



Part 5 - Gangs: Pre-trial issues and Criminal Behaviour Orders

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'Own protection' remands in custody

Russell Fraser, Garden Court Chambers

6 October 2020



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Warning



Powers to detain – Police and Criminal Evidence Act 1984

34.— Limitations on police detention.

(1) A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act.

(2) Subject to subsection (3) below, if at any time a custody officer—

(a) becomes aware, in relation to any person in police 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 could be justified under the provisions of this Part of this Act,
it shall be the duty of the custody officer, subject to subsection (4) below, to order his immediate release from custody.



Powers to detain – Police and Criminal Evidence Act 1984

38.— Duties of custody officer after charge.

(1) Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall [, subject to section 25 of the Criminal Justice and Public Order Act 1994,] order his release from police detention, either on bail or without bail, unless—

(a) if the person arrested is not an arrested juvenile—

(i) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;

(ii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail;

(iii) in the case of a person arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;

...

(iv) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property;

(v) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence; or

(vi) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection;



Powers to detain – Police and Criminal Evidence Act 1984

38. Continued

(b) if he is an arrested juvenile—(i) any of the requirements of paragraph (a) above is satisfied [(but, in the case of paragraph (a)(iia) above, only if the arrested juvenile has attained the minimum age)]; or

(ii) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests



Powers to detain – Bail Act 1976

4.— General right to bail of accused persons and others.

(1) A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.



Bail Act 1976, Schedule 1, part I, para 2

2.

(1) The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

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



Bail Act 1976, Schedule 1, part I, para 3

3.

The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.

- Repeated in paragraph 3 of Schedule 1, part II (Defendants accused or convicted of non-imprisonable offences)
- No requirement for ‘substantial grounds’



Case law



Case law

IA v France (1998) Appln. 28213/95, 23 September 1998

“The Court accepts that in some cases the safety of a person under investigation required his continued detention, for a time at least. However, this can only be so in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place.”



Archer v Commissioner of the Metropolis [2020] EWHC 1567

Two questions for the court:

a) Is s. 38(1)(b)(ii) of the Police and Criminal Evidence Act 1984 (“PACE”) incompatible with Article 5 of the European Convention on Human Rights (“ECHR”) insofar as it purports to authorise the detention of minors in their own interest? If so, should a declaration of incompatibility under s. 4 of the Human Rights Act 1998 (“HRA”) be made?

(b) Was the Claimant’s detention overnight from 22-23 February 2012 contrary to Article 5 ECHR and therefore unlawful?



Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.



Archer v Commissioner of the Metropolis [2020] EWHC 1567

- Law Commission's 2001 report *Bail and the Human Rights Act 1998* (Law Com No.269)
- 'We conclude that a refusal of bail for the defendant's own protection, whether from harm by others or self-harm, can be compatible with the Convention where detention is necessary to address a real risk that, if granted bail, the defendant would suffer harm by others or self harm, against which detention could provide protection, and there are exceptional circumstances in the nature of the alleged offence and/or the conditions or context in which it is alleged to have been committed.'



Archer v Commissioner of the Metropolis [2020] EWHC 1567

Claimant's submissions:

- Article 5(1) contained 'exhaustive' exceptions requiring narrow interpretation;
- The power in s38(1)(b)(ii) of PACE to detain a juvenile 'in his own interests' was unconnected to the requirement in Article 5(1)(c) of detention effected for the purpose of bringing him before the competent legal authority;
- That nothing in *IA* was inconsistent with that submission. In *IA* the claimant challenged Article 5(3) not 5(1) and the court considered whether pre-trial detention, which was initially lawful, had continued for a reasonable time. And that nothing in the decision suggested that the need to protect a detainee provided a stand alone purpose for detention under Article 5(1);
- Did not accept that the consequence of his arguments was that para 3 of Parts I and II of Schedule 1 to the Bail Act were incompatible with Article 5.



Archer v Commissioner of the Metropolis [2020] EWHC 1567

Judgment:

- The case law interpreting Article 5(3) made clear the principle that detention must not be ‘arbitrary’ and must be for ‘relevant and sufficient reasons’;
- ‘Relevant and sufficient reasons’ went beyond securing attendance at court and included preventing interference with witnesses or evidence;
- Therefore, ‘a person who is detained on suspicion of having committed an offence with a view to being brought promptly before a court, but whose detention is regarded as necessary for his own protection, is still being detained “for the purpose of bringing him before the competent legal authority”’;
- *IA v France* demonstrated that ‘own protection’ detention will be permissible only for a short period: ‘[t]he precise length of time will depend on the circumstances, but the longer the detention, the longer the gap between the original offence and release and, therefore, the less likely the circumstances surrounding the offence will generate a risk of reprisal’;
- ‘Own protection’ detention will be justifiable only in ‘exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place’;
- Consideration should be given to alternatives to detention. ‘Own protection’ detention will only be necessary if there are no reasonably available means other than detention to afford protection.



Examples

- *Archer* – risk of being harmed when seeking retribution
- Drill videos and association
- Gang Matrix intelligence
- Context



Criminal Behavioral Orders as applied in ‘gang’ context?

Shina Animashaun, Garden Court Chambers

6 October 2020



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Question to the Mayor - 2017

Answered By: The Mayor

Date: Tuesday, 19th September 2017

The MPS does use gang injunctions, amongst other enforcement tools, to restrict the negative behaviours of those involved in youth violence. There are currently 10 live Gang Injunctions and **268 Criminal Behaviour Orders on those linked to gangs across London. The MPS uses Criminal Behaviour Orders as their primary option, as any breaches of these are listed as a criminal conviction - unlike Gang Injunctions - thus giving sentencing weight to any future offending.**

However each case is assessed on its merits and if the most appropriate option is a Gang Injunction then the MPS will apply for them.



Legislative Framework

Anti-social Behaviour, Crime and Policing Act 2014, s.22

- (1) This section applies where a person (“the offender”) is convicted of an offence.
- (2) The court may make a criminal behaviour order against the offender if two conditions are met.
- (3) The first condition is that the court is satisfied, ***beyond reasonable doubt***, that the offender has engaged in behaviour that caused or was likely to cause ***harassment, alarm or distress to any person***.
- (4) The second condition is that the court considers that making the order will ***help*** in preventing the offender from engaging in such behaviour.



Evidence in support of application

Anti-social Behaviour, Crime and Policing Act 2014, s.23

- (1) For the purpose of deciding whether to make a criminal behaviour order the court may consider evidence led by the prosecution and evidence led by the offender.
- (1) It does not matter whether the evidence would have been admissible in the proceedings in which the offender was convicted.



Terms of the order

Anti-social Behaviour, Crime and Policing Act 2014, s.22

(5) A criminal behaviour order is an order which, for the purpose of preventing the offender from engaging in such behaviour—

(a) prohibits the offender from doing anything described in the order;

(b) requires the offender to do anything described in the order

R v Boness(Dean) [2006] 1 Cr App R (S) 120:

- the terms of the order must be precise and capable of being understood by the offender
- It is beyond doubt that the terms of the CBO, whether they be prohibitions or requirements, must be ‘reasonable, proportionate, realistic, practical, clear and enforceable’



Case Examples

R v Samad [2016] EWCA Crim 1766:

- We accept the term will restrict D and his family within their Bengali community, but the term will assist in reducing the risk of further offences.

Hills v Chief Constable of Essex [2006] EWHC 2633 (Admin):

- There is nothing objectionable about drafting an order so that its subject is prohibited from associating with another named person; if the other person were to try to associate with the subject, the subject may have a defence of reasonable excuse if it were alleged that he had breached the order

R v Boness [2005] EWCA Crim 2395:

- “surely the prohibition cannot have been intended to limit so radically the choice of clothing that the appellant can wear? It seems that the appellant would potentially be in breach of the order were he to wear a scarf or carry a newspaper in public.”



Thank you

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