# Criminal Justice Notes

**In this month's edition of KLS Criminal Justice Notes:**

- **The UK government's current consultation on relaxing the current restrictions on the use of pre-charge police bail threatens to roll back the reforms introduced in 2017 to combat its apparent overuse and abuse.**

- **In its recent decision in *A.P* C-2/19 (26th March 2020), the Court of Justice of the European Union opened the door to a suspended sentence handed down in one Member State being enforced in another Member State under the guise of a probation measure.**

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## Police Pre-Charge Bail in England and Wales

### Introduction

In 2017 the UK government introduced restrictions on the police use of 'pre-charge bail' following widespread and sustained concerns with the manner and extent to which the police were using the facility in their investigation of crime. The immediate effect was a collapse in the police use of pre-charge bail, prompting concerns in some quarters that this was impeding the efficient investigation and prosecution of crime to the detriment of victims and society as a whole. The current government signalled another change in direction in November 2019 with the announcement of a review, including a public consultation which runs until May 2020. This would appear to be a prelude to rolling back the reforms in a manner that will surely revive some of the problems they were intended to cure.

### Background

Arrest has marked a key point in the criminal process for centuries. On arrest, the individual is deprived of his or her freedom and taken into police custody to be investigated for, or charged with, a criminal offence. Typically, the post-arrest investigation will be aimed at gathering incriminating material from the person in custody by searching, interrogating and, where relevant, taking bodily samples (including DNA) from him or her. Critically, these summary coercive powers must be exercised within the time framework, and procedural requirements, imposed by the Police and Criminal Evidence Act 1984 (PACE). In particular, the person must be released from custody at the expiry of the statutory time limit for detention (usually four days), unless he or she has already been released or charged before that. If charged, the person passes fully from the police stage to the judicial stage of the criminal process.

While aspects of these arrangements can be criticised as favouring police expediency over the individual's rights to liberty, privacy of person and property, they at least subject the custodial investigation to strict regulation and time limits. Such vital protections may be heavily compromised, however, if the police can

circumvent aspects of them by releasing the arrested person on police bail before he is charged and before the overall statutory time limit has expired.

**Pre-charge police bail**

Traditionally, the power to release a suspect on bail was a judicial function. The decision would be taken by an independent judicial authority after hearing and considering representations from the prosecution and defence. That, of course, remains the case for a person who has been charged and brought before a court. PACE, however, includes provision for police bail in respect of a person who has been arrested and detained for investigation. In practice, it arises in three situations: where the police charge the person and release him or her on bail to appear in court on a specified date; where the police release a person on bail to await a charge decision by the Crown Prosecution Service; and where the police release the person on bail while they pursue further investigations (pre-charge bail). The first two are in ease of the individual's right to liberty, but the third reflects a significant and loosely defined expansion of police control over the individual's freedom and privacy.

The pre-charge bail option frees the police from the rigour of the PACE regime in the investigation of an arrested suspect. Instead of having to extract evidence from him or her within the statutory time limits imposed by PACE, they can buy time by releasing the person on bail. This has the effect of stopping the detention clock while the police pursue further investigations aided by what they have learned from examining the person in custody. The bail term can be fixed (and renewed) so that the suspect can be returned to police custody, and the custodial examination resumed at a time chosen by the police.

A further benefit of pre-charge bail for the police is that it enables then to manage the suspect in the community in a manner and to an extent that was not otherwise possible without judicial intervention. He or she must surrender to police custody at the expiry of the bail term; almost an exercise in self arrest. From 1994, the police have even had the power to impose further coercive conditions on the person released. Typical examples include: living at a specified address, having no contact with a complainant, staying away from a particular location, surrendering a passport, and so on.

Despite the fact that the suspect has not been charged with a criminal offence, he or she is subject to ongoing police supervision and control in society in a manner akin to a convicted person, or a person under judicial supervision while awaiting trial on a serious charge. The suspect is living in a sort of a halfway house between freedom and custodial investigation. An extraordinary feature of this status, prior to the 2017 reforms, is that it was the result of a low visibility decision taken unilaterally by the custody officer (usually a sergeant) in the police station in question, rather than by an independent judicial authority who had heard and considered both sides. There was no external scrutiny checks or review requirements.

The standard police justification for pre-charge bail is that some offences are so complex, or require such time-consuming investigation methods, that they cannot be investigated sufficiently within the PACE constraints. Even if there is some merit to this argument, it can hardly justify the use of pre-charge bail beyond a few

particularly problematic offences. Its availability across a very wide range of offences offers an irresistible temptation to use it as an expedient tool to compensate for a shortage of police resources and for management failings in the organisation and planning of criminal investigations. This can result in the systemic use of arrest early in an investigation, with a view to availing of pre-charge bail, rather than at an advanced stage where the police are ready to confront the suspect with the case against him or her.

Another argument mooted in favour of pre-charge bail is that ongoing police management of suspects in the community is necessary to protect complainants (most notably in respect of domestic violence and sexual offences) from victimisation by the alleged perpetrator. While it is vitally important to protect complainants from victimisation on account of having made a criminal complaint, it is equally important that the criminal investigation of the suspect should not be diverted from its proper role to pursue that objective. There are other tools in the legal system designed to achieve that purpose, without having to distort the balance of the criminal process unfairly against the suspect.

The extent to which the police were using, and arguably abusing, the pre-charge bail facility is reflected in the limited figures available on its usage before the 2017 reforms. The College of Policing estimated that more than 400,000 people were released on police bail without charge in the twelve months from April 2013. It also estimated that about 26,000 of these were on that bail for more than six months. Research by the National Police Improvement Agency in 2012 suggests that about one third of persons arrested were released on pre-charge bail. These are astounding and disturbing figures. They bring into focus a shadow criminal process run by the police for the police, to the exclusion of the independent courts and due process.

Equally disturbing is research by Anthea Hucklesby which suggests that no further action was taken against the bailed suspects in about half of cases. That, of course, calls into question the justification for the arrests in the first place. Were they made prematurely, and/or as a colourable device aimed at managing the suspect in the community and ensuring that he or she would be available at the convenience of the police if, and when, required? The price paid by the 'suspect', is that his or her life was put on hold for many months, and he or she was subject to significant freedom and privacy restrictions for that period.

**2017 Reforms**

Although there had been widespread concerns for many years over the manner and extent to which pre-charge bail was being used, the government did not move to address the issue until several individuals with high public profiles were affected. Reforms introduced in 2017 impose significant restrictions and checks aimed at reducing resort to the measure. These include a presumption against its use unless it is necessary and proportionate. It has to be authorised by an inspector or more senior officer and is confined to an initial period of 28 days. It can be extended beyond that to three months by a senior officer, but only where he or she has reasonable grounds for believing that extra time is needed for a charging decision or further investigation, the investigation is being conducted diligently and expeditiously or a charging decision is being made, and the use of pre-charge bail is still necessary and proportionate. There must also be reasonable grounds for

suspecting the person to be guilty of the offence in question. Extensions beyond three months can only be made by a magistrate.

These reforms can be criticised for not introducing a judicial check much earlier in the process. Nevertheless, limited as they are, they have triggered an incredible slump in the police use of pre-charge bail. In Nottinghamshire, for example, 7,392 were released on pre-charge bail in the year preceding the reforms. In the following year, this number collapsed to 562. In London, the figures were 67,838 and 9,881 respectively. Overall, it would appear that there was an 84 percent decrease in the police use of pre-charge bail in the year following the introduction of the reforms. Conversely, there has been a massive spike in the number of arrested suspects 'released under investigation'; a police practice that is not subject to regulation at all.

The police explanation for these figures is essentially that the reforms have disincentivised usage of pre-charge bail, especially in complex cases that cannot be completed in 28 days. Another way of putting this, perhaps, is that they had been using the low-visibility facility to make life easier for themselves at the expense of the rights and freedoms of the individual. Now it is more convenient to release the suspect under investigation, rather than submit to the extra workload, checks and restrictions associated with the reforms.

With the current consultation, however, it would appear that the government is keen to encourage a return to greater use of pre-charge bail.

**The consultation**

In introducing the consultation, the government expressed the view that the reforms had been detrimental to the interests of victims. Investigations were taking longer, and this was having an adverse impact on the courts. The expressed objectives of the exercise reflect a heavy emphasis on the interests of the police and crime victims over the rights and freedoms of the individual. They seek to ensure that the system:

- Prioritises the safety of victims and witnesses.
- Supports the effective management of investigations.
- Respects the rights of individuals under investigation, victims and witnesses to timely decisions and updates and
- Supports the timely progression of cases to court.

With these in mind, the consultation seeks views on four main issues: the criteria for the use of pre-charge bail; the timescales for its use; non-bail investigations; and the effectiveness of bail conditions.

The government expressed a firm view in support of greater use of pre-charge bail. It identified four main approaches to achieving that ranging from a return to its use for all cases following arrest, to removing the general presumption against it while maintaining the requirement for it to be necessary and proportionate. Critically, there is no room for retaining the current presumption against its use unless it was necessary and proportionate.

The government's expressed preference is to remove the presumption against pre-charge bail in favour of a requirement that it is used where necessary and proportionate. In deciding whether it is necessary and proportionate, the constable must have regard to the following factors:

1. The severity of the actual, potential or intended impact of the offence;
2. The need to safeguard victims of crime and witnesses, taking into account their vulnerability;
3. The need to prevent further offending;
4. The need to manage risks of a suspect absconding; and
5. The need to manage risks to the public.

Obviously, all of these factors reflect victim, prosecution and crime control interests, to the exclusion of the interests of the individual directly affected. Equally disturbing is the fact that they reflect a view of the individual as a distinct threat to the victim, the administration of justice and the public as a whole. Incredibly, no.3 seems to reflect a conclusion that he or she is guilty of the offence. This reflects poorly on the integrity of the government's approach in this whole matter. Not only has the person not been convicted, but (by definition) the police do not even have enough evidence to charge him or her. Moreover, as noted above, proceedings against these individuals are eventually dropped (months later) in about half of the cases.

The government also seeks to facilitate greater use of pre-charge bail by a relaxation of the current timescales and related "disincentives" in the process. It offers three possible models, all of which envisage the initial decision being restored to the custody officer at the police station concerned (in place of the current position where it can only be taken by an inspector or officer of higher rank). All three models also envisage a significant expansion in police control over the duration of the bail period; ranging from six months in the first model to twelve months in the third.

As noted above, release on pre-charge bail can be accompanied by onerous conditions on the person concerned even though he has not been charged with a criminal offence. A failure to surrender to police custody at the expiry of the bail term is a criminal offence, but breach of any of the other conditions is not an offence. Strangely, the government considers that the lack of a criminal penalty for breach of conditions could encourage breach and could impact negatively on public trust in the criminal justice system. It ignores the lack of a credible normative basis for the imposition of the conditions in the first place. The hundreds of thousands of people of people who could be subject to them, and therefore at risk of being punished for breaching them, have not even been charged with a criminal offence or any other threatening or anti-social behaviour.

If government proposals for relaxing the restrictions and checks on pre-charge bail are adopted, it can be expected that there will be a consequent drop in the current use of the unregulated 'release under investigation' (RUI) option. Nevertheless, the government seems minded to introduce internal supervision of RUI, mirroring the proposed timescales for pre-charge bail. Once again, however, the motivating factors seem to reflect an exclusive concern with the interests of victims, a swifter administration of criminal justice and crime control. There seems to be no appreciation of the manner and extent to which the coercive criminal investigation process is reaching into the lives of individuals far beyond the regulated constraints of police custody.

**Conclusion**

The government seems intent on rolling back the limited reforms to pre-charge

bail. It is submitted that their approach reflects a disappointing endorsement of a regime of low visibility penal restrictions on the lives of hundreds of thousands of people, simply because the police have grounds to suspect them of a criminal offence. A particularly pernicious feature is that the restrictions are imposed by the police as a self-serving means of managing the behaviour of the individuals in the community, until it is convenient for the police to bring them back into custody for further investigation. It signals another significant move in the direction of a shadow criminal process in which the police, rather than the courts, regulate the rights and freedoms of an increasingly expanding 'suspect' class.

# Enforcing a suspended sentence across EU Member States

**Introduction**

One of the fundamental aims of the EU is the establishment of an area of freedom, security and justice encompassing its Member States. Within this area, judicial authorities (widely defined) in a Member State are obliged to recognise and enforce a range of criminal justice decisions handed down by judicial authorities in any other Member State. The most well-known example is the European Arrest Warrant facilitating the surrender of persons for criminal prosecution or to serve a sentence already imposed. However, there are several other examples such as: requests for the gathering and transmission of evidence; the enforcement of probation measures; and the enforcement of criminal confiscation orders. Closely related are measures for the mutual recognition of criminal records.

Such measures offer obvious advantages for the efficacy of criminal law enforcement and the protection of the rights of victims in a multi-jurisdictional space in which internal borders to the free movement of peoples have been abolished. At the same time, however, they carry a heavy price for values of due process, fairness and transparency in criminal prosecution and trial matters. Anyone unfortunate enough to get caught up in their web can find themselves subject to coercive measures from authorities in another Member State impacting deeply on their liberty, privacy, status and family life. The measures can also deprive the person affected of the familiar rights and protections that would otherwise apply in a comparable criminal matter in his or her State of residence.

The Court of Justice of the European Union (CJEU) has accentuated the harshness of these EU measures for those individuals subjected to them. Its case law reflects a marked commitment to the ideological aim of a smooth functioning single EU criminal law enforcement space. All too frequently, this results in the diminution of the rights of the individual who gets caught up in the criminal process of one Member State while he or she is living permanently in another Member State. An example of this is provided by the judgment handed down a few weeks ago by a chamber of the CJEU in *A.P.* concerning Framework Decision 2008/947/JHA on the mutual recognition of judgments and probation decisions.

**The facts**

The appellant had been convicted of a money-laundering offence in Latvia and

was given a custodial sentence of three years which was suspended for three years on condition that he did not commit another intentional offence in that period. He moved to Estonia, and the Latvian authorities relied on Framework Decision 2008/947/JHA to request the Estonian authorities to supervise compliance with the condition that he should not commit a criminal offence during the three-year period post sentence. If this request was acceded to, the appellant would acquire a criminal status in Estonia even though he had not been convicted of an offence there. In effect, he would be subject to a form of probation supervision in Estonia, in respect of a Latvian suspended sentence that was not conditional on a probation measure (apart from the requirement not to commit a new criminal offence).

The condition of not committing another criminal offence is generally considered to be inherent in the concept of a suspended sentence, as distinct for an additional requirement attached to it. The Estonian request, therefore, raised the question whether the condition qualified as a probation measure within the scope of the Framework Decision. An Estonian court granted the request. On appeal, the Supreme Court referred to the CJEU for a ruling on whether the Framework Decision could be used for a judgment imposing a suspended sentence where no probation measure was attached to that judgment.

**Framework Decision 2008/947/JHA**

The Framework Decision provides for the mutual recognition of judgments and probation measures (and alternative sanctions) across Member States. Under it, responsibility for supervising the implementation of a probation measure can shift from the Member State in which it was imposed to the Member State in which the person resides. The measure promotes the interests of the offender, as well as those of crime victims and the general public. Since probation measures can follow an offender from one Member State to another, a court in one Member State will not be deterred from imposing a non-custodial sentence with rehabilitation conditions attached, in place of a custodial sentence. This is in ease of the offender as it reduces he use of custodial sanctions, and promotes his or her social reintegration by facilitating the maintenance of family ties, employment etc. The measure also protects victims and the general public by preventing recidivism through improved monitoring of probation measures.

The Framework Decision includes a list of probation measures to which it applies. These reflect familiar conditions that are typically imposed on an offender who has been given a custodial sentence suspended for a period subject to compliance with a specified condition or conditions. Examples include: instructions relating to behaviour, residence, education and training, leisure activities etc; an obligation to inform the relevant authority of a change of residence; a prohibition on entering certain localities or places; limitations on leaving the State; an obligation to report to a specified authority at specified times; a prohibition on contact with specified persons or objects; an obligation to make financial compensation for harm caused by the offence; an obligation to carry out community service; an obligation to cooperate with a probation officer; and an obligation to undergo therapeutic treatment or treatment for an addiction.

Critically, for the appellant, the list does not expressly include an obligation not to commit a new criminal offence during the probation period. It would seem to follow, therefore, that the Framework Decision

cannot be used to permit cross-border enforcement of the obligation not to commit a criminal offence that is inherent in the concept of a suspended sentence. Surprisingly, however, the CJEU ruled that that obligation could qualify as a probation measure for the purposes of the Framework Decision. Unusually, it refused to follow the contrary opinion of the Advocate General in the matter. It is submitted that the Court's reasoning is weak and unpersuasive compared to the compelling analysis provided by the Advocate General.

**CJEU's ruling**

The Court was not deterred by the fact that the list of probation measures in the Framework Decision did not expressly include a condition not to commit a new criminal offence. Surprisingly, it found that it was included within the scope of "instructions relating to behaviour ..". In line with its standard practice, the CJEU approached the interpretation of this provision by considering its usual meaning in everyday language, while taking into account the context in which it occurs and the objectives of the rules in which it is used. It concluded, without explanation, that the usual meaning of "instructions relating to behaviour" in everyday language, and in the context in which it appears, would include an obligation not to commit a new criminal offence.

The Court rejected the argument that the condition could not qualify as it was not associated with a requirement for active supervision of compliance in the manner typically associated with probation measures. It pointed to the fact that the list of probation measures in the Framework Decision includes examples that do not relate to active supervision (eg. prohibition on making contact with specified persons or objects). It is submitted, however, that this reflects a misunderstanding of probation measures and the requirement not to commit a new offence. The former defines specific conduct that the offender must engage in, or refrain from, in a manner that is capable of being monitored in the community. The latter, by contrast, is general and diffuse. It is no more than the obligation that attaches to everyone every day. If it can be monitored at all, it will be by the police in the sense that they monitor compliance with the criminal law generally.

The Court's interpretation also ignores the significance of the full subparagraph in which "instructions relating to behaviour" appears. It reads in full:

> "instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity".

The intention is clearly to require certain forms of behaviour in respect of these aspects of a person's everyday life. Not only is a requirement not to commit a new criminal offence different in kind from the others, but to include it would impose a very broad obligation on the State authorities that would be difficult to fulfil. If it was intended to include such a requirement, that would surely have been stated expressly.

In further support of its interpretation, the CJEU referred to the fact that the Framework Decision expressly confers jurisdiction on the enforcing authority to take measures relating to the suspended sentence when the offender, among other things, commits a new criminal offence. In the Court's view, it would produce a paradoxical result if the enforcing

authority could do this only if the sentencing court had conditioned the suspended sentence on one of the probation measures expressly listed in the Framework Decision, but not where it was conditioned solely on the obligation not to commit a new criminal offence.

The Court's approach ignores the fact that the enforcement authority's jurisdiction to intervene in the suspended sentence is predicated by breach of a probation condition. The extent of the court's jurisdiction consequent on breach of a probation condition is not a sure guide to what qualifies as a probation condition in the first place. In effect, the Court was putting the cart before the horse in its reasoning. Moreover, as reasoned persuasively by the Advocate General, the very fact that the enforcement authority is expressly given jurisdiction to deal with the commission of new criminal offences suggests that the commission of a new criminal offence is not covered by breach of a probation measure. If it was so covered, there would be no need to include a specific provision for the authority to deal with the commission of a new criminal offence.

The CJEU was also of the view that its interpretation promotes the primary objectives of the Framework Decision. As noted above, these are the social rehabilitation and reintegration of the offender, and improved protection for victims and the general public by reducing recidivism and facilitating the application of suitable probation measures for offenders who do not live in the State of conviction. It is difficult to see how social reintegration will be promoted by stretching the Framework Decision to include the obligation not to commit a new criminal offence. As pointed out by the Advocate General, supervision is effectively lacking in the instant case, and generally in respect of a suspended sentence conditioned by a requirement not to commit a new criminal offence. That argument is also fatal to the notion of such a suspended sentence operating as a suitable probation measure.

There is more weight to the argument that the Court's interpretation will enhance protection for victims. That, however, presupposes that the interests of victims and the general public will be served by a more retributive approach to sentencing. It is also questionable whether that will outweigh the benefits of the social reintegration of offenders.

**Conclusion**

On the surface, it might seem that the implications of the judgment in *A.P.* are relatively narrow and technical. The reality is that they reflect another significant encroachment on the traditional territoriality of criminal law. In its haste to reinforce the EU's area of freedom, security and justice, the CJEU has stretched the interpretation and application of a Framework Decision designed to allow cross-border enforcement of probation measures. By extending it to suspended sentences with no probation conditions attached, other than the standard requirement not to commit a new criminal offence, the judgment facilitates cross-border enforcement to an extent that impacts more harshly on an offender than was surely intended.

The Court's interpretation lifts the suspended sentence out of the natural environment in which it was handed down, and gives it life in other jurisdictions where it was never intended to operate. This is not necessary to prevent an offender avoiding the consequences of a criminal record in

one State by moving to another. There is provision in a separate Framework Decision (2008/675/JHA) to combat that. Accordingly, if the appellant in the instant case did actually commit a new criminal offence in Estonia, his suspended sentence in Latvia could be taken into account in the sentencing for the new offence. Now, however, no matter where he goes in the EU, his suspended sentence can follow him, even where he has not committed a new criminal offence.