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

DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY SINEAD CORRIGAN FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY JR310 FOR JUDICIAL REVIEW

Frank O'Donoghue KC with Michael Ward (instructed by Oliver Roche & Co Solicitors) for the Applicant Corrigan
Martin O'Rourke KC with Joseph McCann (instructed by Quigley MacManus) for the Applicant JR310
Tony McGleenan KC and Philip Henry (instructed by the Departmental Solicitor's Office) for NICTS
Mark Robinson KC and Ben Thompson (instructed by the Crown Solicitor's Office) for the PSNI

Before: Treacy LJ and Colton J

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

Introduction

[1] These are related applications for judicial review of decisions of the Police Service of Northern Ireland ("PSNI") and by a District Judge (Magistrates' Courts) ("DJ") arising from the treatment the two applicants received following alleged breaches of the Health Protection (Coronavirus Restrictions) (No.2) Regulations (NI) 2020 ("the 2020 regulations"). The first applicant's challenge was confined to the lawfulness of the decision by the DJ to impose conditions on the grant of bail. The PSNI were not named as a respondent in her case. The second applicant challenged her pre-charge detention by the police, the refusal of the police to grant her post

charge bail and the decision of the DJ imposing bail conditions. The facts and issues are different in each case and are summarised separately below.

Factual background - common

[2] On 21 January 2021 police received a complaint about a house party in breach of the 2020 regulations. They called at the address and, when no one answered the door, they forced entry. Three females and one male were found inside. Both applicants were among the people present.

[3] The applicants were arrested at the scene and taken to a police station, an hour's drive away. The arresting officer states that, while at the scene, he checked police records and found that the three females present "had multiple breaches of Covid Regulations." Because of this history he sought to arrest the women, and these arrests were authorised by police control. Following their arrest the two applicants were detained in police custody until the next available magistrates' court which took place on 22 January 2021.

Factual background – Sinead Corrigan

[4] On the morning of the hearing this applicant was produced to court via video link from the police station. According to her affidavit she had the following Covid-related history at the time of her appearance:

- 2/10/2020 – issued with four fixed penalty notices for breaches of the regulations;

- 3/10/2020 – arrested at a party which breached regulations. After arrest she was detained in police custody until her appearance in court the following Monday;

- 5/10/2020 – appeared in court where the police opposed bail. The DJ granted bail subject to a residence condition, a curfew between 11pm-7am and restrictions on her use of alcohol;

- 7/10/2020 – arrested for breach of bail and detained in police custody until 8/10/2020 when she was released;

- 12/10/2020 – arrested for a further breach of the regulations and brought before a magistrates' court. She was released on conditional bail, the conditions being similar to those noted above. Her solicitor contested the imposition of conditions on her bail and deputy DJ Mateer adjourned the case for two weeks and suggested that skeleton arguments be submitted on the issue of appropriateness of bail conditions in cases such as this;

- The solicitor applied to the High Court for removal of all conditions. McAlinden J dealt with the application. He did not reject it on the merits but said the deputyDJ should make a final determination before the High Court considered the matter;

- When the matter came back before the magistrates' court, DJ McGarrity heard it. He revoked all the conditions without comment on the legal issues raised by their initial imposition;

- 3/12/2020 – All the above charges were dealt with substantively by the magistrates' court which imposed a fine totalling £1,000;

- 6/01/2021 – The fine was reduced on appeal to £50.

[5] As noted above the issue of the appropriateness of imposing conditions on a grant of bail for breach of the 2020 regulations by this applicant had arisen before but had never been dealt with conclusively. The issue arose again on 22 January 2021 when police outlined her history of Covid breaches and objected to bail on the basis that she was likely to reoffend.

[6] The judge's handling of the case is described as follows in his reply to this applicant's pre-action protocol ('PAP') letter:

> "After hearing from the prosecution and the defence, DJ Ranaghan decided that it was appropriate to grant the applicant bail in her own recognisance of £500.00 and to impose the following bail conditions:
>
> 1. A curfew from 10pm and 8am, with a requirement to present herself at the door if required to do so by police;
>
> 2. To confirm with police who is in her 'social bubble';
>
> 3. She is not to be under the influence of alcohol or in possession of alcohol in a public place.
>
> Most, if not all, of the breaches involved alcohol. The restriction on alcohol and the curfew were specifically designed to reduce the risk of further similar offending, with the associated risk of infection. The requirement to state who was in her social bubble was to enable police to assess any future alleged breaches of the Coronavirus Regulations.

> The PSNI, through the PPS, invited the DJ to impose an electronic tagging condition, but he felt it would be disproportionate at this stage, having assessed the above conditions as the minimum intrusions that he felt would adequately address the risks.
>
> The proceedings were adjourned to 18 February 2021 to allow the defence representative to take instructions on the applicant's attitude to the charge."

His response also states:

> "DJ Ranaghan determined that the bail conditions imposed in this case were appropriate taking into account Article 133 [of the Magistrates Courts (NI) Order 1981], in particular the risk of further offending by contravening the Coronavirus Regulations and the resulting risk of infection flowing from same."

[7] During the hearing on 22 January 2021, the defence solicitor objected to the imposition of bail conditions on the basis that they were not permissible when the index offence did not carry any risk of imprisonment upon conviction. He argued that since deprivation of liberty was not a punishment available for this offence, it was wrong and disproportionate to limit her liberty by way of bail conditions pending trial for a non-imprisonable offence.

[8] The DJ held that he had a statutory power to impose bail conditions in such circumstances and invited the solicitor to apply for judicial review of his decision if he was dissatisfied with it.

[9] The solicitor applied to the High Court for removal of the bail conditions and was granted unconditional bail. Subsequently she was granted leave to apply for judicial review of the decision of the DJ to impose conditions on the grant of bail to her.

[10] The sole relief sought in this applicant's order 53 statement is a declaration that the imposition of bail conditions by the DJ was unlawful.

Factual background – JR310

[11] The brief background to the second applicant's arrest is set out at paragraphs [2]-[3] above. This applicant mounts a similar challenge to the lawfulness of the imposition of bail conditions by the DJ. Since this applicant also raises complaints about her detention by the PSNI, the details of that detention are set out below. These facts are taken from the PSNI custody record in relation to this applicant.

[12] The record shows that her arrest took place at 06:44 on 21 January 2021. She arrived at the police station at 07:44. At 08:00 her continued detention was authorised by the Custody Sergeant on the basis that it was "necessary for the purpose of charging when fit." The basis upon which she was considered unfit is not specified in the record.

[13] At 08:02 she was asked the standard medical questions. She stated she has a range of mental health and other conditions including ADHD, autism, borderline personality disorder, PTSD, depression, and insomnia. Asked if she had ever tried to harm herself, she replied "a whole pile of times." Asked if she was taking, or supposed to be taking, any medication she replied "Delmosart and Quitapine." She had one tablet of each of these prescription medications in her possession at the time of her arrest. These medicines were removed by police at 08:14. The reason recorded for their removal was "prevent damage/injury."

[14] She denied having consumed alcohol recently and is recorded as not being/appearing drunk. She denied having any drug or alcohol dependencies but is recorded as being "under the influence of drugs." It is not clear from the record if these were thought to be the drugs prescribed for her medical difficulties or other drugs. She was placed in a cell with the care plan "To be assessed by FMO and constant obs by CCTV with periodic visits."

[15] She was examined by the Forensic Medical Officer ('FMO'), Dr Burns. A record timed at 10:00 reports that medical advice was to ensure the Detained Person ("DP") "is never left alone at any stage. Do not give/pass any items to the DP without informing the custody officer. If assistance is required, please summon a member of staff."

[16] At 10:56 the observing officer described the applicant as "unresponsive and could not be woken." The officer informed the Custody Sergeant of this fact, and an ambulance was called for her. Meanwhile, the officer returned to the cell. The record states "I returned to the cell and provided oxygen. I ensured her airway was clear and provided oxygen, suddenly the DP attempted to pull the oxygen mask away." It is not clear from the record whether this 'unresponsive' and difficult to wake detainee was in fact awake and aware at the time the oxygen mask was applied to her face.

[17] The paramedics arrived at 11:00 and attended to her in the cell. A note at 11:39 records that all checks were normal, and the paramedics confirmed there was no need to take her to hospital.

[18] A note timed at 11:34 states "DP demanding medication from the doctor." When informed that no medication would be provided, she threw her meal and bedding around the cell and kicked it around the floor. A note at 11:49 says she was taken to a clean cell and "attempts were made to calm the DP, however, she insisted on wanting medication." She made constant threats to self-harm and was observed

tying clothing around her neck. When custody staff intervened, she struggled with them and "handcuffs and limb restraints were applied" (note timed at 11:56). A note timed at 12:06 states "DP has calmed down and restraints removed." A record timed at 13:45 notes further "violence towards staff" and a further application of handcuffs and limb restraints. It is not clear from the record when these were removed.

[19] A note entitled "Review" and timed at 13:44 reads:

> "Due to the DP's behaviour I am unable to carry out this review either in person or over the phone. Having been briefed … *I have reasonable grounds for believing that continued detention is necessary to obtain evidence by questioning.* Because the detained person is unfit. I am satisfied that this is proportionate, and that *the investigation* is being conducted diligently and expeditiously. As soon as practicably possible the detained person is to be reminded of their right to legal advice and the right to have someone informed of their detention and about the decision and reasons to authorise their continued detention." [our emphasis]

[20] A consultation with Paul Harvey from the NI Appropriate Adult Scheme ("NIAAS") took place around 15:00 and at 15:32 he confirmed that he was present when the DP was told she had a right to speak to her solicitor. In response, she named her solicitor and said she wanted him informed of her arrest. She also wanted 'A', who we assume is her mother, to be informed.

[21] There are then a series of entries recording "constant threats of self-harm" and constant demands for medication and to see the doctor. At one stage she claimed to have a hand injury and wanted the doctor to look at that. She displayed a range of destructive and offensive behaviours consistent with aggressive and violent intent, but also consistent with extreme and unmitigated anxiety/distress, particularly in someone with mental health vulnerabilities. These behaviours included defecating and vomiting in the cell, attempting to "headbutt" the wall, attempting to pull her own hair out, tying custody clothing around her neck and making repeated verbal claims that she intended to kill herself. The officer spoke to Dr Burns about the applicant's medication. She advised that she "would not be medicating the applicant at present" but said she would see her again to look at her hand. A further medical did take place at 17:42 but the advice re medication did not change.

[22] Meanwhile, at 16:03 the applicant was charged. There is no record of any interview, questioning or other investigation having occurred prior to the charge. The charge sheet recites that she, without reasonable excuse, contravened a requirement given in regulation 6 of the 2020 regulations, contrary to regulation 8(1) of those regulations. She was served with a Notice under Article 45 of the Magistrates' Courts (Northern Ireland) Order1981 ("the 1981 Order") waiving her

right to receive 24 hours' notice of entitlement to be tried by jury for "the Schedule 2 offence overleaf." This was despite the fact that the offence she was suspected of was summary only – there was never any possibility that it could be tried on indictment. She was refused post charge bail by the police. The custody record does not record a reason for the denial of police bail. It simply records the denial as follows:

> "denied bail and being detained to appear at Dungannon Magistrate's Court on 22/01/21 10.00."

[23] It is now accepted by the PSNI it did not have lawful grounds to detain the applicant post charge – we shall return to that fact later in this judgment.

[24] Around 17:00 she was allowed to telephone her mother. A note timed at 17:03 says "DP permitted to use telephone to speak to her mother, she started shouting at her and told her to go fuck herself. She then stated her mum was to look after her baby and after she gets out, she will be gone and will kill herself." From at least this point onwards, therefore, the police are aware that there is a child somewhere in this mix who may or may not be receiving adequate care while its mother is being detained in police custody for an alleged Covid breach. There is no record of any police enquiry into the welfare arrangements for that child.

[25] At 17:42 she was examined by the FMO, but the medical advice did not change. After the meeting with the doctor she was observed attempting to strangle herself. A note timed at 18:06 records "she had these constant outbursts, was making verbal threats to self-harm and was seen trying to headbutt the wall and pull out her hair."

[26] There is a change in the police shift and new personnel come on duty. At 19:44 the following record is logged:

> "DP … had been observed tying clothing around her neck by CDO Dobson, he has taken immediate action and removed it. DP was unconscious. Sgt Rafferty Con Carwell CDO Rainey responded to first aid given immediately" …

[27] The police officers gave the applicant oxygen, a defibrillator was deployed but no shock given, CPR was commenced, and an ambulance was called. The record concludes "DP has come round, however, appears unwell. NIAS in attendance and DP is going to hospital."

[28] At 22:24 the following note appears under the heading "Review" – "DPs detention remains necessary to ensure court attendance." This note seems to have been logged while the applicant was being treated in hospital.

[29] The applicant was returned from hospital to custody in the police station arriving there at 00:39. She was given a meal and is then observed to sleep for the rest of the night. A "review" note recorded at 07:47 on 22 January 2021 reads "Circumstances are unchanged and further detention authorised to bring the DP before court." The applicant continued to sleep until wakened to attend the FMO at 09:50. The FMO certified her as fit to appear in court and the medical advice re medication did not change. She was returned to her cell at 10:00, given breakfast and was then observed to sleep for the morning.

[30] At 12:13 she was taken to an interview room to appear in court via video link. Following the decision of the court, a final medical check was completed which records that there is no alcohol or other substance abuse in this case, that the applicant is not homeless and that no risks are identified in her case except the risk of self-harm.

[31] Her property was returned to her, and she was released from police detention at 14:37, some 30 hours after she was first presented to the custody officer for assessment.

Scope of the issues to be determined

[32] In these proceedings JR310 challenges the lawfulness of her arrest and detention by the police. She seeks declarations that the decision to arrest her was unlawful and that decisions to refuse police bail and to continue detaining her at various times were also unlawful. She seeks orders of certiorari quashing all the impugned decisions and an award of damages for her alleged wrongful arrest and unlawful detention by the PSNI. The scope of her claim has now altered as the PSNI now accepts that, as the offence for which she was arrested was not an imprisonable offence, it was unlawful for her to be detained for the reason relied upon. The PSNI further agreed that she is entitled to a declaration to that effect and that her claim for damages against the PSNI pursuant to paragraph 4.1(v) of the Order 53 statement is settled on 'terms endorsed' (which means that the PSNI is not disclosing the details of the settlement either to this court or to the public). To the extent that there remain challenges to her pre-charge detention we consider, for reasons which we set out later in this judgment, that these are matters which will require evidence and that this is not the proper forum for that aspect of the challenge.

[33] JR310 also challenged the imposition of bail conditions by the DJ principally on the basis that as, she was unlawfully detained when she appeared before the district, no bail conditions could or should be imposed on her by that court.

[34] The only respondent in the case of Ms Corrigan was the district judge. There was no judicial review challenge by her regarding her police detention. Since it appeared that Ms Corrigan may also have been unlawfully refused post charge bail, we caused further enquiries to be made of the police so that the issue arising therefrom could be addressed in both cases. The court is grateful for the prompt

assistance from Ms Maura McKenna of the Crown Solicitor's Office who has now confirmed that the PSNI accepts that it was unlawful for Ms Corrigan to have been detained for the reason relied upon. The response to the query is as follows:

> "Ms Corrigan was charged at 16.21 hours on 21st January 2021 with the non-imprisonable offence that she, without reasonable excuse contravened a requirement given in regulation 6 of the [2011 regulations] contrary to regulation 8 of the [2011 regulations]. Pursuant to art 39(1) of the Criminal Evidence (NI) Order 1989 the custody officer was required to order her post-charge release from police detention, either on bail or without bail, unless the conditions in subparagraph (a) or (b) were satisfied. Whilst [the PSNI] was not a respondent in Ms Corrigan's proceedings the PSNI accepts that the reason the custody officer refused to release [her] was because, like JR310, they considered that they had reasonable grounds for believing that her detention was necessary to prevent her from committing an offence. Pursuant to art 39(1)(a)(ia), this reason applies only in the case of a person arrested for an imprisonable offence. As the offence for which the applicant had been arrested was not an imprisonable offence, PSNI accepts that it was unlawful for her to be detained for the reason relied upon."

[35] Accordingly, in the case of both these applicants, it follows that as the offence for which each applicant was arrested was not an imprisonable offence, it was unlawful for them to be detained by the PSNI for the reason given and therefore when they appeared before the DJ neither was lawfully detained. Both appeared in court via video link from the police station and remained in the custody of the police. The DJ released them on bail subject to conditions. In the case of JR310 she was not immediately released but remained in detention until seen by a doctor before being released. We do not know whether the same procedure was followed in the case of Ms Corrigan.

Preliminary Matters

(i) ***Criminal cause or matter?***

[36] The first question we must consider is whether these applications are a 'criminal cause or matter' because the answer to that question governs the constitution of the court that should hear the applications and it affects the applicants' rights of appeal.

[37] In *Re Murphy's Application* [2023] NIKB 58 the court considered the nature of bail applications and noted that they fall into two categories: substantive bail

applications and compassionate bail applications. *Murphy* involved a compassionate bail application which, on analysis, the court found was not intrinsically linked to the commencement or continuation of the underlying criminal proceedings in that case. *Murphy's application* could not therefore be properly classified as pertaining to a 'criminal cause or matter.'

[38] These two applications arise out of decisions intimately related to the instigation, commencement and processing of two criminal trials. They relate to the first grant/refusal of bail by the police and by the magistrates' court. They are not related to variation of existing, established remand conditions. The decisions challenged here were made in the time between arrest and the end of their first appearance in a court of law. The complaints raised cover the process used to secure their attendance at that first court hearing and the conduct of the hearing itself. So, the decisions under review here relate to how these proceedings were instigated in the first place, and how it was intended they would be *processed* going forward.

[39] The decisions on these 'how' question have potentially very significant implications for the lives of the affected accused. In the language of *Murphy*, this is the time when the meaning of 'criminal jeopardy' crystallises for the accused citizens. These decisions govern what the 'waiting time' until their trial dates would feel like, where it would take place, and how much disruption to their normal lives it would entail. All these questions are intrinsic to the processing of the criminal charges they faced and to the lived meaning of 'criminal jeopardy' for each individual accused.

[40] Bail applications and matters arising from them do not often qualify to go on appeal to the Supreme Court, though some such cases can. In *McGuinness' Application* [2020] UKSC 6 Lord Sales delivered an authoritative review of the meaning of 'criminal cause or matter' for the purposes of accessing appeal rights to the Supreme Court under section 41(1)(a) of the Judicature Act (NI) 1978. By way of context, he noted that:

> "Parliament's concern that the time of the … highest court within the legal system, should not be taken up with routine appeals in criminal matters (however meritorious such appeals might be …), 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 restricted than in a civil matter." [Para 47]

[41] Lord Sales' guidance for identifying the cases which can qualify is as follows:

> "to qualify as a 'criminal cause or matter' a person had to be placed in jeopardy of criminal trial and punishment as

> the **direct outcome** of that proceeding such that it was possible to identify 'the defendant' and 'the prosecutor' in respect of it …" [Para 47; our emphasis]

[42] He described the primary criterion a case must fulfil as follows:

> "First, the decision has to relate to the question of prosecution of a specific person in relation to a particular criminal offence …" [Para 73]

The two instant applications clearly fulfil these preliminary criteria.

[43] The category 'criminal cause or matter' is not limited to criminal trials alone. Lord Sales notes that earlier legislation treated public law actions, for example those for mandamus or certiorari, actions for contempt of court, and *habeas corpus* cases as falling within the category 'criminal cause or matter.' He comments that this:

> "reinforces the inference that Parliament intended the phrase 'criminal cause or matter' to refer to **proceedings in which an individual, 'the defendant' is directly in jeopardy pursuant to a process potentially leading to his punishment under the criminal law …" [Para 49]** [Emphasis added.]

These "proceedings" can include what we might call secondary or satellite litigation, provided that its focus is strictly directed to issues about the criminal process that gives rise to the secondary litigation.

[44] He concludes that when construing the intention of Parliament in using the phrase 'criminal cause or matter' in modern statutes:

> "it is to be inferred that … the phrase defines a reasonably tightly drawn category of case **focused directly on the process for bringing and determining criminal charges."** [Para 69] [Emphasis added]

[45] We consider that the present applications satisfy all Lord Sales' criteria. They do arise in 'a criminal cause or matter' because they relate so directly to the process that was used to commence and progress the criminal trials of these two applicants and to their treatment pending the outcome of those trials. For this reason we consider that the *predominant character* of both applications is 'criminal', therefore we are constituted as a Divisional Court for the purpose of hearing the applications.

(ii) Is Judicial Review the right procedure for these applications?

Corrigan's application

[46] In Corrigan's case the Order 53 statement raises one challenge to the decision of the DJ to impose conditions on the grant of bail made to her. She seeks a declaration that the imposition of the conditions was unlawful and disproportionate. The grounds relied on are illegality - because the imposition of conditions breached her rights under articles 5 and 8 of the ECHR, and lack of proportionality - because the legislature had limited the potential sanctions that were available for breaches of the 2020 regulations and had specifically prohibited imprisonment as a penalty. She says it was wrong in principle for the court to extend the punitive effects of the regulations beyond the range of punishments clearly delineated by the legislature and she seeks a declaration to that effect.

[47] This application falls squarely within the traditional range of judicial review challenges which seek guidance from the High Court on questions concerning the lawfulness of the treatment citizens have received at the hands of public bodies such as courts. The availability and value of such guidance in this specific case was recognised by the DJ directly and by the leave Judge. We agree that Corrigan's application is entirely appropriate for the judicial review route.

JR310's application

[48] As previously noted the PSNI has conceded in the case of both applicants that as the offence for which they were arrested and detained is not imprisonable under Article 39 of Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") the PSNI did not have lawful grounds to detain them post charge for the reason given by it. To the extent that JR310 still challenges aspects of her pre-charge detention we do not consider, having regard to *Re Alexander* [discussed below], that this is the appropriate forum. An examination of those remaining issues and of her treatment in custody will require detailed consideration of all relevant evidence including, we imagine, expert evidence. There may be many lessons to be learned.

[49] As to the appropriate forum for the complaints regarding her pre-charge detention and whether judicial review is the appropriate procedure, we consider that the decision of Kerr LCJ in *Re Alexander & Ors* [2009] NIQB 20 is illuminating. The applicants in that case alleged that their arrests by police officers were unlawful, either because the arresting officers had not considered whether the arrests were necessary under article 26(4) of the 1989 order as amended by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order [2007] ('the 2007 Order'), or because the officers had concluded the arrests were necessary on insufficient grounds.

[50] In *Alexander* the PSNI argued that, even if the arrests were unlawful, the applicants could and should pursue any remedy via normal civil claims for wrongful arrest and unlawful imprisonment rather than via the judicial review court.

[51] Considering these arguments Kerr LCJ said:

> "An examination of what motivated a police officer to decide that an arrest was necessary is self-evidently better conducted in proceedings where the opportunity arises for the constable to give oral evidence."

[52] In *Alexander* the applicants also challenged the validity of the custody officer's decisions to authorise their continued detention. Kerr LCJ commented:

> "Again, it is much more appropriate to examine the reasons that the custody sergeant so concluded in proceedings where oral testimony is given."

In the present case no evidence was presented about the motivations of the police officers whose decisions were under review. This is a clear example of why claims of this kind should *not* be commenced in the judicial review court.

[53] In the present case no oral evidence was presented concerning the various officers' motivations for the acts and omissions which are challenged. It is not part of the oversight role of the judicial review court to hear such evidence or to determine basic factual disputes. Also, the challenges presented in this application and the documentary evidence given in support of them, raise serious concerns about the treatment of vulnerable detainees in police custody. It is in the public interest that such concerns be dealt with by a court whose principal function is to hear and evaluate oral evidence, including expert evidence if needed. It is not in the interests of any of the parties to have such matters determined in the judicial review forum.

[54] As the settlement in JR310's application relates only to post-charge PSNI detention we are prepared to grant leave for an application to be made for remittal of the unexamined pre-charge claims under Order 53(9). The parties are to agree whether such leave is sought and, if so, whether these undetermined claims are to be remitted to the county court or the High Court.

Draft consent order in JR310

[55] Underpinning the draft consent order are the terms of the relevant provision in PACE which we set out below.

[56] Article 39(1) of PACE relevantly provides:

> "**Duties of custody officer after charge**

39.—(1) Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall order his release from police detention, either on bail or without bail, unless—

(a) if the person arrested is not an arrested juvenile—

(i) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;

(ia) in the case of a person arrested for *an imprisonable offence,* the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;

(ii) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary . … to prevent him from causing physical injury to any other person or from causing loss of or damage to property; …

(iii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail or that his detention is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence; or

(iv) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection;

(b) if he is an arrested juvenile—

(i) any of the requirements of sub-paragraph (a) is satisfied; or

(ii) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests.

(1A) In paragraph (1) "imprisonable offence" means an offence for which a person over the age of 21 years is liable, on first conviction, to a term of imprisonment."

[57] The proposed consent order is in the following terms:

"IT IS HEREBY ORDERED between the applicant and the first named respondent, the Chief Constable of the PSNI, as evidenced by the signatures of their respective counsel:

1. Pursuant to the Order 53 Statement para 4.1(iii): A declaration that the applicant was being unlawfully detained by the First named respondent, the PSNI, at or about the time she was brought before Dungannon Magistrates' Court on 22 January 2021.

2. The grounds for the declaration:

(a) The applicant was charged at 16.03 on 21 January 2021 with the non-imprisonable offence that she, without reasonable excuse contravened a requirement given in Regulation 6 of the Health Protection (Coronavirus, Restrictions) (No.2) Regulations (Northern Ireland) 2020, contrary to Regulation 8(1) of the Health Protection (Coronavirus, Restrictions) (No.2) Regulations (Northern Ireland) 2020. Pursuant to Article 39(1) of the Criminal Evidence (Northern Ireland) Order 1989 the custody officer was required to order her post charge release from police detention, either on bail or without bail, unless the conditions in either subparagraph (a) or (b) were satisfied. The First Respondent accepts that the reason the custody officer refused to release the Applicant was because they considered that they had reasonable grounds for believing that her detention was necessary to prevent her from committing an offence. Pursuant to Article 39(i)(a)(ia), this reason applies only in the case of a person arrested for an imprisonable offence. As the offence for which the applicant had been arrested was not an imprisonable offence, the

First Respondent accepts that it was unlawful for her to be detained for the reason relied upon.

3. Pursuant to the Order 53 Statement para 4.1(v): The applicant's claim for damages against the first named respondent is settled on terms endorsed on counsel's briefs.

4. Pursuant to the Order 53 Statement 4.1(v): The first named respondent shall pay the applicant's High Court costs to include two counsel and to be taxed in default of agreement. This is up to the date of the appearance before the Divisional Court when the first respondent made a concession to the court in relation to the unlawful detention, 1 March 2022.

5. There is no order as to costs, between the applicant and the second respondent, District Judge Ranaghan on the issue of the unlawful detention by the first respondent."

[58] The court is satisfied that it is appropriate to make a declaration in the following, slightly amended, terms:

> "The Court Declares that as the offence for which JR310 was arrested was not imprisonable, under Article 39 of the Police and Criminal Evidence (NI) Order 1989, the police did not have lawful grounds to detain the applicant post charge, and accordingly she was unlawfully detained when she presented by video-link to Dungannon Magistrates' Court on 22 January."

The decisions of the district judge

[59] The applicants were separately presented by video-link to the magistrates' court via video link from the police station where they had been charged and unlawfully detained post charge for breach of the 2020regulations.

Context

[60] The power to make coronavirus regulations was contained in the Public Health Act (NI) 1967 ("the 1967 Act"), Part 1A. This Part was temporarily inserted into the Act in March 2020 by section 87(1) of the Coronavirus Act 2020. It gave wide-ranging powers to impose restrictions and to create regulations for the purpose of protecting public health during the pandemic. Section 25(C) of Part 1A provided:

"**25C Health protection regulations: domestic**

The Department of Health may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Northern Ireland …"

[61] Section 25F(b) gave power to create offences:

'Health protection regulations may-

…

(b) create offences;"

However, the nature of the offences was limited by 25F(5) and (6) which state:

"(5) Health protection regulations may not create an offence triable on indictment or punishable with imprisonment.

(6) Health protection regulations –

(a) may not create an offence punishable with a fine exceeding £10,000 …"

[62] In exercise of these powers the relevant department in Northern Ireland published the regulations under which the two applicants were charged. These regulations imposed various requirements and restrictions, including restrictions on gatherings in domestic dwellings. Specifically, the 2020 regulations provide:

"***Offences and penalties***

6.(1)– In the period ending at 12.01a.m on 2 January 2021, a person shall not, between the hours of 8.00p.m and 6.00a.m, operate or participate in an outdoor or indoor gathering at a private dwelling which consists of persons from more than one household, except in the event of emergency or for the purpose of the provision of health or care services.

8.—(1) A person who without reasonable excuse contravenes a requirement in regulation 4, 5 or 6 commits an offence.

…

(4) An offence under this regulation is punishable on summary conviction by a fine not exceeding level 5 on the standard scale.'

In Northern Ireland therefore, the maximum penalty that could be imposed for a breach of the regulations was a fine not exceeding £5,000.

Powers of the Magistrates' Courts

[63] The power of the magistrates' court to remand someone on bail is contained in Article 47 of the 1981 Order which, so far as relevant, provides:

> **"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;
>
> …"

[64] Article 132 allows a DJ to release a person arrested for any offence without bail if satisfied that the offence is 'not of a serious nature.' It provides:

> "**Powers of resident magistrate or other justice in relation to persons not released on bail**
>
> 132. Without prejudice to any other provision of this Order, any resident magistrate or other justice of the peace before whom a person arrested for any offence is brought, where he is satisfied that the offence is not of a serious nature, may, without prejudice to further proceedings being brought against such person by way of summons or otherwise, release such person from custody without requiring him to enter into any recognizance."

[65] Article 133 contains the power to impose bail conditions. It states:

"**Conditions on admission to bail**

133. Without prejudice to any other power to impose conditions on admission to bail, a magistrates' court may impose such conditions on admitting a person to bail as appear to the court to be likely to result in that person's appearance at the time and place required or to be necessary in the interests of justice or for the prevention of crime."

The effect of imposing bail conditions

[66] Article 6 of the Criminal Justice (NI) Order 2003 ("the 2003 Order") provides police officers with a power to arrest anyone released on bail if they have reasonable grounds for believing that the person has broken their bail conditions or is likely to break them. Article 6 provides, so far as relevant:

"**Arrest for absconding or breaking conditions of bail**

6.—(1) If a person who has been released on bail and is under a duty to surrender into the custody of a court fails to surrender to custody at the time appointed for him to do so, the court may issue a warrant for his arrest.
…

(3) A constable may arrest without warrant any person who has been released on bail and is under a duty to surrender into the custody of a court]

(a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;

(b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions;

….
(4) A person who is arrested under paragraph (3) shall be brought before a magistrates' court as soon as practicable after the arrest and in any event not later than the next day following the day on which he is arrested.
…
(6) Where a person is brought before a magistrates' court under paragraph (4) the court—

(a) if of the opinion that he—

(i) is not likely to surrender to custody, or

(ii) has broken or is likely to break any condition of his bail,

may remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions; or

(b) if not of that opinion, shall grant him bail subject to the same conditions (if any) as were originally imposed.

…"

The parties' arguments

JR310

[67] This applicant's arguments proceed on the basis, now agreed, that her detention post charge by the PSNI was unlawful. Therefore, when she was produced to the court, she submits that the court had no jurisdiction to impose any bail conditions or recognisance upon her as an unlawfully detained person.

[68] Other arguments which overlap with Corrigan include:

- Article 132 of the 1981 Order effectively required the unconditional release of the applicant on bail because the index offence cannot be regarded as 'serious.' It is submitted than an offence which is punishable by fine only could never be regarded as sufficiently serious to merit the detention of a suspect in custody pending trial. …

- Article 133 only applies if the offence is sufficiently serious that Article 132 does not result in the unconditional release of the suspect.

- The imposition of bail conditions was disproportionate because it constitutes detention subject to release on conditions and could lead to imprisonment 'by the back door' if she breaches the conditions which may be proven on a balance of probabilities.

- She points to the policy implications of using bail conditions contending bail conditions in circumstances such as these could create a perverse incentive for defendants to wrongly plead guilty, in the knowledge that a modest fine would be preferable to restrictions on their liberty or incarceration. This, it is

argued, would be anathema to the purpose of the criminal justice system: to convict the guilty and acquit the innocent.

- Finally, she asserts that the failure to grant her unconditional bail violated her rights under article 5 ECHR as the imposition of release on bail subject to conditions constitutes an unlawful interference with her liberty.

Sinead Corrigan

[69] Her arguments may be summarised as follows:

- Section 25F(5) of the 1967 Act (as amended) prohibits the creation of "an offence triable on indictment or punishable by imprisonment";

- Those provisions should be the overarching consideration in respect of an individual brought before a court under the 2020 regulations. The court should not impose conditions that might lead to imprisonment by default ie through revocation on breach of bail. Nor should it impose conditions that extend the punitive effects of the regulations beyond the range of punishment clearly delineated by the legislature.

- The applicant relies on the statement of principle made by Stanley Burnton LJ in *Stellato v Ministry of Defence* [2010] EWCA Civ 1435 as follows:

> "In principle a grant of bail is not an order for the detention of the person to whom it is granted. To the contrary it is a grant of liberty to someone who would otherwise be detained … If the person granted bail does not comply with the conditions of his bail, he is liable to be returned to custody. If so, the legal authority for his detention is not the grant of bail, or his breach of the conditions of his bail, but the authority of his detention apart from the order for bail. All that the breach of the conditions of his bail does is disentitle him to bail."

- The *Stellato* point is stressed in the applicant's skeleton argument in the following terms:

> 'The foundation of both the grant of bail and the imposition of bail conditions is that but for the grant of bail, the accused would otherwise be subject to detention. In the context of the present case, the offences which brought the applicant before the magistrates' court are punishable by way of fine only and are not, therefore, offences which rendered the applicant "otherwise subject to detention."

That being the case, the applicant could never have been refused bail when she was brought before the court.

- It is submitted that for precisely the same reason, the DJ was wrong in law to impose conditional bail upon the applicant and to expose her to the potential of detention for offences for which she could not otherwise have been sentenced to imprisonment.

- The applicant's article 5 rights are engaged and that the failure to grant unconditional bail constitutes a breach of those rights.

Arguments of the District Judge

[70] The DJ notes that once in police detention, following arrest, the individual, if charged, must be released on police bail or brought before a magistrates' court at the next available court. Article 132 provides that where a DJ is "satisfied that the offence is not of a serious nature" he may release the detainee from police custody "without requiring him to enter into any recognisance." The DJ says that if a DJ does not believe it is appropriate in the particular circumstances of a case to release someone unconditionally, Article 47 of the 1981 Order permits him to remand the defendant into custody or release him on bail. He stresses the 'unrestricted' nature of Article 47 noting that it permits a DJ to remand someone in custody or on bail when adjourning 'any proceedings for an offence.'

[71] The power to impose bail conditions derives from Article 133 of the 1981 Order. This provision the DJ asserts contains no qualification that it applies *only* to imprisonable offences. The DJ determined that the bail conditions imposed in this case were appropriate taking into account Article 133 in particular the risk of further offending by contravening the 2020 regulations and the resulting risk of infection flowing from same.

[72] As to the contention from the applicants' of "custody by the back door" he notes that while breach of bail is not a standalone offence Article 6 of the 2003 Order provides police with the statutory authority to arrest and detain. He acknowledges that once a person is arrested for breach of bail, they must be brought back before a DJ who can then decide to remand them in custody or to release them on the same or different bail conditions under the authority of Articles 47 and 133 of the 1981 Order.

[73] In relation to the applicant's article 5 arguments he asserts that it has not been explained how article 5 rights have been breached. Article 5(1), so far as relevant, reads:

"**Right to liberty and security**

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> …
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, …;
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. …"

[74] The DJ notes that article 5(1) provides for specific scenarios for the lawful deprivation of liberty. He argues that the applicant was on bail, not in custody, that she is subject to a curfew and "insofar as there is any deprivation of liberty", the justification for same falls within the scenarios provided for in article 5(1).

[75] He notes that the applicant has had the benefit of legal safeguards against arbitrary deprivation of liberty as required by article 5. She was promptly brought before a court after being charged and was granted bail. She also has the option of challenging the DJ's decision in the High Court or return to the magistrates' court with an application to vary bail if there is a material change in circumstances.

[76] The DJ submitted an affidavit in response to the second applicant's claims. He states:

> "7. Miss Corrigan's case was dealt with earlier in the day than JR310's case. Miss Corrigan's solicitor made submissions that bail could not be imposed because the offence charged could not result in a sentence of imprisonment if she was convicted. I believed the provisions in the Magistrates' Courts (NI) Order 1981, as amended, provided me with statutory authority to grant bail and impose bail conditions in her case. While I would take the seriousness of the offence charged and potential outcome on conviction into consideration, among other factors, there is no restriction on the statutory authority limiting the grant of bail only to cases involving imprisonable offences.
>
> 8. No such issues were raised by JR310's legal representatives. However, as they were raised by Miss Corrigan's solicitor, I alerted JR310's solicitor to the issue. He was content that I deal with her case by adjourning and granting bail."

[77] He avers that the police objected to bail because of "the repetitive nature of the breaches of the Regulations by JR310" and states:

> "13. I considered the seriousness of the offence, which I was aware did not carry any risk of custody in the event of conviction. I was aware that it was open to me to release JR310 unconditionally pursuant to Article 132 of the Magistrates Courts (NI) Order 1981 but I did not believe that was appropriate in the circumstances. Article 47 permits me to remand in custody or grant bail. I did not consider it was appropriate to remand JR310 in custody. In the circumstances of her case I felt it was appropriate to grant bail and impose conditions for the purpose of reducing the risk of re-offending."

[78] The DJ contends that even if the applicant was unlawfully detained post charge that this did not deprive him of jurisdiction. He maintained that there was a valid criminal complaint before him meaning that there was a forward-looking criminal case that he was "required by statute" to deal with (in the absence of a plea and disposal on the first appearance). He complains that the applicant is conflating past and future, forward looking events.

Discussion

[79] As earlier set out the factual and legal matrix of this case has changed to the extent that it is now accepted by the PSNI in the case of both applicants that it was

unlawful for each of them to have been detained for the reason relied upon by the police. The PSNI and their advisors are to be commended for the assistance they provided to the court and for the helpful manner in which they have approached resolution of the issues raised. These applications raise two separate questions. We propose to consider first the question of whether the DJ was lawfully empowered to impose bail conditions upon the applicants when they were both unlawfully detained ("the first question") We then propose to consider the question of whether a DJ is empowered to impose bail conditions for an offence that is not punishable by imprisonment ("the second question").

The first question

Was the district judge empowered to impose bail conditions upon the applicants when they were both unlawfully detained?

[80] The nature of bail has been described as "a grant of liberty to someone who would otherwise be detained" – see *Stellato v MOJ* [2010] QB 856 at 23. If not granted bail what would be the authority for their detention in custody? Is there any legal reason why they would 'otherwise be detained' in custody? In the case of those who are lawfully detained this is determined by the outcome of the exercise mandated by Article 133 of the 1981 Order which addresses the separate and distinct issue of bail.

[81] In the case of those who are not lawfully detained the approach is different. Article 5 of the ECHR provides that no one shall be deprived of their liberty save in the cases enumerated in article 5(1)(a)-((f). Article 5(3) provides for prompt judicial review before a court that has the power to review the lawfulness of the detention. The purpose of this requirement is to prevent a person being detained arbitrarily and otherwise than in accordance with the due process of law. It is the function of that court to determine the legality of the arrest and continued detention pending further investigation and trial. Thus, it is for the magistrates' court to determine whether there is sufficient reason to do so – see *Re McKay's Application* [2002] NI 307, at page 313 letter (e) to 314 letter (a):

> "The applicant was brought before the magistrates' court promptly. His appearance was automatic and did not depend on any initiative from the applicant. Moreover, the resident magistrate was empowered to review the lawfulness of the applicant's detention. The Divisional Court so held in *Re Valente's Application* [1988] NI 341. Delivering the judgment of the court Carswell LCJ said (at 345):
>
> > 'The purpose of requiring an arrested person to be brought before a court within a specified time is to prevent him from being detained

> arbitrarily and otherwise in accordance with the due process of law. It is to determine the legality of his arrest and his continued detention pending further investigation and trial. It is for the court that is asked to remand him to determine whether there is sufficient reason to do so.'"

Referring to the case of *TW v Malta* (2000) 29 EHRR 185 Kerr LCJ noted that:

> "It was held that art 5(3) provided a person arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty. It required the judicial officer before whom the arrested person appeared to review the detention by reference to legal criteria and to order release if there were no legally justified reasons to detain him. Such judicial control had to be both prompt and automatic."

As the ECtHR noted in TW at para 43:

> "The purpose of the safeguard under art 5(3) is to protect the individual from arbitrary detention by ensuring that the act of deprivation is subject to independent judicial scrutiny."

Referring to the magistrate, Kerr LCJ said at p315 letter b:

> "He must be satisfied that the arrest and continued detention are lawful."

[82] The right to be brought promptly before a judge competent to examine the legality of the arrest and detention has to be distinguished from the question of bail which is a distinct and separate issue "… which only comes into play when the arrest and detention are lawful" [see *McKay* at page 315 letters c-d citing].

[83] Neither applicant made the case before the DJ of being unlawfully detained at the time of their appearance before the court via videolink whilst detained in the police station. As the authorities discussed above make plain the purpose of requiring an arrested person to be brought before a court within a specified time is to prevent him from being detained arbitrarily and otherwise in accordance with the due process of law. It required the judicial officer before whom they appeared to review the detention and to order release if there were no legally justified reasons to detain. No enquiries were made by the DJ as to the legal basis upon which these two women were being detained. This was not a complicated inquiry to make. In

fact in each case the PSNI concede that they did not have the power to detain either of them post charge. The judicial control required has to be prompt and automatic and if there were no legally justified reasons to detain release must be ordered. There were, as a matter of law, no legally justified reasons for detaining either of them and, accordingly, their release ought to have been ordered and they should have been discharged.

[84] It is plain from the jurisprudence that the issue of bail only comes into play when the detention is lawful. Either the detention is lawful, or it is not. As both applicants were unlawfully detained they are not persons "… who would otherwise be detained" (per *Stellato v MOJ*). This is because there was then no lawful basis for any detention. They were improperly and unlawfully before the court and the court was not empowered to extend their otherwise unlawful detention. They remained in detention in the police station throughout the proceedings via video link. Indeed, in the case of JR310 she remained in police custody *after* the courtimposed bail conditions as the PSNI did not release her until the completion of an FMO medical examination. Imposing bail conditions on a person unlawfully detained only compounds the illegality. Both remained in unlawful detention at least until the point they were released on bail. As it transpired, JR310 was not even released at that stage. Right up until the point of her eventual release she remained in continuous unlawful detention. It is unfortunate that the DJ did not examine the legality of arrest and detention. Had he done so he should have discovered that both these women were unlawfully detained. In these circumstances we consider that the judge was not lawfully empowered in either of their cases to impose any bail conditions and they should have been discharged from custody without bail conditions having been imposed.

[85] It follows that we reject the submission that the DJ advanced that even if unlawfully detained post charge that this did not deprive him of jurisdiction. This submission was advanced on the basis there was what he described as a valid complaint that he was "required by statute" to deal with. We consider this a surprising submission in light of the clear and constant Strasbourg and domestic jurisprudence as to the duties of the judicial officer in respect of arrested persons appearing before the court. In short, they are required to review the detention by reference to legal criteria (this was not done) and to order release if there were no legally justified reasons for the detention. There were no legally justified reasons for their detention. Their release should have been ordered. The imposition of bail conditions on those who were entitled to immediate release only compounds matters.

[86] The answer to the first question is that the DJ was not lawfully empowered in the case of either applicant to impose the impugned conditions as they were both unlawfully detained when they appeared before the court via video link from the police station.

The second question

Was the district judge empowered to impose bail conditions for the offence which was not punishable by imprisonment?

[87] Article 47(1) provides that:

> "… in adjourning any proceedings for an offence a magistrates' court may remand the accused (a) in custody … or, (b) on bail, that is to say, take from him a recognizance conditioned for his subsequent appearance before [the] court."

Article 133 of the 1981 Order provides that a magistrates' court:

> "… may impose such [bail] conditions … as appear to the court to be likely to result in that person's appearance … or to be necessary in the interests of justice or for the prevention of crime."

[88] The only express restriction on the exercise of the general power to impose bail conditions is that they must be imposed for the purposes specified in Article 133 namely to secure a person's appearance or to be necessary in the interests of justice for the prevention of crime. Neither Article 47(1) nor Article 133 contain any express restriction or qualification confining the exercise of the courts discretion only to offences that are imprisonable. Had it been the intention of the legislature to so confine the discretion it could easily have said so. An example of such an express limitation is article 39(1)(ia) of PACE which we set out earlier.

[89] The stated purpose of the bail conditions the judge imposed on both these applicants was to reduce the risk of further offences and the associated risk of infection. In light of their histories of repeated breaches of the regulations the DJ's considered that bail conditions were necessary to reduce those risks. We consider that, certainly in the case of someone lawfully detained before the court, the judge was empowered, subject to public law and Convention compliance, to impose such conditions which plainly fall within the statutory framework.

[90] It is argued that the imposition of bail conditions were not permissible when the offence for which they were arrested was not punishable by imprisonment. The principal basis for this argument was the contention that since the offence was not imprisonable it was not open to the DJ to restrict her liberty by way of bail conditions pending trial for a non-imprisonable offence. As a matter of statutory construction, for the reasons set out above, this argument must fail on the basis that the DJ is empowered to impose bail conditions under the provisions of the 1981 Order.

[91] Of course in deciding whether it is proportionate to impose bail conditions, if any, the judge must take into account all relevant matters. These will include the fact that the offence is not imprisonable, the risk of reoffending and the nature of the risks arising from such potential reoffending. That is precisely what the judge did. Because of the history of repeated breaches, most of which involved alcohol, the judge imposed a curfew, alcohol restriction, and the requirement to identify her 'social bubble', conditions which were specifically designed to reduce the risk of similar offending and the associated risk of infection.

[92] Since the relevant offence is non-imprisonable it would ordinarily be disproportionate to remand a person in custody given the power of the court to impose appropriate conditions. In many cases unconditional discharge may be the appropriate disposal. If, extraordinarily, the court refused bail or imposed unnecessary and unjustifiable conditions the matter can be revisited speedily before a High Court judge. Further, if there has been a material change in circumstances since the conditions were imposed an application to vary can be brought before the magistrates' court with a right of appeal to the High Court.

[93] Further, the premise upon which the applicant based her contention that bail conditions were disproportionate was largely on the basis that, since deprivation of liberty was not an available punishment for the index offence, it followed that limiting her liberty by bail conditions was impermissible. The fallacy in this argument is to equate the imposition of bail conditions either with punishment or deprivation of liberty. Plainly, the imposition of these conditions was not a punishment. On the contrary it was to facilitate her speedy release, reduce the risk of reoffending and protect the public from the associated grave risk of infection. Further, as the ECtHR jurisprudence makes clear, conditions such as those imposed in the present case do not engage article 5 which is concerned with an 'extreme form of restriction upon freedom of movement' and the restrictions in play in the present case, including the curfews, do not amount to a deprivation of liberty in article 5 terms [see page 298 *et seq.* of 'Law of the European Convention on Human Rights by Harris, O'Boyle and Warwick 5th Ed.]. As the authors note after citation of various cases on this issue:

> "It is evident then, that the court is prepared to accept that night curfews [even] extending over long time-spans do not involve a deprivation of liberty, provided there is no requirement to live in a restricted area (or, indeed, forced exile) and if the extent of the control imposed by the state outside such curfews is sufficient to enable an individual to 'have a social life and maintain relations with the outside world.'[page 299]

[94] There is a difference between "imprisonment" as a punishment and restrictions imposed on a person at liberty as a protective measure to secure, for example, the public interest in reducing the spread of infectious diseases during a

pandemic. Article 133 grants a power to DJs to impose bail conditions which can include a curfew if justified and proportionate in an individual case. Such limitations are properly viewed as restrictions on the freedom to behave in disregard of the law, and in ways which prejudice the public good by putting it at risk of avoidable contamination by a dangerous virus. By their nature such limitations will only be justified in practice by judges where the clearest conflict exists between an incontestable "public good" and criminal behaviours which have proved resistant to prior legitimate intervention thus requiring escalated measures to mitigate the serious and established damaging impacts upon that public good by those who persist in flouting laws designed to protect the public good.

[95] Ms Corrigan argues that the power in Article 133 must be read in the light of section 25F of the 1967 Act which stipulated that any offences created by Coronavirus regulations must not be triable on indictment or punishable with imprisonment. She contends that any action by the court that rendered her liable to imprisonment for Coronavirus breaches runs contrary to the express will of Parliament. Parliament had specifically ruled imprisonment out of the scope of the criminal jeopardy she would face if she broke these regulations. Therefore, it was not open to the DJ to reintroduce that jeopardy via the 'back door' by facilitating her imprisonment for breach of bail conditions imposed for breaching those same regulations. By making her bail conditional, she claims the DJ treated her unlawfully.

[96] We do not accept the 'back door' argument. Breach of bail is not a stand-alone offence and does not result in imprisonment as 'punishment.' By virtue of Article 6 of the 2003 Order it does, however, empower the police to arrest and detain, and such a power properly exercised cannot be equated with punishment.

[97] JR310 makes the additional point that the DJ ought to have released her under Article 132 because the breach alleged against her was not "an offence of a serious nature." She argues that the assessment of whether an offence is serious or not should not conflate two different things namely the problem the offence is designed to address (which may be a very serious problem) and the nature of the offence itself. The offence she faced was summary only and punishable by fine only. Parliament had specifically stipulated these limitations in the empowering legislation used to create these very offences. In the taxonomy of criminal offences these summary, fine only offences fell into the least serious category available to the legislature. Parliament could not have stipulated a less serious type of offence. She says there was no basis on which the DJ could decide the offences where anything other than 'not serious' by nature and, therefore, he was obliged to release her unconditionally. A consideration of his powers under Article 133 should never have arisen.

[98] We reject the contention in the previous paragraph. As noted earlier, given that an offence is non-imprisonable it would ordinarily be disproportionate to remand a person in custody given the power of the court to impose appropriate

conditions. If, extraordinarily, the court refused bail, the matter can be revisited speedily before a High Court judge. Further, only necessary and proportionate conditions can be justified which will only be fixed by the competent court having heard the submissions of the legally assisted parties. Any decisions as to custody or bail conditions is subject to the accused's right of appeal to the High Court or further judicial review in light of a material change of circumstances. However, if as in these cases, the DJ does not consider it appropriate to release a person unconditionally Article 132 does not require him to do so even though the index offence is non-imprisonable. In most such cases conditions may not be necessary or appropriate. But as always context is everything. The history of breaches, the risk of further offences and the associated risk of infection provide a clear example as to why in certain situations the non-imprisonable nature of an offence should not necessarily be a bar to declining unconditional release. Further, because an offence is non-imprisonable it does not follow that it cannot be regarded as a serious offence. The maximum fine provided for in the legislation is substantial and the consequences of covid breaches were potentially life threatening. Assessing the seriousness of the offence is not necessarily limited to looking at the legal nature of the offence. It can also include a consideration of the potential consequences of the behaviour that has, in extraordinary circumstances, been criminalised in order to protect the public. We consider that it would be strange if it were otherwise. In the present case the judge took appropriate account of the potential effects the applicants' serial breaches of the Coronavirus regulations in terms of the risk of spreading infection during a pandemic. We consider that this is an appropriate consideration relevant to the assessment of seriousness.

[99] For the foregoing reasons we conclude that the answer to the second question is that, as a matter of statutory construction, a DJ is empowered to impose bail conditions for an offence that is not punishable by imprisonment.

[100] In deciding whether it is proportionate to impose bail conditions, if any, the judge must take into account all relevant matters. These will include the fact that the offence is not imprisonable, the risk of reoffending and the nature of the risks arising from such potential reoffending. That is precisely what the judge did. Because of the history of repeated breaches, most of which involved alcohol, the judge imposed a curfew, alcohol restriction, and the requirement to identify her 'social bubble', conditions which were specifically designed to reduce the risk of similar offending and the associated risk of infection.

[101] Since the relevant offence is non-imprisonable it would ordinarily be disproportionate to remand a person in custody given the power of the court to impose appropriate conditions. In many cases unconditional discharge may be the appropriate disposal. If, extraordinarily, the court refused bail or imposed unnecessary and unjustifiable conditions the matter can be revisited speedily before a High Court judge. Further, if there has been a material change in circumstances since the conditions were imposed an application to vary can be brought before the magistrates' court with a right of appeal to the High Court.

Summary of principal conclusions

[102] Both applicants were charged with non-imprisonable offences pursuant to the 2020 regulations. Pursuant to Article 39(1) of PACE the custody officer in each case was required to order their post charge release from police detention, either on bail or without bail, unless the conditions in either subparagraph (a) or (b) of the 1989 Order were satisfied. In each case the reason the custody officer refused to release was because they considered that they had reasonable grounds for believing that their detention was necessary to prevent her from committing an offence. However, pursuant to Article 39(i)(a)(ia), this reason applies only in the case of a person arrested for an imprisonable offence. As the offence for which each applicant had been arrested was not an imprisonable offence, it was, as the PSNI now accept, unlawful for either of them to be detained for the reason relied upon.

[103] Accordingly, the court declares as follows:

> "The court declares that as the offence for which JR310 was arrested was not imprisonable, under Article 39 of the Police and Criminal Evidence (NI) Order 1989, the police did not have lawful grounds to detain her post charge and, accordingly, she was unlawfully detained when brought before the magistrates' court."

It follows that had Ms Corrigan joined the PSNI as a respondent and sought a similar declaration this would have been granted in light of the proper acknowledgment on behalf of the PSNI that she also was unlawfully detained for the same reason.

[104] The answer to the first question is that the DJ was not lawfully empowered in the case of either applicant to impose the impugned bail conditions as both were unlawfully detained when they appeared before the court.

[105] The answer to the second question is that if the applicants had been lawfully before the court the DJ would have had the power to impose bail conditions for the offence even though the offence was not imprisonable.