¡GET HOME FREE? OR MAYBE NOT:

A BRIEF GOOD PRACTICE GUIDE TO BAIL APPLICATIONS

1. In the **Bail Guidance for Immigration Judges Presidential Guidance Note 1of 2012 FTT-IAC 11Junr 2012**the test for bail has been summarised as follows:

"In essence an Immigration 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. An Immigration Judge will focus in particular on the following three criteria (which are in no particular order) in deciding whether to grant immigration bail.

a) The reason why the person has been detained

b) The length of the detention to date and its likely 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 2 below)

e) The likelihood of the person complying with the conditions of bail

2. However, as we all know, there are other requirements which are equally important for the Applicant to comply with in order to achieve a Grant of Bail, albeit with conditions. Problems regularly arise with:

i) The Bundle (if there is to be one)

ii) Evidence of pending Judicial Review or Fresh Claim

iii) Accommodation (necessary documentary evidence)

iv) Sureties (suitability and with adequate evidence of consistency of available and adequate funds)

v) The services of an Independent Interpreter for the pre-hearing conference if the Applicant has no command of English

vi) Previous liaison with the Offender Manager (in pending Deportation cases) to ensure and enable compliance by the Applicant with both Licence Reporting Conditions and Immigration Bail Reporting Conditions by providing for the addresses to be within the same area

vii) The question of Withdrawal if there are any deficiencies in the evidence

It will be clear from the headings below that these requirements tend to overlap.

3. THE BUNDLE

The Bundle often consists of simply the Application, the Bail Summary, if available, and possibly short Grounds supporting the Application for Bail. However, if there are more documents to submit, an indexed and paginated Bundle is essential. It is not advisable to submit a weighty Bundle with every single document relating to any pending Judicial Review (JR) and if this is done without an Index and pagination, some judges will refuse point blank to consider any of the documents included which makes the application difficult if not impossible for the advocate and potentially disastrous for the Applicant. Ideally, the Bundle should contain i) the Grounds for JR, if one is pending, ii) details of the reasons for Re-consideration, if one is pending, iii) a copy of the first Determination if there is to be a Fresh claim as this will undoubtedly have been analysed in depth in the Second Refusal Letter, iv) the necessary accommodation details (see below), v) statements from the sureties and any family members who can all give evidence about how they would ensure that the Applicant would not: a) abscond, b) commit further offences (if a Deport looms), c) fail to comply with his residence and reporting conditions and d) what action they would take regarding any non-compliance. Such statements are very helpful but obviously add to the expense of the Application and providing them would be a cost/risk exercise, ie is it worth it and do such people exist? If there is to be a Fresh Claim, any additional evidence, for example, expert and/or objective, to counter the negative findings of the first Determination, should be provided and served in time.

4. PENDING JUDICIAL REVIEW OR FRESH CLAIM

It is essential, where there has been an application for JR, that the covering letter, the Application and the Grounds are included in a Bundle. It has

been known for the Home Office to deny all knowledge of any such application, particularly if it has only recently been lodged. Obviously the existence of such an application is vital and in the best interest of the Applicant to bring this to the attention of the judge by way of incontrovertible written documentation. Judges frequently ask what the basis of the JR is as they wish to evaluate the prospects of success which in turn could impact on the final decision whether or not to grant bail.

5. ACCOMMODATION

This is becoming a very thorny issue of late. The Home Office are including the proposed address in the proposed bail conditions but then come to court and say that the address has not been approved; this actually means not even visited, much less checked and is the kiss of death for the Application which is contrary to their own Guidelines; it is thus at odds with the latest (62 pages) **Home Office Guidance of 24 March 2014** (see paragraph 11 below). This says, at page 13,

"You must follow the instructions and, liaise with the offender manager, check the bail address, check the sureties

"Undertaking these actions produces information relevant to the decision on whether to grant or oppose bail. This information informs decisions about bail conditions"

At page 19, it is stated that the Offender Manager must be contacted with the making, date and location of the Bail Application and the possible release on bail of the Applicant.

At page 23, it is stated that in all cases, the authority who considers the bail application must be aware of the situation and the opinions of the offender manager.

In any event, enquiry should therefore be made well prior to the hearing to find out whether or not the proposed bail address had been visited and checked, if not, why not and when this is likely to happen so that the Application will not be listed until the address has been approved. Arguably, if, at the hearing, it is evident that there has been a failure by the Home Office to comply with their own Guidelines, this could amount to a failure by them to provide an adequate Bail Summary and therefore bail should be granted.

It is therefore well worth taking a copy of the Guidelines to court to support any argument in case it becomes evident at the bail hearing that there has been a failure by the Home Office to follow their own Guidelines.

A further problem can arise where, for whatever reason, an Applicant has had bail at an approved address, gone back to prison, for whatever reason, and makes a further bail application. You would think that once an address with the same occupant had been approved, this would suffice for a subsequent application. Wrong, it will not suffice; the Home Office (and the judge) require the address and the occupant to be approved all over again.

If the accommodation offered is NASS accommodation, then the relevant correspondence confirming this must be produced. Availability of NASS accommodation is always limited in time so ensure that the time window extends for at least 3/4 days after the hearing to allow for tagging and enable the applicant to take it up before it lapses. It is always difficult to extend/renew a NASS offer as this class of accommodation is much in demand; this means trying to list the date of the bail hearing within the fixed period that has been offered.

If the accommodation offered is private accommodation, production of the following documents is essential. If the occupant is the freeholder, he should bring with him a Land Registry Certificate confirming this. If the occupant is a tenant, he should bring with him his tenancy agreement and a letter from the landlord confirming the landlord's permission for the Applicant to reside there. If the tenancy agreement allows for the tenant to have a lodger (which does happen), the landlord's permission is not required since it is permitted in the tenancy agreement. The occupant is often also a surety. If he is not, he needs, in any event, to come to court to give his evidence of the above.

Any occupant who has colluded with/aided and abetted an Applicant overstaying for any period of time (the longer, the worse) and/or, in deport cases, has been unable to prevent the Applicant from committing imprisonable offences, will not be considered a suitable party if it is he/she who is making the offer of accommodation.

6. SURETIES

Sureties must bring with them bank statements and/or savings pass books showing that they are good for the money offered by them as a recognizance. The bank statements and/or savings pass books must be up to date and show consistent available balances in excess of the sum offered as a recognizance, preferably over a period of 4/6 weeks. Single bank recent or historic bank statements are usually not sufficient. Being overdrawn and having an overdraft facility will definitely not do. Having consistently a lesser amount in the bank than that offered will not do. Having consistently a lesser amount in the bank than that offered, followed by a recent upward spike in the balance (usually poorly explained) to equal or exceed the amount offered, will be frowned upon and may well not be acceptable. Sureties should also bring 3 months' wage slips and utility bills. It should be explained to sureties that, were the Applicant to abscond, they will forfeit the entirety of the sum offered as a recognizance. Sureties should be asked what steps they would take to ensure that the Applicant comply with any bail conditions imposed and what they steps they would take if the Applicant were to abscond. The sureties should also be asked about the length of time they have known the Applicant and the nature of their relationship with the Applicant. The sureties must provide evidence of their immigration status and should not have criminal convictions (see the **Presidential Guidance Note No 1** referred to above).

7. INDEPENDENT INTERPRETERS

It is essential to have an Independent Interpreter at court prior to the hearing to interpret for the Applicant if the Applicant has a poor or non-existent command of English but sadly this rarely happens. No doubt the issue of costs again raises its head. An Independent Interpreter enables the advocate to question the Applicant as to whether or not he has read, or has had read to him in his own language the Bail Summary, whether he has understood it and whether he agrees or disagrees with what is said there. Actual court interpreters are mostly loath to assist in this role and say they are forbidden so to do. An Independent Interpreter is also vital to enable the advocate to discuss with the Applicant the awkward question of whether or not to withdraw the current Application because of defects in the necessary evidence; this could be absence of the evidence required regarding accommodation, as yet unapproved accommodation, failure of the sureties or one of them to attend, etc. It is inevitably frustrating for both the Applicant and his advocate to be unable to

communicate on matters of great importance and in particular for the advocate to be able to explain what is in the Applicant's best interests.

8. WITHDRAWAL OF AN APPLICATION

It is very difficult and sometimes verging on the impossible to convey to the Applicant why it is in their best interests to withdraw the current Application rather than pursue it with serious deficiencies. They are always understandably anxious to proceed, often absolutely desperate to obtain their liberty and cannot endure the thought of any more delay. However, a Withdrawal will give the Applicant's legal advisers the opportunity to rectify any defects in the evidence or obtain, for instance, the requisite approval needed for the accommodation to enable the Application to come back next week with a clean sheet and ready to roll. Pursuing an Application without either the necessary evidence or without, say, Home Office approval for the accommodation address, runs a serious risk of a Refusal. The Refusal means that any subsequent Application for Bail must demonstrate a change of circumstance. On occasion, some judges may indicate that bail would be appropriate once the accommodation is approved, but not always.

9. LIAISON WITH OFFENDER MANAGERS

In the case of a pending deportation, this is something that needs to be addressed well in advance of any Application for Bail. The situation can arise where the bail address, be it private or NASS, together with the reporting address for the Immigration Officer, are miles away from the Probation reporting address stipulated on the Licence. This means that the Offender Manager needs to be contacted to re-locate the Licence reporting address for the Applicant to report to a Probation Officer to enable the Applicant to comply with the conditions of his Licence. This needs to be in writing by way of a letter or e-mail from the Offender Manager and needs to be served on the Home Office and the court prior to the hearing. 'Stringent bail conditions bail conditions may not be necessary if there is already an obligation to report to a Probation Officer regularly' (see **Presidential Guidance Note No 1** as above).

10. GENERAL OBSERVATIONS

Always remind the judge of 'the Initial Right to Bail'.

Is there an immediate prospect of removal/deportation? It is frequently the case that the Home Office cannot provide a specified date for a) an actual

decision for a resolution of the issue of Re-consideration, b) the issue of an Emergency Travel Document, c) the JR hearing/Fresh Claim?

Do not make an Application for Bail listed for the same day as the Applicant is due to be put on the relevant flight (- and yes, that has happened), unless there has been a late Application for JR or an emergency application for immediate injunctive relief to prevent removal. A grant of bail will not prevent the removal.

A refusal of bail can only be challenged by way of JR. However, even if successful, unless combined with a challenge to the lawfulness of the underlying detention or combined with a bail application to the High Court, JR will not lead to the detainee's release. It will only lead to a quashing of that decision.

As far as the impact of the length of detention on the judge's view of the application is concerned, 'Imperative consideration of public safety may be necessary to justify detention over 6 months' (see **Presidential Guidance Note No 1** as above).

As far as procedure is concerned, some judges decide on the issue of bail in principle first and then move on to hear from the sureties, others like to consider the bail position in the round and hear, if so indicated, evidence from the Applicant, then submissions and then evidence from the sureties. It cannot be stressed too strongly that the quality of the evidence of the sureties is of overwhelming importance to ensuring a grant of bail.

11. The foregoing constitutes only a brief over-view of some of the issues that may be encountered in and impinge on Applications for Bail. More comprehensive guidance may be found in i) **Foreign National Prisoners - Law and Practice, Laura Dubinski with Hamish Arnott and Alistair Mackenzie, Chapter 40 - Powers of Immigration Bail and Powers of Release**,the **Presidential Guidance Note No1**, as referred to above and, most recently, **Home Office - Criminal Casework - Bail Applications: action before and during a bail hearing or decision - 26 March 2014**. This is lengthy, 62 pages, but extremely comprehensive and precise in its requirements and would amply repay careful study. The obligations of Home Office to take certain actions are many and to be adhered to. Time constraints prevent a detailed analysis here save to say that the advocate appearing at the Bail Hearing should not fail to have a copy available to consult at court - it could pay dividends.

12. The Home Office approach to Bail Applications can perhaps be summed up by the comment of John Stuart Mill, "The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people" - see his L**iberty, Chapter 3** but they should not be permitted to depart from their own Guidelines**.**

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