



# Bail: An overview for lay judicial officers

When a defendant first appears in court you are likely to have to deal with bail. You may also need to deal with bail at later appearances.

The fundamental common law principle is in favour of freedom, unless there is a just and proper reason to refuse bail.

Most **minor offences will be bailable as of right**, which means you simply grant bail.

For some **serious offences, you may not be able to grant bail** – this will be considered by a judge and you should remand the defendant in custody.

For **offences that are not bailable as of right**, you will have to decide whether to grant bail and to consider what bail conditions are suitable. There are several possible situations:

- Bail may not be needed because the charge is minor
- The alleged offence is one of the serious offences that you cannot grant bail for (only a judge can)
- The police may not oppose bail but may seek specific bail conditions
- The police may oppose bail
- The defendant does not ask for bail and agrees to be remanded in custody.

Most often you will be concerned with when the **police oppose bail and deciding bail conditions**.

## Police oppose bail

When the police oppose bail, the basic question to ask: **“Is there a just and proper reason to refuse bail?”**

Remember the common law principles in favour of innocence (everyone charged with a criminal offence is presumed innocent until proven guilty according to law) and freedom (everyone charged with a criminal offence deserves to be free unless there is a just and proper reason to refuse bail).

The first step is to ask the police why they oppose bail. They must have a reason to do so and must provide reliable information to support an argument to remand a defendant in custody. Generally, those reasons are:

- The defendant is unlikely to appear in Court
- The defendant is likely to interfere with witnesses or evidence against them
- The defendant is likely to commit an offence while on bail.

If the defendant has pleaded guilty to a really serious crime and is likely to go to prison, a judge will most likely refuse bail.

In deciding whether to grant bail and on what conditions, the following factors are relevant.

### **How serious are the charges the defendant faces?**

For example, where there is a really serious charge, such as rape or murder, and the defendant, if convicted, is facing a long sentence of prison, they have a good reason not to turn up. Also relevant to this ground is the strength of the case against the defendant.

### **How has the defendant behaved while on bail before?**

If the defendant has a record of failing to turn up to court while on bail in the past, or of breaching court orders, then you might consider them unreliable and there is a risk that they might not turn up to court if bail is given, or that they will not comply with the bail conditions.

### **Risk of interfering with witnesses**

If police rely on this ground for opposing bail, they will need to provide specific evidence. If the police say the defendant might interfere with witnesses, you need to ask why? What evidence do the police have to back up their claim? If such evidence exists to suggest the defendant might interfere with witnesses, this can be a sufficient reason to refuse bail.

### **Risk of offending on bail**

This ground of objection to bail mostly arises when the defendant has a history of offending while on bail. Again, you should ask the police to explain why they oppose bail on this ground.

## **Bail conditions**

When granting bail, you need to state what conditions will apply. Try to keep the bail conditions to a minimum and keep these simple so the defendant can understand and comply with them.

The police will suggest what conditions they would like imposed on the defendant while on bail. However, it is your decision which conditions you impose.

All bail conditions must relate to any concerns you have about granting bail. For example, if you are concerned that the defendant will not turn up to court, then consider the following conditions:

- (a) Report to the police station (maybe once or twice a week)
- (b) Not to leave the village or town in which the defendant lives
- (c) Surrender passport to the police.

Other conditions will depend on the nature of the offence:

- If the offence was a night burglary, you might consider a curfew.

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- If the offence was an assault, you might make a condition that the defendant must stay away from a particular person.
- If the offence was a driving offence, the conditions may be that the defendant not drive a motor vehicle or carry passengers when driving a motor vehicle and not to consume alcohol or use an illegal drug.

You may impose any other condition that you think appropriate relating to the conduct of the defendant. In addition to these conditions, a defendant must enter into a bail bond, with or without surety for such sum as you fix. A surety is seldom used, however when it is, it usually involves quite large sums. It is used for people who would like to travel overseas pending a continuation of their proceedings.

### **Serious charges**

Keep in mind if the charge the defendant faces is very serious, this points toward being remanded in custody. If the charge is minor, then being remanded on bail is likely.

You should not generally remand a defendant in custody for a longer period than any prison sentence he or she is likely to get if convicted.