Neutral Citation No: [2024] NIKB 21	*Ref:*	**COL12471**
	ICOS No:	**22/111433**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**26/03/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY PATRICK HIGGINS TO APPLY FOR JUDICIAL REVIEW

Between:

PATRICK HIGGINS

Applicant

and

THE POLICE SERVICE OF NORTHERN IRELAND

Respondent

_____

Mr Ronan Lavery KC with Mr Stephen Campbell (instructed by Paul Campbell, Solicitors) for the Applicant
Mr Ian Skelt KC with Mr Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Respondent

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Before: Horner LJ and Colton J

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COLTON J (*delivering the judgment of the court*)

Introduction

[1] The applicant, Mr Patrick Higgins, seeks to challenge the decision of the respondent, the Police Service of Northern Ireland ("PSNI"), on 1 December 2022 to extend his pre-charge bail conditions.

Factual background

[2] The applicant ordinarily resides at 49 The Demesne, Newry, with his mother. His partner resides at 68 The Demesne, Newry, with her three young children.

[3] On 15 May 2022, police received a report of an assault at 68 The Demesne, Newry. The applicant was reported to have struck another male causing him to fall and strike his head off the ground losing consciousness. On 19 May 2022, the applicant was arrested in relation to the allegation of assault. Following interview, in which he claimed he acted in self-defence, he was released from Banbridge Police Station on pre-charge bail to allow for further investigations to be carried out. The applicant was initially bailed to return on 17 June 2022 with three conditions:

(a) Not to have contact with the injured party by any means directly, indirectly or through a third party.

(b) Not to the enter The Demesne, Newry.

(c) To reside at 3 Lock Keepers, Newry.

[4] The bail order confirmed that he was required to attend at the police station on 17 June 2022 (unless he received notice in writing from the PSNI).

[5] The respondent, owing to the absence of medical evidence was not able to progress the investigation to the point where a decision could be made on charging the applicant. Therefore, the need for the applicant to remain on bail continued whilst investigations were ongoing. Accordingly, ahead of the initial return date, on 16 June 2022, the applicant's solicitor was informed by the investigating officer ("IO"), via email that his attendance was not required and that his bail return date would be pushed back until 16 August 2022. In advance of the new date, on 15 August 2022, the IO communicated with the applicant's solicitor via email that the bail return date would be pushed back to 19 October 2022. The date of 19 October 2022 was then further put back to 23 November 2022. The applicant's solicitor was informed of that change on 14 October 2022 via email.

[6] Due to a period of unexpected illness the IO was on sick leave between 16 November 2022 and 29 November 2022. He was not, therefore, in a position to take any steps in relation to the return date of 23 November ahead of time. The applicant's solicitor was unaware of the IO's sick absence. Prior to 23 November 2022 he endeavoured to contact the IO via email and telephone call, but without success. On the morning of 23 November 2022, the existing return date for the applicant to answer to his bail, his solicitor contacted the Custody Sergeant at Banbridge Police Station. It was agreed between them that the applicant could delay his attendance until the arrival of the IO, whereupon the applicant and his solicitor would immediately attend. The applicant's solicitor remained in contact with the custody suite staff, however, the IO did not attend. Consequently, the applicant did not attend Banbridge Police Station to answer bail on 23 November 2022.

[7] On 30 November 2022, and still unaware of any period of sickness, the applicant's solicitor emailed the IO seeking confirmation that the applicant's case was

being dealt with by way of report to the Public Prosecution Service ("PPS"). No response was received. Upon return to normal duties on 30 November 2022, the IO became aware that the applicant had not attended to answer his bail on 23 November. Rather than flag the applicant for arrest for breach of bail, the IO decided that adjusting the bail return date to 6 January 2023 was more appropriate. On 1 December 2022, the IO contacted the custody suite to request that the bail return date be extended. The IO did not prioritise informing the applicant's solicitor of the new return date.

[8] On 8 December 2022, the applicant's solicitor, through an informal discussion with the Custody Sergeant regarding another matter, sought confirmation that the applicant's case had been referred to the PPS. The Custody Sergeant informed him that a note on the Custody Log stated that on 1 December 2022, the applicant's bail had been "extended" to 6 January 2023. The applicant's solicitor sought confirmation of the legal basis on which the respondent could retrospectively extend his bail eight days after his bail return. No response was received.

[9] The applicant's solicitor then sent a pre-action protocol letter to the respondent. A response was received on 22 December 2022. As a consequence, the applicant maintains he did not return to The Demesne estate to share Christmas with his partner and her children.

[10] A leave application came before this court on 4 January 2023 on an emergency basis. Proceedings were adjourned for a full hearing. It was further agreed that the impugned bail return of 6 January 2023 would also be rescheduled. On 5 January 2023, the IO advised the applicant's solicitor he had sought a date of 15 Febuary 2023 from Banbridge Custody Suite, to allow sufficient time for the proceedings to be heard. However, confirmation of this date was not provided to the applicant and the leave application was fixed for hearing on 27 March 2023. The applicant remained under the impression that the impugned bail return would be listed for a date after the hearing. He was arrested on 16 February 2023 for a breach of an alleged failure to answer bail. Having explained the miscommunication, the applicant was readmitted to bail. Leave was granted by Horner LJ on 5 June 2023 in a short written judgment. He concluded:

> "[25] The circumstances of this case are far from clear. However, I consider the applicant has just about made out an arguable case that there was no basis for imposing (or extending) bail conditions on a person who was not detained after the expiry of his bail return."

Is this a criminal cause or matter?

[11] The court convened as a Divisional Court. At the outset the court invited oral submissions in relation to the issue of whether, in fact, the application concerns a criminal cause or matter. It was agreed that a full hearing would proceed but with a

direction that written submissions would be provided addressing the issue as to whether the application concerns a criminal cause or matter for the purpose of section 41(1)(a) of the Judicature (Northern Ireland) Act 1978 and the Rules of the Court of Judicature (Northern Ireland) 1980 Order 53, rule 2. In the event that the application relates to a criminal cause or matter it means that this court is constituted as a Divisional Court. This has consequences for the parties as any onward appeal must be to the Supreme Court and not the Northern Ireland Court of Appeal and only where the Divisional Court certifies the issue as being of public importance: see section 41(2) of the Judicature (Northern Ireland) Act 1978. In the event that the court determines this is not a criminal cause or matter the parties were content that the hearing proceed before the two judges allocated to hear the case.

[12] The Supreme Court considered the meaning of "criminal cause or matter" in *Re McGuinness's Application* [2020] UKSC 6. The case concerned the method used by the Department of Justice to calculate the earliest possible release date for a prisoner on licence who had been recalled to prison having committed further serious offences. The Department's decision was challenged by the sister of one of the prisoner's victims. The court sat as a Divisional Court, finding in favour of the applicant. Upon appeal to the Supreme Court, Lord Sales delivering the unanimous judgment, held that the Divisional Court had been in error on the procedural point and that the Supreme Court did not have jurisdiction to hear the appeal as the issue raised did not concern a criminal cause or matter. In his judgment he comprehensively set out the approach to be adopted which has since been applied in this jurisdiction on several occasions (see *Mark's Application* [2022] NIQB 57; *Re Heaney's Application for Leave* [2022] NIQB 57 and *Re Murphy's Application* [2023] NIKB 58. At para [45] Lord Sales' judgment refers to the authority of *Amand v Secretary of State for the Home Department* [1943] AC 147 noting that:

> "*Amand* remains the leading decision at the highest level regarding the meaning of the phrase 'criminal cause or matter' in the context regarding rights of appeal. Three points may be made about it. First, the 'wide' interpretation of the phrase is required to direct attention to the nature of the underlying proceedings in which the High Court is asked to intervene, rather than focusing on the abstract categorisation of the proceeding in the High Court itself. Secondly, as Lord Wright put it 'the word 'matter' does not refer to the subject matter of the proceedings, but to the proceeding itself.' It is not sufficient for the underlying proceeding to relate to a subject matter which might be described as 'criminal' in a broad sense; the proceeding itself has to be criminal in nature. Thirdly, in order for the proceeding (in respect of which an application is made to the High Court to intervene) to be a criminal matter the two conditions identified by Viscount Cave must be satisfied, so that it can

> be said that the applicant is put in jeopardy of criminal punishment by the proceeding; and such jeopardy has to be 'the direct outcome' of the proceeding (p156 per Viscount Simon LC) …" [emphasis added]

[13] Before reaching his conclusion, Lord Sales explored the policy rationale behind the restriction of appeal rights to the Supreme Court. Accordingly, the restriction of appeals to points of law of public importance reflects:

> "[47] Parliament's concern at the time of the House of Lords, as the highest court within the legal system should not be unduly taken up with routine appeals from criminal matters (however meritorious such appeals might be, with reference to the particular facts) is clear. Accordingly, the scope for an appeal from the High Court in a criminal cause or matter (in an application for *certiorari* or other public law relief and in those cases where an appeal in a criminal case lay to the High Court) was far more restrictive than in a civil matter."

[14] However, recognising the potential dilution of appeal rights in criminal cases, Lord Sales stated that there were compelling reasons against adopting an overly expansive interpretation with the phrase which would "have the effect of reducing to an unacceptable degree parties' access to justice at appellate level, leaving pockets of unchallengeable, potentially erroneous first instance decisions." (Para [68]). This concern is mitigated by construing the phrase "criminal cause or matter" as defining:

> "A reasonably tightly drawn category of case focused directly on the process for bringing and determining criminal charges …"

[15] Parliament obviously intended that cases with a direct bearing on that process should be captured by the phrase, without drawing subtle and ultimately unsustainable distinctions depending on the precise nature of the procedure to which the matter concerning the process for bringing and determining criminal charges might be brought before the High Court" (paras [69]-[70]). [Emphasis added]

[16] Importantly, for the present purposes, Lord Sales clarified at the beginning of para [71]:

> "The process for bringing a criminal charge against a person under domestic law begins with a decision to prosecute. It was authoritatively established by the decision of the House of Lords in *Provincial Cinematograph Theatres Ltd v Newcastle-upon-Tyne Profiteering Committee* [1921] 90 LJ (KB) 1064, in reliance on *ex p Woodhall*, that a

> resolution by the Committee to authorise their clerk to take steps to bring a prosecution for a criminal offence was an inherent part of the process for bringing a criminal charge, so that a decision of judicial review of that resolution in the High Court was a decision in a criminal cause or matter …" [emphasis added]

[17] Applying these principles, Lord Sales concluded that an application for judicial review of the method used to calculate the tariff expiry date did not relate to the commencement or conduct of any underlying criminal process. In his Lordship's view:

> "[94] There is a clear distinction between proceedings leading up to the imposition by a court of a sentence in relation to a criminal charge, which fall within the relevant phrase according to the guidance in *Amand* and proceedings brought to challenge some non-judicial body such as a prison governor or a minister, which has to calculate the date of release in relation to such a sentence in the exercise of their administrative functions under public law, which is not. In my view, procedural clarity regarding rights of appeal requires that this distinction should be respected."

[18] In *Re Murphy's Application* [2023] NIKB 58, the court considered whether a compassionate bail application amounted to a criminal cause or matter. In reaching its decision, the court discussed in depth the concept of bail, distinguishing between the first remand decision after an individual had been charged, and a compassionate bail application. The former, as explained by Treacy LJ, at para [31]:

> "… is intrinsically linked to the criminal process. It arises at a time close to the beginning of a criminal proceeding against the suspect. It generally arises when the person is appearing as a 'defendant' in a criminal court. He is defending himself against allegations laid by a 'prosecutor', someone who makes charges against him and sets out the evidence about his alleged crimes. The initial bail decision has the colour and feel of 'a criminal cause or matter.' Indeed, this first remand decision defines the content of what 'criminal jeopardy' will mean for this suspect. Will it mean immediate detention in custody or not? The first remand decision answers that question."

[19] Following the distillation of the relevant principles in *Re McGuinness's Application*, Treacy LJ stated:

> "[35] This case arises out of the exercise by the PPS of their statutory right to appeal the decision of the district judge to grant bail and the decision of Morgan LCJ reversing that decision. Neither the appeal nor the bail applications give rise to it involved any challenge to the original decision to remand the applicant in custody pending his trial. Nothing about this 'matter' puts the applicant in criminal jeopardy. He was already in criminal jeopardy months before the application was made. The specific meaning of 'criminal jeopardy' in the circumstances of his case had already been clarified at the first remand – in his case it would include immediate detention in custody pending trial. His compassionate bail application did not challenge that, it simply sought a compassionate variation to it because of the sad event that had occurred to his family. It proceeded on the basis that, if compassionate bail was granted, the applicant would return to prison voluntarily as soon as the bail period expired.
>
> …
>
> [37] This appeal against the grant of compassionate bail was not immediately and closely related to the criminal case in which the remand in custody pending trial was imposed. While he was pursuing bail in court he appeared as an 'applicant' for bail not as a 'defendant.' The other side's representatives appeared as 'respondents' to his application – not as 'prosecutors.'"

[20] I therefore return to the key question this court must answer. Is the underlying proceeding focused directly on the process for bringing and determining criminal charges? Unlike the previous case law examined above, the court is faced with an application in which the applicant was, at the relevant time, not charged with any offence, although he was the subject of a criminal investigation. A similar situation arose in *JR27* [2010] NIQB 12. In that case the applicant challenged the refusal of a policy to destroy certain data relating to him collected under PACE 1989 with a view to possible prosecution, although in the event charges were not brought. McCloskey J, with whom Weatherup J agreed, held that although no investigation was underway an investigation of the potential prosecution of the applicant for a criminal offence on a future date was nevertheless a foreseeable and possible outcome. Morgan LCJ dissented. In *McGuinness*, Lord Sales agreed with the approach of Morgan LCJ who found that the possibility of criminal proceedings was too remote to satisfy the need for proximity between the application before the court and the matter putting the individual in jeopardy. At para [93] Lord Sales clarified:

> "The jeopardy principle as adumbrated in *Amand* is much more tightly focused on court proceedings in relation to a specific criminal charge than the majority thought. Issues regarding the holding and use by public authorities of information relating to an individual are firmly in the sphere of civil public law, and there was no close connection with the bringing of a criminal charge in this case to change that position."

[21] In the present case, after the completion of the hearing the parties submitted an agreed position that the application does not concern a criminal cause or matter. The decision under challenge is that made on 1 December 2022, taken in excess of three months prior to the ultimate decision to charge the defendant. The applicant's challenge is not to the commencement of the prosecution, but to police actions ancillary to a subsequent criminal proceeding. The parties draw an analogy with the distinction in *McGuinness* between the tort of malicious prosecution, which has "no bearing on the determination of a criminal charge against a person" and a criminal cause or matter sufficient to engage section 41(1) of the Judicature (Northern Ireland) Act 1978.

[22] The extension or imposition of bail conditions by the respondent on 1 December 2022 will not ultimately have a bearing on the determination of the subsequent criminal proceedings before the magistrates' court. The applicant was not placed in immediate criminal jeopardy by the impugned decision of the PSNI on 1 December 2022, insofar as there was no suggestion of him being flagged for arrest as a result of that decision, nor has the respondent sought to charge the applicant for breach of bail.

[23] In light of the guidance from the Supreme Court in *McGuinness,* subsequent clarification by the courts in this jurisdiction and the joint position of the parties the court concludes that the present application, properly analysed, does not concern a criminal cause or matter and does not require to be determined by a Divisional Court.

Grounds of challenge

[24] The applicant seeks a declaration from this court quashing the impugned decision on the grounds that it is:

(a) Ultra vires insofar as the power to grant bail under Articles 38 and 48 of the Police and Criminal Evidence Order (Northern Ireland) does not permit the respondent to impose bail conditions on an individual who is not a detained person, and after expiry of a bail return;

(b) Unreasonable, irrational and unfair; and

(c) An unlawful and disproportionate interference with the applicant's rights under articles 5 and 8 of the European Convention on Human Rights ("ECHR").

The applicable statutory provisions

[25] The starting point is Article 38(2) of the Police and Criminal Evidence Order 1989 (PACE 1989) which permits the custody officer at each police station to release a person on bail where evidence to charge a person is unavailable. It provides:

> "(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."

[26] Article 48 of PACE 1989 provides that a person who is released on bail under the relevant part of the Order is under a duty "to attend at such police station at such time as the custody officer may appoint."

[27] Article 35(8) provides that a bailee upon returning to custody for the purposes of answering bail, reverts to a status as an arrested person, who is detained for the original offence. It states:

> "(8) For the purposes of this Part a person who—
> …
>
> (b) returns to a police station to answer to bail granted under this Part; or
>
> …
> is to be treated as arrested for an offence and that offence is the offence in connection with which he was granted bail under Article 32A or this Part."

[28] The power to grant bail after arrest is contained within Article 48 of PACE 1989. Article 48(1) provides:

> "48.—(1) The duty of a person who is released on bail under this Part to surrender to custody under Article 4 of the Criminal Justice (Northern Ireland) Order 2003 consists of a duty—

(a) to appear before a magistrates' court at such time and at such place as the custody officer may appoint; or

(b) to attend at such police station at such time as the custody officer may appoint."

[29] Article 48(1)(a) deals with what is referred to as post-charge bail where persons are under a duty to appear before a magistrates' court. Article 48(1)(b) deals with what is commonly referred to as pre-charge bail. An important feature of post-charge bail is that it cannot be fixed for a period which exceeds 28 days. This mandatory temporal limit previously applied to pre-charge bail. However, it was removed by Article 24 of the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007.

[30] Article 48(6)-(11) relates specifically to pre-charge bail:

"(6) Paragraphs (7) to (11) apply to a person who is released on bail … subject to a duty to attend at a police station in accordance with sub-paragraph (b) of paragraph (1).

(7) The custody officer may give notice in writing to such a person as is mentioned in paragraph (6) that his attendance at the police station is not required.

(8) Where it appears to the custody officer that such a person is, by reason of illness or other unavoidable cause, unable to appear at the police station at the time appointed, the custody officer may extend the time for such further period as may appear reasonable in the circumstances.

(9) Where a person is detained under Article 38(3), any time during which he was in police detention prior to being granted bail shall be included as part of any period which falls to be calculated under this Part.

(10) Nothing in this Article shall prevent the re-arrest without warrant of such a person as is mentioned in paragraph (6) if new evidence justifying a further arrest has come to light since his release.

(11) Where such a person is re-arrested, the provisions of this Part shall apply to him as they apply to a person arrested for the first time; but this paragraph does not apply to a person who is arrested under Article 47A or has

attended a police station in accordance with the grant of bail (and who accordingly is deemed by Article 35(8) to have been arrested for an offence)." [Emphasis added]

[31] Failure to attend pre-charge bail is a criminal offence under Article 5 of the Criminal Justice (Northern Ireland) Order 2003. It provides:

> "5.—(1) If a person who has been released on bail fails without reasonable cause to surrender to custody, he shall be guilty of an offence.
>
> (2) If a person who—
>
> (a) has been released on bail, and
>
> (b) has, with reasonable cause, failed to surrender to custody,
>
> fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable, he shall be guilty of an offence."

The parties' submissions

[32] The applicant challenges the decision of 1 December 2022 on two grounds.

[33] First, he argues that there exists no legal basis for pre-charge bail extensions. This is based on the premise that there is no express power in the legislation permitting the respondent to extend pre-charge bail. The only provisions in the applicant's submission, which come close to providing the power to extend pre-charge bail, on an indefinite basis are Articles 48(7) and 48(8). Relying on the decision in *Re Gerard McDonnell* [2006] NIQB at para [11] the applicant says that this does not provide the basis for re-extension of bail, but rather, it provides the mechanism by which a person – readmitted on pre-charge bail may be released from bail in its entirety. Article 48(8) by contrast does allow for pre-charge bail extension but only in narrowly defined circumstances such as where the bailee by reason of illness or unavoidable cause is unable to appear at the police station. In any case, the applicant contends that the power to extend bail is not retrospective. He says that since no action was taken in advance of his bail return date on 23 November 2022 to extend bail, the decision on 1 December 2022 was necessarily retrospective, and therefore, unlawful.

[34] The second ground relied upon by the applicant is that pre-charge bail expires after the return date where a bailee is not taken into custody and re-admitted to bail. He contends that pre-charge bail, under the statutory scheme, is not open-ended and that the return date is the "temporal limit of bail, rather than a condition of bail itself."

[35] The respondent contends that the fundamental issue is whether the applicant's bail expired after his failure to attend Banbridge Police Station on the return date of 23 November 2022. The respondent's position is that bail does not automatically expire following a failure to attend the police station on the return date. At all times, therefore, in the period between 24 November and 21 December 2022, the applicant was subject to bail, under a duty to surrender and should have attended Banbridge Station on 23 November, irrespective of the IO's absence. Had the applicant attended he could have made, the respondent submits, representations about the conditions of bail which the custody sergeant would have been obliged to consider under Article 38 of PACE.

[36] The respondent relies on the distinction between pre and post-charge bail; the latter is subject to a mandatory temporal limit of 28 days, which was removed in respect of the former by the 2007 Amendment Order (see para [29] above). This, coupled with the absence of any suggestion in the legislation that bail expires when a failure to attend occurs, confirms that pre-charge bail is open-ended. (Subject to proportionality as per the PSNI's Service Instructions in relation to bail – see discussion below.)

[37] As for the legal basis, the respondent pinpoints Article 48(1)(b) which gives wide discretion to the custody officer to appoint a return date for pre-charge bail. The respondent contends that the power under Article 48(7) was not exercised in the present case and therefore, the applicant remained under a duty to surrender to custody. The respondent also challenges the applicant's reliance on *Re Gerard McDonnell*, which was a judgment delivered before the 2007 Amendment Order, when pre-charge bail remained subject to the mandatory 28-day temporal limit. Similarly, the respondent contends that Article 48(8) does not dilute or remove the general power of the custody officer under Article 48(1)(b) to require attendance at such time as the custody officer may appoint.

[38] In the alternative, if the court were to find a breach, the respondent argues that any such breach was modest, rather than grave and of no material consequence (*Duffy and others* [2022] NICA 34, paras [63]-[64]). The court did not hear specific argument based on irrationality or alleged breaches of articles 5 and 8 ECHR. However, the court considers these arguments to be parasitic upon the judicial review challenge based on legality.

Consideration

[39] At the outset the court regrets that significant communication errors were made in respect of the applicant's pre-charge bail situation. Steps should have been taken to inform the applicant of the situation regarding the IO and steps should have been taken to extend the applicant's bail prior to 23 November 2022. Equally, we do not consider that the applicant was entitled to simply not turn up in the absence of specific indication that this was unnecessary. Overall, the court is concerned that a casual approach was adopted to the ongoing issue of bail for the applicant. However, the

court's consideration turns on the legal issues raised in the case. As is clear from the summary of the parties' positions two issues arise. The first is whether there is any legal basis at all for the extension of pre-charge bail in the circumstances of this case. Assuming a legal basis does exist, the second issue is whether bail automatically expires following the return date where a bailee is not readmitted to bail. If the applicant's bail automatically expired following his failure to attend his custody appointment on 23 November 2022, then a separate question arises as to the legality of the decision of 1 December 2022.

The legal basis for extension

[40] The court considers that Article 48(1)(b) as identified by Mr Skelt, provides the necessary legal basis for the extension of pre-charge bail. The court considers that the fact that Article 48(7) permits a custody officer to give notice in writing that attendance is not required provides strong support for the contention that bail return dates may be extended. We agree with the respondent's submission that the decision in *Re Gerard McDonnell* is of limited relevance to the present case and does not support the applicant's contention that Article 48(7) provides only a mechanism for release from bail in its entirety. Article 48(1)(b) provides in unequivocal terms for a duty to surrender at a police station at a date appointed by the custody officer. No restriction is placed on the discretion of the custody officer to choose a date or to adjust the bail return date. In this sense the court agrees with Mr Skelt that pre-charge police bail is, subject to proportionality requirements, open-ended. It is clear following the amendment of Article 48(2) by Article 24 of the PACE (Amendment) Order 2007 that there is no time limit on pre-charge bail. As put succinctly by Horner LJ in the leave judgment:

> "The argument that the bail return date is a temporal limit is not consistent with Article 48 in general and Article 48(7) that the custody officer may give notice that his attendance at the police station is not required." [para 23]

[41] There are legitimate reasons for such a practice which are highlighted in the affidavit of the IO, and the relevant PSNI's Service Instruction. According to the latter, S1029, section 12 at page 9:

> "For investigations where evidence is not readily available (see Appendix B) officers should bail the person for a realistic period of time to allow their enquiries to be completed. This period must not be excessive and should be based on the nature of enquires required, the length of time to complete them and any representations made by the person on bail or their legal representative. Investigating officer, Supervisors and Custody Officers shall endeavour, where possible, to avoid persons

returning to a police station solely for the purpose of fixing a new bail date.

Where they will not be dealt with on a date the person should be contacted and advised of this in advance, offered the opportunity to fix a new date, and provided with a record of the new date in accordance with section 10 and 11. New dates to reappear shall be agreed in advance with Custody Suites."

[42] We acknowledge that this may give rise to certain concerns as to the proportionate use of pre-charge bail. However, the PSNI is clearly alive to the responsibility to ensure the pre-charge bail is not excessive or used in a disproportionate manner. At p 8, the Service Instruction explains:

"**12. Proportionate use of bail before charge**

Bail involves restrictions on the person's family and private life therefore investigating officers must conduct their enquiries expeditiously. In cases where evidence is readily available (see Appendix B) this should be completed within the first period of bail which will be a maximum of 28 days…"

[43] Appendix B provides a list of situations in which evidence will typically not be readily available and includes "investigations requiring forensic examination or evidence." It further states:

"In an investigation where evidence is not readily available, the first period of bail should be an appropriate amount of time for the evidence to be made available. Care should be taken to avoid excessive or protracted periods of bail."

[44] There is, of course, an additional mechanism of protection against disproportionate interference with ECHR rights, as referenced by Horner LJ in his leave judgment. Thus, if there is a dispute about the conditions of bail, a person may apply to the magistrates' court to vary the bail conditions and can also apply to the High Court to vary bail conditions imposed by a magistrates' court (see para [22]). It is also the case that a bailee may make representation to the custody officer, which if made, must be considered when a person on bail attends the police station to answer their bail. As the respondent reminds the court, "if the applicant had attended Banbridge Police Station on 24 November 2023, he could have made representations to the custody officer regarding his bail conditions, who would have been obliged to consider them under Article 38(2) PACE 1989."

[45] In the court's view, no issue arises as to the proportionality of the applicant's bail. He was at the relevant time being investigated for the commission of a serious offence. Evidence relating to the applicant's potential charge remained outstanding. The extension of bail for those reasons is consistent with the statutory scheme.

When does pre-charge bail expire?

[46] Having clarified the legal basis, the court moves to the second issue; does pre-charge bail expire upon failure to surrender to custody? We preface this discussion by pointing out that there is no issue as to the applicant's criminal liability for breach of bail conditions. Although the respondent may argue that the applicant was technically in breach of his bail conditions between 24 November-1 December, no arrest was carried out, no charges were raised, and it is probable that a "reasonable cause" defence under Article 5 of the Criminal Justice (Northern Ireland) Order 2003 would have been available to the applicant.

[47] However, the court does not accept that the applicant's bail expired for the following reasons.

[48] If the applicant is correct that his pre-charge bail expired, then any person without reasonable cause who fails to attend a police station on the return date would no longer be subject to bail or any of the conditions, imposed as part of his bail conditions. Nothing in Article 48 may be found to that effect. Rather, there are only two ways envisaged in the legislation by which a person may be released from pre-charge bail; where a person is charged with an offence or when the investigation concludes and the person subject to bail is no longer a suspect.

[49] The court also agrees there is force in Mr Skelt's submission that the offences under Article 5 of the Criminal Justice (Northern Ireland) Order 2003 support the contention that bail continues where a bailee does not attend at the appointed time, even with a reasonable cause. Article 5(2) confirms that a bailee remains under a duty to surrender to custody as soon as possible after the appointed time as is reasonably practical.

[50] In the court's view it is too much of a leap for the applicant to have assumed that he was no longer subject to bail notwithstanding the lack of advance communication by the respondent prior to 23 November 2022. The applicant's solicitor, despite being told by the custody officer that Mr Higgins' presence was not required in the morning, clearly understood that it would be required once the IO arrived at Banbridge Police Station. No indication was given that the applicant was to be released from bail, or that he was no longer under a duty to surrender to custody. In fact, the evidence is to the contrary. For example, the applicant did not receive a Bail Cancellation Notice, which is normally provided when a suspect is released on report. Furthermore, no advance written notice under Article 48(7) was provided. This is a permissive provision and does not impose a statutory requirement to give advance written notice where bail is extended. We therefore accept the respondent's

submission that if a written notice is not received, the bailee remains under a duty to surrender to the police station. Indeed, the initial bail notice signed by the applicant on 19 May 2022 states this plainly:

> "I understand that I am granted bail and must appear personally at Banbridge Custody Police Station on 7th day of June in the year 2022 at one o'clock in the afternoon unless I receive notice in writing from the Police Service of Northern Ireland that my attendance is not required …" [emphasis added]

[51] Accordingly, the applicant was under a duty to surrender to Banbridge Police Station on 23 November 2022. The IO explains in his affidavit that following his return from sick leave he considered it more appropriate upon discovering the applicant had not attended to extend the return date instead of arresting the applicant for breach of bail. Had the IO been present at the relevant time the court is confident that bail would have been extended due to the outstanding medical evidence and lack of progression in the investigation. It follows that the real issue is not the extension of bail; that assessment is entirely lawful. Rather, the grievance arises from the lack of advance notice typically exercised in respect of bail extensions.

[52] The court understands the applicant's dissatisfaction with how his pre-charge bail was handled. Evidently, he should have been informed of the adjustment to his pre-charge bail return date in advance, as set out in the service Instruction:

> "Where they will not be dealt with on a date the person should be contacted and advised of this in advance, offered the opportunity to fix a new date, and provided with a record of the new date in accordance with section 10 and 11. New dates to reappear shall be agreed in advance with Custody Suites."
>
> Where bail is varied the person should be given a record of their bail request …" (B9) [emphasis added]

[53] However, the court concludes that the lawfulness of the decision to extend the applicant's pre-charge conditions is not affected by the lack of advance notice in the present case.

[54] For these reasons the application is dismissed.