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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McRandal's (Daryl) Application [2011] NIQB 83

IN THE MATTER OF AN APPLICATION BY DARYL McRANDAL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant is Daryl McRandal of 10 Dhu Varren Park, Portrush, Co Antrim who seeks, inter alia, an order of certiorari quashing the decision of the Chief Constable implementing an alleged policy permitting police officers to impose, as a condition of police bail, a condition that an applicant for police bail should consent to allowing police to enter and search his premises without warrant, where police have a reasonable suspicion that there are drugs on the premises. He also seeks a declaration that an alleged policy of requiring detainees to consent, as a condition of being granted police bail to the same impugned condition is unlawful.

[2] The core of the applicant's complaint appears to be that where there is an express statutory power outlining in detail the circumstances in which the police can search a premises (Arts 19 and 20 of the Police and Criminal Evidence (NI) Order 1989) that the police cannot, as a condition of bail, impose conditions with a view to enabling them to search the premises in circumstances not provided for by the legislation and specifically that it cannot be used as a method of circumventing the protections provided for under statute.

[3] The application is grounded on three affidavits all from the applicant's solicitors – two from Andrew Russell and one from Fearghal Shiels. There is no affidavit from the applicant himself.

Background

[4] The applicant was arrested on 9 November 2010 and detained in Coleraine Police Station on suspicion of possession of Class B drugs and possession with intent

to supply. Having been interviewed by the police the applicant was charged with possession of Class B drugs.

[5] The applicant was granted police bail subject to two conditions: firstly that he reside at 10 Dhu Varren Park Portrush; and secondly that he "allow a search of 10 Dhu Varren Park Portrush *without warrant* if police have reasonable grounds to suspect that there are controlled substances within the dwelling" [emphasis added].

[6] Mr Russell has averred that Sergeant Kincaid was the officer in charge of the case who was seeking to impose this condition and that he advised the applicant that if he did not consent to the condition he would be refused bail. He avers that he objected to the imposition of the second condition on the basis that it was an illegal extension of PACE and should not be permitted. This objection was made to the Custody Sergeant. He represented to the Custody Sergeant that PACE provides express powers permitting searches without warrant, under conditions expressly provided for by PACE, and that to seek to use police bail in order to extend the circumstances in which a search without warrant could be conducted, was unlawful. Notwithstanding these representations the Custody Sergeant allowed the condition to be imposed.

[7] The applicant thereafter consented to the condition "but only because he had been expressly advised by police that he would be denied police bail if he did not so consent" (see para 7 of Mr Russell's first affidavit). Mr Russell's objection and the basis upon which the applicant consented to the condition were recorded in the custody record.

[8] The custody record also records the reasons as to why the impugned condition was imposed and states "Reason: committing an offence whilst on bail; interfering with witnesses or otherwise obstructing the course of justice". The same section of the custody record contains the following:

> **"I understand that I am granted bail with conditions and must surrender to the Court. I have been informed that if I fail to surrender custody I may commit an offence and be fined, imprisoned or both; that if I fail to comply with any of the conditions set out above, *I may be arrested*; and that if I wish to vary any of the conditions I may apply to either the police station or Court specified, stating my reasons. I have been given a copy of this form.**
> **Signed by the applicant"**

[9] The custody record also records that Mr Russell stated that his client was only agreeing to the condition because Sergeant Kincaid stated that his client would be charged to Court in the morning and would not be bailed. Mr Russell also stated that

10 Dhu Varren Park is the address of his client's mother and the condition has to consider her position.

[10] At that stage (9 November 2010) Mr Russell avers that consideration was given to issuing judicial review proceedings however the view was taken that the applicant could, in the first instance, apply to the District Judge's Court to have the condition lifted. A bring forward application was lodged on the applicant's behalf on 12 November 2010 and the application was dealt with on 17 November 2010.

[11] At para 9 of his affidavit Mr Russell states that on 17 November 2010 the applicant applied before District Judge Wilson to vary his bail and specifically to remove the second condition. The PPS called the police officer to explain the basis upon which the bail condition was imposed. According to the solicitor's note of his evidence the police officer stated as follows:

> **"If we call to the Defendant's house to do a bail check and smell cannabis or see that the Defendant is under the influence of cannabis then it would allow us to search the premises and look for illegal drugs. It is not a willy nilly condition (the police would use at any time without reason). By the time we would go back and get a warrant to search the property the evidence would be gone and it would be too late. That was the reason for imposing the condition as one of the conditions of bail."**

[12] The District Judge acceded to the bail variation.

[13] On 21 March 2011 the charge of possession was withdrawn and a caution for possession of a Class B drug was administered to the applicant.

[14] Mr Russell further avers that because of a concern with the approach taken by the police at Coleraine Police Station was not an isolated incident but represented PSNI policy. Correspondence was sent to the Chief Constable of the PSNI on 13 January 2011 seeking confirmation that the approach taken by the officers did not represent the policy of the PSNI and asking that the relevant officers who were responsible for imposing the condition be spoken to about the matter and be advised accordingly.

[15] The PSNI replied by letter dated 15 February 2011 stating as follows:

> **"I agree with the part of your comments that if police have reasonable grounds then we could use legislation to obtain a warrant and enter for search purposes. The reason behind the inclusion of this condition is to deter the person from committing further drug offences. Should the detained person**

> **refuse police entry then police would require a warrant and the detained person would breach their bail. This condition has been held in the High Court and the Magistrates Court."**

[16] Pre-action correspondence was sent to the PSNI on 23 March 2011 in which the PSNI were asked to confirm that they do not routinely seek to impose conditions such as were imposed on the applicant, in granting police bail and further confirmation that the relevant officers had been so advised [by this stage the charge against the applicant had been withdrawn and a caution had been administered – see above].

[17] At the time of the swearing of his first affidavit on 19 April 2011 Mr Russell had not received any substantive response to the pre-action correspondence.

[18] Sergeant Kincaid swore an affidavit on 20 May 2011. He confirmed that it was he who had sought to impose the impugned bail condition upon the applicant and that he had suggested the imposition of this bail condition on numerous occasions in circumstances where detained persons are applying for police bail.

[19] As an operational police officer involved in the investigation of drugs carrying it has been his experience that young drugs offenders continually use and supply illegal substances when granted police bail. The purpose of using this condition, according to him, when granting police bail to persons charged with offences relating to the supply of drugs, is to reduce the likelihood of further drugs offending by the detained person.

[20] He avers that Constable McAreavey was called to give evidence at the bail variation hearing on 17 November 2010. At that hearing Constable McAreavey, according to Sergeant Kincaid, explained the rationale for using this condition in cases of this type. He confirms that the applicant's solicitor's note of the evidence is broadly in accordance with his own recollection of what Constable McAreavey had told him was said in Court. He then states:

> **"However, the purpose of using this condition is not to facilitate the searching of premises. The bail condition, in itself, does not afford a power to search the premises. A person subject to such a condition who refuses to permit police to have entry for a search will be in breach of their bail condition. This, in itself, will not provide a power of search of the premises. The use of such conditions is not intended to extend search powers, indeed, it simply does not have that effect. The use of this bail condition is a means of preventing further offending by persons who have been granted police bail."**

[21] He has indicated that he has used this condition on a number of occasions and that he has not done so because of any particular policy but because, as a frontline Sergeant, this provides a practical and common sense means of discouraging repeat offending. He also avers that the impugned bail condition has been challenged at a number of bail hearings. He has searched records to identify hearings where this condition has been upheld by the Courts and confirms that it was upheld at High Court bail applications on 12 March 2010, 3 September 2010 and 10 September 2010. It has also been upheld, he says, on a number of occasions at bail applications in North Antrim Magistrates Court.

[22] At para 6 of his affidavit he states that he did not indicate that the applicant would remain in custody if he did not accept the condition. He says that he did suggest the condition to the applicant and that he had agreed to accept it and that he did so with the advice of solicitor. He avers that if the applicant had refused to accept this condition that he did not consider that such a refusal would, of itself, have been a sufficient reason to refuse bail.

[23] At para 7 of his affidavit he states:

> **"At paragraph 7 of this [Mr Russell's] affidavit the applicant makes a similar averment that after the Custody Sergeant had allowed bail to be imposed the applicant consented to the condition because he had been expressly advised that he would be denied bail if he did not consent. The exchanges between custody sergeant and a detained person are usually the subject of video and audio recording. Those recordings are retained for 90 days. Due to the elapse of time between the arrest on 9 November 2010 and the bringing of these proceedings the recordings in question are no longer stored. I can state I did not tell the applicant that he would be denied bail if he did not consent to this condition."**

[24] Sergeant Kincaid also refutes the applicant's contention that the express purpose of the impugned bail condition is to seek to circumvent the protections afforded by PACE. He says that the bail condition does not confer a right of search and that the purpose of the condition is to encourage charged detained persons from further drugs related offending.

[25] In response to Sergeant Kincaid's affidavit Fearghal Shiels, Solicitor swore an affidavit on 24 May 2011. At para 3 of that affidavit he avers that Mr Russell had communicated his concerns to him on 10 November 2010 about the impugned condition. Mr Shiels in turn immediately sought advice from Counsel whose initial advice was that she was of the view that there was an alternative remedy in that the

applicant could apply to have the bail condition varied in Court. That course was duly undertaken.

[26] Mr Shiels states that whilst the applicant's bail condition was varied he remained of the view that there was a wider policy issue involved given that Sergeant Kincaid and Sergeant Patton considered that they could lawfully impose this condition. Correspondence was drafted by Counsel in relation to this matter and issued on 13 January 2011, within the 90 day period during which, according to Sergeant Kincaid, the PSNI would have retained the relevant audio and video recordings. The letter of 13 January 2011 states clearly that Madden & Finucane's client only consented to the condition because he was told that he would not be granted bail unless he consented and both Sergeant Kincaid and Sergeant Patton were sent copies of this correspondence on 18 January 2011. Mr Shiels makes the point that in the event that they disputed the averment they could readily have retained the audio and visual recordings from the custody suite. He confirmed that although he was aware that there is a recording in custody suites, because notices to that effect are visible throughout police stations, he was unaware that 90 days was the period within which such recordings are routinely destroyed.

[27] Mr Russell swore a second affidavit standing over the averment contested by Kincaid and contained in Mr Russell's first affidavit and he also made the same point as was made by Mr Shiels in the affidavit to which I have referred in respect of their absence of knowledge that after a period of 90 days the audio and video visual recordings were destroyed. So as I say Mr Russell in his second affidavit he continued to aver that Sergeant Kincaid had stated that the applicant could refuse to consent to the condition in which case he would be charged and brought to the court the following morning.

[28] At para 4 of Mr Russell's second affidavit he states:

> **"I should also state that I consider that the position advanced by Sergeant Kincaid is illogical in the sense that it appears to be being suggested that I would on the one hand advise my client accede to the imposition of the impugned bail condition and then seek to have my objection to the condition recorded in the custody record. I can confirm that on the morning of 10 November 2010 I sent an email to Mr Fearghal Shiels of our office outlining my concerns about what had happened and asking him to consider whether judicial reviews were appropriate".**

And he then refers to a relevant email and he says:

> **"As appears from the attached email I advised Mr Shiels at the time that the applicant had only**

consented because of Sergeant Kincaid's suggestion that if he did not consent that he would be detained in custody rather than granted police bail."

Relevant Statutory Framework

[29] The **relevant statutory framework** is contained within the Police and Criminal Evidence (Northern Ireland) Order 1989:

"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. [added 12 March 2007]
…
(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.
…."

[30] The applicant's central challenge relates to the lawfulness of the PSNI, as a condition of bail, imposing the impugned condition. The applicant contends, inter alia, the condition is being used to circumvent PACE protection and is ultra vires. Undoubtedly the imposition of the impugned condition will facilitate but not empower the PSNI to carry out a drugs search – a search which, absent consent, would require PACE compliance. The fact that such a condition will facilitate a search is obvious. If the applicant consents to such a search nothing further will be required but since a refusal will place him in breach of his bail ordinarily it might be thought "consent" is likely to be forthcoming. The crucial point is that absence of consent and therefore breach of the bail does not confer power of search.

[31] The imposition of the bail condition does not without more afford a power of search. The provisions of PACE still apply and where a person who has accepted this bail condition subsequently refuses to allow police to enter his property this will not in itself generate a power of search. The consequence of a refusal of entry will not be the creation of a right to search outwith PACE but a breach of bail condition and as he then points out this was expressly stated in a (see letter from Chief Superintendent Goddard set out at para. [15] above.

[32] The fact that the imposition of the impugned condition may facilitate but not empower such a search does not deprive the condition of its avowed purpose of preventing a person from committing further offences whilst on bail. If the condition is imposed and is necessary for the statutory purpose such a condition is *intra vires* Art 48. The applicant has not established that the purpose of imposing such a condition was outwith the powers conferred upon the police by Art 48 or was imposed to circumvent PACE safeguards. The respondent's sworn averments expressly refute such a contention and, as already noted, the impugned condition does not create a power of search. If, on the other hand, a condition was allegedly imposed for an ulterior purpose other than those identified in the statute or the condition was not necessary for the permitted purposes the police would be acting outside their powers. The forum for addressing such fact sensitive bail issues is the Magistrates court on a request to review bail conditions or on appeal to the High Court.

[33] The applicant did seek to argue at paras 38 to 40 of their skeleton argument that the imposition of a condition was not necessary within the meaning of Article 48 and the way in which they put their submission was as follows:

> **"It is evident from the evidence of Constable McAreavey and also Sergeant Kincaid that the stated purpose of the condition was to prevent the applicant from committing offences whilst on bail. However if Sergeant Kincaid's affidavit is correct it is apparent that the condition could not have been lawfully imposed on the applicant because the condition was not necessary as required by the legislation. Sergeant Kincaid expressly avers that if the applicant had refused to accept this condition I do not consider that such a condition would of itself have been a sufficient reason to refuse bail. If that averment is correct it is clear, according to the applicant's written submissions, that the imposition of this condition was not necessary in order to prevent the applicant from further offending and should not therefore have been imposed by the custody sergeant. This highlights the necessity of the precise contours of the PSNI's policy being clarified through cross examination of Sergeant Kincaid and through the provision of any relevant disclosure."**

[34] In response to this contention the respondent submitted that this is not what the statutory provision requires and that Article 48(3)(f) outlines a default position where bail should not be subject to the imposition of bail conditions but that such conditions may however be lawfully imposed where in the *judgment* of the custody officer it is *necessary* to do so for one of the three broad purposes stated therein. The applicant's argument, it was contended, adopted a particularly extreme construction of the term "necessary" suggesting that a bail condition must be considered absolutely essential for the purpose of preventing offending before it can be lawfully imposed. The PSNI submitted on its proper construction Art 48(3)(f) permitted the imposition of bail conditions by the police where it was considered to be practical and appropriate to do so and he sought support for that submission from the decision of the divisional court in *Alexander & Others* [2009] NIQB 20. In that case the court was considering the correct interpretation of the word "necessary" in relation to another provision of PACE. In *Alexander* the applicants challenged the *use* of powers of arrest pursuant to Article 26(4) of the 1989 Order on the basis that they were not necessary. The courts attention was drawn to paras 17 - 20 of the judgment and in particular to the following passage in para 18:

> **"In one connotation the word necessary can mean indispensible or essential. It can also mean that**

> **which is required for a given situation. As always the meaning to be ascribed to a particular word such as necessary must depend on the context in which it falls to be interpreted. We consider that the requirement that the constable should believe that an arrest is necessary does not signify that he requires to be satisfied that there is no viable alternative to arrest rather it means that he should consider that this is the practical and sensible option."**

[35] I agree with the respondent's submission that it would be appropriate for this court, in the context of the interpretation of the provision of Article 48 now at issue, to adopt the divisional court's analysis in Alexander. I agree that, like Article 26(4), Article 48 requires the police officer to form a view that the imposition of a specific bail condition is a practical and sensible option. Accordingly applying the Alexander test I consider that there is no merit in this aspect of the applicant's submission.

[36] I therefore hold contrary to the applicant's central challenge that the police do have the power to impose the impugned condition when such a condition is deemed necessary for the purpose of preventing the commission of further offences whilst on bail.

[37] The applicant issued summonses for discovery and cross examination of Sergeant Kincaid claiming that the alleged absence of clarity about how the alleged policy operated had to be resolved before the court could determine this judicial review. Having regard to the relief claimed and the grounds upon which it was sought I do not consider that there is any material conflict that required to be resolved before arriving at a decision on the substantive issues raised by this judicial review. The court can and has ruled on the lawfulness of the impugned condition without engaging in detailed scrutiny of what was said in Coleraine police station on 9 November 2010 which was long before this judicial review application was introduced which was in April 2011 some 5½ months later.

[38] The applicant placed this specific bail condition before the district Judge challenging it in the variation application and achieved an outcome in his favour. I agree with the respondent that attempting to re-litigate the factual basis for this specific bail condition in the context of these proceedings is not appropriate.

[39] I accept the respondent's further contention that Parliament has put in place a mechanism for the review of bail conditions by way of oversight by the magistrates' court and an appeal to the High Court. There is no necessity for this court to be engaged in addition in circumstances where there has already been a determination in the applicant's favour and there is force in the submission that this is the type of satellite litigation in the context of criminal law proceedings that has been deprecated by the courts in other cases. The respondent submitted the impropriety of this challenge is demonstrated by the fact that the applicant is now seeking to reopen

issues relating to the evidence given by Constable McAreavey at the bail variation hearing on 17 November 2010. This ground of challenge therefore first arose on November 2010. It is well out of time. There has been no acceptable reason for the delay in raising it and one of the consequences of the delay has been that the objective custody desk video recording has not been retained. There is no overriding public interest which requires this aspect of the matter to be dealt with by the court.

[40] Bail conditions are subject to prompt challenge and review before the Magistrates Court and, on appeal, to the High Court. In the present case the impugned condition was in fact promptly removed by the District Justice. Trying to convert or elevate bail conditions imposed on an individual into a policy challenge by judicial review is impermissible. If a person is unhappy with bail conditions they can apply to the court as aforesaid. That is the proper forum for resolving bail issues – not the judicial review court. Large numbers of such decisions are made by the police and courts everyday and the deployment of unjustified satellite litigation in this area is wholly unwarranted. This is compounded by the consideration that the matter is effectively academic for this applicant (who never even swore an affidavit) because the impugned condition was removed by the court and because the charges giving rise to it have been disposed of. With the benefit of public funding such unmeritorious points can however be pursued. I really do question whether such a case as the present should be pursued at public expense though I do appreciate that this is a decision for other authorities.

[41] For the above reasons the summonses are dismissed. This was a "rolled up" hearing. Leave is granted but the application is dismissed.