

The Law Commission

BAIL AND THE HUMAN RIGHTS ACT 1998

(LAW COM No 269)

GUIDANCE FOR BAIL DECISION-TAKERS AND THEIR ADVISERS

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General principles applicable to the refusal of bail

1. Any decision to refuse bail should only be taken where this can be justified both under domestic legislation, principally the Bail Act 1976 (the Act),¹ and under the European Convention on Human Rights (the Convention), as interpreted by the European Court of Human Rights² (Strasbourg jurisprudence).
2. Accordingly, a defendant should only be refused bail where this is necessary for a purpose that is recognised by Strasbourg jurisprudence applying Article 5(3) of the Convention. That is where detention is necessary to avoid a real risk that, were the defendant released,
 - (1) he or she would
 - (a) fail to attend trial; or
 - (b) interfere with evidence or witnesses, or otherwise obstruct the course of justice; or
 - (c) commit an offence while on bail; or
 - (d) be at risk of harm against which he or she would be inadequately protected; or
 - (2) a disturbance to public order would result.
3. Detention will only be necessary if the risk could not be adequately addressed by the imposition of appropriate bail conditions that would make detention unnecessary.
4. Any court refusing bail should give reasons that explain why detention is necessary. Those reasons should be closely related to the individual circumstances of the defendant.

The exceptions to the right to bail in English law

5. Some of the exceptions to the right to bail found in the Act correlate so closely with the above purposes recognised by the Strasbourg jurisprudence that there is no need to consider separately how they should be applied in a way that complies with the Convention. These are the exceptions in paragraph 2(a) (fail to surrender to custody) and (c) (interfere with witnesses or otherwise obstruct the course of justice) and paragraph 7 (impracticable to complete inquiries or report

¹ Additional provision is made in section 25 of the Criminal Justice and Public Order Act 1994.

² And formerly, the European Commission of Human Rights.

without keeping defendant in custody) of Part I, and paragraph 2 of Part II (also based on failure to surrender to custody), of Schedule 1 to the Act.

6. In respect of the remaining exceptions to the right to bail we offer the following guidance as an aid to compliance with the Convention.

The risk of offending on bail

7. The decision-taker must consider whether it may properly be inferred from any previous convictions and other circumstances relating to the defendant that there is a real risk that the defendant will commit an offence if granted bail, and that the defendant therefore falls within paragraph 2(b) of Part I of Schedule 1 to the Act. Provided that a decision to withhold bail is a necessary and proportionate response to a *real risk* that, if released, the defendant would commit an offence while on bail, such a decision will comply with the Convention.

Defendant on bail at the time of the alleged offence

8. The factor in paragraph 2A of Part I of Schedule 1 to the Act (a defendant who commits an indictable offence whilst on bail) does not, in itself, establish any Article 5(3) purpose.
9. Consequently, a court should not base a decision to withhold bail *solely* on paragraph 2A. To do so would infringe Article 5 and would be unlawful under sections 3 and 6 of the Human Rights Act 1998 (HRA).
10. That factor may, however, be *relevant* to a decision whether to withhold bail on the basis of another relevant exception, for example the risk that the defendant will commit an offence while on bail.

Detention for the defendant's own protection

11. A decision to refuse bail to a defendant under the exception in paragraph 3 of Part I of Schedule 1 to the Act, that is for the defendant's own protection (from self-harm or harm from others) would comply with the Convention, where
 - (1) detention is *necessary* to address a *real risk* that, if granted bail, the defendant would suffer harm, against which detention could provide protection; and
 - (2) there are exceptional circumstances in the nature of the alleged offence and/or the conditions or context in which it is alleged to have been committed.
12. A decision of a court to order detention because of a risk of *self-harm* may be compatible with the ECHR even where the circumstances giving rise to the risk are unconnected with the alleged offence, provided that the court is satisfied that there is a real risk of self-harm, and that a proper medical examination will take place rapidly so that the court may then consider exercising its powers of detention under the Mental Health Act 1983.

Detention because of a lack of information

13. The refusal of bail under paragraph 5 of Part I of Schedule 1 to the Act, where it has not been practicable to obtain sufficient information for the taking of a full bail decision for want of time since the institution of proceedings against the defendant, would be compatible with Article 5 provided that
 - (1) detention is for a short period, which is no longer than necessary to enable the required information to be obtained, and
 - (2) the lack of information is not due to a failure of the prosecution, the police, the court, or another state body to act with “special diligence”.
14. There is no need in such a case for the court to be satisfied of any of the recognised purposes set out in paragraph 2 above.
15. After the initial short period of time has passed, a lack of information that is not due to a failure of a state body to act with “special diligence” may be taken into account as a factor militating in favour of detention on *another* Convention-compliant ground for detention.

Detention following arrest under section 7

Paragraph 6 of Part I and paragraph 5 of Part II of Schedule 1

16. The broad provisions in paragraph 6 of Part I and paragraph 5 of Part II of Schedule 1 to the Act, that a defendant arrested pursuant to section 7 need not be granted bail, should be read subject to the narrower provisions governing bail following a section 7(3) arrest, set out in section 7(5) of the Act. That provision requires that bail should again be granted unless the justice is of the opinion that the defendant is not likely to surrender to custody, or has broken or is likely to break any condition of bail. Detention on one of these grounds will comply with the Convention only where this is necessary for one or more of the recognised purposes set out above in paragraph 2.

Section 7(5) hearings

17. At the hearing of section 7(5) proceedings there is no *requirement* that oral evidence should be heard in every case, but account should be taken of the quality of material presented. This may range from mere assertion to documentary proof. If the material includes oral evidence, the defendant must be given an opportunity to cross-examine. Likewise, a defendant should be permitted to give relevant oral evidence if he or she wishes to do so.

Section 25 of the Criminal Justice and Public Order Act 1994

18. The expression “exceptional circumstances” in section 25 of the Criminal Justice and Public Order Act 1994 should be construed so that it encompasses a defendant who, if released on bail, would not pose a real risk of committing a serious offence. This construction achieves the purpose of Parliament to ensure that, when making bail decisions about defendants to whom section 25 applies, decision-takers focus on the risk the defendant may pose to the public by re-offending.

19. It is possible that some other circumstance might constitute “exceptional circumstances”. Even if “exceptional circumstances” do exist, bail may, nonetheless, be withheld on a Convention-compatible ground if this is deemed to be necessary in the individual case.

Conditional bail

Conditional bail as an alternative to custody

20. A defendant must be released, if need be subject to conditions, unless:
 - (1) that would create a risk of the kind which can, in principle, justify pre-trial detention (set out above in paragraph 2), *and*
 - (2) that risk cannot, by imposing suitable bail conditions, be averted, or reduced to a level at which it would not justify detention.

Conditional bail as an alternative to unconditional bail

21. A court should only impose bail conditions for one of the purposes which Strasbourg jurisprudence recognises as capable of justifying detention (set out above in paragraph 2).
22. A bail condition should only be imposed where, if the defendant were to break that condition or be reasonably thought likely to do so, it may be necessary to arrest the defendant in order to pursue the purpose for which the condition was imposed.

Reasons for imposing conditions

23. Decision-takers should state their reasons for imposing bail conditions and specify the purposes for which any conditions are imposed.
24. Decision-takers should also be alert to ensure that any bail conditions they impose do not violate the defendant’s other Convention rights, such as those protected by Articles 8–11 of the Convention (the right to respect for family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association).

Giving reasons for bail decisions

25. It is of particular importance that decision-takers or their clerks make, and retain for the file, a note of the gist of the arguments for and against the grant of bail, and the oral reasons given by the tribunal for their decision.
26. Standard forms should be completed accurately to show that a decision has been taken in a way that complies with the Convention.

Participation of the defendant

27. Strasbourg jurisprudence recognises it as sufficient participation of the defendant in bail proceedings if, where necessary, he or she participates through a legal representative. Nevertheless, a domestic court should not hear a bail

application to a conclusion in the absence of a defendant where the defendant's presence is essential to fair proceedings.

Form of evidence

28. It is not necessary to hear sworn evidence in the great majority of cases. Courts should, in particular cases, consider whether fairness requires the calling of evidence on oath for the determination of the application, as a failure to call such evidence may cause a particular decision to fall foul of Article 5(4).
29. A court hearing bail proceedings should take account of the quality of the material presented. It may range from mere assertion to documentary proof. If the material includes sworn oral evidence, the defendant must be given an opportunity to cross-examine. Likewise, the defendant should be permitted to give *relevant* oral evidence if he or she wishes to do so.

Disclosure

30. *Ex parte Lee*³ recognises an ongoing duty of disclosure from the time of arrest. The Court of Appeal emphasised that at the stage before committal, there are continuing obligations on the prosecutor to make such disclosure as justice and fairness may require in the particular circumstances of the case, that is, where it could reasonably be expected to assist the defence when applying for bail. This will ensure that the defendant enjoys "equality of arms" with the prosecution.
31. Compliance with this requirement, together with those imposed by the Attorney General's guidelines to prosecutors, should ensure compliance with the Convention. This will apply equally to hearings pursuant to s7(5). (see above)
32. The duty of disclosure does not require that the whole of the prosecution file be disclosed to the defence prior to the hearing. It is sufficient if disclosure is provided of the material the defendant needs in order to enjoy "equality of arms" with the prosecution in relation to the matter to be decided by the court.

Public hearing

33. Where normally the hearing would be in chambers, if the defendant requests that the bail hearing be held in public, it should be held in public unless there is a good reason not to do so.

The right to challenge pre-trial detention

34. The Convention gives a detained person the right to make further court challenges to the legality of his or her detention despite having already made one or more such challenges, where for example, with the passage of time, the circumstances which once were considered by a court to justify detention may have changed.

³ [1999] Cr App R 304.

35. To ensure compliance with the Convention, Part IIA of Schedule I to the Act should be applied on the basis that courts should be willing, at intervals of 28 days, to consider arguments that the passage of time constitutes, in the particular case, a change in circumstances relevant to the need to detain the defendant, so as to require the hearing of all the arguments on the question of bail. It may be, for example, that the time served on remand may have reduced the risk of the defendant absconding.
36. If the court finds that the passage of time does amount to a relevant change of circumstances then a full bail application should follow in which all the arguments, old and new, could be put forward and taken into account.