailed person has reasonable

cause for breaking the mandatory condition of bail. Under subsection (5), an application may be made to the court by, or on behalf of the person who gave the security that the bailed person did have reasonable cause for breaking the mandatory bail condition. Such an application may be made before or after the order for forfeiture has taken effect but may not be considered by the court unless it is satisfied that the Secretary of State was given reasonable notice of the applicant's intention to make the application (subsection (7)).

Section 50: Power of arrest

172. This section grants power to an immigration officer or constable to arrest, without warrant, a person who has been released on bail if there are reasonable grounds for believing that the person has broken or is likely to break any condition of bail. Subsection (6) specifies that the person must, if required by a condition of his release to appear before an immigration officer within 24 hours of the arrest, be brought before an immigration officer within that period. Subsection (7) provides that if the person was released on bail by SIAC, he must be brought before that body within 24 hours of arrest. In all other cases, the person arrested must be brought before a justice of the peace or, in Scotland, before an adjudicator or, where this is impracticable, the sheriff, (subsection (8)). The court dealing with the matter may, if of the opinion that the arrested person has broken or is likely to break any condition on which he was released, order the person to be detained, release him on his original bail or release him on new bail. If the court does not agree that the person has broken or is likely to break a condition of bail, it must order release on the original bail. Subsection (5) provides immigration officers and constables with powers to enter premises, where necessary, by reasonable force, for the purposes of searching for a person liable to arrest under the section so long as an authorising warrant has been issued.

Section 51: Procedure

173. This section makes provision for the procedure and practice to be followed in connection with routine bail hearings. It provides that any rules made by the Lord Chancellor will be under the general rule-making power contained within section 144 of the Magistrates' Courts Act 1980. The rules must require the Secretary of State to notify the detained person and also, if he is aware of the fact, the person who is to represent the detained person at the hearing, that a reference under section 44 has been made. Subsection (3) restricts repetition of the same arguments by detainees at subsequent bail hearings. The section also requires magistrates holding routine bail hearings to sit in open court and provides for the conduct of proceedings at routine bail hearings by persons other than barristers (or, in Scotland, advocates) or solicitors.

Section 52: Use of live television links at bail hearings

174. This section will enable courts to direct, after hearing representations from both parties, that the detained person is to be treated as being present in the court if he is able, by live television link or otherwise, to see and hear the court and to be seen and heard by it. Subsection (2) provides that any representations about whether the hearing should be conducted by TV link will themselves be heard by TV link. If, after hearing representations by both parties, the court decides not to give a direction, it must give its reasons for refusing. The court may not give a direction under this section unless the Secretary of State has notified the court that appropriate facilities for the setting up of a link are available.

Section 53: Applications for bail in immigration cases

175. This section allows the Secretary of State, by regulations, to make new provision in relation to applications for bail made under current immigration legislation. Subsection (2) makes it clear that the regulations may confer a right to be released on bail in prescribed circumstances. Subsection (3) provides that, in particular, the regulations

may make provision for creating or transferring jurisdiction to hear an application for bail from adjudicators to magistrates, as to the places in which a hearing can take place, as to circumstances in which, and conditions (including financial conditions) on which an applicant may be released on bail, and to amend or repeal any enactment so far as it relates to such an application. Any regulations under this section require the approval of the Lord Chancellor. In addition, the Lord Chancellor is required to obtain the consent of Scottish Ministers before he gives his approval to any regulations which would, for Scotland, extend to the sheriff court or the Court of Session jurisdiction to hear applications for bail with which section 53 is concerned.

Section 54: Extension of right to apply for bail in deportation cases

176. This section extends the right of those subject to deportation action to apply for bail under current immigration legislation. At present there is an anomaly between deportation and other enforcement cases in that persons who are subject to deportation action may only apply for bail where they have an outstanding appeal. This anomaly is removed by section 54.

Section 55: Grants to voluntary organisations

177. This section will enable the Secretary of State, with the approval of the Treasury, to make grants to voluntary organisations providing advice or assistance to detained persons in connection, inter alia, with routine bail hearings. The Secretary of State can decide the terms and conditions on which such grants may be made.