

Suspects' rights and pre-charge bail

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Pre-charge bail

- Street Bail

Arresting officer can impose bail with or without conditions

- Bail from custody

Custody officer can impose bail with or without conditions

Current position

A suspect's right to expedition/a time limit

**A suspect's right to oppose or
make representations about the
imposition of bail conditions**

A suspect's right to appeal police bail

s47(1E) PACE 1984

Criminal Procedure Rules 19.6

A suspect's right to anonymity

A brighter future?

Government proposals for legislative changes

Proposed Changes

A suspect's right to expedition/a time limit

28 day limit

**A suspect's right to oppose or
make representations about the
imposition of bail conditions**

A suspect's right to appeal police bail

Appeal against conditions unchanged

28 day review – Superintendent

S 42 (6) and (7) PACE 1984

3 month review – court application

A suspect's right to anonymity

Final thoughts.

Slide 1

I have been asked to speak on Defendant's rights and pre charge bail. As a pedant I would prefer to use the phrase a suspects rights as at his stage this is exactly what the individuals we are talking about are and it is worth bearing this in mind. These are people about whom the police only need have a suspicion that they may have done something wrong a very low standard indeed.

When first presented with this I had to think what rights are there and as I pondered this I have to tell you I started to get worried not out of concern for my fellow citizens who may have the misfortune to become subject to police bail but rather selfishly for myself. For I had read the programme and worked out that I was probably expected to speak for about 30 minutes on this topic and my early thoughts suggested that 30 seconds might require some repetition on my behalf, my thoughts however soon moved on to consider rather more productively what rights should there be.

I will focus on just four that might be considered rather basic rights. I have not included those rights which clearly may arise from the Articles of the European Convention on Human Rights but have looked at specific defined rights that might be found in specific relevant domestic legislation.

The four “rights” I have considered are:

- **A suspect’s right to expedition/time limit**
- **A suspect’s right to oppose or make representations about the imposition of bail conditions.**
- **A suspect’s right to appeal against the length of time they have been kept on police bail and the conditions imposed.**
- **A suspect’s right to anonymity.**

Before turning to these however it is worth remembering how a suspect might find themselves on police bail.

Slide 2

There are two situations where a suspect might be granted bail by the police before they conclude their investigation. The first occurs at the police station following an arrest the second is the relatively new street bail.

Street bail was introduced by the 2003 Criminal Justice Act and amended by the Police and Justice Act 2006 to allow the imposition of conditions to that grant of bail, now s30A PACE 1984. Bail is granted following the arrest of a suspect who may then rather than being taken to a police station immediately be released on unconditional or conditional bail to return to the police station. The arresting officer may impose conditions other than requiring a surety, security or condition to live at a bail hostel.

Post detention bail can be granted by a custody sergeant for the purpose of further enquiries or a decision to charge by the CPS. Again this can be with or without conditions.

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A suspect's right to expedition/time limit

At present simply put there is none. Although there are strict limits on how long the police can keep a person in custody there are no such limits on how long a person may be kept on bail. This has resulted in defendant's remaining on police bail for months and in some examples even years with no redress.

The impact of this can be devastating not only for those high profile individuals about whom much has been said recently and whose plights have helped to draw attention to this issue such as Paul Gambaccini, Freddie Star and those journalists and others caught up in the hacking and cash for information cases but also for less famous individuals such as the case sighted in the recent Summary of consultation responses and proposals for legislation, involving a male 13-year-old child suspect. At the time of writing he had been on pre charge bail for 300 days and has been re-bailed 6 times. His family wrote of the effect on him. "Prior to his arrest, he was attending mainstream education, and was progressing well and was projected high grades. He had a wide group of friends, was actively involved in school life, had no attendance or behavioural issues at school. He, and his family, were not known to the police, Social Services and had no Mental Health issues." Since being place on police bail "He was removed from mainstream education following activity on social

media. The source of the website postings and messages on BlackBerry Messenger was identified as originating from another family. Our family member was named, along with the name of the complainant, and full details of her allegation.

This social media activity was reported by the school to the police but no action was taken.

As a result, the local authority placed him in a wholly unsuitable Interim Education Centre for children with needs significantly different from those of his own. The Interim Education Centre is for children who have a history of significant repeat offending. The focus of the Interim Education Centre is to provide “interim” education for anything up to 3 months. To date my family member has been there in excess of 8 months.

In terms of health, prior to the allegation he had no mental health issues. As a result of the allegation, the protracted investigation, and totally unsuitable education he is now being treated by a Child and Adolescent Psychiatric Consultant for depression.”

In my firm we have a case of a 17 year old who was arrested over an allegation about an incident that was supposed to have occurred when he was 10 years old. He has now been on police bail for 19

months since his first interview where he gave a full account to the police. He has been bailed by the police on 10 occasions. The impact on him and his family has been immense. The strain on the whole family has been intolerable. We have been told that part of this delay was due to the initial officer in the case doing nothing for 8 months. Without limits, without recourse to an independent review such scandals go unchecked.

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A suspect's right to oppose or make representations about the imposition of bail conditions.

In relation to street bail there is no right and as the person granting bail is the person arresting the suspect/seeking to impose the conditions and so there is no real process for having representations heard.

For those in custody at the police station there is no statutory right to make representations nor a requirement for the custody sergeant to consider them, in practice however lawyers do make representations and these can often result in conditions being varied or dropped altogether. This sounds more promising however as we know that less than 50% of those detained at the police station following arrest receive legal advice this become more worrying rather than comforting as unrepresented suspects are unlikely to know of their right to make representations and where they do make them are less likely to be successful so that conditions that might otherwise have not been imposed had a lawyer been present are applied. With the result that they could be subject to onerous conditions from the moment that they are released from the police station.

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A suspect's right to appeal against the length of time they have been kept on police bail and the conditions imposed.

At present there is no right to appeal against how long a person has been kept on bail. There is therefore no check on how many times they can be re-bailed or for how long they be kept on bail. With the draconian conditions available to the police as far as conditions are concerned this can prevent a suspect from living in their own home, from having contact with their children or grandchildren from going to a particular place or area, from being outside of their home address at particular times (a curfew) and they can require a suspect to report to a police station regularly even daily. In one London Borough for example it is common for the police to bail youth suspects with conditions not to contact or associate with more than 4 or 5 people at any one time, means can't play football, raises issues about attending clubs or other lawful activities. Not to enter the borough where their GP or local hospital might be situated and a curfew. These are enormous restrictions on a person for whom there is not sufficient evidence even to charge.

There is a power to appeal against the conditions imposed firstly by making representations to the police themselves and then to the court under the provisions of s47(1E) PACE. The procedure which is set out in the Criminal Procedure Rules 19.6 is not simple and

requires the service of a written notice setting out each offence charged, the police decision to be reconsidered and the reasons for it and why the court should vary the condition. Legal Aid is available for this but not all defendants are aware and often don't instruct solicitors until they attend their first appearance at court and so remain subject to these conditions until a decision is taken as to whether to charge.

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A suspect's right to anonymity.

We know that many of those arrested are never charged (over 50%). We know that the mere fact of being arrested can cause enormous stigma not only to a suspect but also to his family and children in particular. It may therefore be thought that whilst there is not even sufficient evidence to charge a person let alone for them to have been found guilty there might be a right to remain anonymous yet there is none. For some there the protection of the presumption of innocence is sufficient. In the real world we know that the prevailing view is not innocent until proven guilty but there's no smoke without fire! A proposition that journalists thrive on and innocent people suffer for. We only have to think of the recent appalling situation with Sir Cliff Richard and the televising of the search of his home.

It is felt appropriate to grant anonymity to a complainant of a sexual offence yet not to an accused but as yet uncharged individual. I would suggest that this is wrong and suspects should have the right to anonymity certainly until they are charged if not to the point of conviction.

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A brighter future?

Many of you will be aware of recent events, seeing celebrities and perhaps more significantly journalists being subjected to extended periods of police bail which has highlighted this lack of rights and has resulted in public pressure for change as a consequence of which there have been two consultations on the subject; one from the College of Policing (March to July 2014) and another the Home Office (December 14 – February '15).

Following the Home Office consultation proposals for legislation were published in March of this year and then in the Queen's Speech it was announced that there will be new legislation to improve the law on policing and criminal justice and following her address to the Police Federation on 20th May Teresa May made clear that the new legislation would include her proposed changes for police bail.

The government have said that they will provide for a presumption to release without bail, with bail only being imposed when it is both 'necessary' (e.g. where there is a need for conditions) and 'proportionate'. Together with this they are to explore with the senior judiciary and the College of Policing what guidance might be given to custody officers and magistrates on the appropriate

conditions of bail in particular circumstances. This is certainly to be welcomed

However once a suspect is aware an investigation has started there will inevitably be concern and strain over awaiting an eventual outcome to that investigation and so the issue of release without bail still leaves this hanging in the air, although there is to be a requirement to notify the suspect that the investigation has concluded where there is to be no further action. This period however has no time limit and so this only meets some of the concerns raised about police bail.

But what of our four rights how have they fared in the new proposals?

Slide 8

A defendants right to expedition/time limit

The government have rejected a hard limit for police bail although they have said that it is a matter that they will revisit once the impact of the proposed reforms have bedded in. They have however said that the initial bail period should be 28 days, with a further review of the necessity and proportionality of bail taking place towards the end of that period and being conducted by a senior police officer in the rank of Superintendent or above, who can then extend bail to a maximum of three months.

This is good and in my view should see the vast majority of what are fairly straight forward matters dealt with more expeditiously and should prevent situations where officers have simply sat on cases and done little or no work.

Any extension of pre-charge bail beyond that point would only be possible with the authority of the courts. Except it appears, in the as yet undefined category of “the most complex cases”. Here the proposal is for the decision to extend bail beyond three months to be taken by a Senior Civil Servant for SFO cases; in CPS cases, the decision would be taken by an assistant chief constable in consultation with a senior prosecutor, with the courts not becoming involved until six months after arrest. There will also be provision for

prosecutors or investigators to skip the next hearing where they can justify it on the rounds of due expedition and necessity. This may seem like a sensible move but it does dilute the oversight of police bail. Surely it should be possible to make such provision as to reduce the administrative burden and cost of making such applications only with the consent of the defendant. Where the case is made out fine in not it should be subject to the court's scrutiny or make provision for the defence to bring the matter before the court for review during the additional period.

To this generally good news however there has to be a massive caveat. All of these time limits are to exclude the time taken for the CPS to reach a charging decision. In my opinion this is a major failing. In the review it is stated that "the period spent waiting for a prosecution decision, ... will normally be only a small proportion of the total time spent on pre-charge bail." I am afraid I don't agree. My experience is that CPS decisions particularly in sexual offences are taking many weeks and sometimes months. Delay is delay and the CPS should not be excluded or protected from this they are part of the prosecutorial process and as police delays are considered part of the prosecution process in relation to court custody time limits so the CPS should be for police bail. In addition there is potential for abuse, a police officer may think that in order to avoid explaining the lack of work to a superintendent it would be better to submit a file to

the CPS which he knows will come back with a list of things to do but will give him the extra time to do them so that when the file comes back he will be in a position either to re-submit the file or ask for more time showing what has now been done. I appreciate some may say I am being over cynical or critical but I hope you will recall the example I gave of the young client on bail for over 19 months where it was said the first officer did nothing for 8 months, well when a file was submitted we were told it came back with a list of 25 action points required by the CPS before they could consider authorising a charge, I may be cynical but it is a result of experience. I fear that excluding the CPS from the time limits will be seen to undermine the intended purpose of the reform of police bail it also fails to highlight delays that may be attributed to a lack of resources, a real issue at present in my experience.

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A defendant's right to oppose or make representations about the imposition of bail conditions.

No specific provision has been made for this prior to the three month application. At the point bail is granted there should be a right to make representations to the custody officer who should be under an obligation to consider them and record his decision in the light of them applying such guidance as may be issued. This however has not been included and so we remain where we are.

Slide 10

A suspect's right to appeal against the length of time they have been kept on police bail and the conditions imposed.

The new proposals keep in place the current provisions for challenges to the conditions imposed by the police and in addition with the proportionality test and hopefully the new guidance this should see the more onerous conditions being imposed less often or swiftly removed.

In relation to the 28 day extension there is no mention of a right to make representations about the decision of further bailing the suspect, there is no similar provision to s 42 (6) and (7) PACE for superintendent extensions beyond 24 hours for those in custody.

S 42 PACE 1984 Provides:

(6) Before determining whether to authorise the keeping of a person in detention under subsection (1) or (2) above, an officer shall give—

(a) that person; or

(b) any solicitor representing him who is available at the time when it falls to the officer to determine whether to give the authorisation, an opportunity to make representations to him about the detention.

(7) Subject to subsection (8) below, the person in detention or his solicitor may make representations under subsection (6) above either orally or in writing

I see no reason why similar provision in relation to the 28 day extension should not apply.

I hope that this is a detail omitted rather than a decision taken as this is an important further safeguard which should be included where this review is being carried out in a quasi-judicial capacity.

The new three month limitation will however for the first time introduce a right to challenge the period of police bail. Assuming that there is a right to legal aid for representation at such hearings then this is a welcomed change. I would hope however that in fact the three month period would in due course be reduced to allow a court's involvement in police bail decisions at 28 days in the meantime there must be a right to make representations over the extension of the police bail period.

I would also make the point that having an open process for police bail will allow transparency so that if delay is caused thorough a lack of police resources e.g. in digital analysis, then it should be made clear and then it will be for the politicians to state their financial priorities and also be open to being accountable for their decisions. a

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A suspects right to anonymity.

In the response the government state on this topic, “There is a difficult balance to strike between the operational advantages of naming suspects in criminal investigations and respecting their right to privacy. The Government believes that there should, in general, be a right to anonymity before the point of charge, but there will be circumstances in which the public interest means that an arrested suspect should be named.

What information is disclosed in a given instance will need to be assessed on a case-by-case basis. Police forces should follow the College of Policing’s Authorised Professional Practice “Guidance on Relationship with the Media”, published in May 2013. Section 3.5 of that document sets out the criteria the police should use in deciding when it would be appropriate to identify an individual before the point of charge.” In a foot note it refers to that guidance and it states “These “...circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence.” I am afraid I read that as business as usual with all that that has been shown to mean. I hope it is a topic that the government will return to as it is need of reform.