

The Law Commission

BAIL AND THE HUMAN RIGHTS ACT 1998

(LAW COM No 269)

EXECUTIVE SUMMARY

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Introduction

1. This report concerns the impact of the Human Rights Act 1998 (HRA) on the law governing decisions taken by the police and the courts to grant or refuse bail in criminal proceedings, between the time when a person is charged or appears in court, and the time of the verdict or other termination of the case in criminal proceedings.¹
2. Section 3 of the HRA states that, “[s]o far as it is possible to do so”, legislation must be “read and given effect in a way which is compatible with the Convention rights”. Where legislation cannot be interpreted and applied compatibly with those rights the higher courts may issue a “declaration of incompatibility,” although the legislation will remain valid until repealed or amended. Section 6 of the Act states that “It is unlawful for a public authority to act in a way which is incompatible with a Convention right” unless primary legislation allows it no other option.

Purpose of the report

3. Our primary purpose in this report has been to determine whether domestic bail legislation can be applied in a way which is compatible with the Convention rights, not to reform or simplify the law. Our secondary purpose has been to produce guidance for bail decision-takers on how the domestic bail legislation can be interpreted and applied in a manner which complies with the Convention.

Methodology and conclusions

4. We have examined the relevant Strasbourg jurisprudence² relating to Article 5 of the European Convention on Human Rights (which guarantees the right to liberty).³ This states that, although reasonable suspicion that the detained person has committed an offence can be sufficient to justify pre-trial detention for a short time, thereafter, the national authorities must show additional grounds for detention.
5. Five such additional grounds are recognised under the Convention, namely where the purpose of detention is to avoid a real risk that, were the defendant released,

(1) he or she would

¹ Our consultation paper on Bail and the Human Rights Act 1998 (HRA) was published in November 1999, Consultation Paper No 157.

² Judgments of the European Court of Human Rights and decisions and opinions of the former European Commission of Human Rights.

³ In particular we focused upon cases relating to Articles 5(1)(c); 5(3) and 5(4).

- (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.
6. We have examined the provisions of the Bail Act 1976 and section 25 of the Criminal Justice and Public Order Act 1994 in light of this Strasbourg jurisprudence and considered whether, acting in accordance with sections 3 and 6 of the HRA, a court and police officers with responsibility for taking bail decisions would be able to make those decisions in a manner that complies with the Convention.
7. We have concluded that there are no provisions which *cannot* be interpreted and applied compatibly, nor which, given appropriate training, decision-takers would be likely to apply in a way which would violate Convention rights. We have, however, identified some areas of the law which we believe would benefit from legislative reform.

Guidance on how domestic bail legislation can be interpreted and applied in a manner that is compatible with Convention rights

8. With a view to assisting bail decision-takers to make decisions in accordance with English law in a manner which complies with the Convention rights we have suggested guidance on a range of issues. This guidance is collected in Part XIII of the report and it is also set out in the “Guidance for bail decision-takers and their advisers” document on our website. In addition to giving specific guidance on a wide range of issues, we have also suggested the following, more general, guidance.
9. A defendant should only be refused bail where detention is *necessary* for a purpose which Strasbourg jurisprudence has recognised as legitimate in that detention may be compatible with the defendant’s right to release under Article 5(3). Those purposes have been summarised above, under the sub-heading “Methodology and conclusions”.
10. Detention will only be necessary if that risk could not be adequately addressed, so that detention would no longer be necessary, by the imposition of appropriate bail conditions.
11. The court refusing bail should give reasons for finding that detention is necessary. Those reasons should be closely related to the individual circumstances pertaining to the defendant, and be capable of supporting the conclusion of the court.

12. A domestic court exercising its powers in a way which is compatible with the Convention rights should refuse bail only where it can be justified both under the Convention, as interpreted in Strasbourg jurisprudence, *and* domestic legislation.

Areas of law which we believe would benefit from legislative reform

Defendant on bail at the time of the alleged offence

13. **We have recommended** that the Bail Act 1976 be amended so that it is plain that the fact that the defendant was on bail at the time of the alleged offence is not *an independent* ground for the refusal of bail, as paragraph 2A of Part I of Schedule 1 to the Bail Act may appear to suggest, but is *one* of the considerations that the court should take into account when considering withholding bail on the ground that there is a real risk that the defendant will commit an offence while on bail.

Arrest under section 7

14. **We have recommended** that paragraph 6 of Part I of Schedule 1 to the Bail Act be repealed.⁴

We have recommended further that paragraph 5 of Part II of Schedule 1 to the Bail Act be amended by adding a requirement that the Court must be satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would fail to surrender to custody; commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice.

Bail conditions

15. **We have concluded** that conditional bail should be used in preference to detention where a bail condition could adequately address the risk that would otherwise justify detention. There is, however, no power for the police or the court to impose a bail condition for the protection of the defendant although one of the exceptions to the right to bail, in the Bail Act, is based on the need for protection of the defendant, and Convention case law recognises that, in certain circumstances, the protection of the defendant is capable of being a relevant and sufficient reason for detention.

⁴ It is superfluous. The circumstances leading to the defendant being arrested under section 7 may properly be taken into account under paragraph 9(c) of Part I of Schedule 1 to the Bail Act 1976, as a possible reason for concluding that one of the Convention compatible grounds for withholding bail is satisfied.

16. **We have recommended** that the Bail Act be amended so that the police and the courts are empowered to impose such bail conditions as appear necessary for the defendant's own protection, **consonant with the exception to the right to bail at paragraph 3 of Part I of Schedule 1 to the Bail Act.**⁵

⁵ Our guidance relating to the scope of the exception to the right to bail based on this ground will also be relevant to the exercise of this new power.