D7 Compilation

# D7.1

Bail in criminal proceedings is governed by the Bail Act 1976 (BA 1976) (see s. 1(6) of the Act). 'Bail in criminal proceedings' is defined in s. 1(1) of the Act as: '(a) bail grantable in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or (b) bail grantable in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued'. The procedural rules relating to bail are set out in CrimPR Part 14 (see Supplement, R14.1 et seq). This section is chiefly concerned with bail from magistrates' courts and the Crown Court. For bail in appeals to the Court of Appeal, see D7.5 and D27.14.

The BA 1976 is set out at D7.134 et seq.

# D7.2

A magistrates' court, when adjourning a case, may remand the accused (see the MCA 1980, ss. 10(1) and 18(4), at D5.29, for the jurisdiction to adjourn and remand at the preliminary stages of a case). Under the MCA 1980, s. 128(1), a remand by a magistrates' court may be in custody or on bail, in accordance with the BA 1976. For the time restrictions on remands in custody and the possibility of remands in the absence of the accused, see D5.33. Magistrates also have power to grant bail for the period of any remand for reports etc. after summary conviction (see the MCA 1980, s. 10(3), and also the PCC(S)A 2000, s. 11, for remands on bail for medical examination). Where a magistrates' court sends an accused to the Crown Court for trial under the CDA 1998, s. 51, the accused may be kept in custody or released on bail (see D10). Similarly, committals for sentence may be in custody or on bail. Where a magistrates' court has summarily convicted an accused and passed a custodial sentence, it may grant bail pending the determination of an appeal to the Crown Court or to the Divisional Court by way of case stated (MCA 1980, s. 113). The CAJA 2009, s. 115, provides that a person charged with murder may not be granted bail except by order of a Crown Court judge (see D7.4).

# D7.3

Under the Senior Courts Act 1981, s. 81(1)(a) to (g), the Crown Court may grant bail to any person:

(a) who has been sent in custody for trial in the Crown Court;

(b) who has been given a custodial sentence following conviction in the magistrates' court (whether by guilty plea or a finding of guilty after trial) and who is appealing to the Crown Court against conviction and/or sentence;

(c) who is in the custody of the Crown Court pending disposal of the case (so whenever the Crown Court adjourns a trial or adjourns between conviction and sentence, it has a discretion to grant the accused bail for the period of the adjournment);

(d) and (e) whose case has been decided by the Crown Court but who has applied to the court to state a case for the Divisional Court's opinion or is seeking judicial review of the decision;

(f) to whom the Crown Court has granted a certificate that the case is fit for appeal to the Court of Appeal, whether against conviction or against sentence; and (g) who has been remanded in custody by a magistrates' court on adjourning a case under the PCC(S)A 2000, s. 11, the CDA 1998, s. 52(5), or the MCA 1980, ss. 10, 17C, 18 or 24C, provided the magistrates' court has granted a certificate that, before refusing bail, it heard full argument.

All the above powers are subject to the CJPO 1994, s. 25 (see D7.8).

# D7.4

Bail Jurisdiction in Murder Cases The CAJA 2009, s. 115(1), provides that a person charged with murder may not be granted bail except by order of a Crown Court judge. A person who appears before a magistrates' court charged with murder must be committed (in custody) to the Crown Court (s. 115(4)). A Crown Court judge must then make a decision about bail as soon as reasonably practicable and, in any event, within the period of 48 hours (excluding weekends and public holidays) beginning with the day after the day on which the person appears before the magistrates' court (s. 115(3)). These provisions apply whether or not the accused is charged with any offences in addition to the murder charge (s. 115(6)).

# D7.6

Section 4(1) of the BA 1976, together with sch. 1 (see D7.142), creates a rebuttable presumption in favour of bail (sometimes referred to, somewhat inaccurately, as a 'right to bail'). It provides that: 'A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act'. Subsections (2) to (4) of s. 4 then define the persons who benefit from the presumption in favour of bail. They are any person:

(a) who appears before the Crown Court or a magistrates' court in the course of or in connection with proceedings for an offence, or applies to a court for bail (or for a variation of the conditions of bail) in connection with those proceedings (s. 4(2));

(b) who has been convicted of an offence and whose case is adjourned for reports before sentencing (s. 4(4)); and (c) who has been brought before the court under the SA 2020, sch. 10, for alleged breach of a requirement of a community order (s. 4(3)).

Apart from cases where the accused has been convicted and the hearing has been adjourned for pre-sentence reports, s. 4(1) does not apply once a person has been convicted of an offence (as is made clear in the proviso to s. 4(2)). Therefore, an appellant seeking bail pending determination of an appeal against conviction and/or sentence cannot rely on the presumption in favour of bail. Neither can an offender who is committed to the Crown Court for sentence following conviction in a magistrates' court. In both those situations, there is power to grant bail, but its grant or refusal is entirely at the discretion of the court. It should also be noted that s. 4(1) does not apply to bail from the police station, although, once a detainee has been charged, the PACE 1984, s. 38(1), imposes on the custody officer a duty to grant bail unless its refusal can be justified on grounds similar to those which would justify a court refusing bail under the BA 1976 (see D2.47 et seq) Whenever bail is granted in criminal proceedings (whether or not subject to the presumption in s. 4), the general provisions of the Act concerning bail apply (e.g., a person who fails without reasonable cause to surrender commits an offence under s. 6).

# D7.7

Bail Following Indication of Guilty Plea at 'Plea before Venue' Hearing In Rafferty [1999] 1 Cr App R 235, the Court of Appeal dealt with the position where an accused enters a guilty plea at the 'plea before venue' procedure (see D6.11 et seq.), and is then committed for sentence to the Crown Court. Thomas J said (at p. 237) that, in most such cases, it would not be usual to alter the position as regards bail or custody. When a person who had been on bail pleads guilty at the plea before venue, the usual practice should be to continue bail, even if it is anticipated that a custodial sentence will be imposed by the Crown Court, unless there are good reasons for remanding the accused in custody. If the accused is in custody, then it would be unusual, if the reasons for the remand in custody remain unchanged, to alter the position.

# D7.8

No Bail for Homicide or Rape if Previous Conviction Under the CJPO 1994, s. 25 (see D7.10), the court may not grant bail to an accused who is charged with (or has been convicted of) murder, attempted murder, manslaughter, rape or attempted rape, or certain other offences under the SOA 2003, if the accused has been convicted of any of these offences (or culpable homicide) in the past, unless it is of the opinion that there are exceptional circumstances which justify it. In a case where the previous conviction was for manslaughter, the restriction applies only if the accused received a custodial sentence for that offence. 'Conviction' is widely defined to include a finding that the defendant was not guilty by reason of insanity, or was found to have done the act or made the omission charged in a case where the defendant was unfit to plead. Previous convictions in other EU Member States are treated as being relevant previous convictions if the corresponding offences in the UK would be so treated.

It was suggested by the Law Commission in its paper Bail and the Human Rights Act 1998 (Law Com No. 269) that the CJPO 1994, s. 25, is liable to be misunderstood and applied in a way which is incompatible with the ECHR, Article 5. The problem with s. 25 is that it appears to create a statutory presumption against the grant of bail in cases to which it applies. If so, it conflicts with the Convention's starting point of the presumption of liberty, and substitutes a presumption of custodial remand. The Commission suggested that the court should go through the usual process of balancing factors for and against the granting of bail. Because of the provisions of s. 25, however, it should give special weight to those counting against the grant of bail. Thus, the court would take all relevant circumstances into account, but might nonetheless deny bail because the case fell within s. 25, where it might not otherwise have done so.

# D7.11

Murder Under the BA 1976, sch. 1, part I, para. 6ZA, an accused who is charged with murder may not be granted bail unless the court is of the opinion that there is no significant risk that the accused will, if released on bail, commit an offence that would, or would be likely to, cause physical or mental injury to any other person. Again, the presumption in favour of bail is effectively reversed.

# D7.12

Part I of sch. 1 to the 1976 Act sets out the circumstances in which an accused may be refused bail if charged with (or awaiting sentence for) at least one offence that is triable on indictment and punishable with imprisonment (part IA applies where the offences(s) are imprisonable summary offences, and part II applies when none of the offences are imprisonable; see D7.35 et seq).

An unconvicted accused charged with an offence which is imprisonable and triable on indictment need not be granted bail if one or more of the grounds for a remand in custody (listed in the BA 1976, sch. 1, part I, paras. 2 to 6A) is applicable. The first — and most commonly relied on — ground (para. 2) subdivides into three (see D7.13). As regards offenders convicted but remanded for reports, there is a further ground (para. 7) on which reliance may also be placed. The statutory grounds for refusing bail are as follows.

# D7.13

Bail Act 1976, sch. 1, para. 2(1) The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would— (a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

# D7.14

Standard of Proof The opening words of para. 2(1) do not require the court to be satisfied that the consequences specified in subparagraphs (a) to (c) will in fact occur in the event of bail being granted, or even to be satisfied that they are more likely than not to occur. The court must merely be satisfied that there are 'substantial grounds for believing' that they would occur. Although the question posed by para. 2 is whether substantial grounds exist for believing that a future event will occur and to that extent is a question of fact, it is not a question which can be answered according to the usual rules of evidence. Thus in Re Moles [1981] Crim LR 170 it was held that a police officer explaining the objections to bail was entitled to recount what he had been told by a potential witness about the threats the latter had received, with a view to showing that the granting of bail would lead to further interference with witnesses. In Mansfield Justices, ex parte Sharkey [1985] QB 613, Lord Lane CJ referred to Re Moles and said (at p. 626A), 'there is no requirement for formal evidence to be given [at an application for bail] ... It was for example sufficient for the facts to be related to the justices at second hand by a police officer.' Current practice when presenting objections to bail in a magistrates' court is not even to have a police officer present, but for the CPS representative to argue that bail is inappropriate on the basis of information supplied by the police and included in the case file.

# D7.16

not apply where the accused has attained the age of 18, and has not been convicted of an offence in those proceedings, and it appears to the court that there is no real prospect that the accused will be sentenced to a custodial sentence in the proceedings. In such a case, bail cannot be withheld on any of the grounds set out in para. 2.

# D7.17

Relevant Factors Certain factors to which the court should have regard when taking a decision under para. 2 are listed in para. 9. These factors are:

(a) the nature and seriousness of the offence and the probable method of dealing with the offender for it (see D7.18);

(b) the character, antecedents, associations and community ties of the accused (see D7.19 and D7.20);

(c) the accused's 'record' for having answered bail in the past (see D7.21);

(d) the strength of the evidence against the accused (see D7.22); and (e) if the court is satisfied that there are substantial grounds for believing that the accused would commit an offence while on bail, the risk that the accused may engage in conduct likely to cause physical or mental injury to anyone else (see D7.23).

# D7.18

Nature and seriousness of offence (para. 9(a)). The relevance of the offence alleged being serious is that the accused will know that, if convicted, a severe sentence is likely and it will therefore be tempting to abscond rather than run the risk of such a sentence. The gravity of the charge is not an automatic reason for refusing bail (although, by virtue of the CJPO 1994, s. 25, an accused must normally be refused bail where the charge is, e.g., homicide or rape and the accused has previously been convicted of such an offence (see D7.8)). Indeed, in Hurnam v State of Mauritius [2005] UKPC 49, [2006] 1 WLR 857, the Privy Council said that the seriousness of an offence cannot be treated as a conclusive reason for refusing bail to an unconvicted suspect. Lord Bingham said (at [15]):

The seriousness of the offence and the severity of the penalty likely to be imposed on conviction may well ... provide grounds for refusing bail, but they do not do so of themselves, without more: they are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty. Whether or not that is the conclusion reached, clear and explicit reasons should be given.

The statutory presumption in favour of bail continues to apply after conviction where there is an adjournment for the preparation of a pre-sentence report before sentence is passed. In R (R) v Snaresbrook Crown Court [2011] EWHC3569 (Admin), the Divisional Court considered the refusal of bail because of the likelihood of a custodial sentence. Holman J said (at [24]) that, of itself, 'the mere fact that a person has been convicted and a custodial sentence is inevitable, is not sufficient to trigger the exception to bail. It still is necessary that the court is satisfied that there are substantial grounds for believing that one of the statutory exceptions [to the presumption in favour of Risk of Absconding, Further Offences or Interference with Witnessesbail] applies.' This point is reiterated at [31], where his lordship said that, 'even the inevitability of a custodial sentence is not itself an exception to the right to bail, unless it justifies a court being satisfied that there are substantial grounds for believing that the defendant would fail to surrender to custody'.

# D7.19

Character and antecedents (para. 9(b)). This refers primarily to previous convictions. These may make a custodial sentence more likely (especially if the accused, if convicted of the present offence, will be in breach of a suspended sentence of imprisonment). Moreover, a person of previous good character is more likely to be trusted by the courts than one with a criminal record. Previous convictions under the BA 1976, s. 6, for failing to surrender to custody in answer to bail are especially relevant (see subparagraph (c)).

# D7.20

Associations and community ties (para. 9(b)). The word 'associations' is generally taken to refer to undesirable friends with criminal records. Examining the 'community ties' of the accused involves looking at how easy it would be to abscond and how much the accused has to lose by absconding. Relevant factors include the following: How long has the accused lived at the present address? Does the accused have a partner? Does the accused have dependent children? Is the accused in employment? If so, for how long? Does the accused have a mortgage or a protected tenancy? An accused of 'no fixed abode' or living in short-term accommodation is not automatically debarred from bail, but the ease of disappearing to another address is a factor to be considered.

# D7.21

Bail record (para. 9(c)). Considering the bail record of the accused requires the court to consider whether the accused has absconded in the past. Absconding in earlier proceedings is regarded as evidence of a risk that the accused may do so again.

# D7.22

Strength of the prosecution evidence (para. 9(d)). This is relevant to whether an accused would answer bail, in the sense that one who knows there is a good chance of being acquitted is less likely to abscond than one who anticipates almost certain conviction. It can be argued that there is no point in the accused absconding if an acquittal is likely anyway. Conversely, if the prosecution case is strong, so that conviction is likely, the accused may abscond rather than 'face the music' (especially if a custodial sentence is likely). It is also relevant that a remand in custody followed by acquittal creates a manifest, if sometimes unavoidable, injustice. In borderline cases, where the arguments against bail are strong but not overwhelming, the court may prefer to run the risk of the accused absconding etc. rather than run the risk of an acquittal after a long period in custody on remand.

# D7.23

Risk of injury to someone else (para. 9(e)). Where the court is satisfied that there are substantial grounds for believing that the accused would commit an offence while on bail, the court considers whether that offence is likely to cause physical or mental injury to any other person.

Paragraph 9 concludes with the words 'as well as to any others [i.e. considerations] which appear to be relevant', thus making it clear that the considerations mentioned in para. 9(a) to (e) are not exhaustive. Those 'others' might include the fact that the accused has previously committed offences while on bail, or the suggestion that potential prosecution witnesses have already received threats and/or are known to the accused, who could therefore locate them if at liberty. Also, it should be noted that the BA 1976, s. 4(9), stipulates that 'in taking any decisions required by Part I or II of Schedule 1 to this Act, the considerations to which the court is to have regard include, so far as relevant, any misuse of controlled drugs by the defendant'.

# D7.24

Part I of sch. 1 to the BA 1976 (see D7.151 et seq.) sets out other grounds for withholding bail: risk of injury to an 'associated person' (para. 2ZA); where the accused is already on bail for another offence (para. 2A); for the accused's own protection (para. 3); where the accused is already serving a custodial sentence for another offence (para. 4); where the court has insufficient information (para. 5); where the accused has absconded in the present proceedings (para. 6). Additionally, where the accused is charged with murder, para. 6ZA restricts the circumstances in which bail can be granted.

# D7.25

Domestic Violence: Risk to an 'Associated Person' By virtue of para. 2ZA, the accused need not be granted bail if the court is satisfied that there are substantial grounds for believing that, if released on bail, the accused would commit an offence while on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to an associated person, or else cause such a person to fear such injury. For this purpose, an 'associated person' is a person who is associated with the accused within the meaning of the Family Law Act 1996, s. 62(3) (the definition includes people who are or have been married to each other, or who are or have been civil partners; cohabitants or former cohabitants; people who live or have lived in the same household, otherwise than as an employee, tenant, lodger or boarder; relatives; people who have or have had an intimate personal relationship with each other which is or was of significant duration; and in relation to any child, a parent or person who has or has had parental responsibility for the child).

# D7.26

Accused Already on Bail Under para. 2A, the accused need not be granted bail if it appears to the court that the accused was on bail in respect of another offence on the date of the current offence. However, by virtue of para. 1A, para. 2A does not apply where the accused has attained the age of 18, and has not been convicted of an offence in the current proceedings, and it appears to the court that there is no real prospect that the accused will be sentenced to a custodial sentence in the proceedings.

# D7.27

Own Protection Under para. 3, the accused need not be granted bail if the court is satisfied that remaining in custody would be for the accused's own protection. This will (for example) cover cases where the offence alleged has caused anger in the area where it was committed and there is a risk of members of the public exacting retribution on the person believed to be responsible. Where the accused is a child or young person, bail may be refused under para. 3 if the accused should be kept in custody 'for his own welfare'.

# D7.28

Already in Custody Under para. 4, the accused need not be granted bail if already serving a custodial sentence. Paragraph 4 applies only if the accused is in custody pursuant to a sentence, not when in custody as a result of a remand in other proceedings that are currently outstanding. Where an accused is certain to be in custody for the foreseeable future, the court may find it more convenient to grant what may be regarded as technical bail; this Other Grounds for Withholding Bailavoids the restrictions on the periods for which remands in custody may be ordered and the consequent need to bring the accused back to court for further remand hearings.

# D7.29

Insufficient Time Under para. 5, the accused need not be granted bail if the court is satisfied that, owing to lack of time since the commencement of the proceedings, it has not been practicable to obtain sufficient information for the purposes of taking the decision on bail. In such cases, the court might remand in custody (possibly for a shorter than usual period) to enable the necessary information to be discovered. Paragraph 5 might apply, for example, where the police are not satisfied that the accused has given them correct particulars and think the accused may have previous convictions under another name, or if time is needed to check an address, or if inquiries are still in hand which may reveal the offence to be more serious than originally supposed and/or that the accused has committed additional offences. It is submitted that para. 5 should be relied on sparingly, and should not be used to justify dilatoriness on the part of the police or the prosecution in marshalling their objections to bail.

A remand in custody under para. 5 does not amount to a decision to withhold bail for the purposes of para. 2 of part IIA, and so does not restrict further applications for bail (see D7.70).

# D7.30

Absconded in the Present Proceedings Under para. 6, the accused need not be granted bail if arrested under the BA 1976, s. 7, having previously been released on bail in connection with the current proceedings (see D7.147). However, by virtue of para. 1A, para. 6 does not apply where the accused has attained the age of 18, and has not been convicted of an offence in the current proceedings, and it appears to the court that there is no real prospect that the accused will be sentenced to a custodial sentence in the proceedings.

# D7.31

Bail in Cases Involving Abuse of Drugs Paragraphs 6A to 6C of the BA 1976, sch. 1,partI, provide that an accused aged 18 or over may not be granted bail, unless the court is of the opinion that there is no significant risk of the accused committing an offence while on bail, where the three conditions set out in para. 6B apply, namely:

(1) there is drug test evidence (by way of a lawful test obtained under the PACE 1984, s. 63B, or the SA 2020, sch. 22, para. 1) that there is a specified Class A drug in the person's body;

(2) either the accused is charged with an offence under the Misuse of Drugs Act 1971, s. 5(2) or (3), and the offence relates to a specified Class A drug, or the court is satisfied that there are substantial grounds for believing that the misuse of a specified Class A drug caused or contributed to the offence with which the accused is charged or that offence was motivated wholly or partly by intended misuse of a specified Class A drug; and (3) the person does not agree to undergo an assessment (carried out by a suitably qualified person) of dependency upon or a propensity to misuse any specified Class A drugs, or has undergone such an assessment but does not agree to participate in any relevant follow-up which has been offered.

If an assessment or follow-up is proposed and agreed to, it will be a condition of bail that it is undertaken (BA 1976, s. 3(6D)).

The phrase 'may not' is a prohibitive one and makes it plain that the court should not grant bail unless satisfied that there was no significant risk of the accused committing offences while on bail. In essence, the presumption created by the BA 1976, s. 4, is reversed and it becomes necessary for the court to be persuaded that there is no significant risk of the accused committing an offence if released on bail (cf. R (Wiggins) v Harrow Crown Court [2005] EWHC 882 (Admin), per Collins J, at [24]).

Under sch. 1, para. 2(2), where the accused falls within these drugs provisions, para. 2 (refusal of bail where there are substantial grounds for believing that the accused will fail to surrender to custody etc.: see D7.13) does not Other Grounds for Withholding Bailapply unless the court is of the opinion that there is no significant risk of the accused committing an offence while on bail.