

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF SCOTT McHUGH AN APPLICANT FOR BAIL

**HART J**

[1] This application comes before the court in somewhat unusual circumstances, and has given rise to an issue whether the High Court has the power to entertain an application for the variation of conditions of bail set by a district judge in the Magistrates' Court upon hearing an application for the variation of conditions imposed upon the applicant by a custody officer when the applicant was released from the police station after questioning as a suspect. The applicant has not been charged with any offence, and is therefore on what is commonly called "Pre-charge bail".

[2] The amendment of Art. 48 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (the 1989 Order), which in turn is part of Part V of the 1989 Order which provides for arrest and detention, introduced for the first time into the criminal law of Northern Ireland a power on behalf of the police to impose bail conditions upon a suspect who had not yet been charged with any criminal offence. The relevant provisions are now to be found in Art. 48, and in Art. 132A of the Magistrates' Courts (Northern Ireland) Order 1981 (the 1981 Order).

[3] Because of the nature of the scheme now contained within Art. 48 I set it out in full.

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

- (a) to appear before a magistrates' court at such time and at such place as the custody officer may appoint; or
- (b) to attend at such police station at such time as the custody officer may appoint.

(1A) A person released on bail and subject to a duty to appear before a magistrates' court in accordance with paragraph (1)(a) shall be

deemed for the purpose of Articles 48 and 49 of the Magistrates' Courts (Northern Ireland) Order 1981 to have been remanded on bail.

(2) The time to be appointed under sub-paragraph (a) of paragraph (1) shall be either the date of the next petty sessions at the place appointed or a date not later than 28 days from the date on which the person is released.

(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.

(3) No recognisance for his surrender to custody shall be taken from him.

(3A) Except as provided by this Article-

(a) no security for his surrender to custody shall be taken from him;

(b) he shall not be required to provide a surety or sureties for his surrender to custody; and

(c) no other requirement shall be imposed on him as a condition of bail.

(3B) He may be required, before release on bail, to provide a surety or sureties to secure his surrender to custody.

(3C) He may be required, before release on bail, to give security for his surrender to custody; and the security may be given by him or on his behalf.

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

(a) he surrenders to custody;

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

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

(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.

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

(a) failing to surrender to custody;

(b) committing an offence while on bail; or

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

(3G) Paragraph (3F) also applies on any request to a custody officer under paragraph (3E) to vary the conditions of bail.

(3H) Where a custody officer varies any conditions of bail or imposes conditions under paragraph (3B), (3C), (3D) or (3E), he shall make a

record of the decision and shall, at the request of the person to whom bail was granted, cause a copy of the record to be given to that person as soon as practicable after the record is made.

(4) A magistrates' court may, on an application by or on behalf of a person released on bail under Article 38(2) or (7)(b), vary the conditions of bail.

(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.

(5A) A person arrested under paragraph (5) must be taken to a police station (which may be the station where the conditions of bail were set or varied or any other police station) as soon as practicable after the arrest.

(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 subparagraph (b) of paragraph (1).

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

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

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

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

(11) Where such a person is re-arrested, the provisions of this Part shall apply to him as they apply to a person arrested for the first time; but this paragraph does not apply to a person who is arrested under Article 47A or has attended a police station in accordance with the grant of bail (and who accordingly is deemed by Article 35(8) to have been arrested for an offence).

(13) In this Part "bail" means bail granted in accordance with this Article.

[4] Art. 132A of the Magistrates' Courts (NI) Order 1981 (the 1981 Order) is also relevant, as it provides for an applicant aggrieved by any of the conditions imposed as part of pre-charge bail to apply to the Magistrates' Court. It provides that

(1) Where a custody officer-

(a) grants bail to any person under Part V of the Police and Criminal Evidence (Northern Ireland) Order 1989 (other than under Article 38(2) or (7)(b)) and imposes conditions; or

(b) varies; in relation to any person, conditions of bail under Article 48(3E) of that Order,

a magistrates' court may, on application by or on behalf of that person, grant bail or vary the conditions.

(2) On an application under paragraph (1), the court, if it grants bail and imposes conditions or if it varies the conditions, may impose more onerous conditions.

(3) On determining an application under paragraph (1), the court shall remand the applicant in custody or on bail in accordance with the determination and, where the court withholds bail or grants bail, the grant of bail by the custody officer shall lapse.

[5] From the above provisions it can be seen that where a suspect has been released, but not charged, the position is as follows.

(i) The custody officer has the power to admit the suspect to pre-charge bail under the provisions of Art. 48(3D) of the 1989 Order. The conditions themselves are not specified, and are "such requirements as appear to the custody officer to be necessary" to secure the three objectives specified in Art. 48(3D).

(ii) Any conditions imposed by the custody officer may be varied by the custody officer under Art. 48(3E). The custody officer may only do so at the request of the suspect, and when the conditions of bail are varied the custody officer may impose conditions, and in particular is expressly empowered to impose "more onerous conditions".

(iii) In any event, by virtue of Art. 48(3) pre-charge bail means "bail granted in accordance with this Article" and that Article is to be found in Part V of the 1989 Order.

(iv) Whether bail is granted, and/or conditions are imposed, the order of the custody officer is a grant of bail within the provisions of Part V of the 1989 Order, and therefore the suspect upon whom those conditions are imposed may apply to the Magistrates' Court.

(v) Upon an application being made by the suspect, the Magistrates' Court has a discretion to (i) grant bail, or (ii) vary the conditions, that is the

conditions imposed by the custody officer. As part of that process the Magistrates' Court is expressly empowered to impose more onerous conditions if it varies the original conditions.

- (vi) When the Magistrates' Court determines the application it does so by either remanding the suspect in custody or on bail, and, in either event, "the grant of bail by the custody officer shall lapse", in other words the suspect is henceforth subject to either being remanded in custody or being granted bail with or without conditions by an order of the Magistrates' Court.
- (vii) As a consequence the suspect is thereafter on court bail and no longer subject to police bail. The status of the suspect has not otherwise altered because he or she remains someone who has not yet been charged with, and may never be charged with, any criminal offence. Nevertheless he or she may well be subject to conditions of bail which will have the effect of circumscribing the liberty of the suspect to behave as he or she pleases within the law, and these conditions may, in certain circumstances, be very onerous. Examples of conditions, both of which apply in the present case, are the imposition of a curfew or an order excluding the suspect from a particular locality. These are significant interferences with the right of an individual to go wherever he or she pleases, and to behave within the law as he or she pleases.

[6] The question that now arises is whether, in such circumstances, an applicant who is dissatisfied with the decision of the Magistrates' Court upon his or her application in relation to conditions imposed by the custody officer may further apply to the High Court? This raises the question of the jurisdiction of the High Court, and in a helpful and illuminating review of the evolution of the inherent power of the High Court to grant bail in the judgment given on behalf of the Divisional Court in the case of Chaos v The Kingdom of Spain [2010] NIQB 68 McCloskey J considered the inherent jurisdiction of the High Court at [12] to [20]. It is therefore unnecessary for me to consider this area in detail. Although Chaos v The Kingdom of Spain involved questions under the Extradition Act 2003, a number of observations in that case are of general application and merit repetition.

- (i) "It is evident from the 37<sup>th</sup> and 38<sup>th</sup> Editions of Archbold, published in 1969 and 1973 respectively, that the power of the High Court to grant bail in England and Wales has traditionally differed from that exercisable by the High Court in Northern Ireland and it would seem that the differences are mainly attributable to statutory intervention".
- (ii) "In Northern Ireland, there were no statutory measures equivalent to those introduced in England and Wales considered above. Thus the significant statutory erosion of the

inherent jurisdiction of the English High Court in the sphere of bail has not been replicated in Northern Ireland.”

- (iii) “... it is clear from the foregoing that any suggested analogy between the inherent jurisdiction in the English High Court and that of the Northern Irish High Court in the field of bail must be treated with caution.”

[7] I am satisfied that the decision of the Divisional Court in Chaos v The Kingdom of Spain makes it clear that the inherent jurisdiction of the High Court of Justice in Northern Ireland to consider the grant of bail remains entirely unfettered in any case where it has not been circumscribed or removed by an act of the legislature, and there is nothing to suggest that it has been circumscribed or removed in relation to the grant of bail in circumstances such as these. In the present case it has to be remembered that the applicant has not been charged with any criminal offence, his liberty has been circumscribed by an order of a custody officer, and that order had subsequently been varied by the Presiding Judge of the Magistrates’ Courts. I can see no reason why it should not be possible for an applicant in the same position as that of the present applicant to make a further application to the High Court if the applicant considers that any conditions imposed upon him by the Magistrates’ Court following an application under Article 132A of the 1981 Order are unjustified or inappropriate. Although it is not the case in the present application, what would be the position if the Magistrates’ Court had imposed a requirement that the applicant surrender his passport, or find a very substantial cash surety? Can it be said that a suspect should not have the right to challenge such conditions before a higher court?

[8] I consider that it cannot be argued that the applicant in such circumstances should be prevented from applying to the High Court as he would be entitled to apply if he had been charged with a criminal offence and admitted to bail by the custody officer on terms which the applicant argued were unduly onerous, disproportionate or otherwise unjustified, and he then applied to the Magistrates’ Court to have the conditions varied. Were that the case the result would be that someone who has not been charged with a criminal offence but subjected to onerous bail conditions would not have the same right to apply to the High Court as someone who had been charged with an offence. Whilst there may be reasons of administrative convenience where such a situation would be regarded as justified because the applicant has already had one opportunity to apply to a court of competent jurisdiction to reconsider the terms of his bail, nevertheless it is hard to see why a person not charged with a criminal offence, and whose liberty is being interfered with by the imposition of conditions should not have at least the same right to apply to the High Court as someone charged with an offence. If anything I consider that a person who has not been charged with an offence has a stronger case to seek to have conditions varied or removed than someone who has been charged. I am satisfied that the legislature has not circumscribed or confined the power of the High Court to deal with an application such as this, and I can see no reason why in

the absence of such a restriction the High Court should not entertain such an application, and I am therefore satisfied that I have power to do so.

[9] The circumstances alleged in this case are that on 20 September 2011 at about 9.00 pm three masked males forced their way into a house in the Markets area and asked by name for the two sons of the woman of the house, one son was not present but another son was. The masked men told the lady that both her sons were to leave the country because of their anti-social behaviour, and are alleged to have brandished handguns in her face before she was taken into another room. She then heard two shots, and her son Joseph had been shot in both feet.

[10] The applicant lives in an address in the Markets area of Belfast in close proximity to that of the victim of the shooting and his mother. He was subsequently arrested and a hammer was found in his house, the significance of this being that the third male was alleged to have brandished a hammer during this incursion. When questioned the defendant denied involvement by means of a no comment interview. He has not yet been charged.

[11] The custody officer admitted him to pre-charge bail and imposed two conditions, (i) that he was not to enter the Markets area of Belfast; (ii) was to be subject to a curfew between the hours of midnight and 6.00 am. Upon the application to the Magistrate's Court the Presiding District Judge varied the times of the curfew, but declined to interfere with the prohibition placed upon the accused from entering the Markets area.

[12] During the hearing before me the prosecution no longer argued in favour of a curfew, but sought to maintain the exclusion order from the Markets area. Given that the applicant normally resides at an address within the Markets I consider that in principle the exclusion order is justified in order to prevent any contact with, and possible interference with, the witnesses. He was bailed to an address in a different part of Belfast, and it has not been suggested that it is unreasonable for him to live in that area. I am satisfied that it is appropriate that such a requirement should be a condition of his pre-charge bail because I am satisfied that, in accordance with Article 48(3D) of the 1989 Order, such a condition is necessary to ensure that he does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

[13] I therefore vary the order of the District Judge and remove the curfew, but the exclusion order will remain as a bail condition. It does not appear that a map or other definition of the Markets area was considered necessary, but upon production of a suitable map I will, if necessary, define the area from which the applicant is to be excluded.