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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY LEE HEANEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Before: McCloskey LJ and O'Hara J

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Representation:

Mr Ronan Lavery QC and Mr Sean Mullan (instructed by Donnelly and Wall Solicitors) for the applicant
Ms Nessa Murnaghan QC and Ms Neasa Fee (instructed by the Departmental Solicitor) for the respondent

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Introduction

[1] Magistrates' courts, on the occasion of remand listings in criminal proceedings, are not confined to the binary choice of remand in custody or remand on bail. Rather there are at least two further courses available. One is to refuse to remand the defendant, ordering their discharge, essentially on the ground that there is no sufficient evidential basis for maintaining the prosecution: see *Re Valente's Application* [1998] NI 341 and *Re McAuley's Application* [2004] NIQB 5. The other is to make an order under Article 47 of the Magistrates' Courts (NI) Order 1981 (the "1981 Order") known as "remand in custody with bail fixed." This judicial review challenge is concerned with the essence and scope of this discrete power.

Article 47

[2] Article 47 provides, in material part:

"Period of remand in custody or in bail

47.–(1) Without prejudice to any other provision of this Order, in adjourning any proceedings for an offence a magistrates' court may remand the accused-

(a) in custody, that is to say, commit him to custody to be brought at the end of the period of remand before that court or any other magistrates' court; or

(b) on bail, that is to say, take from him a recognizance conditioned for his subsequent appearance before such court;

and may, if the accused is remanded in custody, certify in the prescribed manner its consent to the accused being remanded on bail in accordance with subparagraph (b), in which event the court shall fix the amount of the recognizance with a view to its being taken subsequently.

(2) Subject to Article 49, the period for which the accused is remanded in custody shall not exceed-

(a) in the case where-

(i) the accused is before the court and he consents, or
(ii) the court has previously remanded the accused in custody for the same offence; or
(iii) the accused is already detained under a custodial sentence,

twenty-eight days;

(b) in any other case, eight days;

commencing on the day following that on which the accused is remanded, so, however, that in a case to which sub-paragraph (a)(iii) applies, the court shall inquire as to the expected date of the accused's release from that detention, and if it appears that he will be released before twenty-eight days have expired, he shall not be remanded in custody for a period exceeding eight days or (if longer) a period ending with that date.

> (4) Where the accused is admitted to bail and he and prosecution consent, the period for which the accused is remanded may exceed the period referred to in paragraph (2)."

[3] There are two further statutory provisions which may be noted. The first is Article 48 of the 1981 Order:

> "Where a person is remanded on bail any recognizance or condition of bail may provide for his appearance at every time and place to which during the course of proceedings the hearing may be adjourned, without prejudice, however, to the power of the court to vary the order at any subsequent hearing."

As regards procedural mechanics, Rule 16 of the Magistrates' Courts Rules (NI) 1984 (the "1984 Rules") provides so far as material:

> "16.(1) Where a magistrates' court commits an accused for trial in custody in accordance with Article 37 of the Order or remands an accused in custody in accordance with Article 47 of the Order it may certify its consent to bail either on a separate form or by endorsement on the warrant of commitment and the certificate of such consent may be signed on behalf of the court by the clerk of petty sessions.
>
> …
>
> (3) Where an accused is remanded in custody or is committed for trial in custody and is subsequently granted bail before the expiration of the period for which he was originally remanded or before the sitting of the court to which he is committed for trial, upon an application by or on behalf of the accused to the court, the court shall issue a warrant for his discharge from prison to take effect from the completion of the necessary recognizance."

Criminal Cause or Matter?

[4] As appears from the chronology of events rehearsed infra the applicant has been the subject of certain summary prosecutions since November 2021. By the stage when the impugned decision was made, he was the defendant in two separate prosecutions in the magistrates court. The impugned decision was a refusal to revoke extant bail orders in his favour, substituting them with the "remand in custody with bail fixed" mechanism. By his application for judicial review the

applicant invites this court, in the exercise of its supervisory jurisdiction, to make an order quashing the impugned decision. The first question to be addressed is whether these proceedings are a "criminal cause or matter" within the meaning of section 41(1)(a) of the Judicature (NI) Act 1978.

[5] This question is answered by focusing on the underlying proceedings in the magistrates court and applying the following test: may the direct outcome of those proceedings be the trial of the applicant and his possible punishment for a criminal offence? (per Viscount Simon LC in *Amand v Secretary of State for the Home Department* [1943] AC 147 at p156.) In the same case, Lord Wright formulated the test of whether, as regards the underlying proceedings:

> "… the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a "criminal cause or matter."
> [at p 162.]

[6] *Amand* is the leading authority on this issue, as the recent decision of the Supreme Court in *Re McGuinness (No 2)* [2020] UKSC 6 confirms. The application of the test, while sometimes posing difficult questions, is straightforward in this instance. Given the nature of the underlying proceedings this is plainly a criminal cause or matter. Neither party sought to argue the contrary. The result is a procedural one, of some importance. It means that this court is constituted as a divisional court and any onward appeal must be to the Supreme Court and not the NI Court of Appeal, per section 42 of the Judicature (NI) Act 1978.

Factual Matrix

[7] Lee Heaney ("the applicant") brings this application for leave to apply for judicial review. In brief compass, on separate dates between November 2021 and January 2022 the applicant was charged with three offences: common assault on 4 November 2021, burglary on 15 December 2021 and making off without payment on 21 January 2022. We shall describe these as the "first three charges." During this period, he was the beneficiary of successive orders of the magistrates' court remanding him on bail in respect of the first two charges. Initially, he was unable to take immediate advantage of any of these orders on account of his delayed ability to perfect the conditions which they enshrined. However, following some periods of delay each of these orders was effective to achieve his release from custody. During the period 5 November 2021 to 24 January 2022 the remand history included two "remand in custody with bail fixed" orders.

[8] On 22 January 2022 the third of the first three offences allegedly occurred. On 24 January 2022 there was a combined remand listing before the court. This gave rise to three bail orders in his favour. The applicant was not, however, at liberty in consequence because on the same date he was charged with a new

offence, sexual assault (the "fourth charge") and was in police custody in consequence. This stimulated a further listing before the magistrates' court, namely a first remand hearing in respect of the fourth charge, on 26 January 2022. On this occasion the court refused the applicant's application for bail in relation to this new charge and remanded him in custody. This left him with three impotent remand on bail orders.

[9] Pausing briefly, as of 26 January 2022 the applicant's status in the criminal justice system was the following. He was remanded on bail in respect of the first three charges and remanded in custody in respect of the fourth charge. As a result the three remand on bail orders were ineffective to secure his liberty. His solicitors reacted to this state of affairs in the following way.

[10] On 28 January 2022 an application for orders under Article 47 of the 1981 Order revoking the extant bail orders in respect of the first three charges and substituting them by "remand in custody with bail fixed" orders was lodged. While this application remained undetermined, on 9 February 2022 the applicant applied to the High Court for bail in respect of the fourth charge. The application was adjourned for the purpose of obtaining a medical report.

[11] The next development unfolded in the magistrates' court. On 11 February 2022 the application under Article 47 in respect of the first three charges was listed. This was adjourned for one week. In the intervening period the applicant's solicitors provided the court with a written submission. The application was relisted on 18 February 2022. Following submissions from the applicant's solicitor the court refused the application in an ex tempore decision. This is the decision impugned in these proceedings.

[12] It is necessary to continue the chronology. On 28 February 2022 the High Court ordered that the applicant be admitted to bail in respect of the fourth charge. This order was effective to secure his liberty immediately, on the same date, in light of the extant bail orders in respect of the second and third charges, the first charge having been dismissed by the magistrates' court one week previously.

[13] Drawing together the strands, the advent of the fourth of the charges complicated matters for the applicant. Its effect was that during a period of five weeks, beginning on 24 January and ending on 28 February, the applicant was in custody, unable to avail of his three remand on bail orders. The fourth charge was the trigger for his loss of liberty and the ensuing events culminating in these proceedings.

[14] During the period 5 November 2021 to 24 January 2022 the remand history included two "remand in custody with bail fixed" orders. Both the ICOS entries and the actual orders are included in the evidence before this court. The ICOS entries "Remand in custody with bail fixed" must be juxtaposed with the text of the orders made. By the first of the court's remand orders, dated 5 November 2021, the

hearing was adjourned to 30 November 2021 and the Chief Constable of the Police Service of Northern Ireland ("PSNI") was "commanded" to convey the applicant to Maghaberry Prison, delivering him to the Governor thereof; while the Governor was "commanded" to receive the applicant into his custody and "… unless you shall be otherwise ordered in the meantime, to keep [him] until the above date and time when the defendant shall be produced before the said court." This order contained the following further component:

> "**Consent to Bail on Remand**
>
> The court consented to the defendant being released on bail, upon the said defendant and sureties, if any, entering into a recognizance on the terms and conditions as specified by the court."

This order was repeated verbatim upon the next listing of the case, on 30 November 2021. In passing, "RICBF" denotes, in 'ICOS speak', "remand in custody bail fixed."

The Treatment of Offenders Act

[15] At this juncture, for reasons which will become apparent, it is necessary to consider certain provisions of the Treatment of Offenders Act (NI) 1968 ("the 1968 Act") and the relevant jurisprudence of this court. Section 26(2A) provides so far as material:

> "(2A) In subsection (2) "relevant period" means-
>
> (a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or
>
> (b) any period during which he was in custody-
>
> (**i**) **by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose**; or
>
> (ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court; or
>
> (c) [added 21 July 2014] any period during which he was in custody in a category 1 territory with a view

> to his being extradited to the United Kingdom to be tried or sentenced for that offence (and not for any other reason)." [**emphasis added**]

[16] Section 26A was considered in some detail by this court in *Re Allen's Application* [2020] NICA 40. There the court made the following general observation, at para [13]:

> "The scheme of section 26 of the 1968 Act is to credit sentenced prisoners with certain periods of detention accumulated prior to the date of their sentencing. Section 26 distinguishes carefully between a "sentence of imprisonment" on the one hand and, on the other, pre-sentencing "police detention" or "committal to custody" by order of a court. Section 26, in this way, reflects the dichotomy in the criminal justice system of Northern Ireland of police custody and so-called remand custody (on the one hand) and sentenced custody (on the other). In short, section 26 prescribes the circumstances in which the latter form of custody is to be reduced by the former."

The judgment continues, at para [15]:

> "As observed during the hearing, the court considers that section 26(2A)(b)(i) encompasses the following three disjunctive scenarios regarding sentenced prisoners:
>
> (i) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings giving rise to the sentence of imprisonment under consideration.
>
> (ii) The custody of an offender solely by reason of a committal order of a court made in connection with the offence giving rise to the relevant sentence.
>
> (iii) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings from which the proceedings concerning either (i) or (ii) arose.
>
> Where any of the aforementioned three scenarios applies, the period of custody constitutes a "relevant period" within the meaning of section 26(2). The effect of this is that any such period "shall be treated as reduced" (i.e. shall be credited to the sentenced prisoner) in calculating

> the length of any sentence of imprisonment or other form of detention specified in section 26(2)."

[17] At paras [16] and [17] the court laid emphasis on the imperative of being "scrupulously faithful to every part of the interlocking and cumulative requirements prescribed by the words of the statute." At para [28] the court, having emphasised that the words of the statute are to be accorded their ordinary and natural meaning, concluded that they establish a test of "sufficient, or material, connection." At para [29] the judgment continues:

> "The question of whether the sufficiency of connection test is satisfied is primarily one of fact. The exercise to be performed will normally be an unsophisticated one, involving detached, clinical analysis of undisputed (or indisputable) facts and the application of realism fused with common sense. Cases in which the application of the test involves mixed questions of fact and law will include those where, for example, there is debate about the meaning of one of the statutory words, for instance 'proceedings.'"

[18] The phrase "by reason only of" has proved troublesome in practice. It has been considered in several cases in this jurisdiction. First, in *Re Rea's Application* [2008] NIQB 24 the court stated at para [11]:

> "It seems clear …. that the expression 'only' in paragraph (b)(i) is intended to preclude any account being taken of periods in custody unrelated to the offence or offences for which the relevant sentence or sentences were passed."

In *Re McAfee* [2008] NIQB 142 the court stated, first, at para [15] that the purpose of section 26 is to ensure that pre-trial detention reduces the period of sentenced custody. At para [20] Kerr LCJ, having stated that a teleological, rather than literal, interpretation is to be preferred continued:

> "The rule against double counting (which is soundly based in common sense and logic) should inform the interpretation of section 26 …
>
> The purpose of the legislation is to ensure that offenders do not spend longer in prison than is warranted by the pronounced sentence."

In *Re Millar's Application* [2013] NIQB 132 one finds the following passage, at para [10]:

> "The court agreed with the conclusion in **ex parte Naughton** [1997] 1 WLR 118 that the expression 'only' in section 26(2A)(b)(i) of the 1968 Act is intended to preclude any account being taken of periods in custody unrelated to the offence for which the relevant sentence was passed. Secondly, the court accepted that considerations of justice required that the time spent in custody in relation to any offence for which a sentence is passed should serve to reduce the term to be served subject always to the condition that time can never be counted more than once."

The Impugned Decision

[19] As noted above, the application to the magistrates' court giving rise to the impugned decision had two elements. It sought, in respect of the first three charges, the revocation of the extant remand on bail orders and their substitution by "remand in custody with bail fixed" orders under Article 47. It is necessary to understand the reasons why these applications were made. They are set forth in the affidavits of the applicant's solicitor, Mr Patrick Higgins, who, firstly, suggests that the status conferred by an order under Article 47 of the 1981 Order is the following:

> "… a bail status used for someone who has been granted bail by the court but who cannot perfect court bail for some reason. For example, it is often used whenever bail is granted subject to an address being approved by police."

Mr Higgins next explains his reasons for applying for orders under Article 47:

> "This bail status would properly reflect the applicant's position as he was physically in custody with bail granted. Additionally, even though he was in custody the applicant would not gain any remand time against the other three cases. The applicant would only obtain credit for the matter for which he had been remanded into custody, namely the sexual assault allegations … [ie the fourth charge]."

In the longest of his four affidavits Mr Higgins provides the following elaboration:

> "If I email the Custody Office as I have done in this case I receive a disclaimer at the bottom of the email "Please note that this remand time has had an initial calculation completed only and has not been checked by Custody Office staff. The information should be used as guidance

only and a more in-depth check will be completed should your client receive a custodial sentence.

I am aware from other proceedings that the Prison Service are carrying out sentence calculation checks approximately 21 days before the Early Release dates of prisoners. The court, PPS and Defence practitioners do not have access to the Prison Service sentence records or computer systems. I am proactively emailing the prison when I check release dates with clients, especially whenever they do not feel right …

Defendants with multiple cases

A defendant might also be on bail for some cases and remanded for others. This is the 'hybrid scenario.' This often occurs when a defendant is on court bail but then is arrested on foot of another new allegation and charged overnight to court. Very often, only the overnight charge comes before the court. And if then refused bail, the defendant will be remanded into custody on the new allegation but will still have bail on the previous allegation. Unless there has been a breach of bail for the previous offence the PPS or court do not list the other matter before the court …

It is possible to be arrested for a breach of bail and a new matter. The defendant would be connected for the new matter and the District Judge would enquire if the breach of bail is accepted. A defendant can contest a breach of bail – which may not be proven and therefore still have bail for the old matter and they could be refused bail for the new matter. Effectively they would be remanded then in custody for the new matter and would still have bail for the old matter. In these circumstances it is in the applicants interests to contest the breach of bail to allow them to show to the Magistrates Court (and or High Court) that they have been abiding by the previous bail conditions. In these circumstances unless the applicants Solicitor knows to ask the court to revoke the older bail order the defendant will now be receiving remand time for only the new matter …

> To revoke the bail the Defence Solicitor has to draft a bring forward application and bring the ongoing remand case back before the court …
>
> For defendants with multiple cases across multiple jurisdictions, perhaps dealt with by different solicitors in one practice it can be very difficult for a firm to stay on top of all cases for one defendant. Sometimes defendants also use different Solicitors practices altogether for example we have clients that use our practice in Belfast but have a local firm representing them in Derry. We have also had clients using us for their Crown Court case and another firm for a domestic magistrates' case …
>
> **Remand in custody with bail fixed**
>
> In relation to my application to have the applicant Lee Heaney remanded in custody with bail fixed whilst he is remanded in custody for other matters, I have previously made similar applications for other clients. I am aware that other Solicitors in my firm have also made similar applications for other clients. These applications were all granted without any issue by the District Judge."

[20] The impugned decision having been pronounced orally, the magistrates' court not being a court of record and in the absence of a text agreed between the parties, the only sources of what the District Judge said when making the impugned decision are the PAP response letter (clearly based on the judge's instructions), an affidavit sworn by the judge and the affidavit of the applicant's solicitor. To begin with, the District Judge describes the application made to the court as:

> "… an application under Article 48 of [the 1981 Order] to revoke three existing bail orders and then proceed to fix bail for those same three charges."

Pausing, this is not a correct characterisation of the applications made: see above.

[21] One important passage in the letter is the following:

> "The court centred its decision on the extant High Court bail proceedings leading to the applications before the Magistrates Court not having the effect of liberating the applicant. The court referred the applicant's solicitor to …. *Re BG* [2012] NIQB 13 at para [17]:

> 'I consider that, fundamentally, there is an inextricable link between bail and liberty …. [the] court should not exercise its discretionary power to grant bail in circumstances where this will not operate to confer liberty on the accused person concerned, immediately or in the foreseeable short term.'"

The expressed rationale which follows is that there was then pending before the High Court an undetermined application for bail, regarding the fourth of the charges, which had been adjourned for the purpose of providing a medical report:

> "As the applicant's solicitor did not provide any date for the expected receipt of the medical report the court concluded that the High Court proceedings would not be determined in the foreseeable short term."

[22] In a separate section of the letter it is stated:

> "The court rejected the argument advanced by the applicant that he required unsigned "theoretical bail", so as to ensure any sentence calculation by the Northern Ireland Prison Service properly calculates the relevant sentencing period, for the following reasons:
>
> (a) Exercising the power under Article 48 to vary an order under Article 47 in the way sought by the applicant leads to an absurdity;
>
> (b) The court can take into account the applicant's circumstances, including time spent in custody, in determining the sentence to be handed down; and
>
> (c) It was open to the applicant to apply for his bail orders to be revoked without bail being fixed and re-apply for bail after the conclusion of the High Court bail application."

Finally, the District Judge's affidavit makes clear that the first of the two reasons rehearsed in the PAP response letter, namely the decision in *BG,* was the "key reason" for the impugned decision.

Executing a Recognizance

[23] Some understanding of the practical and procedural out-workings of a remand on bail order is necessary. The starting point is the range of discretionary options available to the magistrates' court in cases where the court is minded to

remand the defendant on bail. All of the following matters lie within the discretion of the court: whether to remand on bail unconditionally or conditionally; the content of any conditions to be imposed; whether to require the execution of a recognizance by the defendant and, if so, in what amount; whether to require a third party or parties (a surety/sureties) to execute a recognizance and, if so, in what amount; whether to require a different form of security (e.g. the lodgement in court of a specified amount of cash); and the period that is to elapse between the remand on bail order and the next remand listing before the court, subject to the statutory maximum of 28 days.

[24] The following summary is based on a combination of the relevant statutory provisions and the uncontentious evidence assembled. In cases where a recognizance is required of the defendant by the remand on bail order this engages the commonly used terminology of "own bail" and "signing for bail." This is effected in the bail office in the relevant court building. It can also be effected in the custody office at HMP Maghaberry. Where the remand on bail order requires a surety the recognizance can be executed at either of these locations. See generally Articles 136 and 137 of the 1981 Order.

[25] A remand on bail order will not automatically secure the liberty of the defendant immediately, promptly or at all. One of the more typical complications which arises in practice is complying with a surety requirement. Another is complying with a specific condition which must be satisfied prior to release – for example, the surrender of a passport, identity document or mobile phone or kindred device or confirmation that a specified place of residence is available to the defendant. There may also be cases where compliance with a requirement to provide specific financial security is not feasible. Practical difficulties of this kind can result in delays in the defendant "perfecting their bail" and in some cases the defendant may still be in custody on the occasion of the next remand listing in court.

[26] There may also be cases where a defendant released pursuant to a remand on bail order subsequently loses their liberty. There are two common instances of this. The first is the case where the defendant is alleged to have breached a condition of bail and is brought before the court following arrest by the police, resulting in revocation of bail. The second is the case where a defendant on bail is arrested on suspicion of having committed a further offence, charged and brought before the court. In the first instance the court must determine whether to remand in custody or on bail as regards the new charge. A remand in custody order will have the practical effect of stultifying any extant remand on bail order. Another possible scenario is an application by the prosecution under Article 133A of the 1981 Order for reconsideration of a remand on bail order.

The decision in BG

[27] In *Re BG's Application* [2013] NIJB 43 the High Court addressed the question of whether bail should be granted in circumstances where this would not be effective to secure the liberty of the accused person. The court, having identified "an inextricable link between bail and liberty", addressed firstly an issue of practice, at para [16]:

> "It seems equally undesirable that bail applications of the present fragmented, detached type should be heard and determined in the kind of vacuum which seems to prevail in existing practice. There are obvious benefits to the court if the accused person is required to apply for bail in respect of all of the offences with which he is charged. This will result in the court being seised of the entire picture and being infinitely better informed in consequence. If, in future cases, any court finds itself invited to determine one of these detached, isolated applications for bail it may wish to consider adjourning the application, to enable a composite request for bail, encompassing all charges, to be assembled and pursued. This would be an unobjectionable exercise of the court's power to adjourn any proceedings for good reason. One cannot readily conceive of any sustainable objection to this course in the generality of cases. I acknowledge that there is one discrete category of case where logistical difficulties may arise, namely where the accused finds himself appearing before magistrates' courts in different divisions. If an accused person refuses to co-operate with the court's preferred course of action, it may well be appropriate, in the exercise of what is a discretionary power, to dismiss the application on the basis that the court cannot properly formulate a bail order which is likely to become progressively inappropriate, uninformed and irrelevant." ([2013] NIJB 43 at 53)

The judgment continues at para [17]:

> "I consider that, fundamentally, there is an inextricable link between bail and liberty. If effect is given to the adjustment to existing practice discussed above, this will address the fundamental objection that a court should not exercise its discretionary power to grant bail in circumstances where this will not operate to confer liberty on the accused person concerned, immediately or in the foreseeable short term."

Almost ten years later this principle remains undisturbed and it has been applied into other reported cases, namely *Re McGlinchey's Application* [2013] NIQB 5 and *Re Carlin's Application* [2018] NIQB 28.

The Parties' Main Contentions

[28] The central submission of Mr Lavery KC and Mr Mullan relating to section 26(2A)(b)(i) was formulated in these terms:

> "The purpose of this provision is to prevent post-conviction custody (serving a sentence) counting towards another sentence or a period of remand in custody unrelated to the offence … the word 'only' … is to ensure that a period of remand in custody on a different case will not count towards the 'relevant period' … [it] is to prevent remand time stored up on one case being used for another case …
>
> Section 26 needs to be interpreted purposively and pragmatically. Otherwise, this could lead to a prisoner being detained arbitrarily."

Mr Lavery further submitted that the impugned orders of the District Judge were not consonant with one of the main purposes of article 5 ECHR namely the avoidance of possible arbitrary detention of the applicant at some future stage.

[29] On behalf of the district judge it was submitted by Mrs Murnaghan KC and Ms Nessa Fee that the ratio of *Re BG* does not preclude the grant of bail in respect of charge X in circumstances where the defendant will remain in custody in respect of charge Y. It was further submitted that the applicant had failed to avail of the option of making a composite application for bail to the High Court in respect of all four charges. It was also submitted that the applicant had failed to avail of the option of applying to the magistrates' court for revocation of his bail in respect of the first three charges. Mrs Murnaghan further submitted that the applicant's challenge was hypothetical, premature and a disguised impermissible appeal against the merits of the impugned decision.

[30] Both parties had a common position on one particular issue. In response to the court, Mr Lavery and Mrs Murnaghan were in agreement that in determining the applications made the District Judge had two choices, namely (a) to maintain the remand on bail orders or (b) to substitute these orders with "remand in custody with bail fixed" orders under Article 47(1)(b) and was thus exercising a discretion to be reviewed by this court in accordance with normal principles. We would add that the third option available to the court was to remand the applicant in custody.

Analysis and Conclusion

[31] This court, in the exercise of its supervisory jurisdiction, must conduct an objective audit of whether the impugned decision of the District Judge is sustainable in law. This is a pure legality judicial review challenge. The determination of this question depends primarily on whether the "remand in custody with bail fixed" option in Article 47(1)(b) of the 1981 Order is designed to accommodate a case in which the court is requested to make this species of order for the sole purpose of seeking to ensure that in certain unpredictable future eventualities such custody remand allowance as a defendant may later legitimately claim under section 26(2A)(b)(i) of the 1968 Act is not jeopardised. We consider the correct answer to be that this is not an issue falling within the embrace of Article 47(1) of the 1981 Order, with the result that the impugned decision of the District Judge is unimpeachable, for the following reasons.

[32] The discretion which the magistrates' court must exercise on the occasion of every remand listing where no *Re Valente* issue arises (see para [1] above) is whether, in adjourning the proceedings, to remand the defendant (a) in custody, (b) on bail or (c) "in custody with bail fixed." The contest lies between pre-trial custody and pre-trial bail. It is of a specific and circumscribed nature. Neither the statutory language nor the context thus analysed contains the slightest hint that one of the ingredients belonging to this equation is the possible future event of post-conviction imprisonment and ensuing sentence calculation issues.

[33] Alternatively phrased, on the occasion of every remand listing the magistrates' court must exercise a discretion under Article 47(1). The language of discretion is appropriate because no particular course of action is mandated by the statutory provisions. It is trite that in exercising this discretion all material facts and considerations must be taken into account. There is nothing in the statutory language indicating that one of these factors is the impact of the order to be made by the magistrates' court on a possible future scenario involving conviction, imprisonment and sentence calculation. This factor is not identified in the statutory provisions.

[34] That, however, does not spell the end of the analysis since, by well established principle, the magistrates' court must in the exercise of its discretion under Article 47(1) take into account any fact or consideration impliedly required by the statute to be reckoned: *Re Findlay* [1985] AC 318, per Lord Scarman at 333H-334C**.** Once again, having regard to the narrowly drawn context in which the magistrates' court exercises is discretion under Article 47(1) and the circumscribed nature of the determination being made, we find it impossible to identify an unexpressed but implied requirement in this statutory provision that the aforementioned future scenario be taken into account by the court.

[35] Our conclusion is reinforced by an examination of the rationale of the "remand in custody with bail fixed" option in Article 47(1). What is the purpose of

this curiously phrased statutory option? What scenarios was it designed to accommodate? As none of this is spelled out in the statutory language an orthodox exercise of statutory interpretation is required. The governing principles are of an orthodox kind. In *R(O) v Secretary of State for the Home Department* [2022] 2 WLR 343 the Supreme Court stated at paras [29]-[31]:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated:
>
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397:
>
> > 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the

court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot

reasonably be taken as used by Parliament with that meaning.'"

[36] We have paid particular attention to the final clause in Article 47(1)(b) ("… the court shall fix the amount of the recognizance with a view to its being taken subsequently"). Every order of this species is a remand in custody order. This is its fundamental identity. Of course, there is a significant qualification. The effect of this qualification is that this specific order can be made only where the court is satisfied that the defendant qualifies for the grant of bail. Why, therefore, is a bail simpliciter order not appropriate? The court considers that the answer must lie in the world of pragmatic reality. We have already adverted to several typically encountered scenarios above. It would not be appropriate for this court to attempt the formulation of an exhaustive list of the scenarios in which a "remand in custody with bail fixed" order should be made. We consider that there are three identifiable pre-requisites to the making of such an order. First, the court must be satisfied that the defendant qualifies for the grant of bail. Second, that there is a realistic prospect of release on bail materialising before the next remand listing. And third that, for whatever reason, a remand on bail simpliciter order is not appropriate, with the result that a qualified remand in custody order is required.

[37] Completing our construction of the "remand in custody with bail fixed" option in Article 47(1)(b) we would add the following. The words "the recognizance", considered particularly in conjunction with "in accordance with subparagraph (b)", denote a recognizance to be executed by the defendant. They do not encompass a recognizance to be executed by a surety where this is required. A recognizance of the latter kind is not mentioned in Article 47(1). Rather the power to require a surety in a remand on bail order is found in quite separate provisions of the 1981 Order, namely Articles 136 and 137.

[38] Next, the final clause in Article 47(1)(b) – "… with a view to its being taken subsequently" – indicate that in opting for the "remand in custody with bail fixed" course the court will probably have formed the view that a recognizance required of the defendant cannot be executed immediately. This might, for example, arise where the defendant is temporarily incapacitated on account of ill health, although multiple examples do not readily spring to mind. Irrespective, the word "subsequently" simply denotes at any time subsequent to the making of the court's order. This analysis highlights one of the peculiarities of this discrete statutory provision, since every recognizance (where required) is taken subsequent to the making of the order: there must be some elapse of time in every case.

[39] The foregoing analysis is reinforced by the following considerations. Issues of sentence calculation belong to the domain of the Department of Justice/Northern Ireland Prison Service. In statutory terms they are not a matter for magistrates' courts exercising remand powers. Furthermore, in any given case where a remand on bail order has proved ineffective to liberate the defendant, this should in principle be apparent from court and prison records. In cases where a sentence

calculation dispute materialises, the defendant will have available to him recourse to the habeas corpus and judicial review jurisdiction of the High Court. Civil proceedings will be another option

[40] The statutory predecessor of the final clause of Article 47(1)(b), section 54(1) of the Magistrates' Courts Act (NI) 1964, is couched in identical terms. This court is unaware of any relevant decided cases. Its ancestry can be traced still further to section 16(2) of the Petty Sessions (Ireland) Act 1851. The commentary in O'Connor, Justice of the Peace (2nd ed), p 94 lends support to our analysis of Article 147, while illuminating why this discrete statutory provision was considered appropriate in the era in which it was enacted.

[41] Our final reflection on this discrete statutory provision is the following. Taking into account the foregoing analysis, the kind of case in which the magistrates' court will deem it appropriate to invoke the "remand in custody with bail fixed" option instead of making a remand on bail simpliciter order is not altogether clear. The fact that a remand on bail order is unlikely to be given practical effect immediately will normally be apparent to the court. This, however, will not preclude making such an order. In every case the court, applying its good sense and experience, and mindful of the *BG* principles, will identify the appropriate option. While the detailed analysis which this court has undertaken might suggest that the "remand in custody with bail fixed" option is of limited practical utility nowadays, whether to resort to it will be a matter for the exercise of the discretion of the magistrates' court.

[42] Giving effect to our analysis and construction of the third of the remand options in Article 47(1)(b) of the 1981 Order above, we conclude that the applicant's challenge must fail. The impugned decision of the District Judge was correct in law because the application to have the applicant "remanded in custody with bail fixed" was made for a purpose which does not fall within the scope of this statutory provision. While certain aspects of the reasoning of the District Judge are questionable, the manner in which the discretion of the District Judge was exercised is unassailable in consequence.

Rule 16(1)

[43] Finally, it is opportune to comment upon the interplay between the final clause in Article 47(1)(b) of the 1981 Order and Rule 16(1) of the 1981 Rules, which has featured in the parties' submissions. Rule 16(1) is to be viewed as the procedural outworkings of Article 47(1)(b). In short, it prescribes <u>how</u> the certification of consent is to be formulated. In passing, by virtue of the presumptively permissible "may", adherence to Rule 16(1) is not obligatory as regards an Article 47(1)(b) certification of consent order. Thus, non-adherence thereto in any given case will not invalidate the order made. This obiter observation is made subject to detailed further argument in some future case.

Order

[44] This judicial review challenge proceeded by the "rolled up" mechanism. Had the court dealt with the question of whether leave to apply for judicial review should be granted in a separate, preliminary way we consider that this threshold would have been overcome. Accordingly, we order that leave to apply for judicial review be granted, while dismissing the application substantively.