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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARTIN FEGAN FOR JUDICIAL REVIEW

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Mr R Lavery KC with Mr S Campbell (instructed by Paul Campbell Solicitors) for the Applicant
Mr I Skelt KC with Mr J Kennedy (instructed by the Crown Solicitor's Office) for the Respondent

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McLAUGHLIN J

Introduction

[1] This is an application for judicial review of a decision by a custody officer of the PSNI not to appoint a date for the applicant's surrender into custody in answer to police bail on a date earlier than that previously appointed. The application raises issues of statutory interpretation which are very similar to those recently considered by the Court of Appeal in *Re Higgins* [2025] NICA 19. In that case, the Court of Appeal declared that a number of police practices were unlawful which had the effect of "extending" or substituting a later date for the surrender into custody of a person previously released on police bail.

Factual background

[2] On 16 July 2024, the applicant was arrested in connection with a series of cross-border fraud offences which targeted the agri-business sector. He was interviewed by investigating officers on that date at a PSNI station and was granted bail by a custody officer, pending further enquiries with a requirement to return on 15 January 2025. Bail was granted on a condition of no contact with two named suspects.

[3] On 2 January 2025, the applicant's solicitor and an investigating officer agreed to re-schedule his further interview on 27 February 2025. He was asked to return to custody on that date. It is not clear from the materials whether this was formalised by means of a written appointment, issued by a custody officer or whether it was an informal and consensual arrangement.

[4] On 27 February 2025, the applicant attended Banbridge PSNI station for interview. He was released again on police bail to return to Banbridge PSNI station at 14:00 hrs on 23 May 2025. On this occasion, a custody officer issued a written record of the appointment, using the PSNI Form PACE 13/1(a). Bail conditions were amended to prohibit contact with only one of the previously named suspects. The form states:

> "I understand that I am granted bail and must appear personally at BANBRIDGE CUSTODY police station on the 23rd day of May 2025 at 2 o'clock in the afternoon unless I receive notice in writing from the Police Service of Northern Ireland, that my attendance is not required and not to depart the station without leave. I have been informed that if I fail to do so, I may commit an offence and can be arrested, fined, imprisoned or all 3."

[5] On 4 April 2025, the Court of Appeal handed down its judgment in *Re Higgins* [2025] NICA 19 and made a declaration by which two practices involving informal "extensions" of police bail were declared to be unlawful.

[6] On 30 April 2025, the applicant's solicitor emailed the investigating officer, D/Constable Costello, stating that both he and the applicant were "*in difficulty on 23 May 2025 and are unable to attend*." He inquired whether it would be possible to bring forward the proposed further interview and suggested 15 May 2025. Later that day, DC Costello responded with a summary of the legal advice he had received following the decision in *Re Higgins*. In summary, he stated that, save for the express power under article 48(8) of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"), to extend the time for surrender to custody where the individual was "*unable*" to attend, police had "*no power to administratively extend or change the date/time/place a detained person is to answer their bail, once they have been bailed*."

[7] DC Costello went on to repeat the PSNI advice that informal changes to bail dates, even on an agreed basis "*must stop*" and that the individual "*must return on that date, be booked into custody and re-bailed*." He indicated that further legal advice was awaited.

[8] On 1 May 2025, the applicant's solicitor responded, asserting that the applicant was "*unable to attend on 23 May 2025*" and that the power of extension was available. No further explanation was provided as to why the applicant was "*unable*" to attend on the appointed date. The applicant's solicitor also made the

assertion that "*nothing within the Higgins judgment prohibits an **earlier** surrender to custody*." It was asserted that, upon the grant of police bail, the appointed date for surrender to custody represented the "temporal limit" of the surrender obligation and that a person could surrender on an earlier date, thereby triggering the custody procedure and enabling a revised date and time for surrender to custody could be appointed.

[9] In a further email exchange on 1 May 2025, DC Costello undertook to obtain further legal advice upon the suggestion for an earlier return date. He also asked that the applicant explain why he was unable to attend on 23 May 2025. The applicant's solicitor responded that day stating that the applicant "*has a pre-booked holiday on the bail return date*" and submitted that this "*amounts to an unavoidable cause*" within the meaning of article 48(8) PACE. He also repeated the request for an earlier date. The parties then exchanged further emails regarding potential dates, subject to further legal advice from PSNI Legal Services.

[10] On 6 May 2025, DC Costello forwarded a letter from PSNI Legal Services Branch to the applicant's solicitor. In summary, it stated that a pre-booked holiday did not amount to an "*avoidable cause*" and that the power to extend police bail was not available. The advice stated:

> "… you state there is nothing in the statutory scheme or the judgment which prohibits a bailee from surrendering to custody on an earlier date. Equally, there is nothing in the statutory scheme or the *Higgins* judgment that permits earlier surrender. …
>
> Due to the *Higgins* judgment, all suspects on bail have to attend in person at the location, time and date that is stipulated in their bail authorisation unless Article 48(8) applies. Article 48(8) only allows for the extension of the bail date and does not mention bringing the date forward …
>
> This is not a situation of exceptionality and your client is under a duty to surrender on 23 May 2025 at Banbridge Custody at 14:00, otherwise he is in breach of bail and liable to arrest."

[11] On 9 May 2025, the applicant's solicitor sent a pre-action letter to PSNI, proposing to challenge the decision not to appoint an earlier date for surrender to custody. It was asserted that PSNI had "*fundamentally misunderstood*" the *Higgins* judgment and stated:

> "The respondent fails, however, to distinguish an extension of the period for which a citizen is subject to

> bail, from circumstances where a beneficiary of the grant of bail, voluntarily surrenders at an earlier time and date (which is convenient to police) and thereby reverts to his status as an arrested person by virtue of Article 35(8) of PACE.
>
> The applicant says that in circumstances where police have confirmed their readiness and willingness to progress the investigation, as well as the availability both of personnel and venue to allow for further interview at a date earlier than the bail surrender date appointed at the most recent bail return, it would be illogical and absurd that he should not be permitted to surrender at an earlier date."

[12] In a pre-action response dated 12 May 2025, the PSNI repeated the position set out in its letter of 6 May 2025. It maintained the position that a pre-booked holiday did not amount to an "*unavoidable cause*" or that it rendered the applicant "*unable*" to attend at the appointed date and time. It also asserted that the legislation did not make express provision for earlier surrender. It observed that if the applicant presented himself earlier than the appointed time, there would be no reason to detain him as he would not be returning in line with his bail and detention would not be authorised.

[13] On 16 May 2025, the applicant issued these proceedings which included a request for interim relief. On 20 May 2025, McAlinden J (a member of the Court of Appeal panel in *Re Higgins*) refused leave. In doing so, he is recorded as having observed:

> "… I have a very clear view as to what the judgment [in *Re Higgins*] was intended to achieve, it was not just to look at a fine point, a fine narrow issue and leave the police in the situation that they did not know what they should do in respect of police bail and other factual scenarios. The judgment, in my view, is quite clear as to what has to happen. There is a very limited and restricted discretion under 48(8) and that limited discretion would not extend to the facts of this case or anywhere near the facts of this case … The court is adamant that this case is neither arguable nor are there reasonable prospects of success …"

[14] On 21 May 2025, the applicant appealed the decision of McAlinden J. On the same date, the Court of Appeal granted interim relief by prohibiting PSNI from taking any steps to arrest or prosecute the applicant in relation to any failure to

surrender to custody on 23 May 2025, provided that he surrender himself to custody at Banbridge police station at 12:00 hrs on Friday 6 June 2025.

[15] On 28 July 2025, the Supreme Court refused permission to appeal the decision of the Court of Appeal in *Re Higgins* [2025] NICA 19.

[16] On 21 October 2025, the Court of Appeal heard the substantive appeal against the refusal of leave. The Court of Appeal allowed the appeal, granted leave and remitted the application to the High Court. An agreed note of the Court of Appeal hearing which was prepared for the purposes of the remitted application, recorded the following reasons:

> "… The case concerns whether the appellant was unlawfully prevented from bringing forward the date for answering pre-charge bail. The substantive relief sought had been granted on an interim basis which allowed the appellant to travel on holiday, but there remained a point which the court required to be adjudicated on for the sake of certainty. The court indicated its view was validated by the position of the proposed respondent."

Statutory framework

[17] Police powers to grant bail to an individual who has been arrested on suspicion of commission of an offence are governed by a combination of Part V of PACE and Part II of the Criminal Justice (Northern Ireland) Order 2003 ("the 2003 Order"). Police have no common law powers to impose surrender obligations or bail conditions upon an individual following release from lawful pre-charge custody. Accordingly, police powers are entirely statutory and the above statutory provisions, together with the PACE Codes of Practice, represent an exclusive code governing police bail powers. Uncertainties about the scope or the exercise of those powers must therefore be resolved by application of the principles of statutory interpretation.

[18] The present case concerns bail granted by a custody officer at a police station following arrest and detention on suspicion of commission of an offence. Parallel powers for police to grant bail otherwise than at a police station are contained in Part IV of PACE (Articles 32, 32A, 32B, 32C and 32D) and were inserted by the Criminal Justice (Northern Ireland) Order 2004 (known colloquially as "street bail"). These provisions do not arise on the facts of this case and it is not proposed to set them out. They are analysed in detail by the Court of Appeal in *Re Higgins* (at paras [6]-[8]).

[19] The key provisions in Part V of PACE are the following:

"**Limitations on police detention**

35.—(1) A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part.

(2) Subject to paragraph (3), [release only on the authority of a custody officer], if at any time a custody officer—

(a) becomes aware, in relation to any person in police detention, that the grounds for the detention of that person have ceased to apply; and

(b) is not aware of any other grounds on which the continued detention of that person could be justified under the provisions of this Part,

it shall be the duty of the custody officer, subject to paragraphs (4) and (4A), to order his immediate release from custody.

…..

(5) Subject to paragraph (6), a person whose release is ordered under paragraph (2) shall be released without bail.

(6) Where—

(a) it appears to the custody officer—

(i) that there is need for further investigation of any matter in connection with which that person was detained at any time during his detention; or

(ii) that proceedings may be taken against that person in respect of any such matter; and

(b) the custody officer considers that, having regard to all the circumstances, that person should be released only on bail,

the custody officer shall so release that person.

…

(8) For the purposes of this Part a person who—

(a) attends a police station to answer to bail granted under Article 32A; [street bail]

(b) returns to a police station to answer to bail granted under this Part; or

(c) is arrested under Article 32D or 47D [failure to answer bail]

…

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.

Duties of custody officer before charge

38.—(1) Where—

(a) a person is arrested for an offence—

(i) without a warrant; or

(ii) under a warrant not endorsed for bail,

the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.

(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.

…

(4) Where a custody officer authorises a person who has not been charged to be kept in police detention, he

shall, as soon as is practicable, make a written record of the grounds for the detention.

(5) Subject to paragraph (6), the written record shall be made in the presence of the person arrested who shall at that time be informed by the custody officer of the grounds for his detention.

(6) Paragraph (5) shall not apply where the person arrested is, at the time when the written record is made—

(a) incapable of understanding what is said to him;

(b) violent or likely to become violent; or

(c) in urgent need of medical attention.

Responsibilities in relation to persons detained

40.—(1) Subject to paragraphs (2) and (4), it shall be the duty of the custody officer at a police station to ensure—

(a) that all persons in police detention at that station are treated in accordance with this Order and any code of practice issued under it and relating to the treatment of persons in police detention; and

(b) that all matters relating to such persons which are required by this Order or by such codes of practice to be recorded are recorded in the custody records relating to such persons.

Limits on period of detention without charge

42.—(1) Subject to the following provisions of this Article and to Articles 43 and 44, a person shall not be kept in police detention for more than 24 hours without being charged.

…

(5) Subject to paragraph (6), a person who at the expiry of 24 hours after the relevant time is in police detention and has not been charged shall be released at that time either on bail or without bail.

(6) Paragraph (5) does not apply to a person whose detention for more than 24 hours after the relevant time has been authorised or is otherwise permitted in accordance with Article 43 or 44.

(7) A person released under paragraph (5) shall not be re-arrested without a warrant for the offence for which he was previously arrested unless new evidence justifying a further arrest has come to light since his release; but this paragraph does not prevent an arrest under Article 47A.

Detention after charge

Power of arrest for failure to answer to police bail

47A.—(1) A constable may arrest without a warrant any person who, having been released on bail under this Part subject to a duty to attend at a police station, fails to attend at that police station at the time appointed for him to do so.

Bail after arrest

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—
…

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

(2A) The custody officer shall make a record of the time and place appointed under paragraph (1)(a) or (b) and if the person released on bail so requests, the custody officer shall cause a copy of the record to be given to that person as soon as practicable after the record is made.

[Articles 48(3A-3D) make provision for imposing conditions of bail, taking of security or provision of sureties to secure surrender to custody.]

(3E) Where a custody officer has granted bail he or another custody officer serving at the same police station may, at the request of the person to whom it is granted,

vary the conditions of bail; and in doing so may impose conditions or more onerous conditions.

(5) A person who has been released on bail under Article 38(2) or (7)(b) may be arrested without warrant by a constable if the constable—

(a) has reasonable grounds for believing that the person is likely to break any of the conditions of his bail; or

(b) has reasonable grounds suspecting that the person has broken any of those conditions.

(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.
…

(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."

[20] Part II of the 2003 Order makes provision for bail granted by police prior to charge and also by a court, post-charge. It provides in relevant part:

"**Surrender to custody**

4.—(1) A person released on bail shall be under a duty to surrender to custody.

(2) In this Part—

surrender to custody means, in relation to a person released on bail, surrendering himself (according to the requirements of the grant of bail)—

(a) into the custody of the court at the time and place for the time being appointed for him to do so; or

(b) at the police station and at the time appointed for him to do so;

...

Offence of absconding by person released on bail

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."

[21] A brief summary of the key features of the governing statutory framework is therefore as follows:

(i) An arrested person may only be detained at a police station, upon the authority of a designated custody officer at that station, for the purpose of determining whether there is sufficient evidence to charge the person, for the purpose of securing or preserving evidence or for obtaining evidence by questioning (Article 38(1) and (2) PACE).

(ii) If the grounds for detention have ceased to apply and no other grounds are known, it is the duty of the custody officer to order the immediate release of the suspect (Article 35(1) and (2) PACE).

(iii) The custody officer may order release on bail for the purposes of further investigation of the offences for which the person was detained or for the purposes of proceedings being taken against the person for that matter (Article 35(6) PACE).

(iv) When a person returns to a police station to answer to bail granted under (Part V of PACE) they are to be treated as arrested for the offence for which they were originally granted bail (Article 35(8)(b) PACE).

(v) Where an arrested person is detained at a police station, the custody officer must, as soon as is practicable, make a written record of the grounds for detention. The record must be made in the presence of the arrested person who must also be informed by the custody officer of the grounds for his detention, unless one of the statutory exceptions apply relating to the detained person's condition (Article 38(4)-(6) PACE).

(vi) The powers to grant police bail to a person who has been arrested and detained at a police station (Articles 35(6) and 38(2) PACE) and the power to appoint the place and time for attendance at a police station to surrender into custody (Article 48(1)(b) PACE) are conferred exclusively upon designated custody officers. The time and place of appointment must be recorded by the custody officer and the record must be made available to the person released on bail if they "*so request*" (Article 48(2A) PACE).

(v) A custody officer may waive the obligation to surrender by written notice if the attendance "*is not required*" (Article 48(7) PACE).

(vi) An express power of extension exists if the suspect is "*unable*" to attend due to "*illness or other unavoidable caus*." (Article 48(8) PACE).

(vii) A person released on bail at the end of the permitted 24 hours, shall not be re-arrested without a warrant in the absence of fresh evidence or failure to surrender on the appointed date (Article 42(7) PACE). "*Nothing shall prevent*" a person released from detention on bail from being re-arrested for the same offence if fresh evidence comes to light (Article 48(10) PACE).

(viii) A failure to surrender into custody at the time and date appointed may result in the suspect's arrest (Article 47A PACE) and may also amount to a criminal offence (Article 5 of the 2003 Order).

Re Higgins [2025] NICA 19

[22] The issue under consideration by the Court of Appeal in *Re Higgins* and which was the subject of a declaration, differs from the issue raised in the present case in two key respects:

(i) *Re Higgins* concerned decisions to extend, rather than shorten, the appointed date and time for surrender to custody following the grant of police bail; and

(ii) The declaration made by the Court of Appeal in *Re Higgins* was limited to two specific police practices whereby surrender dates were extended informally by agreement (sometimes involving investigating officers rather than custody officers). The relevant practices are summarised at para [17] of the judgment. The final order dated 4 April 2025 declared the following practices unlawful:

> "(i) The practice whereby a custody officer other than in accordance with one of the express statutory dispensations, "extends" the surrender date of a person previously released on police bail in the absence of any surrender to police custody by the suspect as required by the bail authorisation; and

(ii) The practice whereby a person released on police bail who does not surrender to police custody as required by the bail authorisation is the subject of the police subsequently and retrospectively amending/deferring the elapsed surrender date to a future date."

[23] The reasoning of the Court of Appeal may be summarised as follows.

[24] The scope of police powers to grant and extend bail and the reciprocal rights/obligations of a person released on police bail must be determined by applying normal principles of statutory interpretation (paras [25]-[28]). The duty upon a person released on police bail is discharged "*by surrendering at the time, on the date and at the location specified*" in the grant of bail. This takes the form of a surrender into police custody, whereupon the status of that person becomes that of an arrested person, in relation to the offence for which bail was granted (para [29]). A surrender into police custody is "*conceptually distinct*" from the imposition of bail conditions (para [43]). The duty to surrender may be waived by a custody officer by means of a written notice under Article 48(7) of PACE. The effect of such a notice is that the released person's "*interaction with the criminal justice system is at an end*" (para [30]). Separate express provisions govern the variation of police bail conditions by a custody officer, at the request of the individual. The distinction between the two concepts is reinforced by the separate statutory powers of arrest for breach of a bail condition (Article 48(5)) and for failure to surrender at the time appointed (Article 47A) (para [43]). PACE makes express provision for police interference with a bail surrender arrangement. For a detained person, these are contained in Article 48(7) (waiver) and Article 48(8) extension due to "*illness or other unavoidable cause*" (paras [14](vii) & (viii)). The interpretative principle of "*expressio unius"* applied in this case (para [35]). No provision of PACE authorises the informal extension of bail surrender dates which occurred in that case (para [45]). If police could "extend" bail surrender dates in the manner undertaken in that case, the express power of extension under Article 48(8) would be "*entirely nugatory*" (paras [34]-[35]).

[25] The Court of Appeal also identified several other features of the broader statutory scheme which it considered were inconsistent with the use of a custody officer's power under Article 48(1)(b) PACE to authorise "informal" extensions to a bail surrender date. First, it considered that the language of a custody officer's power to appoint a date and time of surrender under Article 48(1)(b) "*has a clear focus on the conduct of the custody officer at the time when the suspect is released from police custody*" (para [36]). Second, it considered that surrender to custody must be "*according to the requirements of the grant of bail*" per Article 4(2) of the 2003 Order (para [36]). Third, in light of the statutory context (ie the liberty of the citizen and their susceptibility to arrest and criminal conviction for non-observance of a bail surrender obligation), the Court of Appeal considered that the exercise of a power of "*appointment*" under Article 48(1)(b) contemplated "*appropriate formal solemnity*" (para [36]). Fourth, the practicalities of a grant of police bail was indicative of a

direct physical-interaction between the custody officer and the suspect, all of which pointed towards a need for physical presence in a custody suite. These include signing the bail document (per Form PACE 13(1)(a)); the right of a suspect under Article 48(2A) PACE to request a copy of the bail record; and the right of a detained person under Article 48(3E) PACE to make representations to the custody officer about the bail conditions (paras [36]–[38]). The combined effect of these features of the statute was that the power to appoint a date and time for a suspect's future surrender to bail under Article 48(1)(b) of PACE did not authorise the practices of informal extension, found to be unlawful (para [39]). In expressing this conclusion, the Court of Appeal stated the principle in slightly broader terms as follows:

> "[39] The substance of the respondent's submission was that [Article 48(1)(b)] permits a custody officer from time to time to appoint and re-appoint any or all of these prescriptions. Any such construction is defeated by our analysis in the immediately preceding paragraphs and is further confounded by the Article 48(2A) requirement prescribing that a record be made and (upon request) furnished to the suspect being released on bail."

[26] The Court of Appeal also recognised that a custody officer's power under Article 48(1)(b) to appoint a date and time for surrender was drafted in what it described as "*superficially broad terms*" and was not qualified by any express prohibition upon making fresh or alternative appointments. Nevertheless, considering the statutory scheme as a whole, it considered that the power of appointment was "*not open-ended.*" While its exercise would always be constrained by the *Padfield* principle or any contrary statutory provision, it considered that it would be contrary to the legislative intention if these public law principles were the primary constraint upon the validity of police bail arrangements or the status of a released person (paras [33]-[36]). If the legality of informal extensions was determined by reference to these principles, "*courts would in reality be left to legislate on the issue of their qualifying conditions, criteria and constraints on a case-by-case basis.*" The legislative intention pointed towards an interpretation involving greater legal certainty (para [40]).

***Re Morgan* [2009] NIQB 105**

[27] A further relevant authority (which does not appear to have been opened to the court in *Re Higgins*) is *Re Morgan* [2009] NIQB 105. It concerned the question of whether the exercise of the power to grant police bail required the consent of the person arrested. The Divisional Court answered the question in the negative in the following unequivocal terms (per Sir Anthony Campbell):

> "[17] Article 35(6)(c) requires a custody officer to release a person on bail where it appears to him that there is a need for further investigation and he considers that the

> person should be released only on bail. To introduce a requirement that he may only do so where the person consents to entering into bail would require a departure from the plain meaning of the legislation and would import into the provision a stipulation that the legislature gave no indication was required.
> …
>
> [19] I conclude that a requirement for consent cannot be implied into Article 35(6) [PACE]. Such a requirement could make the scheme of police bail unworkable at the whim of the arrested persons who declined to co-operate in the grant of bail and it is inconceivable that this was the intention of Parliament."

Submissions of the parties

[28] The applicant contended that any person released on police bail following arrest and detention had a "right" to surrender into police custody on a date and time earlier than that appointed by the custody officer. It was contended that the source of this statutory right was Article 35(8)(b), which provides that a person who "*returns to a police station to answer bail*" is to be treated as arrested for the offence in connection with which he was granted bail. It was emphasised that the phrase "*to answer to bail*" in Article 35(8)(b) was different to the phrase "*surrender to custody*" in Article 48(1) of PACE and Article 4 of the 2003 Order. The applicant contended that an obligation to "*answer to bail*" must therefore involve a different obligation than to "*surrender to custody.*" It was contended that answering to bail included doing so at a time of the arrested person's choosing and that surrendering to custody referred to an attendance at the police station at the time appointed by the custody officer upon the grant of bail, as stated in Article 4 of the 2003 Order. It was contended that the right to answer to bail in this manner was also supported by the existence of a detained person's statutory right to request a variation of bail conditions (per Article 48(3E)). The applicant argued that in order to give effect to this right, an individual would be required to attend at the police station and that when they did so they would have "answered their bail", thus triggering the obligation to be treated as an arrested person, in accordance with Article 35(8).

[29] The PSNI adopted a somewhat neutral approach to the proceedings. It did not formally oppose the application, insofar as it welcomed clarification of police bail powers and also the flexibility of a power to appoint an earlier date and time for surrender. However, it did not accept the existence or scope of a "right" to answer bail contended for by the applicant. PSNI also submitted that it may be difficult to reconcile the existence of a power to appoint an earlier date and time for surrender with the reasoning in *Re Higgins*, even if it would not be in conflict with the declaration made in that case. In particular, PSNI referred to the Court of Appeal's rejection of the reasoning of the High Court in the *Higgins* case together with its

emphasis on both the need for certainty when interpreting the scope of powers to detain an arrested person and its focus upon the physical presence of a person in custody at the time a custody officer exercises the power under Article 48(1)(b) to appoint a date and time for surrender (at para [36]). It also pointed to the Court of Appeal's reliance on the *expressio unius* principle regarding police powers to interfere with bail arrangements and its conclusion that Article 48(1)(b) did not confer upon a custody officer a power "*to appoint and re-appoint dates and times for surrender*" (at para [39]). The PSNI therefore submitted that it was difficult to reconcile some of the reasoning in *Re Higgins* with a power to appoint an earlier surrender date. The PSNI also contended that the power of extension under Article 48(8) was not available the facts of this case on the basis that a pre-booked holiday did not amount to an "*unavoidable cause*" rendering the applicant unable to attend a police station.

Consideration

[30] As noted above, there is no common law power for police to grant bail to an arrested person or to require their future attendance at a police station upon release. The regime for the grant and operation of police bail is therefore exclusively statutory in nature. Any dispute about the scope or exercise of police powers to grant bail must be resolved by the principles of statutory interpretation.

[31] Applying ordinary principles of statutory interpretation, it is clear that Article 35(8)(b) PACE does not confer upon a released person a statutory right to "answer bail" by surrendering themselves to police custody at a time, at a location or on a date of their choosing, earlier than the date appointed by the custody officer. It is not necessary to look beyond the natural and ordinary meaning of the language used in Article 35(8)(b). It is a purely explanatory provision which clarifies and confirms the legal status of a released person upon their return to a police station in answer to bail. Their legal status reverts to that which they had immediately prior to their release - namely a person who has been arrested and accepted into police detention in connection with the offence for which they were granted bail. This is clear from the unqualified and unambiguous language of the provision. The interpretation is reinforced when considered in light of its purpose namely, to provide legal certainty about the status of the individual and to ensure that the statutory code governing the operation of police bail is as comprehensive and clear as possible. It also has the important collateral effect of affirming the immediate revival of the suite of rights and safeguards available to detained persons under both PACE and the Codes of Practice. They include the obligations upon a custody officer to open a record for the resumed detention; to inform the individual of the reasons for the detention; to keep under review the grounds for detention; to release the applicant if grounds for detention cease to exist (without or without bail); to ensure that detention is limited in time and to provide a further appointment for surrender into custody if released on bail. There is nothing within the language or purpose of the provision which supports the contention that Article 35(8)(b) confers a right of earlier surrender into custody.

[32] The applicant relied heavily upon the difference in the language used in Article 35(8)(b) when compared with that used in both Article 4 of the 2003 Order and Article 48(1) of PACE. While the use of different language may sometimes point to a different statutory intention, I consider that no such distinction arises in the case of these two provisions, as there is no difference in substance between the legal effects for detained persons by virtue of the two provisions. On the applicant's own case, it was accepted that if a person released on bail was to return to custody early on a voluntary basis to "*answer to bail*" they would immediately hold the status of an arrested person who had been detained for the relevant offence. This is identical to the status of a person "*surrendering to custody*" on the appointed date and time. In the absence of any substantive difference in the status of an individual in these circumstances, I do not accept that the use of the phrase "*answer to bail*" used in Article 35(8)(b) of PACE, without any further qualification or supplementary provision, is sufficient to support the existence of a right for a released person to answer bail at a date and time of their choosing, earlier than the appointed time. Within this statutory scheme, I therefore consider that the phrases "*answer to bail*" and "*surrender into custody*" represent a distinction without a legal difference. While it is not decisive to the issue of interpretation, it is perhaps of note that the phrases "*surrender to custody*" and "*answer to bail*" were inserted into PACE at different times and by different statutes. The duty to "*surrender to custody*" was created by Article 4 of the 2003 Order, with a consequential amendment of Article 48(1)(b). In contrast, Article 35(8) of PACE, (which uses the phrase "*answer to bail*" for both persons who had been detained and also those granted street bail) was inserted in its entirety by Schedule 1, paragraph 1 to the Criminal Justice (Northern Ireland) Order 2004. The fact that different statutes use slightly different language to convey the same substantive outcome tends to lessen any interpretative significance which might otherwise be attributable to the use of different language within a unitary and unamended statutory scheme.

[33] In addition to the natural and ordinary meaning of the language used in Article 35(8) and the purpose of the provision, there are a number of other aspects of the broader statutory scheme which point away from the interpretation contended for by the applicant. First, the confirmation of a bailed person's legal status which is provided by Article 35(8), also applies to a person who has been arrested under Articles 32D or 47A for failure to answer bail at the time appointed in the relevant statutory notice (per Article 35(8)(c)). Such a person can only be arrested if they have failed to "*surrender into custody*" at the appointed time. Accordingly, within Article 35(8) itself, there is a statutory parallel between those who had an obligation to "*surrender into custody*" and those under an obligation to "*answer to bail*."

[34] Second, a similar parallel between the two concepts is clear by asking the question what a person who "*answers to bail*" is actually answering? It is clear that the person attends the police station in answer to an obligation to surrender into custody.

[35] Third, the express language used in Article 4(2) of the 2003 Order makes clear that the phrase "*surrender to custody*" means surrendering "*according to the requirements of the grant of bail … (b) at the police station and at the time appointed for him to do so …*" The obligation of surrender, as defined by Article 4(2) of the 2003 Order is expressly incorporated into Article 48(1) of PACE, which confers upon a custody officer the power to appoint a date and time for surrender. It would be incongruous for PACE to confer expressly upon a custody officer the exclusive power to appoint a fixed date and time for surrender, but at the same time confer by implication upon a released person, a right to return into custody at a date and time of their own choosing. I consider that express language would be necessary to limit the power of the custody officer in this way and to confer such a right upon a released person.

[36] The consequences of the interpretation contended for the applicant are also highly impracticable and tend to run contrary to the scheme for police bail. As explained in the case of *Re Morgan*, police bail is not a voluntary matter for a suspect. The grant of police bail following detention constitutes a restriction on the liberty of an individual which is imposed in furtherance of police powers to investigate crime. If the applicant was correct, a suspect could potentially frustrate the investigative process by surrendering himself at a police station of their choosing and a time of their choosing (eg during the night). He could do so at a time when the investigating officers were either not available, were on leave, were ill or were otherwise unprepared for interview (eg awaiting forensic reports or witness appointments). A suspect could effectively "run down the custody clock" by waiting in a police station of their choosing, with a view to securing an unconditional release or a release at the expiry of the permitted 24-hour period. In the latter situation, this could have the collateral consequence of restricting the police's ability to re-arrest the suspect for the same offence in the absence of fresh evidence (per Article 42(7)). Police would also have the extreme administrative inconvenience of being required to accept into custody a person whose arrival was unexpected and for whom the necessary custody arrangements may not be available. For example, a released person may attempt to present at a police station which was not a designated custody station (per article 36 PACE), or which did not have capacity to accept a suspect into custody.

[37] Considering all of these features of the statutory scheme, it is clear that there is nothing in the language, purpose or context of the statutory provisions to support the existence of a right within Article 35(8) for a person released on police bail to return to custody at a place or time of their choosing on a date earlier than that appointed by the custody officer. On the contrary, Article 48(1)(b) makes clear that the "*duty*" upon a released person is to attend at "*such police station at such time*" as appointed by the custody officer. When read together with Article 4 of the 2003 Order, I consider it is clear that the concept of "*answering bail*" amounts to a surrender into custody at the appointed time and place. The applicant's primary submission that he had a "right" under Article 35(8) to answer his bail on an earlier date and time than appointed, is therefore rejected.

[38] This conclusion is not altered by the applicant's alternative submission that the existence of a "right" to surrender into custody on an earlier date can be derived from the statutory entitlement to request a variation of bail conditions. As explained in *Re Higgins*, a surrender into custody and a variation of bail conditions are legally and conceptually distinct. The right to request a variation of conditions is available at all times after the detained person has been released on police bail. The exercise of that right is not dependent upon a prior surrender into custody and may be exercised at any time after bail has been granted, whether in-person or by remote communication. Attendance by a bailed person at a police station for the purpose of making an in-person request for variation of bail conditions is conceptually and legally distinct from attendance at a police station for the different purpose of answering to bail. Contrary to the applicant's submission, the mere fact of a physical attendance at a police station by a bailed person does not, without more, amount in law to "*answering to bail*" or "*surrendering to custody.*" It is necessary to consider also the purpose of the attendance. A voluntary attendance to discuss bail conditions other than at the time appointed for answering bail consists of nothing more than a request for a custody officer to exercise the power under Article 48(3E) of PACE to vary bail conditions. There is nothing in the language of purpose of this power which necessitates a bailed person to be accepted into custody before the power may be exercised or that an attendance at a police station for this purpose amounts to a surrender into custody. Accordingly, the entitlement of a bailed person to request a variation of police bail conditions does not require the implication of a right to earlier surrender into custody.

[39] In the course of submissions, both parties addressed the question of whether an earlier surrender date could be achieved if a custody officer issued a notice under article 48(7), which confirmed that the person's surrender on the appointed date was not required and thereafter appointed an earlier date, in lieu of the first appointment. This issue was raised with the parties by the Court at an earlier stage of the proceedings. In light of the conclusion in *Re Higgins* that the phrase "*not required*" in article 48(7) of PACE was a clear indication that the notice was intended to signify the end of a detained person's interaction with the criminal justice process in relation to the offence for which bail was originally granted, neither party supported the use of an article 48(7) notice in this manner. It is also clear that if a custody officer purported to issue an article 48(7) notice, in these circumstances, he would do so at a time when bailed person's attendance *was* required (as opposed to "*not required*") for the purposes of the investigation. It is therefore doubtful whether the notice could be issued consistently with *Padfield* principles or the broader statutory scheme. Both parties also highlighted that, in order for an article 48(7) notice to be used in the suggested manner, it would be necessary to imply the words "*on the specified date*" at the end of article 48(7). Since the statute could clearly operate consistently with statutory intentions without the implication of those additional words, it was difficult to contend that the statutory test of necessity was met in order to justify the implication of those additional words. Having reflected further upon the issue and considered the findings in *Re Higgins* on this issue, I agree

that an article 48(7) notice could not be used in the manner suggested above as a mechanism for achieving an earlier surrender date.

[40] Notwithstanding the above conclusions, the question remains whether a custody officer's power of appointment under Article 48(1)(b) is sufficiently broad to enable a custody officer simply to substitute an earlier surrender date for that originally appointed, whether upon request or upon the initiative of police. The Applicant did not initially make a positive submission to that effect. However, it was later confirmed that, if the Court considered such an interpretation to be available, the Applicant would support such an outcome. In light of the wider public importance of ensuring clarity about the scope of police powers to grant bail, I considered that this issue should be explored. I consider that there are plausible arguments both for and against such a conclusion, based upon both the statutory scheme and the decision in *Re Higgins*.

[41] Several factors may point in favour of interpreting a custody officer's power of appointment under Article 48(1)(b) to be sufficiently broad to include a power to substitute an earlier appointments date. First, the language which defines the scope of the power of appointment is reasonably broad and is in unqualified terms. It provides that the detained person must attend at "*such time as the custody officer may appoint*." The possibility of substituting an earlier date from that originally appointed is not expressly excluded and would appear to be consistent with the legislative scheme, if there has been a material change in circumstances since the appointment was originally made. If a released person expressly requested an earlier date and investigating officers were agreeable, it might also be considered that Parliament is unlikely to have intended to preclude such an outcome, if the formalities of a replacement appointment were observed and the fresh appointment was consistent with the statutory purpose of further the investigation (per article 35(6)). Sections 17(1) and 31(1) of the Interpretation (NI) Act 1954 (which apply to PACE by virtue of Article 2) might be considered to support such an approach to interpretation. They provide:

> "17(1) Where an enactment confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time, as occasion requires."
>
> "31(1) Every enactment shall be construed as always speaking and if anything is expressed in the present tense it shall be applied to the circumstances as they occur, so that effect may be given to each enactment according to its true spirit, intent and meaning."

[42] It may be considered that neither Article 48 nor any other provision of PACE expressly requires that the suspect must be physically present in the police station or that they be "in custody" at the time the power of appointment is exercised. While

the Court of Appeal in *Re Higgins* referred to the "*clear focus*" of the power under Article 48(1)(b) being upon a person in custody, it did not go so far as to state that it was a jurisdictional condition precedent. A further significant concern of the Court of Appeal in *Re Higgins* was the informal manner in which "extensions" were "agreed" between investigating officers and released persons. However, if a custody officer appointed an earlier replacement date in a formal manner by completing a written document (such as PACE Form 13(1)(a)) and made it available to the released person (particularly after a request from legal representatives), the concerns about exercising the power with "*appropriate formal solemnity*" may be addressed. Clarity and legal certainty regarding the individual's duty of surrender and their legal status could be achieved to a sufficient degree. The formal use of the Article 48(1)(b) power by a custody officer to appoint an earlier surrender date is <u>not</u> one of the practices which was declared to be unlawful in *Re Higgins*. It may also be considered to be consistent with the *expressio unius* principle, insofar as Article 48(8) of PACE only places an express restriction upon the circumstances in which an <u>extension</u> may be granted but is silent on shortening surrender periods. Accordingly, there is not express conflicting provision and court's concern about the express restrictions contained in Article 48(8) being rendered nugatory, would not arise. An earlier appointment date might also be regarded as consistent with *Re Higgins*, insofar as the Court of Appeal expressly recognised that Article 48(1)(b) <u>did</u> confer upon a custody officer a "*superficially broad*" discretion to appoint the place and date for surrender, the exercise of which was subject to public law principles. If a custody officer was satisfied that appointing an earlier date for surrender was consistent with the statutory purposes of furthering the investigation (per Article 35(6)), the discretion could still be exercised in a manner faithful to the scheme and the *Padfield* principle.

[43] Notwithstanding the above, several aspects of the decision in *Re Higgins* might be regarded as inconsistent with such an interpretation. These include the findings at para [35] that the only police powers to interfere with bail arrangements for a detained person are the express powers in Article 48(7) (waiver) and Article 48(8) (extension). Similarly, the Court of Appeal emphasised that the "*focus*" of the custody officer's function under Article 48(1)(b) was to appoint a time for surrender as part of the grant of bail to a person who was in custody at the time the power was exercised. As recognised above, the Court of Appeal did not go so far as to find that police bail could *only* be granted to a person, while in police custody, however this does appear to be its implicit conclusion, particularly in light of other features of the scheme which it relied upon and which are set out in *Higgins* at paras [35] and [36]. The Court considered that these were indicative of a suspect being physical present in a police station at the time an appointment for surrender was made (ie signing a bail form; requesting a copy of the appointment record; or making representations on bail conditions). It might also be considered that the presence of a suspect in custody was inherent in the concept of a grant of bail. There might also be interpretative significance in the absence of an express power to appoint an earlier surrender date, in contrast to the express power to vary bail conditions. The Court of Appeal's comments at para [39] also appear to support an interpretation of Article

48(1)(b) which precludes its exercise "*to appoint and re-appoint*" the dates and times for surrender. Finally, if police took unilateral action to appoint an earlier date, issues of procedural fairness or even abuse could arise, especially if sufficient notice to the suspect had not been provided or if there was uncertainty about whether the revised Form had been made available. In such cases, there may be uncertainty about the legality of the exercise of the power of appointment (and hence the status of the suspect) or any subsequent arrest of the suspect. A Court could become drawn into the type of case-by-case adjudication (perhaps under circumstances of urgency) which was eschewed by the Court of Appeal in *Re Higgins*.

[44] If I had been required to decide this matter in the absence of authority, I may have been persuaded that the power of appointment under Article 48(1)(b) was sufficiently broad and flexible to include a power to appoint an earlier surrender date in substitute for the original date. I may have been open to persuasion that the factors outlined in paras [35] and [36] of *Higgins* did not point inevitably to the absence of such a power in any circumstances. Nevertheless, having considered the judgment of the Court of Appeal in *Higgins* carefully and having given the matter anxious reflection, I consider that such a conclusion is not open to me as a judge of first instance and I consider myself to be bound by the findings and reasoning of the Court of Appeal in *Re Higgins*. I am particularly influenced by the emphasis placed by the Court of Appeal upon a person's presence in police custody at the time of granting bail and making an appointment for surrender. If a suspect's presence in custody is essential at the time an appointment for surrender is made, then Article 48(1)(b) could not realistically be interpreted to include a power to substitute an earlier appointment date, as it would require an earlier arrest by police for the original offence. However, in the absence of fresh evidence, such an option does not sit easily with the restrictions on police arrest powers under Articles 48(10) and 42(7). Similarly, I consider that such an interpretation would run contrary to the Court of Appeal's reasoning in para [39] which appears to preclude the possibility of "*re-appointment*" under Article 48(1)(b). Accordingly, notwithstanding that this case raises a slightly different issue of interpretation, I consider that in light of the language and reasoning used by the Court of Appeal in *Re Higgins,* it is not open to me as a first instance judge to interpret the power under Article 48(1)(b) to be sufficiently broad to enable a custody officer to make an earlier appointment for the applicant to surrender into custody. If Article 48(1)(b) can be interpreted in an alternative manner, whether for the reasons summarised above or otherwise, I consider that such clarification should only be provided by a higher court.

[45] The applicant's second ground of challenge was that the police erred in deciding that a pre-booked holiday did not amount to an "*unavoidable cause*" and also by deciding that the power of extension under article 48(8) was not available. The power of extension under article 48(8) is available when an individual is "*unable*" to attend a bail surrender appointment for one of the reasons stated in the provision, namely illness or "*unavoidable cause*." The phrase "*unable*" clearly connotes an inability to attend, as distinct from the undesirability or inconvenience of attendance. It is clear that a conflicting commitment such as a family holiday does

not amount to an inability to attend. I accept that the concept of "*unavoidable cause*" does confer some degree of discretionary judgement upon a custody officer. However, the detained person must still demonstrate that they are unable to attend in the circumstances of the particular case, rather than simply demonstrate the existence of a conflicting commitment. In this case, I am entirely satisfied that the respondent was entitled to refuse to exercise the power of extension on account of the pre-booked holiday. While it would no doubt have been extremely inconvenient and possibly expensive for the applicant to miss the holiday or to make alternative travel arrangements, none of these mean that he was "*unable*" to attend on the appointed date. Rather the applicant's circumstances fall squarely into the domain of inconvenience. Accordingly, the respondent was entitled to refuse the request under article 48(8) to extend the time for surrender.

[46] For all of the above reasons, I dismiss the application for judicial review.