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*Judgment: approved by the court for handing down  
(subject to editorial corrections) \**

**ICOS No: 20/71984/01**

**Delivered: 05/07/2023**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**KING'S BENCH DIVISION  
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY DONNA ARTHURS  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION BY THE CHIEF CONSTABLE  
OF THE POLICE SERVICE OF NORTHERN IRELAND**

**Monye Anyadike-Danes KC and Sean P Mullan BL (instructed by Hunt Solicitors) for the  
Applicant**

**Ian Skelt KC and Joseph Kennedy BL (instructed by the Crown Solicitor's Office) for the  
Respondent**

**Stephen Toal BL (instructed by Finucane Toner Solicitors) for the Intervener Victim  
Support NI**

**FOWLER J**

***Introduction***

[1] The applicant challenges the granting of police bail conditions and the management of those bail conditions to an individual, Patrick Russell ("PR"), who was detained during enquiries into the death of her daughter, Gabrielle Connolly ("the deceased"). Along with the Intervener, Victim Support NI, the applicant submits that this is an important case with wider implications in terms of how victims of crime are dealt with and how the voice of victims ought to be central to police actions during the bail decision-making process.

[2] Ms Monye Anyadike-Danes KC appeared for the applicant with Mr Sean Mullan BL, and Mr Ian Skelt KC appeared for the respondent with Mr Joseph Kennedy BL. Mr Stephen Toal BL appeared for the Intervener. I am grateful to all counsel for their helpful written and oral submissions.

[3] The application was brought on for hearing on a rolled-up basis that considered not only leave but also the substance of the issues raised.

### *The impugned decision*

[4] The applicant challenges the manner in which the proposed respondent determines and manages bail decisions, in particular, alleged breaches of its legal obligations to:

- (a) Ensure that the voice of the victim is considered during police bail decisions;
- (b) Ensure a voice for victims in the management of those on police bail conditions and;
- (c) Have a policy on police bail incorporating the voice of victims.

### *The relief sought*

[5] The applicant seeks:

- (i) A declaration that the current police bail decision-making process in respect of granting bail to a suspect:
  - (a) operates in a procedurally unfair manner;
  - (b) operates contrary to the applicant's Convention rights under article 8 of the European Convention on Human Rights ("ECHR");
- (ii) A declaration that the current police bail decision-making process in respect of the management of a suspect's bail:
  - (a) operates in a procedurally unfair manner;
  - (b) operates contrary to the applicant's Convention rights under article 8 ECHR;
- (iii) An order of Mandamus requiring the PSNI to implement a policy for police officers which incorporates the voice of victims in the decision-making process.

### *The Grounds of Challenge*

[6] In her Order 53 statement dated 9 October 2020, the applicant contends that the police decision-making process in releasing PR on pre-charge police bail together with the associated management of bail conditions was unlawful with the grounds

of challenge including illegality, failing to take into account material considerations, procedural unfairness and breach of ECHR law as follows:

- (i) Illegality in that:
  - (a) The PSNI police bail decision-making process under the Police and Criminal Evidence (Northern Ireland) Order 1989 is presently not interpreted in light of and in accordance with the victim's rights under article 8 ECHR.
  - (b) The police bail conditions chosen by the PSNI failed to protect the applicant's interest in ensuring a proper investigation and prosecution of whoever is responsible for her daughter's death.
  - (c) Contrary to article 8 ECHR, the absence of adequate guidance pertaining to police bail decision-making to incorporate the views of victims, results in the present regime failing the "quality of law" test.
  - (d) There is a failure by the PSNI to have any or an adequate policy in place with regard to the voice of the victim during police bail decisions.
- (ii) Material considerations in that the PSNI failed to take into account:
  - (a) Any representations from the applicant or her family.
- (iii) Procedural unfairness in that:
  - (a) The PSNI did not appraise the applicant of events during the bail decision-making process.
  - (b) The PSNI failed to advise the applicant that a decision-making process had begun regarding possible bail for the suspect.
  - (c) The PSNI failed to advise the applicant of any representations made by the suspect to the PSNI in relation to the grant of bail.
  - (d) Contrary to the "triangulation of interest", the PSNI failed to consider the rights of the applicant.
  - (e) Given the selected defective bail conditions, the PSNI failed to protect the victim adequately or show concern for her safety.
- (iv) Breach of ECHR law in that
  - (a) The police decision to grant bail without considering the views of the victim was inconsistent with, and in violation of, the rights of the applicant under article 8 ECHR, whereby her right to respect for private and family life was

ignored, and the infringements of her right were neither proportionate nor necessary in a democratic society.

- (b) The PSNI failed to ensure that its police bail decision-making process operated in compliance with the applicant's article 8 ECHR rights and failed to ensure that its interpretation of the bail process was informed by article 8 ECHR.
- (c) Contrary to the applicant's article 8 ECHR rights and unlike the suspect, there is no provision under PACE (NI) Order 1989 for the victim of a crime to seek the amendment of police bail conditions.

### ***Background***

[7] This is a tragic case and the family of Gabrielle have suffered an immense loss. The applicant is the mother of the late Gabrielle Connolly. In 2019, Gabrielle was deemed a vulnerable child and was under the care of the Belfast Health and Social Care Trust ("Trust"). Gabrielle was placed by the Trust in bed and breakfast accommodation at the age of 17 years and would periodically go missing. She again went missing on 5 July 2020, having just turned 18 years and still under the supervision of the Trust. A report was made to the PSNI on 6 July 2020 by a social worker conveying concern for Gabrielle's safety. A missing person investigation was instigated by the respondent. Gabrielle was last seen alive in the company of Patrick Russell (PR) on 6 July 2020. At this time, PR was living with his mother as part of his court bail conditions. However, he was not there when police checked that address.

[8] On 8 July, PR was spoken to by police and on this occasion, he untruthfully indicated to police that he did not know Gabrielle. The following day, PR was admitted to the Mater Hospital following an overdose of heroin. He left the hospital against advice and was subsequently discovered by police on Clifton Street bridge threatening to jump. He was returned to the Mater Hospital by police and admitted to a mental health ward.

[9] Tragically, Gabrielle's body was discovered by PR's mother and sister at 9 Rockville Street on 10 July 2020. A post-mortem examination was carried out, and a toxicology sample taken revealed the presence of heroin. The cause of death was given as combined heroin, flualprazolam, fubromazolam, mirtazapine and sertraline toxicity and cardiac dysrhythmia.

[10] Between Gabrielle going missing on 6 July and the discovery of her body on 10 July, the police spoke with the applicant on 11 occasions concerning their enquiries.

[11] PR was arrested at 14:20 on 11 July 2020 at Belfast City Hospital and taken to Musgrave Street Police Station for interview. When questioned by police regarding

allegations of administering a lethal injection and of preventing the lawful burial of a corpse, he gave a 'no comment' interview. It was the police view that there was insufficient evidence to charge PR with any offence in connection with Gabrielle's death. In these circumstances, there was no lawful reason for his continued detention, and he had to be released. He was freed on police bail at 20:16 on 11 July 2020. It was noted on his custody record that he suffered from 'paranoia schizophrenia.' He was bailed to his mother's address as police were aware there was a court order bailing him to this address, and it was considered appropriate due to him requiring support for his mental health issues.

[12] After the police decision to release PR on bail, the applicant was informed. The bail decision was made without any input having been sought or received from the applicant.

[13] Subsequently, on 30 July 2020, it was alleged by the applicant that PR's brother was seen near her home, which, it is said, put them in fear. Further, it is alleged PR attempted communication with Gabrielle's family by seeking to add the applicant as a friend on Facebook.

[14] The applicant, through her solicitor, contacted police to raise these concerns. Later, a discussion also took place with police where the applicant outlined her concerns regarding the proximity of the bail address being used by PR and the deceased's family home. The applicant raised a further concern in that PR had been bailed to his mother's address despite the fact she and her daughter had found Gabrielle's body and could potentially be prosecution witnesses in any subsequent criminal proceedings.

### *The statutory scheme*

[15] Before considering the grounds relied upon by the applicant, it is appropriate to set out the statutory scheme applicable in this case. Detention in police custody and bail are dealt with in Part V of PACE, which determines police powers and duties in respect of detention, release from custody, bail conditions and variation of bail. On arrest, a detained suspect can be held for specified periods of time for questioning and associated investigations. Detention can only be authorised and maintained for as long as is necessary. However, when the legal basis for detention ceases, the suspect must be released. Once a suspect is brought into custody, it is a custody officer who makes the final decision on whether or not to release the suspect with or without bail and with or without conditions.

[16] The powers and duties of a custody officer in relation to police detention are set out in Article 35(1) of PACE as follows:

"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), if at any time a custody officer –

- (a) becomes aware, in relation to any person in public 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 be justified under the provisions of this part,

it shall be the duty of the custody officer, subject to [F 1 paragraphs (4) and (4A)], to order his immediate release from custody.”

[17] Article 38(2) provides:

“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.”

[18] The power of police to impose police bail conditions can then be found in Article 48:

“(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.”

[19] Further, Article 48(3F) determines that conditions cannot be imposed 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.

[20] The above provisions reflect that detained persons have a right to freedom. article 8 ECHR ensures that public authorities protect a detained person's right to respect for private and family life. To this extent, it is suspect focused. It provides that:

- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[21] Accordingly, the circumstances in which a person may be arrested, detained, bailed and subjected to bail conditions are limited to those that are in accordance with the law and are necessary. It is these provisions that govern the custody officer's powers of detention and granting of bail, with or without conditions, in the present case. These powers must be exercised by the custody officer on the basis of necessity and requires a practical and proportionate assessment of the risks involved. See *McRandal, Re Judicial Review* [2012] NICA 22.

### *The applicant's case*

[22] It is accepted by the applicant that in the circumstances of the present case, pre-court bail was entirely a matter for the custody officer. However, the real issue of concern for the applicant is what opportunity is to be given to victims to express their views concerning bail and what if any conditions might be imposed. The applicant's case was commendably focused on three overarching arguments; (i) the failure by police to ensure the voice of the victim is considered during police bail decisions. (ii) failure by police to ensure a voice for victims in management of police bail conditions and: (iii) failure by PSNI to have a policy on police bail incorporating the voice of victims.

#### *(i) Failure to ensure the voice of the victim is considered during police bail decisions*

[23] The applicant argues that the voice of the victim must be considered within the context of applicable convention rights. That article 8 of the ECHR, the EU

Charter of Fundamental Rights of the European Union, the European Union Agency for Fundamental Rights (“EUARF”) and the Victims’ Rights Directive have all signposted a direction of travel and change in emphasis where victims of crime are to be regarded as rights holders.

[24] It is suggested by the applicant that the EUARF represented a paradigm shift in respect of victims and their participation in proceedings. The EUARF published in 2019 ‘Justice for victims of violent crime Part I’ in which it observed that ‘Increasingly, victims are seen as rights-holders.’ In addition, article 47 of the Charter of Fundamental Rights of the European Union (“the EU Charter”) entitles victims of violent crime to treatment by legislation and in practice on an equal footing with the other parties to proceedings. Consequently, the applicant makes the case that where decisions in respect of bail are being considered, public authorities are required to consider the triangulation of interests at play between the victim and his or her family, the accused/suspect and the public. (per Lord Steyn in Attorney General’s reference (No 3 of 1999) [2001] 2 AC 91). It is argued that since the provisions of the Human Rights Act 1998 were introduced it gives effect to rights and fundamental freedoms under the ECHR. Accordingly, and to the extent those rights and freedoms are reflected in the Charter, the applicant submits that it remains relevant to consider the commentary on them, albeit the Charter itself no longer remains part of UK domestic law.

[25] Further, the applicant suggests that the Justice Act (Northern Ireland) 2015 and the 2015 Victim Charter (“NI Victim Charter”) reflects victims being seen as rights holders as referenced in the 2019 EUAFR. That the NI Victim Charter itself implements relevant provisions of EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime. It is against this relevant background of EU provisions the applicant argues that the NI Victims Charter falls to be interpreted in light of the EU Charter

[26] The NI Victim Charter has as its purpose, articulated at para 17, ‘to ensure that victims of crime receive appropriate information, support and protection and able to participate in criminal proceedings.’ It goes on to define “victim” to include “a family member of the victim, where the victim dies (whether directly as a result of the crime or not)” and “criminal proceedings” as starting “when a crime has occurred and is reported to the police.” The applicant argues that it is implicit within the language and spirit of the NI Victim Charter that ‘participation in proceedings’ should include participation in expressing a view on bail and bail conditions. That victims should be provided with information and support at the time bail is being considered by police and able to participate and express their views. Not that the police must follow a victim’s view, simply that they are given the opportunity to express them to police and be listened to.

[27] The applicant says there was an abject failure in this regard in the present case. What happened, it appears, is that the bail decision was bereft of any input by the victim on the issue of bail or conditions to be imposed. The victim only



discovered PR was to be released on bail after he had, in fact been released. That the sole suspect in the investigation concerning Gabrielle's death was released to an address a relatively short distance from the applicant's home, less than three miles away. Additionally, he was bailed to his mother's home, where his mother and sister reside, both of whom were present when Gabrielle's body was discovered, and likely to be witnesses in any potential prosecution with a real possibility of interference with these witnesses. To allow this situation to pertain was, the applicant says, irrational.

[28] It is the applicant's case that these were all matters she would have raised and expressed concerns about with the police had she been given the opportunity. It is conceded by the applicant that representations may not have changed the outcome of the bail determination. Still, she finds it inexplicable why, given the level of communication with her between 6 July and 10 July that she was not told about or communicated with in relation to bail before it was granted. She was not kept informed or able to participate in any way prior to the police decision to grant bail. This was particularly so when, it is argued, her article 8 rights were engaged as the mother of a victim of violent crime. These were, the applicant submits, material considerations the police failed to take into account in ensuring the voice of the victim was considered during police bail decision-making.

[29] It was argued on behalf of the applicant that failure to seek the views of the victim in the present case is not an isolated incident. Written submissions from the intervener, Victim Support NI, suggested it is their experience that there is a pattern whereby victims are not informed of bail and/or conditions imposed on alleged offenders, which means they are not able to assess whether those conditions are appropriate or subsequently breached. The PSNI bail policy, concerning the voice of the victim, in their view, is deficient.

[30] The applicant drew the Court's attention to the HM Crown Prosecution Service Inspectorate in England and Wales 2020 Report on 'Pre-charge bail and release under investigation - striking a balance.' One of the main findings, particularly in cases of domestic violence and sexual offences against women and girls, was that 'All too often, the police don't seek the views of the victim when deciding whether to bail a suspect and impose conditions.' It was felt that changes to the bail legislation were required to secure improvements for victims of crime. This resulted in the Inspectorate recommending a change in pre-charge bail and release under investigation to include a new duty on police to seek the views of victims on pre-charge bail and conditions that relate to their safeguarding. This duty is on investigating officers, where reasonably practical to do so, who will then pass this information on to the custody officer. Custody officers can then consider the victim's views and any conditions to be set. It also establishes a power for police to issue guidance on pre-charge bail. This guidance being subject to consultation and approval of the Home Secretary. The changes recommended by the Inspectorate were legislatively brought into effect in England and Wales by section 45 and Schedule 4 of the Police, Crime, Sentencing and Courts Act 2022, amending section

30A of the Police and Criminal Evidence Act 1984. The applicant argues that this confirms the trajectory of travel, both domestically and within the EU, that victims must be considered and should be on an equal footing with the other parties.

*(ii) Ensure a voice for victims in the management of those on police bail conditions*

[31] Bail having been granted by the custody officer absent input from the applicant victim, in circumstances where the victim had concerns about the extent and nature of the bail conditions, was compounded by her inability to do anything about those concerns. Article 48(3E) of PACE provides that it is only the suspect who can seek to vary police bail conditions:

“(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.”

[32] It is argued that there is no provision for the victim to voice her concerns and fails to ensure a fair accommodation of the triangulation of interests in a criminal matter.

*(iii) Failure by the PSNI to have a policy on police bail incorporating the voice of victims*

[33] The applicant agreed that the police have a discretion when it comes to granting pre-charge bail and conditions. However, the point made by the applicant is that where there is such discretion, police must have a bail policy and guidance in place to avoid inconsistency. That this is fundamental to the exercise of discretion in the criminal justice system, where fairness, reasonableness and certainty of approach is a necessary protection against arbitrariness. This is underlined in the cases of *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 and *Regina v Secretary Of State For The Home Department, Ex Parte Venables* [1997] 2 WLR 67.

[34] While it is the applicant's view that there must be operational discretion, any bail decision-making process by the police must adequately consider the view and voice of the victim. However, the applicant suggests that in Northern Ireland, at the moment, there is no requirement for the police to consider the victim's views, and therefore, pre-charge bail decision-making is arbitrary and inconsistent as evidenced by the case studies provided by Victim Support NI in their written intervention. That the pre-charge bail process is structurally defence-focused, where the voice of the victim is not naturally embedded. The applicant drew attention to the police Bail Service instruction S102019, which deals with pre-charge bail at parts 4–11. The applicant makes the case that this service instruction fails to incorporate the need to

determine the victim's views and what is required to be contained in the service instruction is a clear and unambiguous direction to consider the views of the victim as to bail and conditions in advance of release from detention and to keep the victim informed as to when or if they are released and on what conditions.

[35] Victim Support NI also argues that the PSNI service instruction regarding pre-charge bail fails to require prior engagement with the victim before bail is considered or granted. That there is a failure on the part of police to assess victim vulnerability and risk properly. That it is plainly irrational for the PSNI to assert that they properly or adequately consider victims of crime in pre-charge bail decision-making when they fail to speak with them or to ascertain their concerns.

### *The respondent's case*

[36] The respondent's position in summary is that there is a clear statutory scheme delineating the PSNI's legal duties around detention, bail and the imposition of conditions. The PSNI have complied with that scheme, which together with the Bail Service Instruction is publicly accessible. The police maintain policies which provide guidance to officers when considering granting bail and any conditions to be imposed. These policies include provision to allow (but not mandate) officers to consider the views of victims and to consult with them when considering certain bail conditions. Decision-making remains with the custody officer when deciding whether to grant bail and what conditions to impose. Conditions of bail imposed are those that appear necessary to the custody officer for the purposes stipulated in Article 48(3D) of the Police and Criminal Evidence (NI) Order 1989. In these circumstances, the respondent argues that the release of PR was a lawful, appropriate and in the circumstances, inevitable decision in accordance with the statutory scheme.

[37] In addition, they point out the NI Victim Charter does not require that a victim's views are considered prior to police bail decisions and in any event, the relief sought, in the present case, is academic. PR had to be released on bail and the applicant is unable to establish what different outcome would have resulted had her views been expressed and taken into account.

### *PR's arrest, interview and release on bail*

[38] PR was arrested in Belfast City Hospital, where he was being treated for mental health issues having attempted self-harm. During interview, he made no comment. On a consideration of the available evidence and absent any admissions, the custody officer determined there was insufficient evidence to charge PR with any offence arising out of the death of Gabrielle. There was no lawful reason or basis for his continued detention, and under PACE the custody officer had no alternative but to order his release. To have done otherwise would have been unlawful.

[39] From Chris O'Flaherty's affidavit, it is clear that PR was released on pre-charge bail with conditions. PR was on Court bail to reside at his mother's address. It is the respondent's case that it was not possible to change that address without an application to court. Accordingly, pre-charge bail was also to this address. There was no evidence to suggest that the deceased's family were known to PR and it was considered proportionate to have him released on bail to his mother's address, which the police knew was less than three miles from the deceased's family home. It was additionally determined by the custody officer that a further bail condition not to have contact directly or indirectly with the deceased's family was proportionate. In determining whether to release PR, the custody officer exercised his relatively narrow discretion as prescribed by PACE, to release PR on the basis of necessity. There was no evidence to connect PR to an offence. In doing so, it was necessary for the custody officer to balance the presumption of innocence and in favour of bail against the risk that PR might commit further offences. The respondent argues that was a practical and proportionate assessment of risk specific to the applicant and in light of the available relevant evidence (see *McRandal, Re Judicial Review* [2012] NICA 22). There was nothing unlawful, unfair or irrational in doing so. Since his release PR has not been charged with any offence arising out of the death of Gabrielle and has been released from police bail since April 2021. PR has not been charged with any offence concerning the death of Gabrielle, a decision which was reviewed by the PPS with the present position remaining as no prosecution. The respondent considers as relevant that PR remained on bail for many months and did not breach his bail, seek out the applicant or her family or in any way threaten or intimidate them. Indeed, quite the reverse rather than PR seeking out the applicant as was her expressed concern communicated through her solicitor, members of the applicant's family tracked PR down and seriously assaulted and hospitalised him.

[40] The applicant as outlined above relies on the EU Charter, the ECHR and the Victims' Rights Directive as a catalyst for a shift in emphasis towards greater engagement with victims in the criminal justice process and ensuring the voice of the victim is heard. It is the respondent's case that the Charter is not part of UK law and the retained rights are those expressed in the ECHR. However, the respondent rejects the notion that the grant of pre-charge bail in the present case somehow engages the applicant's article 8 Rights, and much less parallel rights of victims to be consulted before bail is granted on the basis of the Charter. Further, the respondent does not accept that the Victims' Rights Directive suggests that a victim should be consulted by police in pre-charge bail decisions.

[41] In terms of the Victim Charter the respondent argues that neither the relevant legislative provisions nor the Victim Charter itself require or suggest that a victim's opinion on bail (admission to bail or conditions of bail) is to be canvassed ahead of any decision. The materials refers to an entitlement to be informed, without unnecessary delay, of developments on charges, bail and summons.

[42] Further, the respondent argues that the Bail Service instruction provides adequate guidance and sets out the issues to be determined by the custody officer when considering pre-charge bail. These include the following:

- Is there sufficient evidence to charge?
- If not, is keeping the person in custody necessary to secure and preserve evidence by questioning?
- If not, should the person be released on bail or without bail?
- If they should be released on bail – are conditions required? If conditions are required – what conditions are required to mitigate any risk identified?

[43] It also includes a Risk Assessment Matrix, which assesses type of offence, vulnerability of the victim and community tensions. That this informs the custody officer in dealing with and managing bail conditions to ensure all relevant factors are considered before granting bail and in managing bail conditions. It also prompts the custody officer with precedent conditions. While it does not require the victim's views to be sought on bail or conditions, bail conditions in the present case, as prompted by the risk assessment matrix, were imposed in this case.

[44] Further, the respondent rejects the applicability of HM Crown Prosecution Service Inspectorate in England and Wales 2020 Report Pre-charge bail – Striking a Balance. The problem identified in this report was that with the enactment of the PCA 2017, too many suspects were being released under investigation and not on bail, which is the opposite to the present position in Northern Ireland. It was felt too many suspects were being released without bail and this was causing difficulties for both suspects and victims. The suspects encountered very significant delays and the victims a lack of protection by bail conditions. That these problems arose due to changes in pre-charge bail occasioned by the PCA 2017 which did not occur in Northern Ireland. However, the respondent argues that what the England and Wales experience does show is that change to the statutory scheme governing bail is properly an area for the legislature.

[45] The respondent says the problems experienced in England and Wales in terms of pre-charge bail are plainly not applicable to this present case. They argue a proper balance was struck by the custody officer with PR released on bail and the applicant protected by bail conditions. This is evidenced by the fact PR abided by all conditions with no reported breaches of bail, with the conditions imposed by police adequately reflecting the need to manage PR's release together with protection being afforded to the applicant and her family.

## *Consideration*

[46] Dealing first with the applicant's allegation that there has been a failure to ensure the voice of the applicant is considered during police bail decisions. It is clear from the evidence that the applicant was not informed of the police intention to release PR nor were the views of the applicant or her family canvassed at any time prior to his release. However, concerning pre-charge bail it has to be noted that there is a presumption in favour of bail and under PACE it is the Custody Officer who makes the final decision whether or not to grant bail. I am satisfied in the present case the Custody Officer correctly determined that he did not have sufficient evidence to charge PR and was mandated to release him either on bail or without bail under Article 38 of PACE. In these circumstances the Custody officer had no option but to release PR, to do otherwise would have been unlawful, a breach of PACE and article 8 ECHR in respect of PR.

[47] The applicant considers the actions of the respondent in relation to bail decisions under PACE are offender focused and as presently implemented do not adequately consider the rights of the victim. There is no input and no voice of the victim in bail decision making. That this does not accord with the 'triangulation of interests' as required in criminal law. I accept that the voice of the victim must be considered within the context of applicable convention rights. That the EU Charter, EUARF and the Victims' Rights Directive signpost a direction of travel and change in emphasis where victims of crime are to be regarded as rights holders. I also accept that the applicant's article 8 ECHR rights were engaged during the pre-charge bail stage. However, it is clear there is a balancing of rights as between the applicant and PR - as between victims and suspects. Further, I do not consider that the police have failed to consider this balancing of rights.

[48] I am satisfied the Custody Officer applied the statutory scheme set out in PACE, considered all material matters appropriate to a determination of the grant of bail, carried out an appropriate balancing exercise and his decision to grant bail in the circumstances was neither illogical, irrational or in breach of article 8 ECHR.

[49] The Custody Officer having regard to the fact PR was already on court bail came to the not unreasonable conclusion that he should be released on bail to his mother's address. In these circumstances the Custody Officer was obliged under Article 48(3F) of PACE to go on to consider whether or not he should impose conditions on PR's bail as were necessary to ensure: (a) PR's surrender to custody; (b) that he does not reoffend on bail and (c) does not interfere with witnesses. As outlined in the affidavit of D/Sgt O'Flaherty, the officer in charge of the case considered bail conditions necessary which included:

- (i) To reside at his mother's address and;
- (ii) No contact with the family of the deceased (to include the applicant).

[50] PR's article 8 rights were interfered with by his arrest, detention and admission to bail with conditions. The conditions imposed were required to be lawful, pursue a legitimate aim, necessary and proportionate. In balancing his article 8 rights with the applicant's rights, the bail conditions fixed by the custody officer kept PR in accommodation where he was a reasonable distance away from the applicant and required him not to have any contact with the applicant and her family. This was balanced with the risk posed by seeking accommodation in a more distant residence where PR would not have had familial support following his overdose and threatened suicide.

The rationale for the two bail conditions were, first, that he was already court bailed to his mother's address and he was in need of familial support due to his significant mental ill health, recent overdose on heroin, attempted self-harm and having left hospital contrary to medical advice. The address was almost three miles away from the applicant and it was deemed unsuitable that PR live in unfamiliar accommodation at a remove from his support network.

[51] In terms of contact with witnesses, there was nothing to suggest he knew where the applicant or her family lived or for that matter they knew where he lived. However, by virtue of the fact he did know Gabrielle's last name with a potential to find out where she lived it was felt by police prudent to impose the condition that he have no contact with the applicant, to give reassurance that if he did contact her that he would be in breach of bail and liable to arrest and imprisonment. It is significant that PR has not breached the terms of his bail. While a suggestion has been made that he sent a Facebook friend request to the applicant no evidence by way of screen shots or Facebook posts etc have been provided to police. However, it appears that PR has been seriously assaulted on two separate occasions by the applicant's ex-husband and two of her sons. Accordingly, the concerns expressed by the applicant through her solicitor in relation to her article 8 rights do not appear to have materialised.

[52] Concerning the conditions attached to PR's bail, again the Custody Officer in his approach followed the statutory scheme as set out in PACE and in that regard cannot be faulted. I am satisfied the Custody Officer considered all material matters appropriate to a balanced determination of the necessary and proportionate conditions to be attached to RP's bail. His decision to impose those bail conditions in the circumstances was neither illogical, irrational, or in breach of the applicant's article 8 ECHR rights.

[53] It is important to address the applicant's argument that it is implicit within the language and spirit of the NI Victim Charter that 'participation in proceedings' should include participation in expressing a view on bail and bail conditions. The NI Victim Charter provided for by section 28 of the Justice (NI) Act 2015 determines in sections 28(2) & 28(3) that the Victim Charter must set out:

“ ...

- (a) the services which are to be provided to victims by specified criminal justice agencies and the standards which are to be expected in relation to those services;
  - (b) the standards which are to be expected in relation to the treatment of victims by such agencies.
- (3) In particular the Charter must include provision for a victim –
- (a) to be treated with courtesy, dignity and respect;
  - (b) to be informed about the services available to victims;
  - (c) to be informed about –
    - (i) the progress of relevant proceedings, and the reasons for any delay in those proceedings, at such intervals or at such times as are specified;
    - (ii) the final outcome of relevant proceedings, within such time as is specified;
  - (d) where in the course of relevant proceedings a decision is taken not to prosecute a person in respect of the criminal conduct concerned, to be given the reasons for that decision within such time as is specified;
  - (e) to be informed about any special measures which may be available to the victim under Article 4 or 5 of the Criminal Evidence (Northern Ireland) Order 1999 if called as a witness in criminal proceedings arising out of the criminal conduct concerned;
  - (f) to be informed about the opportunity to make a victim statement under section 33;
  - (g) to have considered by an independent body any complaint against a criminal justice agency in relation to any provision of the Charter which has not been resolved by that agency.”



[54] The Victim Charter itself states:

“If a suspect is identified you will be informed if they have been arrested (including any release on police bail and the terms of this), or released with no further action to be taken.” (Page 11 Para 7)

[55] Standard 1.9 of the NI Charter further provides information on Charges, bail and summons that:

“You are entitled to be informed by the police, without unnecessary delay, and to have the reasons explained to you, when a suspect is:

- arrested;
- kept in custody;
- released on police bail, or if police bail conditions are changed or cancelled, or the suspect has absconded from police custody, unless sharing the information would endanger someone or there is an identified risk of harm to the suspect which would result from this;
- charged to court or reported to the Public Prosecution Service; or
- offered an alternative disposal available to the police.

Where necessary, you are entitled to be informed by the police of any relevant measures issued for your protection in the case of the release or escape of a suspect.”

[56] It is evident that there is no mention, either in the Justice (NI) Act 2015 nor in the NI Charter itself, of a requirement that a victim’s views or concerns on a suspect’s admission to bail and the conditions that should be attached are to be sought in advance of a decision in respect of bail. What is required is the provision of information concerning release on bail, conditions or breach of bail. If it was the intention of the legislature that victim’s views would be canvassed in advance of granting pre-charge bail and a duty placed on police to carry out such enquiries with victims then it would be expected to be articulated in the legislative provisions and the NI Charter. Absent such a clear articulation I do not intend to draw the inference sought by the applicant.

[57] In terms of the direction of travel the applicant opened the HM Crown Prosecution Service Inspectorate in England and Wales 2020 Report on 'Pre-charge bail and release under investigation – striking a balance.' Here it was observed that particularly in cases of domestic violence and sexual offences it was 'All too often, the police don't seek the views of the victim when deciding whether to bail a suspect and impose conditions.' The report recommended a change in the law in England and Wales referred to as Kay's Law, in memory of Kay Richardson who was killed by her estranged husband after he was released under investigation rather than on pre-charge bail, following his arrest for sexual offences against her.

[58] The change in the law was brought about by legislative amendment of PACE 1984 by virtue of section 45 and Schedule 4 of the Police, Crime, Sentencing and Courts Act 2022 (the 2022 Act):

"6. Paragraph 22 of Schedule 4 of the 2022 Act inserts a new section into the Police and Criminal Evidence Act 1984 (s. 47ZZA). The sections of 47ZZA which appear relevant are set out below:

' ...

(2) If it is reasonably practicable to do so, the investigating officer must seek the views of the alleged victim (if any) of the offence on—

(a) whether relevant conditions should be imposed on the person's bail, and

(b) if so, what relevant conditions should be imposed.

(3) In this section "relevant condition", in relation to an offence and an alleged victim of that offence, means a condition that relates to the safeguarding of the alleged victim.

...

(13) For the purposes of this section a person ("P") is an alleged victim of an offence if—

(a) an allegation has been made to a constable or other person involved in the investigation of the offence that P has suffered physical, mental or emotional

harm, or economic loss, which was directly caused by the offence, and

(b) P is an individual.”

[59] The applicant argues that this change in the law in England and Wales is entirely in keeping with its submission that the trajectory of travel, both domestically and within the EU, that victims must be considered and indeed should be on an equal footing with the other parties.

[60] The context to this change in the law is that in 2014, in England and Wales, suspects were kept on pre-charge bail for long periods subject to bail conditions. The government legislated to deal with this problem by enacting the Policing and Crime Act 2017 (“the PCA 2017”), which introduced a presumption against pre-charge bail. This led to an increased number of suspects placed on Release Under Investigation and not subject to any restrictions or conditions. Kay’s Law was enacted to correct the position created by the PCA 2017 and take the law back to what it was prior to that legislation.

[61] Significantly, pre-charge bail in Northern Ireland, did not undergo these 2017 amendments, and suspects continued to be bailed with or without conditions. That the respondent’s policy and guidance provides for pre-charge bail consultation with victims when necessary and in appropriate circumstances.

[62] It is quite clear that the change in the law which is advocated by the applicant in Northern Ireland is broadly in line with that in England. That change in England and Wales has been brought about by legislation and, in my view, for very good reason. Changes of this nature require consultation and have to be subject to carefully drafted limitations and conditions. In my view, specific legislative provision will be required to implement any such change in Northern Ireland.

[63] Dealing with the alleged failure by the respondent to afford a voice of the victim in the management of police bail conditions. It is argued by the applicant that there is no provision for the victim to voice her concerns in terms of seeking variation of bail conditions. That this fails to ensure a fair accommodation of the triangulation of interests in a criminal matter. While a victim cannot apply to have a suspect’s bail varied, a custody officer may do so if he considers it necessary to prevent the suspect from committing further offences or, interfering with witnesses or obstructing justice. It is not uncommon for victims to report to police behaviour of suspects likely to lead to a breach of bail. In these circumstances, a person who has been released on bail may be arrested without warrant by a constable if the constable has (a) reasonable grounds for believing that the person is likely to break any of the conditions of his bail; or (b) reasonable grounds for suspecting that the person has broken any of those conditions as per PACE Article 48(5). Equally, a custody officer provided with such information can consider what, if any, other additional bail conditions should be

imposed. I do not consider the respondent has, in the circumstance, acted in breach of the applicant's article 8 ECHR rights irrationally or unlawfully.

[64] The applicant has argued that the PSNI have failed to have a policy on police bail incorporating the voice of victims. The submission made by the applicant is that where there is a discretion given to the Custody Officer whether or not to grant bail and on what conditions, then it is essential that police have a bail policy and guidance in place to avoid inconsistency. Absent such a clear policy and guidance, the pre-charge bail process is structurally defence-focused, where the voice of the victim is not naturally embedded.

[65] The respondent has in place Service Policies and Service Instructions designed to be read together and complement one another. There is also a Bail Service Instruction SIO219 and linked operational guidance, which addresses decisions to be made by a Custody Officer when considering pre-charge bail. A hyperlinked version of this is available on the police intranet. The Bail Service instruction also contains a risk assessment matrix which includes consideration of various factors indicative of heightened risk, including type of offence, vulnerability of victim, etc. This matrix prompts officers managing bail conditions and ensures a full range of factors are considered when managing suspects on bail.

[66] In terms of the operational guidance, it highlights the statutory criteria for imposing bail conditions and prompts with precedent bail conditions that may be relevant to given statutory criteria. These conditions of bail and the applicable criteria are not exhaustive nor mandatory but are designed to be used as an aid to the Custody Officer where appropriate. Consideration, as regards a condition relating to interference with witnesses, may involve speaking to a victim or witnesses depending on the particular circumstances of the case. For example, no contact with a witnesses may require consideration of the views of the witness in a domestic violence case where there are children involved. The guidance in these circumstances is designed to be flexible and agile, capable of responding to different situations. However, what it does not do is introduce a general process or requirement for a victim's views to be taken into account when considering bail conditions generally. These materials promote consistency of approach while at the same time making a degree of flexibility available to the custody officer to accommodate fact-specific circumstances that may arise.

[67] I accept the point made by the respondents that to simply take the Bail Service Instruction in isolation and say the PSNI's policy on the treatment of victims and witnesses is deficient does not take into account the interaction as between the various service instructions and policies.

[68] I also acknowledge that a requirement to enquire as to the views of victims in the vast majority of pre-charge bail cases would be impracticable. While the bail position in England and Wales now allows for the views of victims to be canvassed prior to bail being granted, this is subject to qualifications and conditions, which

should make that new statutory scheme workable. It is evident in my view that such a change requires legislative intervention.

[69] In the circumstances, I do not accept, the present position is confused and unregulated. The discretion given to Custody officers in relatively narrow and supported by appropriate guidance.

### *The test for leave*

[70] In this jurisdiction, it is well-established that the test for leave to apply for judicial review requires an applicant to show “an arguable ground for judicial review on which there is a realistic prospect of success”, per Nicholson LJ in *Re Omagh District Council’s Application* [2004] NICA 10.

### *Conclusion*

[71] The statutory scheme provided in PACE provides custody officers with a relatively narrow discretion whether or not to grant bail and, if so, on what conditions. The custody officer, having regard to the fact-specific circumstances of this case and on consideration of the provisions of PACE, the Bail Service Instruction, and on consideration of all important competing factors relevant to the granting of bail and attendant conditions, was entitled, if not compelled in the exercise of his discretion to release PR. The additional conditions imposed were appropriate, and no additional conditions over and above those put in place are identified as necessary. Only in exceptional cases, of which this is not one, will the court disturb the determination of an independent investigator/custody officer. (see *R (Corner House Research) v DSFO* [2008] UKHL 60). The decision to grant bail was lawful and rational, and the custody officer and respondent have fairly and lawfully adhered to the direction of the legislature as expressed in PACE.

[72] The court, therefore, concludes that there is no error of law identified in the impugned decision. There has been no procedural unfairness. The decision of the tribunal is a rational one, which was plainly open to it.

[73] In the circumstances of the present case, I do not consider there are arguable grounds for judicial review or a realistic prospect of success, and for the reasons set out above, I refuse leave.