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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN:

DONNA ARTHURS

Appellant:

-and-

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent:

Mr Ronan Lavery KC and Mr Sean Mullan (instructed by Hunt Solicitors) for the Appellant
Mr Ian Skelt KC and Ms Paula McKernan (instructed by the Crown Solicitor's Office) for the Respondent

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Before: McCloskey LJ, Horner LJ and McAlinden J

McCLOSKEY LJ (*delivering the judgment of the court*)

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Preface

It is important to acknowledge at the outset that underlying these proceedings is the tragic death of an 18 year old young lady following a period of independent living, involvement in the public care system and an increasingly troubled lifestyle. The Court sympathises with her family. These proceedings are brought by her mother.

The issue

[1] By her application for judicial review and subsequent appeal to this court Donna Arthurs (the "Appellant") seeks to establish the proposition that in circumstances where a person suspected of an alleged offence (the "suspect") has been arrested and the police are contemplating such person's release on bail, the person claiming to be the injured party (the "victim") has a right in law to be consulted by the police about whether bail should be granted and possible bail conditions.

The proceedings

[2] At first instance Fowler J concluded that the threshold for the grant of leave to apply for judicial review had not been overcome and ordered accordingly. As appears from his judgment an intervention by Victim Support NI was permitted. At the case management stage of this appeal this court afforded this agency the opportunity to apply for permission to intervene. No such application materialised.

Factual matrix

[3] What follows in the next four paragraphs derives from the judgment of Fowler J at paras [7]–[14] and is evidently uncontentious.

[4] The appellant is the mother of a vulnerable child who was under the care of the Belfast Health and Social Care Trust (the "Trust"). When aged 17 years the child was assigned a placement in bed and breakfast accommodation. Thereafter, she went missing periodically. This was the impetus for a report by a social worker to the Police Service of Northern Ireland (the "Police Service") which, inter alia, expressed concern for the safety of the child, then aged 18 years. The Police Service initiated a missing person investigation. This elicited evidence that the child had been last seen alive in the company of one "PR" on that date. Police were able to locate PR within two days and spoke to him. He claimed, untruthfully, that he did not know the child. He was then admitted to a hospital mental health ward having taken an overdose of heroin and threatened suicide. This occurred on the third day of a five day period triggered by the social worker's report to police.

[5] During this five day period police officers communicated verbally with the appellant on eleven occasions with regard to their enquiries. Tragically, on the fifth day the child's body was discovered by PR's mother and sister at a private residential

address. A post-mortem examination established that death had been caused by the ingestion of heroin and other toxic substances, together with cardiac dysrhythmia. PR was arrested by police the following day. The suspected offences were those of administering a lethal injection and preventing the lawful burial of a corpse. His stance during interviews was "no comment."

[6] Police formed the view that there was insufficient evidence to charge PR with any offence. As a result, a decision to release him on bail was made some six hours following his arrest and interviews. One of the conditions of his bail required him to reside at his mother's address. This was considered appropriate as it replicated a condition of a previous grant of bail (unrelated), and he was recorded as suffering from paranoid schizophrenia. PR was specifically warned by the police to stay away from and have no contact with the victim's family. His bail address was a little under three miles away from that of the victim's family.

[7] The appellant's views on the possible release of PR on bail were not solicited. Within hours of his release on bail she was informed. Some three weeks later she claimed to have been put in fear by the presence of PR's brother in the vicinity of her home. She further alleged that PR had attempted communication with the family by seeking to add the appellant as a "friend" on Facebook. The appellant's concerns were conveyed to the police by her solicitor. At a subsequent meeting the main concern ventilated was the proximity of PR's bail address to the family home. PAP correspondence followed and the initiation of these proceedings materialised thereafter. The appellant has sworn three affidavits. Regarding the grant of police bail to PR, the most salient of her averments are the following:

> "Regarding the bail process, I had no discussions with police about it. I was not provided with any literature to assist either. I would have at least expected a family liaison officer to be involved and someone to liaise with about the defendant was charged with etc. I feel strongly that police should have engaged much more with myself since … [the death] …
>
> Police ought to involve the victims of crime much more and certainly if the person who was involved in the death of a family member is being released from custody on police bail conditions. Similarly, if there are issues with the bail conditions there ought to be a straightforward way for issues to be raised with police, via a direct point of contact, and also that police can alter offender's bail conditions when required."

[8] These averments represent the zenith of the appellant's case. They invite the following analysis:

(i) Considered in tandem with earlier averments, they confirm that police informed the appellant that PR had been released on bail pending further enquiries.

(ii) The appellant does not suggest that had she been consulted in advance of the grant of bail she would have made any particular representations or suggestions.

(iii) The appellant does not complain about any of the conditions of PR's bail.

(iv) While canvassing the theoretical possibility of "issues with the bail conditions" arising in a given case, she does not aver that any "issues" arose in this particular case.

[9] The affidavit evidence on behalf of the Police Service addresses both specific and broader issues. The detective sergeant who was senior investigating officer concerning the relevant death avers, inter alia:

> "[Para 13 O'Flaherty] At the bail stage, we did consider the family's likely interests and wishes but not by consulting with the family directly. There was no suggestion that the families knew each other. There was very limited evidence available to PSNI and the conditions to be placed were such that the family's views would not impact on those being placed. It is also the case that if the family was offered an input in bail matters they would want the suspect bailed a substantial distance away - somewhere like Newry or Ballymena. That is rarely proportionate and I do not believe that it would have been proportionate in this case, even were Court bail not in place at the time. PSNI have to balance the suspect and victim and the suspect also has a right to a private and family life when they have not been found guilty at this stage…
>
> Bail is always a possibility in any case. Conditions are considered in order to protect the victim, prevent further offences and ensure safeguarding and locating of the suspect is possible. Victims and witnesses are not routinely consulted prior to bail being granted. They are usually informed of the conditions after bail has been granted. We were aware of the conditions outlined in the guidance which may be applied in various cases and which can differ depending on circumstances and offences involved. In PR's case, it was only deemed necessary to have 2 conditions applied – to reside at his mother's (already on court bail here; support for mental health and drug issues;

> can be located if necessary) and no contact with the deceased's family (reasons as outlined below). We had also suggested signing at a Police station once a week, however the solicitor made representations and the custody Sgt agreed with him so this condition was not granted. The Custody Sergeant is the decision-maker and has the duty under PACE to only detain someone where there are grounds to do as well as to set such Bail conditions as are necessary for the statutory purposes (Art 38 and 48 of PACE (NI) Order 1989)…
>
> In deciding the conditions to place on PR, a number of factors were taken into consideration. The two families were not known to each other. However, the victim's family and any possible future interaction were considered and a condition to have no contact with the victim's family was placed. This was due to the fact that PR had the Deceased's full name though he did not have her address. The Deceased was not living at the family home at the time however the condition would assist in preventing any possible future contact, thus providing some protection to the victim's family."

Police bail: The statutory scheme

[10] The material statutory provisions are Articles 35(1), 38(2) and 48(3D) and (3F) of the Police and Criminal Evidence (NI) Order 1989.

> **Article 35(1)**
>
> "…(1) A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this part…"

> **Article 38(2)**
>
> "…(2) If the custody officer determines that he does not have such evidence before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him…"

Article 48(3D)

"…(3D) He may be required to comply, before release on bail under Article 38(2) or (7)(b) or Article 39(1) or later, with such requirements as appear to the custody officer to be necessary to secure that—

(a) he surrenders to custody;

(b) he does not commit an offence while on bail; and

(c) he does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person…"

Article 48(3F)

"…(3F) Where a custody officer grants bail to a person no conditions shall be imposed under paragraph (3B), (3C), (3D) or (3E) unless it appears to the custody officer that it is necessary to do so for the purpose of preventing that person from—

(a) failing to surrender to custody;

(b) committing an offence while on bail; or

(c) interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person."

[11] As these provisions indicate, the police decision maker is the custody officer. Summarising, in every case where a custody officer becomes aware that the grounds for detaining a suspect no longer apply, it is their duty to order the suspect's immediate release. In legal terms, this duty is stimulated at the stage when the basis of the initial reasonable suspicion that the detained person has committed the relevant offence no longer subsists. At the stage of release the custody officer must determine whether release should be on bail or without bail. Release on bail is appropriate only where the custody officer considers this necessary for the purpose of preventing the detainee from (a) failing to surrender to custody, (b) committing an offence or (c) interfering with witnesses or otherwise obstructing the course of justice.

Relevant victims' rights measures

[12] The Northern Ireland Victims Charter (the "*Charter*") is an instrument made pursuant to section 28 of the Justice (NI) Act 2015. Section 28 provides:

> "(1) The Department must issue a Victim Charter.
>
> (2) The Charter must set out—
>
> (a) the services which are to be provided to victims by specified criminal justice agencies and the standards which are to be expected in relation to those services;
>
> (b) the standards which are to be expected in relation to the treatment of victims by such agencies.
>
> (3) In particular the Charter must include provision for a victim—
>
> (a) to be treated with courtesy, dignity and respect;
>
> (b) to be informed about the services available to victims;
>
> (c) to be informed about—
>
> (i) the progress of relevant proceedings, and the reasons for any delay in those proceedings, at such intervals or at such times as are specified;
>
> (ii) the final outcome of relevant proceedings, within such time as is specified;
>
> (d) where in the course of relevant proceedings a decision is taken not to prosecute a person in respect of the criminal conduct concerned, to be given the reasons for that decision within such time as is specified;
>
> (e) to be informed about any special measures which may be available to the victim under Article 4 or 5 of the Criminal Evidence (Northern Ireland) Order 1999 if called as a witness in criminal proceedings arising out of the criminal conduct concerned;

(f) to be informed about the opportunity to make a victim statement under section 33;

(g) to have considered by an independent body any complaint against a criminal justice agency in relation to any provision of the Charter which has not been resolved by that agency.

(4) The Charter may restrict the application of any of its provisions and, in particular, may restrict the application of any of its provisions to—

(a) specified descriptions of victims;

(b) victims of specified offences or descriptions of conduct;

(c) specified criminal justice agencies;

(d) cases where the criminal conduct concerned has been reported to the police.

(5) The Charter may provide for exceptions to its provisions, including in particular exceptions for the purpose of—

(a) ensuring compliance with any statutory provision or order of a court;

(b) avoiding jeopardising any criminal investigation or criminal proceedings;

(c) avoiding endangering any individual.

(6) The Charter may include provision requiring or permitting the services which are to be provided to a victim to be provided to one or more other persons as well as the victim.

(7) The Charter may not require anything to be done by—

(a) a person acting in a judicial capacity;

(b) a person acting in the discharge of a function of a member of the Public Prosecution Service for

Northern Ireland which involves the exercise of a discretion.

(8) In this section "criminal justice agency" means a body or person which has any functions relating to—

(a) victims; or

(b) any other aspect of the criminal justice system.

(9) A criminal justice agency must, in carrying out any functions mentioned in subsection (8), have regard to the Charter.

(10) In this section—

"criminal conduct concerned", in relation to a victim, is to be construed in accordance with section 29(1);

"relevant proceedings", in relation to a victim, means the investigation into the criminal conduct concerned, the taking of a decision whether to prosecute any person in respect of that criminal conduct and any criminal proceedings taken against any person in respect of that criminal conduct;

"specified" means specified in the Victim Charter."

[13] Para 17 of the Charter articulates the following purpose:

> "… to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings."

"Victim" includes "a family member of the victim …." Criminal proceedings are deemed to begin "when a crime has occurred and is reported to the police."

The Charter does not confer an entitlement on an alleged victim of crime to be consulted about the possible release of a suspect on bail or conditions of bail. A different right, failing short of this standard, is specified in para 7:

> "If a suspect is identified you will be informed if they have been arrested (including any release on police bail and the terms of this), or released with no further action to be taken."

The Charter contains a series of "Standards." Standard 1.9, which may be viewed as an elaboration of the aforementioned paragraph 7, addresses the inter-related topics of charges, bail and summons in these terms:

> "You are entitled to be informed by the police, without unnecessary delay, and to have the reasons explained to you, when a suspect is:
>
> - arrested;
> - kept in custody;
> - released on police bail, or if police bail conditions are changed or cancelled, or the suspect has absconded from police custody, unless sharing the information would endanger someone or there is an identified risk of harm to the suspect which would result from this;
> - charged to court or reported to the Public Prosecution Service; or
> - offered an alternative disposal available to the police.
>
> Where necessary, you are entitled to be informed by the police of any relevant measures issued for your protection in the case of the release or escape of a suspect."

[14] The Victims' Rights Directive 2012/29/EU is a measure of The European Parliament and The Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220/JHA. Its main relevance is that it is the genesis of section 28 of the 2015 Act. Paragraph 12 of the Preamble recites that the rights enshrined therein are without prejudice to the rights of any offender. The rights themselves relate to the provision of information (Chapter 2), participation in criminal proceedings (Chapter 3) and the protection of victims and recognition of victims with specific needs (Chapter 4).

[15] Article 3 forms part of Chapter 2, which is entitled "Provision of Information and Support". Article 3, under the rubric "Right to Understand and to be Understood", provides in para (1):

> "Member States shall take appropriate measures to assist victims to understand and to be understood from the first contact and during any further necessary interaction they

have with a competent authority in the context of criminal proceedings, including where information is provided by that authority."

There is a specific right to information enshrined in Article 6, which provides:

"**Right to receive information about their case**

1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:

(a) any decision not to proceed with or to end an investigation or not to prosecute the offender;

(b) the time and place of the trial, and the nature of the charges against the offender.

2. Member States shall ensure that, in accordance with their role in the relevant criminal justice system, victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by them and that, upon request, they receive such information:

(a) any final judgment in a trial;

(b) information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification.

3. Information provided for under paragraph 1(a) and paragraph 2(a) shall include reasons or a brief summary of reasons for the decision concerned, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law.

4. The wish of victims as to whether or not to receive information shall bind the competent authority, unless that information must be provided due to the entitlement of the

victim to active participation in the criminal proceedings. Member States shall allow victims to modify their wish at any moment, and shall take such modification into account.

5. Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender.

6. Victims shall, upon request, receive the information provided for in paragraph 5 at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification."

[16] The right of a victim to be heard is addressed in Article 10 thus:

"1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law."

Article 18 provides:

"Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members."

This may be linked to recital 51 which mentions "injunctions or protection or restraining orders." Recital 41 is also of note:

> "The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing."

[17] A further material source, non-statutory in nature, is the Police Service Bail Service Instruction (SI0219). This operates in tandem with the Police Service "Operational Guidance." Together these two instruments contain the policy and practice of the Police Service in matters of bail. SI0219 contains the following noteworthy provisions:

[P 5]

> "Article 38(2) of PACE requires that if a custody officer determines they do not have sufficient evidence to charge the person with the offence for which they are arrested the person will be released either on bail or without bail unless it is necessary to keep the person in custody to secure and preserve evidence or obtain such evidence by questioning.
>
> This involves five decisions by a custody officer:
>
> - Is there sufficient evidence to charge?
> - If not is keeping the person in custody necessary to secure and preserve evidence by questioning?
> - If not should the person be released on bail or without bail?
> - If they should be released on bail – are conditions required?
> - If conditions are required – what conditions are required to mitigate any risk identified?
>
> Bail before charge may be granted in accordance with Article 48 of PACE. This applies to people detained at a police station having been arrested for an offence and includes those detained under a warrant for further detention under Article 44 of PACE, whether or not it has been extended under Article 45 of PACE."

[P 7]

> "*9. Deciding appropriate Bail Conditions*
>
> Bail conditions are a restriction on a person's family and private life; therefore they must be lawful, pursue a legitimate aim, necessary and be proportionate to the aim.
>
> Conditions should not prohibit conduct which is itself an offence. Guidance on imposing bail conditions including precedent bail conditions is available on the Operational Custody Policenet page."

The Bail Risk Assessment Matrix at Appendix A of SI0219 provides, inter alia, that the vulnerability of the victim will be taken into account.

[18] Instrument SI0219 contains no provision either precluding or discouraging police interaction with alleged victims of crime regarding possible bail decisions or conditions or positively requiring this step to be taken whether in any particular circumstances or at all. In a sentence, this step is possibly consistent with instrument SI0219.

[19] In his affidavit, the police superintendent concerned explains that these two instruments are predominantly directed to custody officers, continuing:

> "… custody sergeants understand that the operational guidance is to be used as an aid and, where appropriate, rather than a direction that must be followed in all cases. Considerations as regards a condition relating to interfering with witnesses may include speaking to victims or witnesses where there is an issue which makes not having contact with a victim or witness (where it would otherwise be felt necessary) impractical or unworkable. An example of this would be where the bailed person and the victim or witnesses have children and either party has to attend the other's home to collect/drop off children. In those circumstances, it may be that the views on the workability of the extant contact arrangements or availability of alternative contact arrangements would need to be canvassed [in advance]."

[20] The superintendent also refers to other Police Service Policies, including one which specifically gives effect to the Victim's Charter (*supra*) in its entirety. The deponent also highlights another Police Service policy, "Criminal Justice" (SP0416), para [1]:

> "The PSNI recognises the potential impact that being a victim of crime or a witness to a crime or event can have on an individual. All victims and witnesses are entitled to receive a high quality service and support from the police, from their initial contact, throughout the investigation and beyond to pre-trial and trial. To maintain and enhance public confidence, it is important that victims of crime, and in particular the most vulnerable in society, feel reassured by PSNI actions. To improve the quality of engagement and service delivery to victims and witnesses and encourage increased reporting, the PSNI will provide an improved service to vulnerable groups."

The deponent further draws attention to the following realities:

> "… the bail risk assessment matrix …. provides a metric against which persons on bail for different reasons can be compared and prioritised for bail check enforcements. This is necessary as at any given time there are in excess of 5,000 persons on bail, of some sort, which requires the Chief Constable to prioritise resources towards those posing the greatest risk for enforcement activity including bail checks."

[21] It is appropriate to interpose the observation that the existence of a Northern Ireland "bail population" of around 5,000 indicates that in 5,000 individual cases bail has been granted by either the police or a court exercising jurisdiction in the criminal justice process.

England and Wales

[22] One of the material sources emanating from the jurisdiction of England and Wales is a report of HM Crown Prosecution Service Inspectorate of Constabulary, published in 2020. This documents, inter alia, a consultation exercise relating to pre-charge bail initiated by the Home Secretary in 2014. Contextually, the main mischief identified was described thus, [at p 7]:

> "Many cases – some of them high profile – had involved suspects being on bail for many months, and even years, only to then have their cases dropped without being charged. The consultation stated that 'A balance needs to be struck between the rights of those on police bail and securing justice for victims of crime.'"

The Inspectorate found that an appropriate balance was not being struck: too many suspects were being released under the "Release under Investigation" mechanism, while others were being released without appropriate conditions.

[23] In this report it is stated at **p 3**:

> "All too often, the police don't seek the views of the victim when deciding whether to bail a suspect and impose conditions. The police frequently don't consider the victim's statement when deciding whether to apply bail conditions. This means that risks to the victim are sometimes overlooked. Even when a victim has said they are afraid of a suspect, we found limited or no evidence that this had been properly considered. RUI has been used without the conditions that could provide extra protection to the victim."

The same theme re-emerges, under the rubric "Assessing Risk to the Victim", at **p 14**:

> "When someone reports a crime, an initial risk assessment and a secondary risk assessment are usually completed for the victim. Risk assessments are used by the police to keep people safe.
>
> The first assessment is usually completed by call centre staff who receive the initial report. This helps the police to determine what priority to give the investigation and how the victim should be contacted. The second assessment is usually carried out by the investigating officer and is used to establish what protection needs to be put in place for the victim. This second assessment should be completed before the suspect is released from custody so that the right bail conditions to protect the victim can be considered properly.
>
> We were concerned to find that in many cases the second risk assessment for the victim hadn't been done before releasing the suspect from custody."

[24] In short, there had been a reduction in pre-charge bail and a corresponding increase in the release of suspects who were still under investigation but not subject to bail. In the particular sphere of domestic violence this gave rise to acute concerns. For example, suspects of this kind were able to communicate freely with complainants and/or witnesses. One further consequence was the weakening of the imperative to conclude police investigations within particular timescales. The report made appropriate recommendations designed to address these concerns.

[25] These concerns were expressed in a further Government consultation exercise and its response thereto published in January 2021. In particular, the report concluded:

> "**Conclusions and next steps**
>
> The Government acknowledges that the changes brought in by the Policing and Crime Act 2017, which introduced the presumption against using pre-charge bail, has had a number of knock-on effects within the criminal justice system. Whilst it achieved its aim of introducing safeguards for suspects who were being placed on bail for lengthy periods, it has inadvertently led to an increase in the number of people who are 'released under investigation' (RUI). Use of RUI has meant that there are suspects who are still under investigation for lengthy periods, but not subject to the oversight and reporting requirements that they would have under pre-charge bail.
>
> Victims are also affected by the use of RUI, as there is no mechanism enabling suspects released under investigation to be subject to conditions, which can lead victims to feel less protected by the police. The Government is committed to ensuring that victims are well-supported by the pre-charge bail system and that the system operates as effectively as possible, with proportionate use of conditions, balanced against the need to safeguard victims.
>
> The Government aims to legislate to remove the presumption against the use of pre-charge bail and to make it easier to use bail in cases where it is necessary and proportionate. This will create a neutral position within legislation so that there is neither a presumption for nor against pre-charge bail. Decisions on bail will continue to be made with reference to whether such a decision is necessary and proportionate on a case by case basis.
>
> The Government has listened to those in favour of introducing a need to consider risk factors when deciding on whether to place a suspect on bail and are considering how best to incorporate these into the framework. This will be designed to aid the police in making risk-based decisions which place an emphasis on the protection of victims, witnesses and the suspect themselves."

The need for statutory reform thus identified, this duly followed.

[26] The new statutory regime was introduced by section 45 of and Schedule 4 to the Police, Crime, Sentencing and Courts Act 2022 (the "2022 Act"). The focus of these new statutory provisions is pre-charge bail. They insert a new section 47ZZA into the Police and Criminal Evidence Act 1984 ("PACE 1984"), which must be considered in full:

> "**Duty to seek views of alleged victims on conditions of pre-charge bail**
>
> (1) Subsections (2) to (5) apply if—
>
> (a) a person has been arrested for an offence, and
>
> (b) a custody officer proposes to release the person on bail under this Part (except section 37C(2)(b) or 37CA(2)(b)).
>
> (2) If it is reasonably practicable to do so, the investigating officer must seek the views of the alleged victim (if any) of the offence on—
>
> (a) whether relevant conditions should be imposed on the person's bail, and
>
> (b) if so, what relevant conditions should be imposed.
>
> (3) In this section "relevant condition", in relation to an offence and an alleged victim of that offence, means a condition that relates to the safeguarding of the alleged victim.
>
> (4) The investigating officer must inform the custody officer of any views obtained under subsection (2).
>
> (5) If the person is granted bail subject to relevant conditions, the investigating officer must, if it is reasonably practicable to do so, notify the alleged victim of the offence of those conditions.
>
> (6) If the alleged victim of the offence appears to the investigating officer to be vulnerable, subsections (2) and (5) apply as if references to the alleged victim of the offence were to a person appearing to the officer to represent the alleged victim.

(7) Subsections (8) to (11) apply if—

(a) a person has been arrested for an offence,

(b) the person has been released on bail under this Part subject to conditions, and

(c) the person requests a custody officer to vary the conditions under section 3A(8) of the Bail Act 1976.

(8) If it is reasonably practicable to do so, the investigating officer must seek the views of the alleged victim (if any) of the offence on—

(a) whether any of the conditions that are relevant conditions should be varied, and

(b) if so, what variations should be made to those conditions.

(9) The investigating officer must inform the custody officer of any views obtained under subsection (8).

(10) If any of the conditions which are relevant conditions are varied, the investigating officer must, if it is reasonably practicable to do so, notify the alleged victim of the variations.

(11) If the alleged victim of the offence appears to the investigating officer to be vulnerable, subsections (8) and (10) apply as if references to the alleged victim of the offence were to a person appearing to the officer to represent the alleged victim.

(12) In this section "investigating officer", in relation to an offence, means the constable or other person in charge of the investigation of the offence.

(13) For the purposes of this section a person ("P") is an alleged victim of an offence if—

(a) an allegation has been made to a constable or other person involved in the investigation of the offence that P has suffered physical, mental or emotional

harm, or economic loss, which was directly caused by the offence, and

(b) P is an individual.

(14) For the purposes of this section an alleged victim of an offence is vulnerable if the alleged victim—

(a) was aged under 18 at the time of the offence, or

(b) may have difficulty understanding a communication from an investigating officer under this section, or communicating effectively in response to it, by reason of—

(i) a physical disability or disorder,

(ii) a mental disorder within the meaning of the Mental Health Act 1983, or

(iii) a significant impairment of intelligence and social functioning."

In popular parlance, these new statutory provisions attract the appellation "Kay's Law."

The appellant's case

[27] The appellant's submissions contain much criticism of the policy and practice of the Police Service relating to the grant of pre-charge bail to a suspect and the formulation of bail conditions. The court emphasised during the case management phase of this appeal that unequivocal formulation of the specific legal right asserted by the appellant and the grounds and sources thereof was not less than essential. This gave rise to some re-working of the appellant's written case.

[28] Ultimately, Mr Lavery KC helpfully distilled the appellant's case to the following concise proposition: a victim of crime has the right to be informed and be heard prior to any decision on police bail being made insofar as that is reasonably practicable pursuant to Article 3.1 of the Victims Directive … and the NI Victim Charter … and pursuant to common law procedural fairness. Some further illumination of the appellant's case is provided in counsel's written submissions, where, having drawn attention to the respondent's suggestion that "… the appellant is seeking for victims to be consulted in every single bail decision", it is stated:

"That is not correct. The appellant's view is that there must be operational discretion for police but that the police

> decision making process must at least properly and adequately consider the viewpoint of the victim. What is happening presently in Northern Ireland is that there is no requirement for police to consider victims' views and therefore it is arbitrary as to whether the individual officer does so. An adequate or proper policy document would ensure that this is foremost in the relevant officer's consider."

The nexus between this proposition and the new English statutory regime is at once apparent.

The appellant's case determined

[29] This written submission helpfully, if indirectly, highlights one of the fundamental legal realities of these proceedings, namely that the sole respondent, the Police Service, is not a legislator. Simultaneously, this indirectly draws attention to the absence of any invocation by the appellant of the incompatibility mechanisms in the Human Rights Act 1998.

[30] Developing this theme, in the abstract it would be open to the appellant to challenge the Police Service decision to grant bail to PR in limine. Further, or alternatively, it would be open to the appellant to challenge the legality of the extant Police Service guidance/policy regulating the grant of pre-charge bail to suspected detainees. However, the court's exchanges with Mr Lavery KC confirmed that no challenge of either such species is being advanced.

[31] Addressing each element of the appellant's case in turn, the first question is whether the right for which the appellant contends can be distilled from Article 3(1) of the Victims Rights Directive (reproduced in para [15] above). We shall simultaneously consider the second element of the appellant's case as this replicates the first, albeit drawing on a different source.

[32] Article 3(1) of the Directive is not to be considered in isolation. Rather it must be evaluated in its full context, namely the Directive's recitals, the titles/headings which we have identified above and its surrounding provisions. The meaning and scope of Article 3(1) could also in principle be illuminated by relevant jurisprudence, such as a material decision of the CJEU or of a domestic UK court. No such jurisprudence has been brought to the attention of this court and none is known to us.

[33] It is beyond plausible dispute that the recognition and protection of the interests of victims constitutes the overarching aim and objective of the Directive and the Victim Charter. These measures have certain readily identifiable central themes. Arguably the most prominent of these is the periodic provision of intelligible and comprehensible relevant information to every victim of crime. Of equal importance

is the theme of treating victims of crime with courtesy and sensitivity. These two themes lie at the apex of the Directive, in Article 1.

[34] It is equally incontestable that neither of these measures contains the right advanced on behalf of the appellant. Each is silent on this matter. In this context, it is appropriate to highlight four considerations in particular. First, both the Directive and the Charter regulate the subject of victims' rights and interests with striking prescription. They do not enshrine in open textured language mere high-level principles of an aspirational kind. The provisions of both instruments are intensely prosaic and detailed in nature. This is illustrated throughout their respective texts: see for example paragraphs 71 and 72 of the Charter regulating the subject of a victim's statement to the police. The second salient consideration is that both measures contain provisions touching on the topic of bail for suspected offenders but stop short of specifying the right advanced by the appellant. The third material consideration is that the Charter had legislative oversight: it was laid before the Northern Ireland Assembly in accordance with section 31(2) of the 2015 Act. The fourth significant consideration is that the Charter was finalised following a public consultation exercise.

[35] In addition to the considerations already highlighted, we are bound to take into account that the exercise of formulating the Victim Charter presented an ideal opportunity for the responsible authority (the Department for Justice NI) to include the right canvassed before this court. Furthermore, given recital (11) of the Directive, there was no obstacle to making provision additional to that contained in the Directive. We must take into account also the absence of any evidence of clamour for the right canvassed, particularly in circumstances where an intervention by Victim Support NI was permitted and gave rise to the submission of certain materials. Evidence of such clamour could be one factor in support of implying the right advanced: there is none.

[36] We are also mindful that in its Consultation Paper and ensuing report the Northern Ireland Law Commission addressed specifically the topics of pre-charge bail and the interests of victims (see eg the Consultation Paper a p16ff and p104ff) and, in doing so, did not espouse the right canvassed before this court.

[37] There is a further consideration, namely one particular lesson to be derived from the recent statutory innovation in England and Wales. These new statutory provisions demonstrate clearly the desirability of extensive prescription of a right of this kind following a conventional public consultation exercise involving all interested agencies. Such an exercise is for legislatures and not courts in a legal challenge of this genre.

[38] The question for the court is whether, given all of these considerations, it is appropriate to imply the right advanced by the appellant. In a celebrated passage Lord Diplock stated:

> "The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining "the intention of parliament"; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself."
>
> (*Fothergill v Monarch Airlines* [1981] AC 251, at 279)

[39] The ability of a court to imply words into any legislative measure, including a subordinate measure made pursuant to primary legislation, is intrinsically limited. Such exercise is normally permissible only where the court is satisfied that a gap has arisen whether by draftsman's oversight or otherwise and should properly be filled by judicial interpretation (see, generally, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed, pp 400 - 406). As this formulation indicates, this step is appropriate only where the court is satisfied that the express words of the statutory measure concerned do not fully reflect the intention of the legislating agency. Given our analysis in the preceding paragraphs, we cannot be thus satisfied.

[40] To summarise, having conducted the foregoing exercise, this court is unable to distil by implication from either Article 3(1) of the Directive or any provision of the Victim Charter the right formulated by the appellant in para [28] above. We consider that all of the foregoing considerations, in tandem, strongly contra-indicate the implication of the right advanced. Acceding to the appellant's invitation would be tantamount to an impermissible exercise of judicial legislating.

[41] It is important to add the following. The exercise which this court has conducted has unfolded on the premise that Article 3(1) enshrines an individual right directly enforceable before the domestic court at the suit of the individual. This court received no argument on this important issue. It suffices to observe that we have substantial reservations about this discrete matter. We are particularly mindful that the Directive has been transposed into domestic law, via section 28 of the 2015 Act and the Victim Charter made pursuant to subsection (1) thereof and there is no challenge

to the validity or efficacy of the transposing domestic legislation. Elaboration is unnecessary, given our primary conclusion.

[42] Furthermore, the foregoing conclusion is made on the premise that the Victim Charter is, as a matter of law, an instrument creating rights enforceable at the suit of the individual. Whether the Charter has this status is dependent upon, inter alia, the European Directive, the relevant primary legislation and the Charter itself. In essence the appellant's case proceeds on the assumption that the Charter is, like the Human Rights Act, a human rights protection instrument which can be invoked by the individual in legal proceedings. We have substantial reservations about the correctness of this. These are based on, inter alia, section 28(9) of the 2015 Act and the absence of anything remotely comparable to the Human Rights Act machinery. However, given our primary conclusion and in the absence of any argument on the point, elaboration is inappropriate.

[43] Separately, Mr Lavery KC suggested that the right canvassed could be found in the celebrated statement of Lord Steyn in *Attorney General's Reference No 3/1999* [2001] 2 AC 91, 118:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

We do not consider that this adds anything of value to the exercise which this court has conducted in the immediately preceding paragraphs. The focus of Lord Steyn was the investigation of crime and the criminal trial. Furthermore, this passage is silent on the right canvassed on behalf of the appellant or any cognate or kindred right.

[44] The third and final element of the appellant's case is that the right canvassed on her behalf is embedded in "common law procedural fairness." This aspect of the appellant's case would seem to flow from one of the court's many pre-hearing enquiries namely whether the appellant was seeking to rely on any common law right.

[45] The fundamental question originally raised by this element of the appellant's challenge was whether, in the bail decision making process relating to PR, the appellant (to be contrasted with PR) had as a matter of law a status or interest conferring on her procedural fairness rights and, more specifically, in the language of counsels' submission, a right "to be informed and be heard prior to any decision on police bail" in respect of PR. Since the appellant is no longer challenging the impugned bail decision, this question has become moot.

[46] Thus the Court is driven to re-formulate and consider the foregoing question purely in the abstract. Exercises of this kind are usually unsatisfactory. The present case is no exception. There is a substantial body of jurisprudence, belonging to the highest judicial levels, relating to common law procedural fairness. The excellent treatise in Chapter 8 of *De Smith's Judicial Review* (9th ed) traces the progressive growth of the doctrine of procedural fairness and demonstrates its potentially wide reach. The suggestion that a victim of crime should in certain circumstances have the right to make representations prior to a suspect being bailed is superficially attractive. However, the question, one purely of law, is whether certain bail decision making processes give rise to a right of this kind.

[47] This aspect of the appellant's case is advanced on an assumption, namely that this right is provided by common law procedural fairness. No authority, whether direct or analogous, was cited in support of the appellant's common law argument and this court is unaware of any. In the absence of detailed argument and consideration of relevant authority we are not prepared to make this assumption. In these circumstances, we conclude that this element of the appellant's case must also fail.

[48] We would add that if this right does arise in certain circumstances its application and content would be unavoidably fact and context sensitive. This is elementary dogma: see for example *Doody v SSHD* [1994] 1 AC 531, 560, per Lord Mustill. This would militate strongly against the judicial recognition of the right canvassed in the general terms formulated, simultaneously pointing firmly in favour of the preference for legislative regulation.

Article 8 ECHR?

[49] It follows from the foregoing that this appeal must be dismissed. We would add that Article 8 ECHR did not ultimately feature in the case made to this court. This contrasts with the proceedings at first instance and the case management phase before this court, in which Article 8 was prominent. In these circumstances, we expressly decline to consider or determine, obiter, whether the appellant's case could derive any support from this source. Recognising the possibility that a future challenge might conceivably adopt this approach, we confine ourselves to drawing attention to two of the major pronouncements of this court on Article 8 ECHR: *Re Said* [2023] NICA 49, paras [49]–[52] and *Re Ni Chuinneagain* [2022] NICA 56, para [49].

Other Issues

[50] Unfortunately, it is necessary to draw attention to the following. From the inception of this appeal there were repeated breaches by the appellant's legal representatives of court orders and directions. Notwithstanding indulgences by the court this scenario continued. The court was regularly required to take the initiative. There was not a single instance of a proactive request by the appellant's legal representatives to modify or relax any case management order. The situation

gradually became intolerable. Ultimately, there was a change of senior counsel two working days before the hearing date and the provision of a hearing bundle and authorities bundle one day in advance. None of these long overdue bundles was compliant with the Practice Direction. As appears from the above this appeal, ultimately, was academic as between the parties. The court has found that it has no merit. If the court had found otherwise the possibility of dismissing the appeal on the ground of egregious breaches of court orders and applying the *Salem* principle, (see, most recently *Re Wilson* [2024] NICA 53, paras [16]–[28]) would have been a real one.

Conclusion

[51] For the reasons given, the appeal is dismissed and we affirm the judgment and order of Fowler J.