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## COVID-19 AND ENTITLEMENT OF DEFENDANTS AWAITING TRIAL TO APPLY FOR BAIL DURING A PUBLIC HEALTH CRISIS

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### **A. INTRODUCTION**

On 23 March 2020, the Lord Chief Justice announced that no new jury trials should commence in light of the COVID-19 pandemic. This means ‘all new jury trials are currently postponed’ and it is unclear when they will start again.<sup>1</sup> The same guidance was issued in relation to criminal proceedings and hearings in the Magistrates’ Court, except for certain, specified ‘urgent’ cases.<sup>2</sup> Trials (whether the defendant is in custody or not) have not been designated as ‘urgent’ hearings.

The result of this is that **all** new trials due to start in England & Wales over the last four weeks, and for the foreseeable future, have been or will be vacated to a further date. The knock-on effect is that defendants in custody who are awaiting trial – presumed innocent, no less – will, through no fault of their own, see an extended, uncertain, wait period added to their time in custody. This is, of course, unless they are granted bail.

At the same time, despite patchy testing, there have already been confirmed cases of COVID-19 across more than 45 UK prisons,<sup>3</sup> with at least ten reported deaths of prisoners resulting, including at HMP Belmarsh, and in prisons across Birmingham, Manchester, and Durham.<sup>4</sup>

In light of this, in this article I address whether defendants remanded in custody are *entitled* to a further application for bail due to COVID-19. It is often considered that this will depend on whether there has been a ‘change of circumstances’. I argue that on a proper construction of the Bail Act 1976, this is the wrong initial approach. I further argue that given the practical impact of COVID-19 on envisaged remand times, prison conditions and resources, and public police presence during lockdown, it is almost inevitable that defendants awaiting trial are **entitled** to have their bail position reviewed in light of the present public health crisis.

I start by setting out the relevant law, and then address the impact of COVID-19 on an entitlement to apply for bail thereof.

### **B. RELEVANT LAW**

It is well-known that those awaiting trial on any offences except murder and rape (in certain circumstances) have a general right to bail under Section 4 of the Bail Act. The starting point is thus

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<sup>1</sup> HMCTS, *Coronavirus (COVID-19): courts and tribunals planning and preparation* (last updated 7 April 2020) <<https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation#hmcts-response-to-coronavirus-outbreak>>

<sup>2</sup> Bar Council, *Updated guidance on attending hearings* (last updated 7 April 2020) <https://www.barcouncil.org.uk/resource/updated-guidance-on-attending-hearings.html>

<sup>3</sup> BBC, *Coronavirus: HMP Winchester families fear ‘death sentences’* (8 April 2020) <<https://www.bbc.co.uk/news/uk-england-hampshire-52215019>>

<sup>4</sup> Metro, *Ten prisoners have died after contracting coronavirus* (7 April 2020) <<https://metro.co.uk/2020/04/07/ten-prisoners-died-contracting-coronavirus-12523406/>>

that ‘bail **must** be granted by a court to a person accused of an offence’.<sup>5</sup> This is of course unless one of the so-called ‘exceptions to bail’ set out at Schedule 1 of the Bail Act are engaged. Practitioners will be familiar with these, and those relevant to defendants remanded in custody awaiting trial for imprisonable offences are set out at Part I of the Schedule.

The more important provisions of the Bail Act for our purposes are set out at Part IIA of the Schedule. This is a section of the Bail Act that is often ignored, and was only later inserted by the Criminal Justice Act 1988. It is worthwhile setting this out in full:

#### Decisions Where Bail Refused on Previous Hearing

1. If the court decides not to grant the defendant bail, it is the court’s duty to consider, at each subsequent hearing while the defendant is a person to whom section 4 above applies [i.e. the general right to bail] and remains in custody, whether he ought to be granted bail.
2. At the first hearing after that at which the court decided not to grant the defendant bail he may support an application for bail with any argument as to fact or law that he desires (whether or not he has advanced that argument previously).
3. At subsequent hearings the court need not hear arguments as to fact or law which it has heard previously.

It is submitted the impact of this provision is that a defendant remanded in custody awaiting trial is entitled **by right** to have heard on his behalf subsequent applications for bail so long as they consist of fresh arguments – i.e. those not previously considered. This is clear from paragraph 3 above, which only limits the defendant’s right to have a bail application heard by a court following refusal insofar as this relates to ‘arguments as to fact or law which it has heard previously.’ The authors of Blackstone’s 2020 confirm this at D7.86.

Practitioners will however be most familiar with the so-called ‘change of circumstances’ test. This in fact arises out of the bail regime prior to the amendment of the Bail Act 1976 noted above.

In a sequence of cases before the question was specifically addressed by Parliament, the Divisional Court considered the position of renewed bail applications. The general conclusion from these authorities was that a court was ‘not bound to entertain an application for bail, after it had previously been refused, unless it was satisfied that there had been a material change of circumstances.’<sup>6</sup>

The *rationale* for this was that to overturn a previous finding on bail as such would be to act as an appellate court unless there was a material change in circumstances. The authors of Archbold reconcile this previous case law with the new, more generous statutory provisions of Part IIA in the following way.

First, the authors of Archbold rightly confirm that after the insertion of Part IIA, the statutory provisions clearly take precedent over previous case law where they apply.

Secondly, this means that where bail is refused a second time, a defendant need not be heard on the same arguments, but **retains the right** to be heard as to bail on any fresh arguments (which is a lower threshold than ‘material change of circumstances’).

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<sup>5</sup> Archbold 2020, 3-3

<sup>6</sup> Archbold 2020, 3-25

Lastly, the former case law does become relevant in determining whether a court ‘need not’ hear the same arguments previously advanced. Therefore, a court is not **bound** to hear arguments as to fact or law which it has previously heard **unless** ‘there has been such a change of circumstances as might have affected the earlier decision.’<sup>7</sup>

In a nutshell, a defendant remanded in custody awaiting trial may advance new arguments on bail by way of right, and a court need only entertain arguments already advanced where there has been a change of circumstances such as to give them a different context.

### **C. APPLICATION TO COVID-19**

The current public health crisis will have a range of significant practical implications for defendants, prisoners in general, and the criminal justice system. Some or all of these may affect a defendant’s particular case on bail, and to varying degrees. It is impossible to be comprehensive in this respect. In what follows, I only intend to set out three of the general, primary ways COVID-19 can impact standard considerations of bail.

- (i) As set out above, the COVID-19 pandemic has put a halt to all criminal trials, and particularly jury trials, with no clear date as to when these will resume.

This means numerous defendants’ trial dates have already been or are likely to be vacated to a further, distant, and – again – uncertain date, which may again be revisited.

This also means that custody time limits (‘CTLs’) – which are specifically intended to safeguard the liberty of defendants who are presumed innocent against lengthy pre-trial remand periods – are likely to be breached or require arbitrary extension.

This is relevant to any application for bail as it results in a potential, substantial, indeterminate extension to pre-trial remand periods. Moreover, any such period will likely be longer than what would have initially been envisaged in a Judge’s mind, whenever bail was last refused. This factor may be particularly pertinent where the resulting remand period will be longer than the period of imprisonment envisaged on conviction for the offence(s) charged.

- (ii) The pandemic has made prison conditions particularly dire. First, as noted, there are numerous reported outbreaks of the virus across prisons, infecting both those imprisoned and staff, with at least ten deaths of prisoners already confirmed.

Secondly, there has been a reduction to staff numbers operating within prisons, which will have a bearing on resources and physical safety within custody.

Thirdly, procedures and isolation periods in prison have become more rigid (and by nature, punitive), in a way that will make already vulnerable prisoners at further risk whilst in custody. For example, all visits have been cancelled, and daily routines have been suspended.<sup>8</sup> This

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<sup>7</sup> Archbold 2020, 3-26

<sup>8</sup> The Independent, *Coronavirus lockdown: Prison visits cancelled across England and Wales* (24 March 2020) <<https://www.independent.co.uk/news/uk/home-news/coronavirus-prison-lockdown-england-wales-latest-a9420606.html>>

particularly impacts those with mental health issues who may find lengthy periods of what is essentially becoming solitary confinement significantly debilitating.

- (iii) Importantly, the pandemic has changed the landscape of general freedom of mobility and public policing. Over the past few weeks alone, there has been a substantial increase in travel restrictions (internal and external), and public police presence aimed at maintaining a lockdown and non-essential presence outside of home.

This will – and should – invariably impact any court’s renewed assessment as to risks of absconding or commission of further offences by a defendant. This is in much the same way an electronic curfew would ordinarily be suggested as a condition to limit risk whilst on bail. Now imagine the curfew is for 24 hours a day, underpinned by dedicated, proactive policing, and applies to nearly everyone.

#### **D. CONCLUSION**

Depending on the facts of a case, it is arguable that any or all of the above practical impacts of COVID-19 on defendants remanded in custody would give rise to fresh arguments, or a material change in circumstances.

It is possible to go as far as to argue that the extended remand periods under (i), or renewed risk assessments in (iii) should mean that even standard, perhaps previously used arguments for bail can be considered ‘fresh arguments’ in light of the new context in which they must be considered. There is therefore a strong argument that most defendants awaiting trial should *at least* have the **right to be heard on any further application for bail** during this public health crisis.

Alternatively, the above factors can be put forward as a material change in circumstances justifying that old arguments be re-heard in light of the arising context.

Either way, during this public health crisis, the current legal framework under the Bail Act should allow most defendants, presumed innocent, and in custody, to have their cases sensitively reviewed to determine the appropriateness of bail.

The merits of such an application of course depends on each case, but should be viewed in light of whether it is ‘**necessary**’ for the defendant to be in custody at this time.<sup>9</sup> Those defendants who have already had their trial dates vacated, who are particularly vulnerable in custody, and have limited previous bail offences will of course be considered more favourably than those in a different position, and it will be for practitioners to make the right judgement call as to the timing and form of any bail applications in the current circumstances.

RABAH KHERBANE  
2 BEDFORD ROW

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<sup>9</sup> The Divisional Court in *R v (Thompson) v Central Criminal Court* [2005] EWHC 2345 (Admin) confirmed that the proper approach was not to consider ‘whether bail should be granted’, but whether ‘it was necessary for the defendant to be in custody’. This requires the Court to view circumstances as a whole, with particular regard to whether conditions would make it *unnecessary* to remand in custody at the particular time.