



## **Attorney General's Guidance**

### **ECHR aspects of bail**

#### **Introduction**

1. This guidance is issued by the Attorney General to prosecutors following the enactment of the Criminal Procedure (Bail) (Jersey) Law 2017 ("the Bail Law") and replaces earlier guidance on the same subject issued on 6 August 2008. Earlier guidance was provided following the comments of the Bailiff in 2007 that he wished to be addressed on human rights issues surrounding bail. It is hoped that, in providing this updated guidance, those appearing before the Jersey Courts will adopt a consistent approach to all such applications.
2. It is not intended that this guidance be a comprehensive guide to the application of the new bail provisions contained in the Bail Law; it is the responsibility of those prosecuting to make themselves fully aware of the legislation and its practical effect. Rather the purpose of this guidance is to consider the application of the European Convention on Human Rights ("the ECHR") to matters relating to bail. The guidance applies to all bail applications in criminal proceedings before either the Magistrate's or the Royal Court, including those applications made to the Magistrate's Court for variation of bail conditions that have been granted by Centeniers or Connétables after charge and pending first court appearance.

#### **The Bail Law**

3. The key provisions of the Bail Law are contained within Articles 7 to 9 and Schedule 1.
4. Article 7 of the Bail Law provides that there shall be a general presumption in favour of the right to bail. This right shall only be derogated from if one or more of the exceptions set out in Schedule 1 of the Bail Law applies. It further places a positive duty upon the court to consider bail on each occasion that a defendant appears in criminal proceedings, including a duty to consider whether there should be any variation of bail granted earlier in the proceedings.

5. Article 9 of the Bail Law makes practical provision for applications for bail or variation of any conditions on bail. It provides that such applications may be made orally, in writing or on any prescribed form. They may be conducted in open court, but, in the case where both parties and any surety agree, an application for variation of conditions on bail may be conducted without a hearing. Any variation of conditions on bail may be made by a court of its own motion or on the application of the parties or any surety.

## **Relevant provisions of the ECHR**

6. The rights and freedoms contained in the ECHR have been incorporated into Jersey legislation by virtue of the Human Rights (Jersey) Law 2000. Articles 5 and 6 of the ECHR (Right to liberty and security and Right to a fair trial respectively) are the relevant rights for the purpose of this guidance.

### **Article 5 – Right to liberty and security**

7. Article 5(1) provides, so far as it is relevant, that:

*“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;*

*...*

*(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;”*

8. Article 5(1) is designed to ensure that no person shall be detained without a lawful basis and procedure for their detention, either before or after conviction. The Bail Law, in tandem with the provisions of the Police Procedures and Evidence (Jersey) Law 2003 (“PPCE”) provide the legal bases for detention both by the police and the courts. It is vital in each and every case that prosecutors consider and apply the provisions, recommending the appropriate course of action to the court in connection with bail and that sufficient comprehensive information is made available to the court in connection with the decision whether or not to grant bail. A reasoned, common sense, approach is required from prosecutors when inviting the court to refuse bail. The starting point remains that the defendant has a *prima facie* right to bail and applications for conditions on bail or a remand into custody may only be made when one or more of the exceptions to the right to bail are

properly made out. Provided that the legislation is followed there should be no issues as to infringement of Article 5(1) rights.

9. Article 5(3) further provides that:

*“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 a trial within reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”*

10. Article 5(3) should be read in conjunction with Article 5(1) *“with which it forms a whole”*<sup>1</sup>. Read together, they address the detention of a defendant prior to conviction. Article 5(3) creates two rights for consideration; one, that the defendant shall be brought promptly before the court following charge and detention and two, that any trial shall be within a reasonable timeframe or the defendant shall be released pending trial (with or without conditions on their release).

11. In relation to the first right under Article 5(3), in accordance with Article 30 of the PPCE, both the police and courts are responsible for ensuring that all defendants are placed before the court as soon as practicable, and in any event not later than the first sitting of the court either after they are charged and detained in custody, or after an application for variation of bail conditions is made. It is accepted that listing policy is solely within the gift of the court. Consequently any issue relating to a potential breach of the right under Article 5(3) ECHR to be brought promptly before the court when in custody or to the hearing of a bail variation application may be the responsibility of the courts and/or the police.

12. Prosecutors should be aware of Articles 40 to 42 PPCE which provide the statutory time limits for detention of an accused prior to charge. A person under arrest shall not be detained for a period exceeding 96 hours without charge (or release). This includes any period granted under a warrant of further detention. This time limit is based on ECHR jurisprudence which confirms that ordinarily the period of pre-charge detention should be no longer than four days.<sup>2</sup>

13. All applications for warrants of further detention shall be brought by the police and shall be dealt with before the Magistrate’s Court. Those prosecuting may of course be asked to provide support or assistance to the police and so it is vital that prosecutors are aware of the existence of the relevant ECHR jurisprudence and Article 5(3) rights when supporting

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<sup>1</sup> Lawless v Ireland (No 3) A 3 (1961), 1 EHRR 15, para 14

<sup>2</sup> Brogan v UK A 145-B (1988), 11 EHRR 117, Commission opinion, para 103

the police in such applications. As the Magistrate's Court is not available to hear applications for warrants of further detention outside working hours it will be necessary for the police to make any application in a timely manner. In the event that the time limit for detention is due to expire during a period when the court is not sitting, the police must ensure that they adequately prepare and present their application in advance of the expiry of the time limit, thereby allowing further detention, if authorised by the Magistrate, to be in compliance with the accused's Article 5(3) ECHR rights and relevant jurisprudence. Clearly, applications for warrants for further detention are likely only to arise in the most serious of cases. In such matters it is anticipated that prosecutors are likely to already be liaising with the police and offering any support and advice needed. It may therefore be prudent for prosecutors to remind the police at this early point of support of the need to be aware of the time available to make their application.

14. Moving on to consider the second of the two rights created by Article 5(3), the overriding objective, found at Part 2 of the Criminal Procedure (Jersey) Law 2018, places on a statutory footing the requirement for all cases to be dealt with "*efficiently and expeditiously*". This requirement arises regardless of whether the defendant has been remanded into custody. The court and each party are responsible for ensuring the active case management of matters throughout the life of the case to ensure an efficient and expeditious disposal. It is therefore of vital importance that prosecutors actively assist the court by communicating with both the police and the defence at the first available opportunity and seeking any directions required to ensure the matter proceeds expeditiously. Provided that the overriding objective is complied with, there should be no breaches of Article 5(3) in relation to trial taking place within a reasonable time frame.
15. The existence of the overriding objective ought to mean that every trial is dealt with within a reasonable time, thereby ensuring that the second element of the right, namely the right to release pending trial in the event that a reasonable time is not possible, does not arise. However, it is accepted that each case must be dealt with on its merits and there may be times when unavoidable delay occurs that may result in there being an argument about whether the trial will take place within a reasonable time as envisaged under Article 5(3). Pursuant to Article 7 of the Bail Law, it remains incumbent upon the court to consider whether it is appropriate for the defendant to be granted bail at each hearing. In the event that there is delay and the issue of bail is being considered, the same principles apply as referred to in paragraph 8 above. Provided that the prosecutor makes a reasoned and common sense recommendation to the court in connection with bail, then they can do no more.

16. Please note: Article 5(3) applies throughout the period from the arrest of a suspect to his conviction or acquittal by the court, but not to detention pending appeal.<sup>3</sup>

### **Article 6 – Right to a fair trial**

17. Article 6(1) provides, so far as it is relevant, that:

*“In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

18. A finding of guilt is not a “*determination...of any criminal charge*” within the meaning of Article 6 “*as long as the sentence is not definitely fixed*”<sup>4</sup>. The rights conferred by Article 6 therefore apply in the period between an individual being charged or summonsed to court and the determination of their case. This includes the period up to and including any sentencing hearing.

19. As discussed above with regard to Article 5(3) ECHR, all criminal cases are subject to the overriding objective, and any delay in hearing a case may require the court to consider whether it is necessary and proportionate to place a restriction upon the liberty of the accused. In considering bail following such a delay, the court may wish to take into account the length of time that the proceedings have been before the court as a whole, rather than just the reasons for the delay. Prosecutors must be live therefore not just to argument about the instant cause for the delay but also to the wider considerations under ECHR about reasonable timeframes for completion of proceedings. Article 3(1)(c) of the Criminal Procedure (Jersey) Law 2018 provides specifically for the recognition of the rights of a defendant, “*particularly those rights granted under Article 6 of the European Convention on Human Rights*”. It is important therefore that those prosecuting do not restrict their submissions to the court in relation solely to the need to remand a defendant and the reasons for the delay, and remain mindful of the courts duty to consider bail at each hearing and the statutory requirement to ensure determination of proceedings within a reasonable time. Clearly what is reasonable will vary dependent upon the facts of the case; the more complex evidential matters will undoubtedly require more time for investigation and preparation than those that are straightforward. However, the prosecutor must always be fully aware of the facts of the case, the stage it is at, both in the investigation and before the court, and what further action is required before the matter can proceed to enable him or her to provide the court with as full a picture as possible.

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<sup>3</sup> Wemhoff v. Germany (1968) 1 EHRR 55, paras 7-9; B v Austria (1991) 13 EHRR 20, paras 36-40.

<sup>4</sup> Eckle v Germany (1983) 5 EHRR 1

## **In conclusion**

20. Whilst it is important to consider how the Bail Law interacts with the ECHR, the legislation in place is designed to respect a defendant's Article 5 and 6 ECHR rights.
21. It follows therefore that, for those prosecuting, an intimate knowledge and consistent application of the Bail Law and other supporting legislation referred to in this guidance is crucial.
22. It is vital in each and every case that prosecutors consider and apply the Bail Law provisions, recommending the appropriate course of action to the court in connection with bail and that sufficient comprehensive information is made available to the court in connection with the decision whether or not to grant bail. It is also vital that the reasons for opposing bail, representations made by the defence and the decisions of courts are recorded in a clear and comprehensive manner.
23. A reasoned, common sense, approach is required from prosecutors when inviting the court to refuse bail. The starting point remains that the defendant has a *prima facie* right to bail and applications for conditions on bail or a remand into custody may only be made when one or more of the exceptions to the right to bail are properly made out.

**13 December 2019**