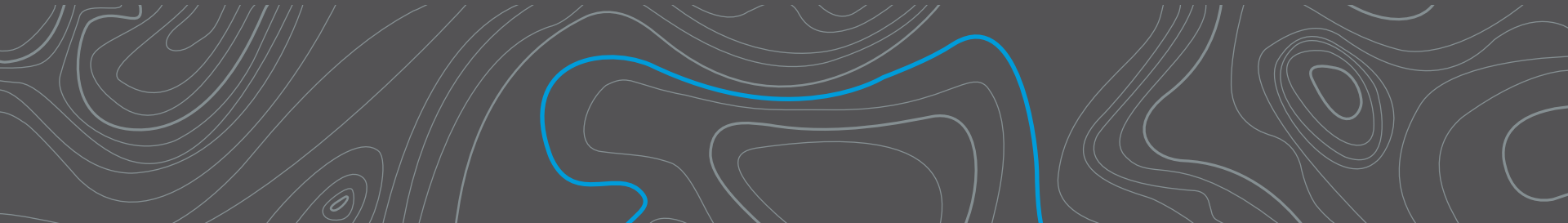


Police, Crime, Sentencing and Courts Bill 2021

Sandra Paul



A timeline of reforms to pre-charge bail

Pre-2017

Police and Criminal Evidence Act 1984 (PACE)
Police Detention and Bail Act 2011 (PDB)

1

Pre-2017



PACE outlines that pre-charge bail is available to manage an arrested individual while an investigation continues or whilst a decision to charge is being obtained. **No presumption** against pre-charge bail. Conditions of bail can be challenged in a Mags' court but length of time a person is subject to bail cannot. PDB is introduced as emergency legislation to return police bail to the position it was in before *Hookway* (2011).

3 April 2017

Policing and Crime Act 2017 (PCA)

2

2017



s.56 of the PCA 2017 amends PACE to allow the police to release a suspect from custody under investigation ('RUI') rather than on pre-charge bail. Reforms introduced a 28-day pre-charge bail time limit and a **presumption** that people would be RUI and not released on pre-charge bail. RUI has no time limit and no conditions are imposed.

2019

Policing and Crime Act 2017 (PCA)

3

2019



On 5 November 2019, the Government announces it intends to introduce further reforms to pre-charge bail. A consultation is launched in 2020.

2021

Police, Crime, Sentencing and
Courts Bill 2021 (PCSCB)

4

2021



PCSCB proposes reforms to pre-charge bail known as 'Kay's Law'. Presumption against pre-charge bail would be removed in favour of a **neutral position**. PCSCB would encourage the police to impose strict conditions on bail more frequently in high harm cases. PCSCB would enable custody officers to authorise the first period of pre-charge bail to a period of three months in standard police cases. Further extensions would require approval from an officer of Inspector or above to six months, and a Superintendent or above to nine months. Judicial approval would be sought to extend beyond nine months. s.50B would be inserted into PACE, conferring a power on the College of Policing to issue statutory guidance on pre-charge bail.

Comparing current and proposed pre-charge bail regimes

	Current Law (Policing and Crime Act 2017)	Proposed Law (Police, Crime, Sentencing and Courts Bill 2021)
Bail Presumption	Presumption against pre-charge bail.	Neutral position on pre-charge bail (presumption would be removed).
Initial Applicable Bail Period (ABP)	Limited to 28 days for standard cases.	Limited to 3 months.
Initial ABP Authorisation	Initial 28-day ABP must be authorised by an officer of the rank of Inspector or above.	Initial 3-month ABP can be authorised by custody officers or an officer of the rank of Inspector or above.
First ABP Extension	Initial 28-day ABP can be extended to 3 months for standard cases. Must be approved by a Superintendent or above.	Initial ABP can be extended to 6 months. Must be approved by Inspector or above.
Second ABP Extension	ABP can be further extended by either 3 months or 6 months for cases deemed exceptionally complex, ad infinitum. Must be approved by a Magistrates' Court.	ABP can be further extended to 9 months. Must be approved by Superintendent or above.
Third ABP Extension	See 'Second Bail Extension'.	ABP can be extended beyond 9 months, ad infinitum. Must be approved by a Magistrates' Court.

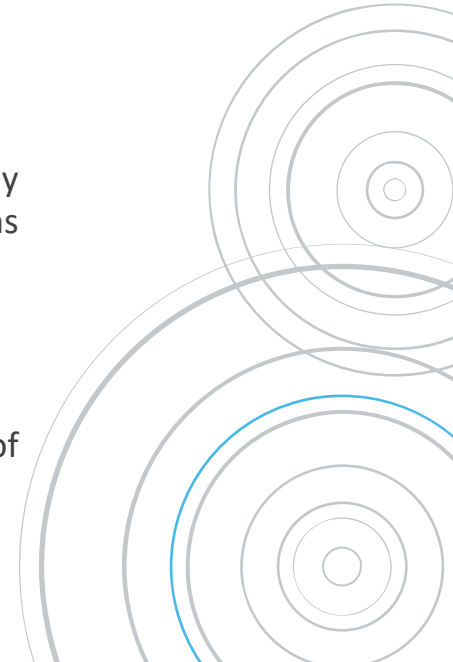
s24 PACE

...

- 2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
- 3) If an offence has been committed, a constable may arrest without a warrant—
 - a. anyone who is guilty of the offence;
 - b. anyone whom he has reasonable grounds for suspecting to be guilty of it.
- 4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
- 5) The reasons are—
 - e. to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

...

....



The *Parker* questions

Parker v Chief Constable of Essex Police [2017] EWHC 2140 (QB) [¶14]

- (1) Did the arresting officer suspect that an offence had been committed? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
- (2) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the Court.
- (3) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
- (4) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the judge, if necessary on facts found by a jury.
- (5) Did the arresting officer believe that for any of the reasons mentioned in subsection 24 (5) of PACE, it was necessary to arrest the person in question? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
- (6) Assuming the officer had the necessary belief, were there reasonable grounds for that belief? This is a purely objective requirement to be determined by the judge, if necessary on facts found by a jury.
- (7) If the answer to the previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with *Wednesbury* principles.

(subjective test | objective test)



Suspicion

Before turning to the Judge's reasons and my own conclusions in relation to this first ground of appeal, in my judgment it is important to underline how low a hurdle "suspicion" is. In ***Hussein v. Chong Fook Kam*** [1970] AC 942 : Lord Devlin (for the Privy Council) explained at 948B-D

"...suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation ...Suspicion can take into account matters that could not be put in evidence at all Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case..."



Reasonable grounds to suspect

“The bar for reasonable cause to suspect set out in section 24 (2) of the 1984 Act is a low one. It is lower than a prima facie case and far less than the evidence required to convict... Further, prima facie proof consists of admissible evidence, while suspicion may take account of matters that could not be put in evidence... Suspicion may be based on assertions that turn out to be wrong... The factors in the mind of the arresting officer fall to be considered cumulatively” **Parker v Chief Constable of Essex** [2018] EWCA Civ 2788 [¶1115].

2.3A There must be some reasonable, objective grounds for the suspicion, based on known facts and information which are relevant to the likelihood the offence has been committed and the person liable to arrest committed it. See Notes 2 and 2A.

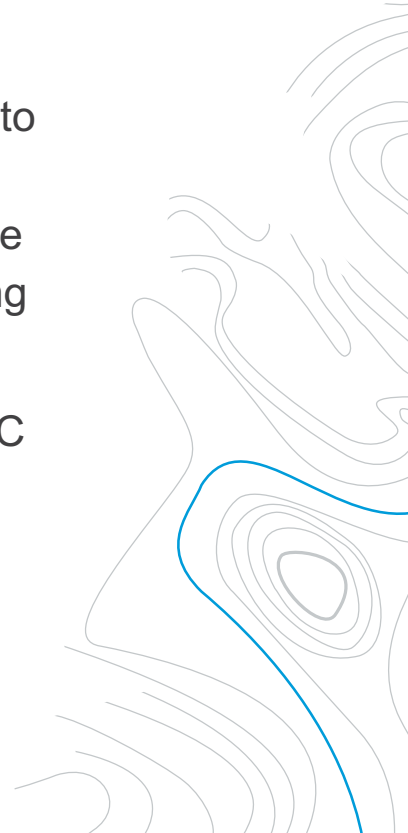
In determining this question officers should take in to account any facts and information that may dispel this suspicion (see Code G, NfG 2 – 2A).



Reasonable grounds to suspect (cont)

Though there is technically no philosophical room for manoeuvre in a binary decision where it is either necessary to arrest or unlawful (i.e. necessary not) to arrest, the job of the court is not an abstract thought experiment. It is a distinctively practical balancing exercise, upholding individual liberty and police accountability on the terms of the operational realities of public interest policing and the choices available on the ground.

Reay and Sherlock v Chief Constable of Northumbria Police [2020] EWHC 3246 (Admin) (¶32)



The comparative tests

...whereas the requirement in subsections 24(2) and (3) for reasonable grounds for suspecting a person to be guilty of a crime imposed a comparatively low hurdle, the requirement in subsections 24(4) and (5) for reasonable grounds for believing that an arrest was necessary imposed a comparatively high hurdle....

Rashid v Chief Constable of West Yorkshire Police [2020]
EWHC 2522 (QB) (¶25).



...(1) the policeman must honestly believe that arrest is necessary, for one or more identified section 24(5) reasons; and (2) his decision must be one which, objectively reviewed afterwards according to the information known to him at the time, is held to have been made on reasonable grounds... **Hayes v Chief Constable of Merseyside Police** [2011] EWCA Civ 911 [¶40].

However, it should be emphasised that the underlying concept in section 24(5) is that of necessity. This cannot be envisaged as a synonym for “desirable” or “convenient”. For present purposes, the issue may be formulated thus: should this Court, in the exercise of its review function, conclude that an arrest was necessary to allow the prompt and effective investigation of this complaint? **R (ota TL) v Chief Constable of Surrey Police** [2017] EWHC 129 (Admin).



Mobile phones and s32

I note that, if the only purpose of arresting a suspect is to exercise the power of search conferred by subsection 32(2)(a)(ii) , then the condition set out in subsection 32(5) needs to be satisfied if the arrest is to be lawful. If that condition is not satisfied, then arresting the suspect will not confer a power of search on the officer, and the arrest will be unnecessary and, therefore, unlawful.

If that condition is satisfied, then it is still open to the officer, instead of arresting the suspect, to ask the suspect to hand over the mobile telephone or other item of potential evidence which is reasonably believed to be concealed on the suspect's person. Of course, depending on the circumstances, making such a request may or may not be practicable....

Rashid v Chief Constable of West Yorkshire Police [2020] EWHC 2522 (QB) (¶¶39 - 40)



Mobile phones and s32 (cont)

...It is plain that a belief is more than a suspicion and that the need to have reasonable grounds for a belief imposes a higher threshold than the need to have reasonable grounds for a suspicion...

R (ota Eastenders Cash & Carry Plc) v South Western Magistrates' Court [2011] EWHC 937 (Admin) [¶13]





Mental vulnerability and mental disorder

R v Muner Al-Jaryan

[2020] EWCA Crim 440

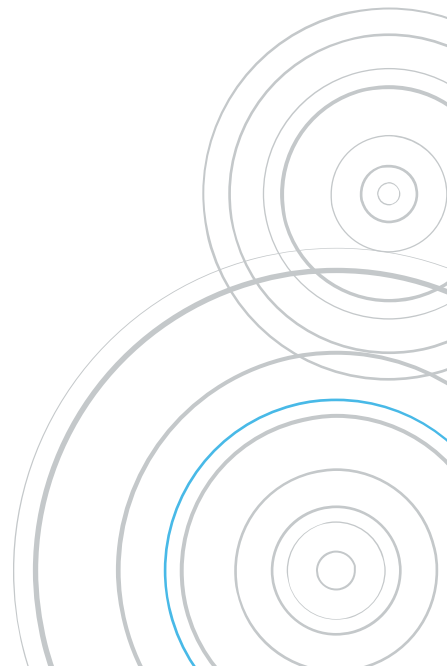
20 March 2020



Was there a breach of Code C para 1.4?

‘1.4 If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, the person shall be treated as such for the purposes of this Code.’

NfG 1G ‘When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called.’



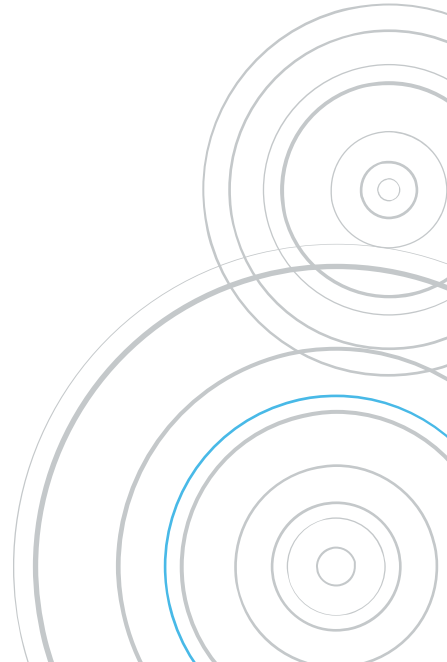
Is the position the same under the revised Code C?

Code C para 1.4 now refers to ‘an officer [having] any reason to suspect that a person of any age may be vulnerable’ – in the absence of clear evidence to dispel that suspicion they must be treated as such

In order to establish any such reason, the officer must make reasonable enquiries to ascertain what information is available that is relevant to any factors described in Code C para 1.13(d)

Code C para 1.13(d) refers to –

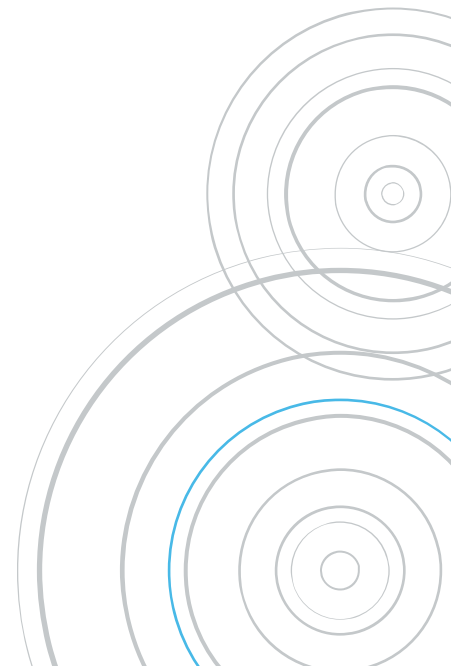
- Difficulty in understanding or communicating effectively
- Understanding of the significance of what they are told or what they say in reply
- Being prone to confusion, providing unreliable or misleading information, etc.



The importance of what the defence lawyer does at the police station

‘There was nothing to suggest that the solicitor advised police that an appropriate adult should be present’ (para 9)

The trial judge placed emphasis on the fact the appellant’s solicitor said nothing whatever about any need to contact an appropriate adult (para 37)



Mental handicap or mental disorder?

Where a case depends wholly or substantially on a confession by an accused who is *mentally handicapped* and the confession was not made in the presence of an independent adult, the court must warn the jury of the special need for caution (PACE s77).

‘[t]his was a case where the appellant had depression (a mental health disorder) and was without a solicitor or an appropriate adult in interview. In such circumstances, a warning to the jury that there is a “special need for caution...” should have been given’ (para 45)

