



**Trinity  
College  
Dublin**

The University of Dublin

**DETOUR**  
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

1st National Report of Ireland

**DETOUR –  
Towards Pre-trial Detention as Ultima Ratio**

David Perry, Mary Rogan

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## **1. Introduction: Pre-trial detention in context**

Ireland is a common law jurisdiction, which has the presumption of innocence, the right to liberty and the right to a fair trial guaranteed within its Constitution.

Until the 1990s, the use of pretrial detention in Ireland was limited. A critical moment in the history of pretrial detention in Ireland occurred in 1997, when a referendum was passed to amend the constitution in order to permit the use of pretrial detention in circumstances where a court felt the accused person was likely to commit serious offences if not detained. Since then, Ireland has built a prison originally designed to house those detained pending their trial, and has seen its pretrial detention population rise to about 15% of its total prison population. This proportion has remained relatively stable over the last few years, with the overall numbers of those in pretrial detention falling, in line with a falling general prison population. There has been little research conducted into the use of pretrial detention in Ireland, or indeed the experiences of those in pretrial detention or subject to alternatives to pretrial detention until recently. The position of those individuals originally from outside Ireland has also received limited attention.

The long-established alternative to pretrial detention in Ireland is bail. As will be described below, this usually comes with conditions attached, but support services and intensive supervision of those on bail is not practiced widely with adults. It is important to clarify terminology at the outset. While the term *bail* in other contexts often refers to the actual financial guarantee provided to secure attendance at trial, the term *bail* in the Irish context is used to describe the alternative to custody in its entirety. An accused person who is granted bail or is "on bail" is simply a person who is not held in pretrial detention while the charges against him or her are pending before the courts. Conditions, including those of a financial nature, may be attached to the accused's bail.

Ireland has seen its legal framework for pretrial detention altered at times of political pressure, particularly around offences committed by people on bail. The 1997 referendum which made it more difficult to obtain bail is an example of this, but so too is the recent amendment to the law which attempts to make it more difficult to obtain bail where the offence charged is one of burglary. This reflects political attention on the crime of burglary in the recent past.

A number of prisons in Ireland are used to hold pretrial detainees. The main prison used in this regard is Cloverhill Prison, a medium security institution located in Dublin, which opened in 1999 and has operated since as a purpose-built remand prison. While Cloverhill Prison houses most of the pretrial detainees in Ireland, a number of other prisons, including Cork

Prison, Limerick Prison, Portlaoise Prison and Castlerea Prison, are used to hold pretrial detainees outside Dublin. In addition, as Cloverhill Prison is a male-only institution, female prisoners on remand in the Dublin area are held in the Dóchas Centre. Unlike Cloverhill Prison, these other institutions are not primarily designed to house remand prisoners, with the effect that those in pretrial detention are sometimes accommodated alongside convicted prisoners.

Ireland has been visited on a number of occasions over the last two decades by the European Committee for the Prevention of Torture, which has made various criticisms about the prevailing conditions in Cloverhill Prison. In the report published its 2002 visit, for example, the Committee noted that it had received complaints from prisoners relating to physical abuse and use of padded cells by prison officers, commented on the level of inter-prisoner violence prevalent in the institution, and criticised the "underdeveloped regime" and lack of meaningful activities provided to prisoners. The Committee noted that the cells had good lighting and ventilation, were well-equipped with facilities and were in a good state of repair, but expressed concern with the practice of using 11 metre squared cells to hold three prisoners and recommended that they be limited to double occupancy.<sup>1</sup> Similar criticisms were made by the Committee regarding the underdeveloped regime in Cloverhill and the triple occupancy of cells in the report published following its 2006 visit.<sup>2</sup> More recent reports of the Committee from 2011 and 2015 have taken issue with the use of observation cells in Cloverhill Prison, the lack of appropriate psychiatric treatment facilities, and the use of Cloverhill Prison to detainee immigration detainees.<sup>3</sup>

In his 2010 Annual report, Ireland's Inspector of Prisons commented that Cloverhill Prison was clean and in good repair, but was "overcrowded" and lacked "adequate services and regimes".<sup>4</sup> However, the Inspector has not conducted any detailed examination of the operation of Cloverhill Prison since this date. Other institutions in which remand prisoners are held

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<sup>1</sup> European Committee for the Prevention of Torture, "Report to the Government of Ireland on the Visit to Ireland Carried Out By the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 20 to 28 May 2002" (18<sup>th</sup> September 2003).

<sup>2</sup> European Committee for the Prevention of Torture, "Report to the Government of Ireland on the Visit to Ireland Carried Out By the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 2 to 13 October 2006" (10<sup>th</sup> October 2007).

<sup>3</sup> European Committee for the Prevention of Torture, "Report to the Government of Ireland on the Visit to Ireland Carried Out By the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 25 January to 5 February 2010" (10<sup>th</sup> February 2011); European Committee for the Prevention of Torture, "Report to the Government of Ireland on the Visit to Ireland Carried Out By the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 16 to 26 September 2014" (17<sup>th</sup> November 2015).

<sup>4</sup> Office of the Inspector of Prisons, "Annual Report 2010" (7<sup>th</sup> April 2011).

have been the topic of frequent criticism by the Inspector. For instance, in a report published in 2011, the Inspector of Prisons criticised the level of overcrowding, existence of slopping out and lack of recreational facilities and workshops in Limerick Prison.<sup>5</sup>

Irish law prescribes a clear difference to be afforded in treatment between pretrial detainees and convicted prisoners. In particular, the Prison Rules 2007 provide that unconvicted prisoners have an enhanced entitlement to receive visits (at least three visits a week, as opposed to a minimum of one visit a week for convicted prisoners), make phone calls (at least five phone calls a week to friends and family and as many calls as are reasonably necessary to manage property and business affairs, compared to a minimum of one call a week for convicted persons), and to receive private medical care at their own expense. Rule 71 of the Prison Rules also provides that unconvicted prisoners should be accommodated separately from convicted prisoners “in so far as is practicable and subject to the maintenance of good order and safe and secure custody”.

This report examines the legal background for the use of bail and the denial of bail, before providing some statistical information regarding the use of pretrial detention and alternatives in Ireland. The report then reviews existing literature, before exploring the decision-making process around the use of pretrial detention, and the operation of bail. The chapter concludes with an analysis of the impact of “European” law and policy on the legal framework and operation of pretrial detention in Ireland.

## **2. Legal Background**

The law on pretrial detention in Ireland derives from case law, statutory provisions and certain Articles of the Irish Constitution.

### *2.1 Circumstances in Which Pretrial Detention Can Be Used:*

It should be noted at the outset that under Irish law, the police have the power to detain persons for investigative reasons for a finite period of time without any charges being proffered. A series of authorisations by senior members of the police and the courts are needed to extend the duration for which a person is held in this form of investigative detention. The relevant powers of detention are set down in various statutes, as follows:-

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<sup>5</sup> Office of the Inspector of Prisons, *Report on an Inspection of Limerick Prison* (25<sup>th</sup> November 2011).

- ❖ Under s. 4 of the Criminal Justice Act 1984, the police may detain a person who has been arrested on suspicion of the commission of an “arrestable offence”, i.e. an offence punishable by five years imprisonment or more. That detention must take place at a police station, must be authorised at outset by the “Member in Charge” of that police station as being necessary for the proper investigation of the offence, and can last for a total of 24 hours. 6 hours detention is permitted from the time of arrest. This can be extended by a further 6 hours, where directed by an officer not below the rank of Superintendent, and a further 12 hours in addition to this where directed by an officer not below the rank of Chief Superintendent.
- ❖ Section 30 of the Offences Against the State Act 1939 permits detention of a person arrested for a specific range of offences – typically involving firearms and subversive offences – which are contained in the Act or scheduled thereto. Detention must take place at a police station, prison or some other convenient place, and may last for a total of 72 hours. An initial 24 hours detention is permitted following arrest. This may be extended by a further 24 hours where directed by an officer not below the rank of Chief Superintendent, and a further 24 hours where authorised by a warrant obtained from the District Court on application by an officer not below the rank of Superintendent.
- ❖ Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 provides a power for the Gardaí to detain a person arrested for a “drug trafficking offence”, which includes any offence involving the possession of a controlled drug for unlawful sale or supply, offences involving the manufacture, preparation or importation of controlled drugs, and money laundering offences in relation to the proceeds of drug trafficking. Detention may take place at a police station or place of detention, and can last for a total of 144 hours. 6 hours detention is permitted from the time of arrest. A further 18 hours detention is permitted where directed by an officer not below the rank of Chief Superintendent. Detention can then be extended by 24 hours on further authorisation of an officer not below the rank of Chief Superintendent, or 72 hours where authorised by a warrant obtained from the District Court or Circuit Court on application by an officer not below the rank of Chief Superintendent. In the event of the latter extension being granted, a further 48 hours detention may be obtained where authorised by a second warrant obtained from the the District Court or Circuit Court on application by an officer not below the rank of Chief Superintendent.
- ❖ A further power of investigative detention is provided for in s. 50 of the Criminal Justice Act 2007. This provides for detention of a person arrested for a limited number

of serious offences, including murder, capital murder, possession of firearms with intent to endanger life, endangerment with the use of a firearm, or an organised crime offence. Detention must take place at a police station, and can last for a total of 144 hours. 6 hours detention is permitted from the time of arrest. A further 18 hours detention is permitted where directed by an officer not below the rank of Chief Superintendent. Detention can then be extended by 24 hours on further authorisation of an officer not below the rank of Chief Superintendent, or 72 hours where authorised by a warrant obtained from the District Court or Circuit Court on application by an officer not below the rank of Chief Superintendent. In the event of the latter extension being granted, a further 48 hours detention may be obtained where authorised by a second warrant obtained from the the District Court or Circuit Court on application by an officer not below the rank of Chief Superintendent.

During this period of investigative detention, a detained person has a range of rights in relation to information which must be provided, legal advice and access to medical treatment.<sup>6</sup> There is, however, no entitlement to apply for early release from detention or similar: detention may lawfully continue up until the maximum statutory period is reached, provided that the required authorisations are forthcoming. Once the maximum period has been reached or further detention is not authorised, the person must be released and can no longer be detained for the investigation of the offence at issue.

Those who are actually charged with criminal offences have a *prima facie* entitlement to be released on bail pending the resolution of those charges before the courts: see, for example, the comments of Kearns J. in *Vickers v. DPP*.<sup>7</sup> The reasoning for this entitlement was set out by Walsh J. in the seminal judgment of the Supreme Court in *People (Attorney General) v. O'Callaghan*.<sup>8</sup> There, he recognised that detaining a person in custody simply because he or she has been charged with a criminal offence is inconsistent with the presumption of innocence underlying the criminal law; that lengthy periods of pretrial imprisonment can have a very damaging effect on the private life of an accused person, in terms of employment and family life; and that pretrial detention will usually have an adverse effect on a defendant's prospects of acquittal, because it limits his or her ability to interact with legal advisors and capacity to prepare a defence.

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<sup>6</sup> See, for example, Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulation 1987.

<sup>7</sup> [2009] IESC 58, [2010] 1 I.R. 548 at 558.

<sup>8</sup> [1966] I.R. 501.

As a result of this *prima facie* entitlement, an accused person may only be lawfully detained in pretrial detention where the prosecution can establish well-founded objections to bail: see *People (Attorney General) v. Gilliland*.<sup>9</sup> Under Irish law, there are only three such objections which are recognised as justifying the refusal of bail.

First, it is open to the courts to refuse bail where it appears probable that the accused will, if admitted to bail, abscond or otherwise evade justice by failing to appear for court to answer the charges against him or her: *People (Attorney General) v. O'Callaghan*.<sup>10</sup> For bail to be refused on this ground, the prosecution must satisfy a court that there is a likelihood of the defendant absconding; however, it need not go further by proving matters beyond a reasonable doubt. In *O'Callaghan*, Walsh J. set down a range of factors which should be considered by a court in determining whether this likelihood has been established. These include matters such as: the seriousness of the charge against the accused and the strength of the evidence; the likely sentence which the accused would face on conviction, based on the nature of the accusation and the accused's record of previous convictions; whether the accused has failed to answer bail in the past; and the length of time the accused would spend in custody if denied bail.

Secondly, an accused may be remanded in pretrial detention where it appears "reasonably probable" to the court that he or she will pervert the course of justice by interfering with prospective witnesses and jurors, tampering with evidence or disposing of illegally-acquired property: *People (Attorney General) v. O'Callaghan*.<sup>11</sup> The Irish courts have recognised that where such a probability is shown to exist, "the right to liberty must yield to the public interest in the administration of justice": *per* Henchy J. in *The People (DPP) v. McGinley*.<sup>12</sup>

Thirdly, bail may be refused where the prosecution satisfies a court that there is a real risk that the accused will commit serious offences if granted bail. It should be noted that in *People (Attorney General) v. O'Callaghan*<sup>13</sup>, the Supreme Court rejected the existence of such a risk as a proper basis for the refusal of bail. However, a referendum held in 1996 inserted a new Article 40.4.6 into the Irish Constitution, which effectively reversed the Supreme Court's ruling on this point and allowed for refusal of bail on the grounds that it is necessary to pre-

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<sup>9</sup> [1985] I.R. 643 at 646.

<sup>10</sup> [1966] I.R. 501.

<sup>11</sup> [1966] I.R. 501.

<sup>12</sup> [1998] 2 I.R. 408 at 414.

<sup>13</sup> [1966] I.R. 501.

vent the commission of criminal offences. This constitutional amendment in turn led to the enactment of the Bail Act 1997, s. 2 of which provides that:-

“Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.”

In practice, an objection to bail by the prosecution on this ground has become colloquially known as a “section 2 bail objection”.

It will be noted that a section 2 objection may only be raised where the accused is charged with a serious offence and it is also apprehended that a serious offence may be committed. The Schedule to the 1997 Act lists a finite but extensive number of offences which are considered to be “serious offences” in this context. These offences include murder, manslaughter, serious assaults, kidnapping, false imprisonment, rape, robbery, dangerous driving causing death or serious bodily harm, drug trafficking, firearms offences, theft, and sexual offences including rape and sexual assault.

In advancing a bail objection of this nature, the prosecution need not prove the existence of the risk of the commission of a serious offence beyond a reasonable doubt. In *Vickers v. DPP*, the Supreme Court said that that would be an “impossible burden” for the State to meet and held instead that the court considering whether to refuse bail must be simply satisfied “from all the evidence adduced that the risk is a real one”.<sup>14</sup> The Act of 1997 specifies a range of considerations that must be weighed up by the court in making a decision on whether or not the existence of a risk has been made out to the requisite level. These include matters such as the seriousness of the offence charged; the accused’s record of previous convictions, particularly for offences committed while on bail; and any drug addiction issues which the accused might suffer from. This list of factors is non-exhaustive and a court is permitted to take into account other factors not listed in s. 2, including the accused’s likely date of trial and the consequent length of time that would be spent in pretrial detention if bail were refused.<sup>15</sup>

The Act of 1997 was recently amended by the Criminal Justice (Burglary of Dwellings) Act 2015 to deal specifically with factors which must be considered by a court where an accused over the age of 18 seeks bail in respect of a charge of burglary of a dwelling and a s. 2 bail

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<sup>14</sup> [2009] IESC 58, [2010] 1 I.R. 548 at 558.

<sup>15</sup> *Maquire v. DPP* [2004] 3 I.R. 241.

objection is raised by the prosecution. The Act of 2015 provides that where an accused person applying for bail in that situation has a conviction for burglary of a dwelling within a period of 5 years immediately prior to the application for bail, and also has two or more convictions and / or pending charges for such offences alleged to have occurred within a period of 6 months before and ending 6 months after the alleged commission of the offence in respect of which bail is sought and after he or she attained the age of 18, these circumstances are to be taken as evidence by the court that the accused is likely to commit a burglary offence in a dwelling if granted bail. Essentially, the legislation – which arose following political pressure about burglar offences – creates a situation whereby pending charges or recent convictions for burglary of a dwelling can be taken as evidence of likelihood to commit such offences while on bail, with the stated purpose of making it more difficult for accused persons in such circumstances to obtain bail. The Act of 2015 came into effect on 17<sup>th</sup> January 2016, and is too early to assess its impact and implications at this stage.<sup>16</sup>

The Irish courts have stressed on numerous occasions that it is unlawful for an accused to be denied bail and remanded in pretrial detention on any grounds other than the three considered above. For instance, in *People (Attorney General) v. O'Callaghan*, Walsh J. remarked that it would be “improper for any Court to refuse bail as a mark of disapproval of former conduct ... or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.”<sup>17</sup> Similarly, in *People (DPP) v. Coffey*,<sup>18</sup> Keane C.J. held that it would be unlawful to detain an accused person in pretrial detention as a means of protective custody given risks that might exist to the accused if released.

## *2.2 Length of Pretrial Detention:*

As set out above, the use of investigative detention by the police – where a person is arrested and detained prior to any charges being proffered – is subject to strict time limits which are prescribed by statute. The total length of detention permitted depends on the particular power of detention which is used by the police: for instance, a total of 24 hours detention is permitted where a person is detained pursuant to s. 4 of the Criminal Justice Act 1984 for investigation of an “arrestable offence”, whereas detention pursuant to s. 2 of the Criminal Justice (Drug Trafficking) Act 1996 for investigation of a “drug trafficking offence” allows for detention of up to 144 hours. Authorisations from senior police officers and the courts are required at certain intervals during detention in order to keep the detention ongoing. If a

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<sup>16</sup> Criminal Justice (Burglary of Dwellings) Act 2015 (Commencement) Order 2016, S.I. No. 15 of 2016.

<sup>17</sup> [1966] I.R. 501 at 517.

<sup>18</sup> [2002] 4 I.R. 526.

required authorisation is not forthcoming or if the maximum permitted duration of detention is reached, the detained person can no longer be lawfully held.

A different situation arises where a person is actually charged with an offence following investigation and remanded in pretrial detention pending the resolution of that charge before the courts. Irish law does not lay down a maximum time in statute for the overall duration of this pretrial detention or provide for automatic reviews of the necessity of detention. Legislation does, however, provide time limits in terms of the maximum length for which a person may be remanded in custody between court appearances in the District Court. In particular, detention on remand may only be ordered by the District Court for eight days at the first appearance of the accused before that Court. At subsequent appearances, the accused may be remanded in custody for a period of up to 15 days, or up to 30 days with the consent of the accused and the prosecution.<sup>19</sup> Similar time limits do not, however, apply to pretrial detention in respect of proceeding before higher courts, such as the Circuit Court, Central Criminal Court or Special Criminal Court.

The length of time a person may spend in pretrial detention is a factor to which a court must have regard when deciding on whether or not to grant bail.<sup>20</sup> In addition, the length of detention is also subject to section 3 of the Bail Act 1997. This section provides that when a person has been charged with a “serious offence” and refused bail, and when the trial has not started within four months of the date of refusal, the accused person can apply to the court for bail on the basis of delay by the prosecution. The court can release the person on bail if satisfied the interests of justice so require. The Supreme Court in *Maguire v. DPP*<sup>21</sup> and *Maguire v. DPP (No. 2)*<sup>22</sup> has held that the elapse of four months is sufficient to trigger a consideration of whether the interests of justice require release. Delay on the part of the prosecution is not essential for such a consideration: court process delay could be enough. Where an application is made for bail, the “interests of justice” is the sole criterion of whether that application should be granted.

### *2.3 Bail Procedure:*

The primary alternative to pretrial detention in Ireland is release on bail pending trial. Bail may be granted to an accused by either the police or by the courts.

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<sup>19</sup> Section 24, Criminal Procedure Act 1967.

<sup>20</sup> *Maguire v. DPP* [2004] IESC 53, [2004] 3 I.R. 241; [2005] 1 I.L.R.M. 53.

<sup>21</sup> [2004] IESC 53, [2004] 3 I.R. 241; [2005] 1 I.L.R.M. 53.

<sup>22</sup> [2004] IESC 113, [2005] 1 I.R. 371.

Section 31 of the Criminal Procedure Act 1967, as amended, regulates the circumstances in which the police may grant so-called “station bail” to an accused person. This section provides that when a person is brought by a member of the Gardaí to a police station in custody, the sergeant or the member in charge may release that person on bail once there is no warrant requiring the person’s detention. The police officer granting bail can require the person to enter a recognisance, with or without sureties or a cash lodgment. This is to guarantee the person’s appearance before the next sitting of the District Court. Such an appearance may be before the next sitting of the District Court where the person is arrested, or at any sitting of the court in that area during a period of 30 days following that sitting. The police have no express power to attach any other conditions to release.

Station bail is an alternative to pretrial detention which has been in existence for around 200 years. It is not an option open in respect of all charges, however. As discussed further below, there are certain serious charges in respect of which only the High Court may grant bail and in respect of which station bail cannot be granted. Further, station bail does not apply to a person arrested under s. 251 of the Defence Act 1954, which concerns desertion from the army. In addition, the lack of ability to attach conditions may make station bail unsuitable in certain cases.

If a person is charged with an offence and the decision is made by the police not to grant station bail, the accused must be brought as soon as practicable before a judge of the District Court having jurisdiction to deal with the offence.<sup>23</sup> Thereafter, the accused person will have the opportunity to apply to the courts for release on bail. In most cases, an application for bail may be made before the District Court itself, on the date of the first appearance or a subsequent court date. Under s. 28 of the Criminal Procedure Act 1967, the District Court has jurisdiction to determine whether or not to grant bail and must admit a person to bail if it appears to the judge to be a case in which bail ought to be allowed. According to O’Malley, this suggests that once the conditions for bail are met, the District Court judge does not have further residual discretion to refuse bail.<sup>24</sup> However, as *per* s. 29 (1) of the Criminal Procedure Act 1967, those charged with the most serious categories of offences – including murder, piracy, treason and genocide – can only be granted bail by the High Court. In practice, the District Court and High Court are the primary venues for bail applications in Ireland; however, it should be noted that the Circuit Court, Special Criminal Court, Court of Appeal and Supreme Court all have jurisdiction to grant bail in the cases which come before them.

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<sup>23</sup> Section 15 (2), Criminal Justice Act 1951.

<sup>24</sup> O’Malley, *The Criminal Process* (2009, Round Hall) at 421.

If bail is refused, an accused person may generally renew an application for bail at any point while in custody awaiting trial.<sup>25</sup> In practice, however, most judges will require that there be a change in circumstances before granting bail in a case where it has been previously refused; otherwise, the matter will be simply deemed “*res judicata*”, with no further order forthcoming. By way of exception to this general situation, a bail application which has been refused on foot of s. 2 of the Bail Act 1997 may *only* be renewed where the trial of the accused has not commenced within four months from the date of the refusal. Where such a renewed application is brought, the court must consider whether “the interests of justice” require the release of the accused on bail.<sup>26</sup>

An accused person who is refused bail or granted bail on overly onerous conditions in the District, Circuit or Special Criminal Courts may appeal that decision to the High Court.<sup>27</sup> The prosecution has a similar right of appeal in respect of a grant of bail. Where the District Court has remanded the person in custody and the offence is triable by the High Court, the High Court may transfer that appeal to the Circuit Court, with the possibility of further appeal to the High Court.

As the loss of liberty is potentially at stake, the principles of natural and constitutional justice must be respected during a court hearing on whether or not to grant bail. When there is an objection to bail by the prosecution, it must be supported by appropriate evidence and the accused person is generally entitled to have that evidence given *viva voce*.<sup>28</sup> Hearsay evidence may however be admitted in the context of a bail hearing where “the court hearing the application is satisfied that there are sufficient grounds for not requiring the witness to give *viva voce* evidence”.<sup>29</sup> Even where hearsay evidence is admitted, however, it is for the court hearing the application to determine the weight that should be given to the evidence in the particular circumstances of the case.

Section 2A into the Bail Act 1997 also allows a senior Garda not below the rank of Chief Superintendent to give evidence of his or her belief that the refusal of bail is reasonably necessary to prevent the commission of a serious offence by the applicant, to be evidence that refusal of the application is reasonably necessary for that purpose. This is taken as evidence

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<sup>25</sup> Section 28 (2), Criminal Procedure Act 1967.

<sup>26</sup> Section 3, Bail Act 1997.

<sup>27</sup> Section 28 (3), Criminal Procedure Act 1967.

<sup>28</sup> *People (DPP) v. McGinley* [1998] 2 I.R. 408.

<sup>29</sup> *Ibid* at 413.

when an objection to bail is made regarding the person's likelihood to commit offences while on bail.

Any ground on which a judge refuses bail must have an adequate basis in evidence.<sup>30</sup> If it is intended to object to bail on the grounds permitted by s. 2 of the Bail Act 1997, the accused person must be put on notice of that fact. The accused person must also have a proper opportunity by means of evidence or through legal submissions to challenge any such objection.<sup>31</sup>

It is usual in Ireland that the accused person would be present and represented by a lawyer at all applications for bail and all hearings regarding pretrial detention. Under the Criminal Justice (Legal Aid) Act 1962 and various implementing regulations, an accused person is entitled to legal aid in the District Court where his or her means are insufficient to obtain legal aid and where, by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that legal aid be provided for the preparation and conduct of the defence. In practice, this means that bail hearings in the District Court are generally funded by legal aid, allowing a solicitor and / or barrister to represent the accused. A specialised legal aid scheme is also available for bail applications heard in the High Court. Under the Legal Aid (Custody Issues) Scheme, *ex gratia* payments are available for High Court bail applications where recommended by the judge hearing the case. In practice, such payments are generally made as a matter of routine in High Court bail cases, ensuring that the accused is represented by both solicitor and barrister.

#### 2.4 Bail Conditions:

Where an accused person is granted bail, it is open to a court to impose certain terms and conditions which must be complied with by the accused.

It is a mandatory condition of every bail bond that the accused appear before the court when required, refrain from committing any offence whilst on bail, and otherwise be of good behaviour.<sup>32</sup> Where a court sets bail, it has a wide discretion to go beyond these mandatory conditions and impose such terms as it "considers appropriate having regard to the circumstances of the case".<sup>33</sup> Common conditions, which are expressly authorised by s. 6 (1)(b) of the Bail Act 1997, include:-

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<sup>30</sup> *McDonagh v. Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 I.R. 394.

<sup>31</sup> *Ibid.*

<sup>32</sup> Section 6 (1)(a), Bail Act 1997.

<sup>33</sup> Section 6 (1)(b), Bail Act 1997.

- ❖ A residence condition, i.e. that the accused resides or remains in a particular district or place within the State;
- ❖ A condition that the accused reports to and signs on at a specified Garda Síochána station at specified intervals and during particular times;
- ❖ A condition that the accused person refrains from having any contact with such person or persons as the court may specify.

While the Bail Act 1997 lists certain conditions such as the above that may be imposed as part of bail, it does not do so in an exhaustive manner and it is open to a court to impose a range of other conditions intended to meet any concerns arising regarding the release of the accused on bail. Other frequently imposed conditions include a condition that the accused complies with a curfew and does not leave his or her place of residence between specified times each day, and a condition that the accused engages with designated rehabilitative services.

However, as an important proviso to the above, a judge does not enjoy free licence under Irish law in relation to bail conditions that are imposed. Any conditions imposed must be justified on the basis of the evidence which has been put before the court and must not amount to an unreasonable restriction upon the liberty of the accused.<sup>34</sup> For instance, in *Brennan v. Brennan*<sup>35</sup>, a District Court judge had imposed as a condition of bail that the accused remain confined to his house for 24 hours a day. The High Court held that there was no evidence to justify the making of an order which constituted such a disproportionate, unreasonable and unlawful interference with the liberty of the citizen.

Section 6B of the Bail Act 1997 provides the courts with the jurisdiction to impose a condition regarding the electronic monitoring of an accused person released on bail. However, whilst this section is contained on the statute books, it has not yet been commenced and therefore is not in force at present. When it enters into force, this section will permit electronic monitoring of those over 18 years who have been charged with a serious offence, or those who are appealing a sentence of imprisonment which has been imposed by the District Court (which gives rise to an automatic entitlement to release). Under the legislation, electronic monitoring is permitted only when the person is released on bail subject to a condition such

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<sup>34</sup> *Ronan v. Coughlan* [2005] IEHC 370, [2005] 4 I.R. 274.

<sup>35</sup> [2009] IEHC 303, (Unreported, High Court, 18<sup>th</sup> June, 2009, Peart J.).

as a requirement to reside at a particular place, to report to a Garda station, or surrender a passport or travel documents. These conditions may not be included unless the person consents to them.

Bail – whether granted by the police or by the courts – will always be subject to a financial bond which provides a concrete incentive for compliance with all related conditions, including attendance at court. In some cases, the accused person might be required to lodge a specified sum of cash with the courts in advance of taking up bail, which will be lost in the event of non-compliance with bail conditions. However, it is not always necessary for the accused person to actually lodge money up front before being released on bail. Instead, he or she may be admitted to bail on entering into an "own bond" in a specified amount, which need not be put forward in advance but which the accused will become lawfully obliged to pay in the event of non-compliance with bail conditions. Finally, it is open to a court to require an accused to put forward a suitable independent surety to put forward cash on the accused's behalf for bail purposes. The surety will lose this money in the event of non-compliance by the accused with bail conditions.

A court enjoys considerable discretion in setting the monetary amount attached to bail; however, in *People (Attorney General) v. O'Callaghan*, Walsh J. noted that the figure should be set by reference to the means, condition and ability of the accused as well as the nature of the offence, and should not be "so large as would in effect amount to a denial of bail and in consequence lead to inevitable imprisonment."<sup>36</sup> In *DPP v. Broderick*, the Supreme Court held that the court must conduct an inquiry into the accused's means and take account of same before fixing bail.<sup>37</sup> Likewise, in *Li Jiuan Choong v. DPP*, the Supreme Court held that a judge must consider all of the circumstances of the case in setting the amount required of an independent surety, including the surety's ability to pay, the nature and gravity of the offence and the probability that the accused will fail to appear for trial.<sup>38</sup>

Under section 9 of the Bail Act 1997, if a person on bail fails to appear in court or otherwise breaches the conditions of bail, the court can order that any money entered by the accused or the surety be "estreated" or forfeited. It is a criminal offence for a person to breach the conditions of their bail by not appearing in court when required to do so.<sup>39</sup> Further, a bench warrant will generally issue for the arrest of a person who fails to show up in court in accordance

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<sup>36</sup> [1966] I.R. 501 at 518.

<sup>37</sup> [2006] IESC 34, [2006] 1 I.R. 629.

<sup>38</sup> [2014] IESC 35, [2014] 2 I.R. 721.

<sup>39</sup> Section 13, Criminal Justice Act 1984.

with their bail; this has the effect of permitting his or her arrest by a member of An Garda Síochána for the purposes of being brought back before a court, where the question of bail will be reconsidered. The court may commit the person to prison until the trial, or until s/he enters fresh recognisances, or further remand him.

A court may also issue a warrant for the arrest of an accused person if a surety or a member of the Gardaí makes a written information on oath that the accused is about to breach one of the conditions of the recognisance. Following such an arrest, the accused must be brought before the court that made the order directing the recognisances as soon as practicable.

### *2.5 Proposed Changes to Legislation*

A General Scheme for a proposed Bail Bill was released in 2015.<sup>40</sup> It is unclear if this Bill will be enacted in the near future, or at all.

The proposed Bill will require courts to consider persistent serious offending in the past by the accused person in decisions on whether or not to grant bail. The courts will have to have regard to the nature and seriousness of any danger presented by the grant of bail where the accused person is charged with an offence which carries a penalty of ten years' imprisonment or more. In certain cases, when a person is seeking bail after s/he has been convicted, but before sentence, the courts will be required to hear evidence from the victim of the crime in deciding whether or not to grant bail.

The Bill also proposes to extend the possible time period before a person is brought back to court when remanded in prison to over 15 days where there is "good and sufficient reason" to do so.

The proposed legislation will also require judges to give written reasons for a decision to grant or refuse bail, and any conditions which are imposed. It is of note, however, that the proposed legislation states that an applicant for bail *shall* be granted bail, except when it is not permitted under the act.

## **3. Statistics**

For clarity, it should be noted that the below figures for those held in pretrial detention include all of those who are awaiting trial or sentence following charge. They do not include

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<sup>40</sup> General Scheme of the Bail Bill 2015.

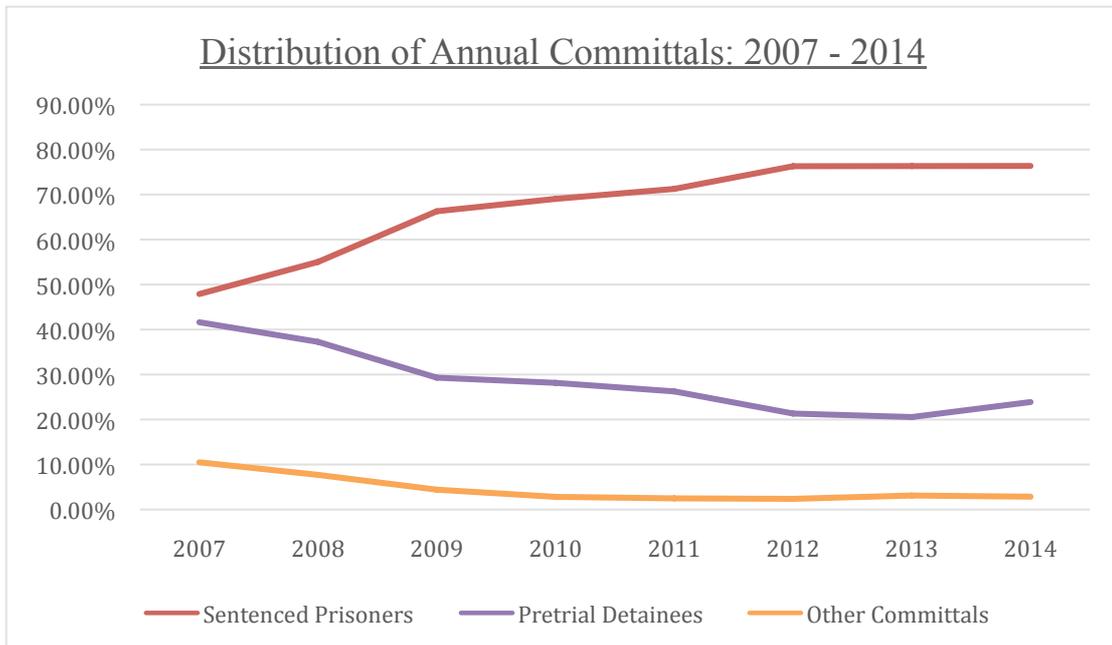
those who have been already been convicted and are detained pending appeal of the sentence: these are considered to be prisoners held and committed under sentence.

As illustrated in figure 1, Ireland has experienced a considerable rise in the number of total annual committals to prisons over the last decade. This is largely accounted for by a marked increase in those receiving prison sentences in the Irish courts. By contrast, the annual number of individuals committed to pretrial detention in Irish prisons has remained relatively stable, with a slight decrease in recent years.



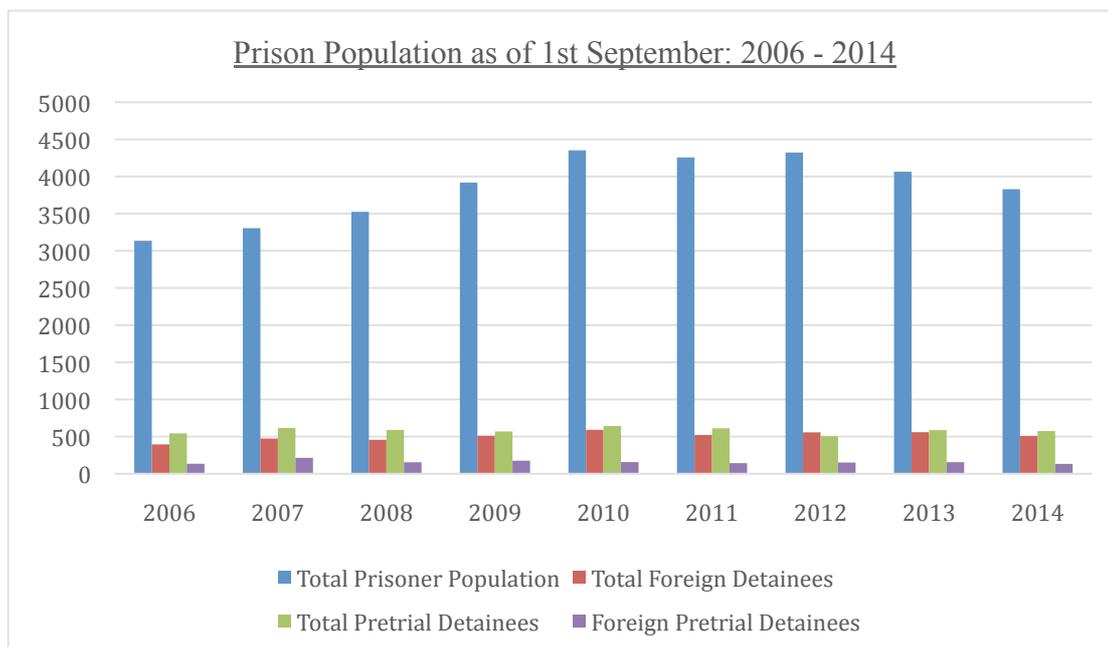
**Fig. 1:** Annual totals for committals to Irish prisons, 2007 – 2014. (Source: Irish Prison Service Annual Reports)

In percentage terms, committals of sentenced prisoners have accounted for an increasing proportion of the overall number of annual committals between 2007 – 2014, with a corresponding decrease in the overall share of committals accounted for by pretrial detention. This trend is demonstrated by figure 2.



**Fig. 2:** Distribution in percentile terms of annual committals to Irish prisons, 2007 – 2014. (Source: Irish Prison Service Annual Reports)

The extent to which pretrial detainees make up the overall prisoner population in Ireland on a given day can be assessed by analysing the Council of Europe’s SPACE-I statistics, which provide the daily prisoner population in Irish prisons on 1<sup>st</sup> September every year between 2006 and 2014. As illustrated in figure 3, these figures indicate that pretrial detainees make up a small number of the daily total population in Irish prisons, and that the total daily numbers in pretrial detention have remained relatively stable over time notwithstanding a general increase that has taken place in the Irish prison population over the last decade. Figure 3 also illustrates the extent to which the total number of pretrial detainees is made up of non-national prisoners, as a proportion of the total number of non-national prisoners in the system.



**Fig. 3:** Composition of daily prison population as of 1<sup>st</sup> September, 2006 – 2014. (Source: Council of Europe SPACE-I)

It is worth noting in relation to the above that, in percentage terms, the number of non-national prisoners encompassed within the category of pretrial detainees is considerably larger than the number of non-national prisoners making up the prison population as a whole. A basic illustration of this is provided in the table below:

Prison Population as of 1st September: 2006 - 2014

Year:	Percentage of Total Population made up of Foreign Detainees	Percentage of Pretrial Detainee Population made up of Foreign Detainees
2014	13.29%	23.13%
2013	13.75%	26.57%
2012	12.88%	29.84%
2011	12.26%	23.36%
2010	13.58%	24.45%
2009	13.04%	30.93%
2008	12.96%	26.27%
2007	14.34%	34.74%
2006	12.60%	24.86%

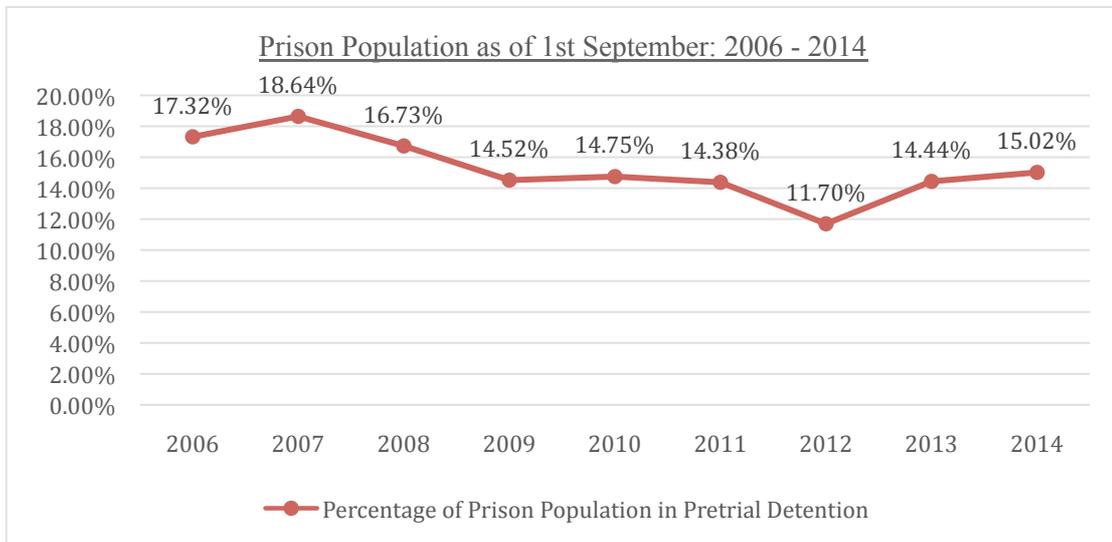
**Fig. 4:** Composition of daily prison population as of 1<sup>st</sup> September, 2006 – 2014. (Source: Council of Europe SPACE-I)

The latest national statistics provide a similar picture of the Irish prison population in terms of the overall use of pretrial detention. As of 19<sup>th</sup> August 2016, there were a total of 3,746 prisoners in custody in the State. 496, or 13%, were pretrial detainees, whereas the rest were held pursuant to sentence or for immigration reasons. 290 pretrial detainees were held in Cloverhill Prison, while the bulk of the remainder were held in the Midlands Prison (43), Cork Prison (40), Limerick Prison (52) and Castlereagh (38).



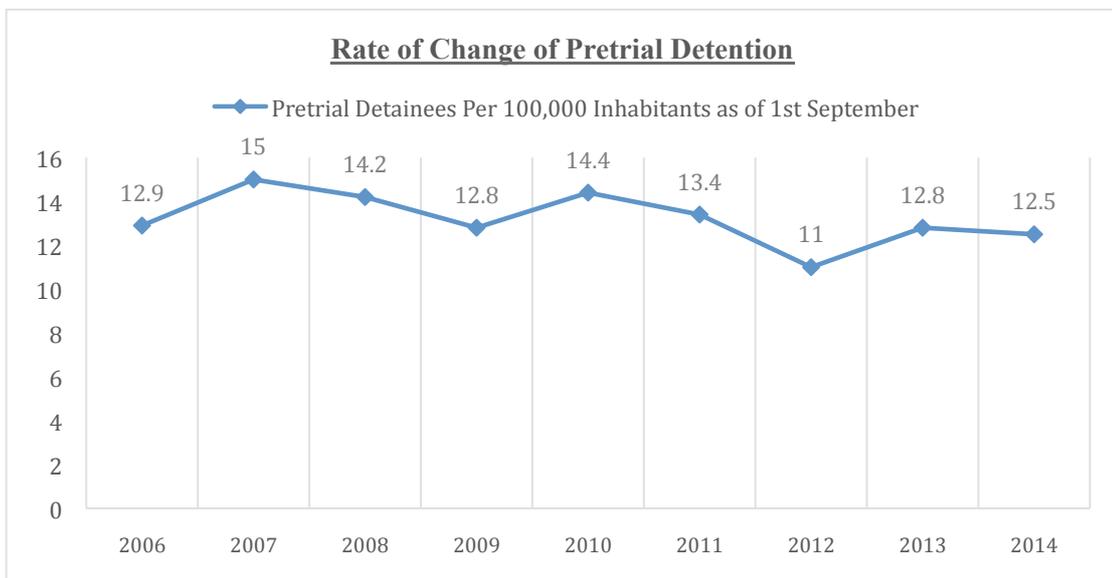
**Fig. 5:** Composition of Irish prison population as of 19<sup>th</sup> August 2016. (Source: Irish Prison Service Daily Statistics)

As depicted in figure 6, the Council of Europe SPACE-I statistics indicate that the percentage of the daily prison population made up of pretrial detainees (as of 1<sup>st</sup> September each year) has varied between 11.7% to 18.64% over the last decade, with decreases in this figure evident in more recent years.



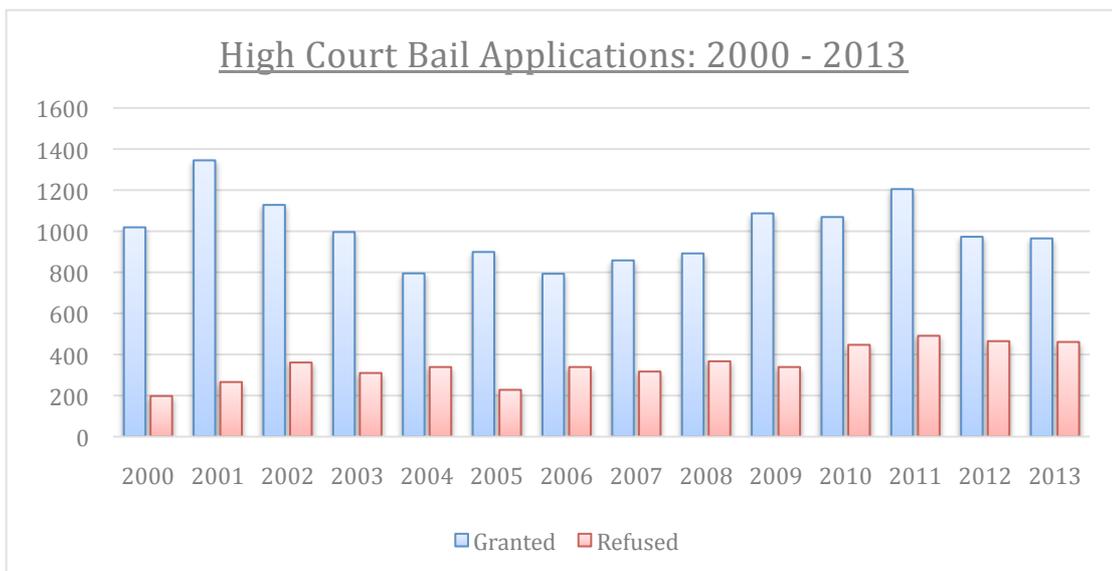
**Fig. 6:** Percentage of prison population held in pretrial detention as of 1<sup>st</sup> September, 2006 – 2014. (Source: Council of Europe SPACE-I)

Similarly, as illustrated in figure 7, the SPACE-I statistics demonstrate that the daily number of individuals held in pretrial detention, when measured against the population as a whole, has experienced downwards fluctuation in recent years.



**Fig. 7:** Rate of change of pretrial detention levels, as measured based on daily prison population as of 1<sup>st</sup> September, 2006 - 2014. (Source: Council of Europe SPACE-I)

Comprehensive statistics are not available for the total number of bail applications made or for the number of individuals granted bail in Ireland in a given year. However, figures are available for High Court bail applications granted and refused between 2000 and 2013, and these are illustrated in figure 8. These applications relate both to situations where bail has been applied for and refused in a lower court, as well as instances where the application for bail is made for the first time before the High Court.



**Fig. 7:** Annual totals for High Court bail applications granted and refused, 2000 to 2013. (Source: Courts Service Annual Reports)

While figure 7 indicates that a relatively large number of High Court bail applications were granted each year between 2000 and 2013, it must be stressed that this does not necessarily mean that the individuals who were granted bail were in a financial position to take up same. Unfortunately, while figures are available for the total number of bail applications dealt with by the High Court in 2014 and 2015, the Courts Service Annual Reports for these years do not provide a breakdown of the number of applications granted or refused and it is impossible therefore to comment on more recent trends relating to the grant or refusal of bail by the Irish courts.

#### 4. Literature Review

Research on the use of pretrial detention and alternatives in Ireland has tended to focus on the legal framework and decisions of the courts on the principles which should guide deci-

on-makers. Empirical research into the factors which influence such decision-making is less common, though is increasing.

An empirical study into the experiences of young people in pretrial detention in Ireland found considerable uncertainty amongst young people about their future. Freeman and Seymour interviewed 62 young people (aged between 16 and 21) at three prisons in Dublin.<sup>41</sup> The interviews examined issues such as the backgrounds of the young people, their experiences on remand, their perceptions of uncertainty and future plans and aspirations. The vast majority were male, and most were Irish. Nine young people self-described as “Irish Traveller”, two as “African”, two as “English” and one as “Romanian”. Two-fifths stated that the reason for their detention on remand was due to breaking their bail conditions, or failing to appear in court. One third said they were detained on remand due to the nature of their offence or their risk of reoffending. One-fifth said they were detained because they had no fixed abode, or because they could not afford bail surety or because they were awaiting placement in a drug detoxification centre.

In keeping with the international literature which shows that remand populations consist largely of prisoners with an array of vulnerabilities, Freeman and Seymour found that the young people they interviewed were vulnerable because of their age, lack of familiarity with the prison environment and their life experiences. One in six had previously been in residential care, more than one in five were homeless at the time of committal, almost one in four had experienced the death of a parent or sibling, and one in three had experienced parental separation. Almost one half reported that before their current period of detention, they had received assistance for difficulties such as aggression, depression or conduct disorder.

Feelings of uncertainty, about the length of their detention, and about the unpredictability of their situation were felt very strongly by the participants.

Freeman has also studied the reasons why young people aged up to 21 years were denied bail and remanded in custody. Using court observations and semi-structured interviews, Freeman found that young people often ended up in remand custody as a result of non-compliance with bail conditions.

During the court observation, which involved 207 cases, and 203 separate individuals, nine individuals were remanded in custody. The reason for remand in eight of these cases was

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<sup>41</sup> Freeman, S., and Seymour, M. “‘Just Waiting’: The Nature and Effect of Uncertainty on Young People in Remand Custody in Ireland” (2010) 10(2) *Youth Justice* 126-142.

non-compliance with bail requirements. Of the 62 remand prisoners who were interviewed, one-half stated that they had been originally released on bail, but ended up in remand custody due to reoffending, failing to attend court, or breaching bail conditions during the bail period. A limitation of this study is that the reasons given for remand in custody by the research participants are self-reported, rather than being drawn from a contemporaneous record of the proceedings.

Analysis of the data indicated that the vast majority of the young people's lives prior to remand in custody were chaotic, with little structure or stability. As Freeman notes, "in essence, the lack of a structured foundation meant that many of the young people had become unaccustomed to performing certain tasks or being in particular places at pre-defined times".<sup>42</sup> The regular consumption of drugs was identified as a destabilising influence during the bail period, and was problematic both as a contributor to offending behaviour, and as an impediment to compliance with bail conditions. Forward planning or goal setting was not evident within this group. Some reported that their parents would not come to court with them, and that they had to deal with the court process and the bail conditions on their own. Freeman calls for bail supervision schemes to support people to attend court, and to abide by bail conditions, cautioning that such schemes should be evaluated to ensure that the correct individuals are selected and the most effective practices are implemented.

Seymour and Butler have also examined the experience of young people on remand.<sup>43</sup> The authors interviewed young people, parents, and those working with young people in a professional capacity, engaged in a consultation survey with professionals, and observed cases. The young people interviewed were between the ages of 13 and 19, and 28 of the 30 were male. With the exception of one case, the young people had been on bail in the previous two years and all of them had broken the conditions of their bail. 26 young people had been previously detained in the juvenile or adult justice system. One-quarter were living in residential care or living independent. 28 were not in school. Half reported psychological and/or learning difficulties.

Most of the young people had been excluded from mainstream education and training from an early age and spent much of their time engaging in unstructured activities. The young people had easy access to drugs and were vulnerable to physical violence as a result of drug debts. The authors concluded that there was a need for a number of services and supports to

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<sup>42</sup> *Ibid* at 131.

<sup>43</sup> Seymour, M. and Butler, M., "Young People on Remand". Report commissioned by the Office of the Minister for Children and Youth Affairs, Department of Health and Children, Ireland. 2008.

address the underlying problems faced by the young people. These challenging circumstances were the context in which the conditions of bail were set, and in which young people were expected to comply with them.

Seymour and Butler found that young people were able to recall the general terms of their bail conditions, but were not able to recall the consequences of not complying with those conditions so clearly. Many were immature in their outlook and lacked insight into their circumstances. Those traits, combined with poor educational experience, meant that the young people were in a difficult position when trying to comply with their bail conditions. The professionals interviewed also felt that young people did not understand bail or the conditions of bail in many instances. 120 professionals were surveyed and 39% felt that young people rarely or never understood the conditions of bail, and 57% thought they sometimes understood. Some felt that judges thought young people understood bail because they were regularly before the courts, whereas the professionals felt that was not the case.

Judges and lawyers were constrained in their ability to explain the conditions of bail because of the time pressures they were under and the large numbers of cases they were dealing with. Young people and their families were ill-informed of the conditions of bail as a result. There was also a consensus view among professionals that it was unrealistic to expect young people to comply with strict bail conditions without providing support. Professionals were unanimous in their view that there was a need to provide proper housing supports and safe facilities for young people who were out of home in order to avoid detaining them on remand. Bail hostel accommodation and remand fostering were two strategies suggested. A bail review programme, where cases would be examined regularly to address any impediments to bail was also approved of by professionals. Professionals were also of the view that family support services, to help parents support their children including compliance with bail conditions were needed, as were structured educational and vocational support services.

The authors recommended training in awareness and communication skills for the judiciary and legal professionals in order to facilitate more effective communication with young people about the consequences of breaching the conditions of bail. A designated bail officer who would provide and explain information to young people and their families immediately after the court hearing was also recommended. A bail information scheme was also recommended as a mechanism to coordinate information about young people required at the hearing. As well as providing the information the judge needs efficiently, it would also act to reduce delays.

Bail support and alternatives to detention on remand were strongly recommended by Seymour and Butler. Services to address the needs of the young person and their family should be part of these support schemes. Bail hostels and remand foster care were recommended to support alternatives to the use of detention on remand.

Carroll and Meehan have also found that there can be delays arising out of adjournments of cases concerning children accused of breaking the law. These delays can lead to a child being on bail or in pretrial detention for over a year.<sup>44</sup>

Much of the other research in Ireland on bail and pretrial detention is of a legal nature, exploring the legal requirements for the grant or refusal of bail.

A recent report by the Irish Penal Reform Trust has examined contemporary practices in the use of pre-trial detention in Ireland.<sup>45</sup> This study involved court observation, analysis of court files, a survey of defence lawyers, and interviews with judges, police, and prosecution lawyers. The study concluded that the consensus amongst interview participants was that the bail system in Ireland was comparatively fair. 47 observations were conducted in the High Court, in which 22 applications for bail were granted. The research found differences amongst urban and rural courts, with judges in courts outside Dublin more likely to use pre-trial detention, in the view of the researcher, although this must be interpreted with caution as statistical analysis was not conducted.

An overreliance on bail conditions and a *pro forma* rather than individualised approach to applicants was also noted. There was no case amongst the 44 instances of bail be granted in which no conditions were attached to bail. The research also concluded that there was inadequate monitoring of compliance with bail conditions. Concern was expressed in the research that this overuse of conditions, and the imposition of unduly onerous conditions amounted to an interference with the right to liberty.

It is of note that the research found that interviewees largely did not consider European Court of Human Rights law to be particularly relevant to Irish practice, with much more emphasis placed on, and awareness of, domestic legal rules. \

This report further recommended that the police should receive training in the law of bail and adopt an approach which avoids seeking conditions which are not absolutely necessary

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<sup>44</sup> Carroll, J. and Meehan, E., "The Children Court: A National Study." 2007.

<sup>45</sup> The Irish Penal Reform Trust, "The practice of pre-trial detention in Ireland research report." 2016.

to meet their concerns. A pro forma approach to the imposition of bail conditions should also be avoided, and written reasons for decisions to grant or refuse bail should be provided by all judges, in the view of the researcher.

## **5. Alternatives to Detention**

### *5.1 Decision-making*

The police may in most cases make the decision to simply release an accused person on so-called “station bail” following charge, and in that way make a decision on pretrial detention at the very outset of most criminal proceedings. There are no legal provisions or court decisions directing how such a decision is to be approached or made by the police.

In any case, station bail is not an option where the accused is charged with one of the prescribed serious offences in respect of which only the High Court may grant bail<sup>46</sup>, or if the police wish to have conditions attached to bail. In addition, the police may simply wish for an accused person to be remanded in pretrial detention. In these circumstances, the decision as to whether an accused is remanded in pretrial detention or is granted bail is in the hands of the courts. The circumstances in which the courts go about making this decision are discussed briefly below.

### *5.2 Bail Applications in the District Court:*

For the purposes of legal jurisdiction, Ireland is divided into 24 geographical districts, with a number of District Courts located in each. These District Courts – which are courts of local and limited jurisdiction, at the bottom of the hierarchy of the Irish court system – only have the power to try and determine minor criminal charges, with more serious matters being sent forward to be tried in superior courts like the Circuit Court or Central Criminal Court. Despite this, all criminal matters start life initially in the District Court, and it has the power to determine routine procedural matters for most criminal charges prior to trial of same. This means that a District Court judge will usually have the first say as to whether or not bail is to be granted in respect of a given criminal charge.

A person who is charged in police custody but is not released on station bail must be brought before the next sitting of the local District Court, and will remain in police custody on a tem-

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<sup>46</sup> See s. 29 (1), Criminal Procedure Act 1967.

porary basis until this is done.<sup>47</sup> Upon coming before the District Court for this initial appearance, the accused will have the opportunity to make a bail application, unless he or she is charged with one of the serious offences in respect of which only the High Court may grant bail.<sup>48</sup> It is also open to the accused to forego a bail application and consent to being remanded in custody on this first appearance, with the possibility of making a bail application in the District Court during a later appearance. This consent may be forthcoming in a variety of circumstances, such as where the accused wishes to gather witnesses or documentary evidence for the purpose of putting forward the best bail application possible. There may be incentive to do so for the reason that, as noted above, once the District Court makes a decision to refuse bail, a subsequent sitting of the Court will generally deem the matter *res judicata* unless there has been a material change in circumstances.

There is no designated date, time or list for the District Court to hear bail applications. Instead, such matters come before the District Court at short notice and are dealt with amongst the Court's other business. Further, it is not necessary for the accused to furnish any preliminary paperwork prior to making an application for bail.

The decision on whether to grant bail or resort to pretrial detention is made by a District Court judge sitting alone after hearing evidence and representations from the prosecution and defence relating to bail objections and the suitability of the accused or release on bail. A court registrar will always be present to assist the judge by calling cases, keeping track of the court list and recording the orders made by the judge, but holds no role in the decision-making process.

While it is open to the prosecution to secure representation from a solicitor or barrister for a District Court bail hearing, this occurs very rarely in practice. Instead, the prosecution at a District Court bail hearing is usually represented by the actual member of An Garda Síochána who investigated the alleged offence and charged against the accused, or another Garda who formed part of the investigation. However, depending on the particular District Court in which the bail application is heard, the prosecution might be represented by a senior member of An Garda Síochána, such as a Sergeant, Inspector or Superintendent, who takes responsibility for prosecuting all cases in that particular District Court.

The accused person will invariably be present for the District Court bail hearing. The positioning and location of the accused and the particular security arrangements in place tend to

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<sup>47</sup> S. 15, Criminal Justice Act 1951.

<sup>48</sup> These offences are set out in s. 29 (1), Criminal Procedure Act 1967.

depend on the particular District Court in which the matter is being heard. The accused will usually be represented at the hearing by a solicitor, a barrister or both. Under the Criminal Justice (Legal Aid) Act 1962 and various implementing regulations, an accused person is entitled to legal aid in the District Court where his or her means are insufficient to obtain legal aid and where, by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that legal aid be provided for the preparation and conduct of the defence. Legal aid applications are usually dealt with on the date of the first appearance in court, and if granted will fund the cost of legal representation for the bail hearing as well as for subsequent appearances in the District Court. In practice, this means that bail hearings in the District Court are generally funded by legal aid, allowing a solicitor and / or barrister to represent the accused. An accused person might arrange for legal representation to be present when the matter comes before the District Court. Alternatively, if no legal representation has been arranged in advance, it is common in practice for a District Court judge to either allow the accused to seek assistance from a solicitor who is present in court, or to ask a solicitor present to assist the accused in the making of the bail application.

The District Court will generally be open to the public during the hearing of a bail application and, as discussed above, usually deals with bail hearings amongst its other criminal and civil business. For this reason, other persons not involved in the case will be present in the courtroom during the course of the hearing, such as legal practitioners, accused persons and Gardaí involved in other cases listed before the court, members of the press and members of the public. There is, however, limited provision under law for the District Court to direct that a bail application be heard *in camera* and exclude those not directly involved in proceedings from the court room.<sup>49</sup>

There are no formal practice directions or statutory provisions dictating the format for bail hearings in the District Court. The typical practice, however, is that hearings proceed as follows:-

- ❖ The prosecution will present its bail objections to the court, calling any witness evidence necessary to substantiate these. Any witnesses called are open to cross-examination by the accused or the accused's legal representative.

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<sup>49</sup> For instance, s. 4 (2) of the Bail Act 1997 permits a court to direct that a hearing relating to a s. 2 bail objection "shall be heard otherwise than in public" or to "exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons if any as the court may permit to remain."

- ❖ The accused then has the option of presenting his or her own evidence. The accused might give evidence personally, for example, or evidence might be called from other persons to outline the supports that would exist in the event of a release on bail. Documentary evidence can be presented as appropriate.
- ❖ The prosecution and accused then both have the opportunity of making oral arguments to the judge as to whether or not the granting of bail is appropriate. The judge will then make a decision on whether or not to grant bail.

In practice, the degree to which the hearing adheres rigidly to the above steps will depend on the nature and extent of the objections raised. There is a considerable variance in the cases that come before the District Court, and accordingly bail hearings differ greatly in terms of their overall length and complexity.

### *5.3 Bail Applications in the High Court:*

The High Court hears appeals from both the prosecution and accused persons relating to the grant, refusal or terms of bail set by a subordinate court such as the District Court. In addition, where an accused person faces one of a number of serious designated charges, such as murder, piracy or treason, the application for bail must be heard by the High Court.<sup>50</sup>

All High Court bail hearings take place during the course of a dedicated list which, as of the date of writing, operates in the courthouse located at Cloverhill Prison in West Dublin. Since 15<sup>th</sup> February 2016, in accordance with a Practice Direction issued by the President of the High Court, bail applications from prisoners detained in the greater Dublin area are heard on Tuesdays (and, if necessary, Wednesdays), while applications for bail from prisoners detained in prisons outside of the greater Dublin area are heard on Thursdays.<sup>51</sup> The sole business of the court on these days is the hearing of bail applications.

In marked contrast to the District Court, there are a number of formalities that must be complied with before the High Court will entertain a bail application. In particular, the accused person who is applying for bail must swear an affidavit which sets out in full the basis upon which the application is made and particular information including the proposed place of residence if granted bail, the identity of any proposed independent sureties, and whether any warrants have previously issued for the applicant's arrest due to a failure to appear in

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<sup>50</sup> Section 29 (1), Criminal Procedure Act 1967.

<sup>51</sup> HC63, Bail Applications at Cloverhill Courthouse.

court.<sup>52</sup> This affidavit must be filed together with a document known as a notice of motion at the Central Office of the High Court, located in the Four Courts in Dublin, in order to secure a date for hearing of the bail application. The documents must then be served on the Chief Prosecution Solicitor. In order to have a case heard during the Tuesday list, service must be effected by the preceding Thursday; similarly, to have a case heard during the Thursday list, service must be effected by the preceding Monday. If not possible to meet these deadlines, it is necessary to make an application for short service before the High Court.

It should be noted that it was formerly the position that an affidavit sworn by the accused's solicitor was sufficient for the purposes of a High Court bail application. By virtue of a statutory instrument which entered into force on 23<sup>rd</sup> November 2015, this is no longer the case and the accused must swear the affidavit personally.<sup>53</sup> In accordance with a Practice Direction issued by the President of the High Court, the filing of an affidavit sworn in this manner has been a necessary prerequisite for the obtaining of a hearing date since 8<sup>th</sup> February 2016.<sup>54</sup>

Bail applications at Cloverhill courthouse are decided upon by a judge of the High Court sitting alone. As with the District Court, a registrar is present to assist the judge in managing the court list and recording the orders made, but plays no role in the decision-making process.

During a High Court bail application, the prosecution is always represented by a solicitor from the Chief Prosecution Solicitor's office and a barrister drawn from the Director of Public Prosecution's bail panel. The applicant for bail will always be present for the hearing and will typically be represented by a solicitor and a barrister. Legal representation for the accused is facilitated by a specialised legal aid scheme: under the Legal Aid (Custody Issues) Scheme, *ex gratia* payments may be made by the Legal Aid Board for High Court bail applications where recommended by the judge hearing the case.

As with the District Court, the High Court will generally be open to the public during the hearing of a bail application and other persons not directly involved in the case will be present in the courtroom during the course of the hearing, such as legal practitioners, Gardaí involved in other cases, and members of the public. It is open to the High Court to direct in

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<sup>52</sup> O. 84, r. 15 (3) Rules of the Superior Courts 1986.

<sup>53</sup> Rules of the Superior Courts (Bail Hearings) 2015 (S.I. No. 470 of 2015).

<sup>54</sup> HC63, Bail Applications at Cloverhill Courthouse.

certain circumstances that a bail application be heard *in camera*, with those not directly involved in the proceedings excluded from the court room.<sup>55</sup>

It is open to the prosecution to agree terms of bail with an applicant and, where this can be done, the High Court will simply make a “consent order” granting bail on those terms. Where, however, no agreement can be reached, the matter will proceed to hearing. Regardless of whether the application is being heard for the first time or is an appeal from a decision made by a subordinate court, the matter is treated as being “*de novo*”, with the following practice adopted:-

- ❖ The prosecution will present its bail objections to the court. This will typically be done by calling a Garda witness, such as the individual member of An Garda Síochána who conducted the investigation, or sometimes a more senior Garda, such as a sergeant, who is familiar with the facts of the case. Prosecuting counsel will, through a series of questions, ask the witness to outline the nature of the objections being put forward. Further witnesses may be called as necessary to substantiate the prosecution objections. Any prosecution witnesses called are open to cross-examination by the applicant’s legal representative.
- ❖ Following the close of the prosecution’s evidence, the applicant may present evidence in support of the granting of bail but is not obliged to do so. Where evidence is called, it will typically be from the applicant or those willing to support the applicant in the event of bail being granted. Any witnesses called by the applicant are open to cross-examination by the prosecution.
- ❖ Once all evidence is concluded, prosecuting counsel is given an opportunity to make oral representations as to why good objections to bail have been made out. Following these submissions, counsel for the applicant is afforded a similar opportunity to make representations. The presiding judge will then make a decision on whether or not to grant bail.

Cases may often be adjourned from time to time to allow an applicant to put forward the best case possible for bail. It is open to an applicant to reapply for bail in the event of a refusal. For the reasons discussed above, this is unlikely to be successful unless a material change in circumstances from those pertaining at the time of the original hearing can be demonstrated

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<sup>55</sup> For instance, s. 4 (2) of the Bail Act 1997 permits a court to direct that a hearing relating to a s. 2 bail objection “shall be heard otherwise than in public” or to “exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons if any as the court may permit to remain.”

to the court or, where bail is refused following a section 2 objection, there has been a four month delay between rejection of the bail application and the bringing of the applicant's case on for trial.<sup>56</sup>

#### *5.4 Bail Applications in Other Courts:*

The vast majority of bail applications in Ireland are determined in either the District Court, given that criminal cases start life there, or the High Court, given its appellate jurisdiction and sole ability to deal with bail for certain serious charges. However, it should be noted that other courts, including the Circuit Court, Central Criminal Court and Special Criminal Court, have full jurisdiction to deal with questions of bail and pretrial detention in the cases that come before them.

This will generally occur where an accused person fails to appear in court to answer bail, and a bench warrant issues for his or her arrest. In such circumstances, the accused if arrested will be brought back to the court which issued the bench warrant and the question will arise as to whether he or she should be readmitted to bail or demanded in custody. This will be determined by way of a bail hearing similar to that occurring in the District Court, though it is material to note that the Special Criminal Court, unlike others, will make this decision through three judges sitting together. It is also open to these courts to change terms of bail, revoke bail or indeed grant bail on foot of an appropriate application being made during the course of proceedings.

#### *5.5 Conditions*

In situations where police seek to have an accused person remanded in pretrial detention, the courts may as an alternative direct that that person be placed on bail and subject to such conditions as our deemed appropriate. The primary conditions of bail, mandated by statute, are to turn up to court, be of good behaviour and refrain from committing any offences.<sup>57</sup> As discussed above, the courts enjoy a large degree of freedom when it comes to imposition of conditions beyond these which are considered "appropriate having regard to the circumstances of the case".<sup>58</sup> The incentive to comply with bail conditions is provided by a financial bail bond, for an amount that will be forfeited or for which the accused or independent surety will be liable if the conditions are breached.

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<sup>56</sup> Section 3, Bail Act 1997.

<sup>57</sup> S. 6 (1)(a), Bail Act 1997.

<sup>58</sup> S. 6 (1)(b), Bail Act 1997.

However, the discretion of the courts to impose bail conditions is not unlimited: any conditions imposed must be justified on the basis of the evidence which has been put before the court<sup>59</sup> and, further, the conditions must not amount to an unreasonable restriction upon the liberty of the accused.<sup>60</sup> In *Brennan v. Brennan*, for instance, the High Court held that it was unlawful for a District Court judge to impose a 24 hour curfew as a bail condition given the lack of evidence justifying the need for such a condition, and indicated that such an extreme order was inherently problematic in any event.

There are practical issues in relation to the sort of conditions that might be imposed as part of bail in Ireland. While the legislation is on the statute books to allow for electronic monitoring of accused persons to be implemented, this section has not yet been commenced and it would appear that any such bail condition could not be lawfully applied at present.<sup>61</sup> Further, there is no dedicated body tasked with supervision of those on bail. The Probation Service, an agency of the Department of Justice, plays a role in assessing, supervising and assisting convicted offenders who are referred by the courts, but it plays no role in dealing with supervision of those on bail *per se* and no equivalent body exists to play such a monitoring role. Instead, the possibility of supervision whilst on bail such as might assuage the concerns of a court must be provided by the police or by such arrangements as the accused can make.

Notwithstanding these limitations, there are a number of general conditions which the Irish courts can impose as part of bail:-

- ❖ The Irish courts may impose bail conditions which place the accused under a level of supervision by the police. For instance, a person might be required to reside at a particular address; to obey a curfew and be present at that address during particular times; to remain contactable on a specific phone number at all times; and to attend at a local Garda station to sign on at regular intervals. The level of supervision tends to be commensurate with the strength of the bail objections raised.
- ❖ Where there is the possibility of a flight risk, it is open to the Irish courts to direct that an accused surrender his or her travel documentation to the police and refrain from applying for any fresh such documentation during the currency of the criminal proceedings against him or her.

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<sup>59</sup> *Ronan v. Coughlan* [2005] IEHC 370, [2005] 4 IR 274.

<sup>60</sup> *Brennan v. Brennan* [2009] IEHC 303, (Unreported, High Court, 18<sup>th</sup> June, 2009, Peart J.).

<sup>61</sup> S. 6 B, Bail Act 1997.

- ❖ To deal with the prospect that an accused might commit further offences or interfere with witnesses in some way, the courts may impose conditions requiring the accused to remain outside of a particular area or avoid interacting with particular persons.
- ❖ The accused may also be required to engage with drug or medical treatment of some description. The accused might in this regard be required to attend a particular residential drug treatment programme which is open to him or her, or to engage in some other way with issues which give rise to a risk of offending.

## 6. The “European Element”

The Irish courts and legislature have given little consideration to the decisions of the European Court of Human Rights in developing domestic law on bail. In particular, important decisions of the Irish courts concerning the circumstances in which bail can be refused and the considerations that must be taken into account<sup>62</sup>, on the type of evidence that is admissible in bail hearings<sup>63</sup> and on the principles that apply to the setting of the monetary amount of bail<sup>64</sup> have all been made without a single reference to a decision of the Strasbourg court. The decision in *Brennan v. Brennan*<sup>65</sup> contains seemingly the only reference by an Irish court to the jurisprudence of the European Court of Human Rights in relation to bail. There, the High Court made reference to the decision in *Nikolova v. Bulgaria*<sup>66</sup> in reaching the conclusion that s. 6 of the Bail Act 1997 did not permit the imposition of a 24 hour house arrest condition as part of bail terms.

Despite this lack of consideration, Irish law nevertheless prescribes a number of the same principles in relation to bail as those which have been set down in the jurisprudence of the European Court of Human Rights. For instance:-

- ❖ The European Court of Human Rights has held that a person charged with an offence must always be released on bail pending trial unless the State can show relevant

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<sup>62</sup> See, for example, *People (Attorney General) v. O’Callaghan* [1966] I.R. 501; *Maguire v. DPP* [2004] IESC 53, [2004] 3 I.R. 241; *McDonagh v. Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 I.R. 394; and *People (DPP) v. Mulvey* [2014] IESC 18, [2014] 1 I.R. 119.

<sup>63</sup> See, for example, *People (DPP) v. McGinley* [1998] 2 I.R. 408; *Vickers v. DPP* [2009] IESC 58, [2010] 1 I.R. 548; *People (DPP) v. McLoughlin* [2009] IESC 65, [2010] 1 I.R. 590; and *Clarke v. Governor of Cloverhill Prison* [2011] IEHC 199, [2011] 2 I.R. 742.

<sup>64</sup> See, for example, *Broderick v. DPP* [2006] IESC 34, [2006] 1 IR 629 and *Li Juan Choong v. DPP* [2014] IESC 35, [2014] 2 I.R. 721.

<sup>65</sup> [2009] IEHC 303, (Unreported, High Court, Peart J., 18<sup>th</sup> June, 2009).

<sup>66</sup> App. No. 40896/98, 30<sup>th</sup> September, 2004.

and sufficient reasons to justify continuing pretrial detention in the individual circumstances of the case and where the imposition of bail conditions or other reasonable preventative measures cannot deal with any risk that exists.<sup>67</sup> Similarly, under Irish law, there is a *prima facie* entitlement to bail which can only be displaced where the prosecution establishes a legitimate objection to bail through properly admissible evidence.

- ❖ The European Court of Human Rights has held that bail may be justifiably refused pursuant to Article 5 § 3 of the Convention where there is a risk that the accused will fail to appear for trial; the risk that the accused, if released, would take action to prejudice the administration of justice; and the risk that the accused would commit further offences or cause public disorder.<sup>68</sup> These effectively mirror the three grounds under which bail may be refused in Irish law.
- ❖ The case law of the European Court of Human Rights indicates that in assessing whether the danger of absconding is such as to justify refusal of bail, a range of different factors must be considered.<sup>69</sup> The risk cannot be gauged solely on the basis of the severity of the sentence risked or the state of the evidence against the accused.<sup>70</sup> While the Irish courts have not gone so far as to hold that a decision to refuse bail might never be based on the severity of a sentence or the state of the evidence, it is clear from *People (Attorney General) v. O'Callaghan*<sup>71</sup> that a range of additional factors are to be considered before bail is refused on the basis of flight risk.
- ❖ The European Court of Human Rights has accepted that an accused might justifiably be kept in pretrial detention to avoid the commission of offences, but that there must be a plausible danger of further offences given the past history and factors such as previous convictions of the accused.<sup>72</sup> Section 2 of the Bail Act 1997 prescribes similar

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<sup>67</sup> See, for example, *Yagci and Sargin v. Turkey* (App. No. 16419/90, 8<sup>th</sup> June 1995); *Wemhoff v. Germany* (App. No. 2122/64, 25<sup>th</sup> April 1968); and *Jablonksi v. Poland* (App. No. 33492/96, 21<sup>st</sup> December 2000).

<sup>68</sup> See, for example, *Tiron v. Romania* (App. No. 17689/03, 7<sup>th</sup> April 2009); *Smirnova v. Russia* (App. No. 46133/99, 24<sup>th</sup> July 2003); and *Piruzyan v. Armenia* (App. No. 33376/07, 26<sup>th</sup> June 2012).

<sup>69</sup> *Panchenko v. Russia* (App. No. 11496/05, 11<sup>th</sup> June 2015).

<sup>70</sup> See, for example, *Idalov v. Russia* (App. No. 5826/03, 22<sup>nd</sup> May 2012); *Garycki v. Poland* (App. No. 14348/02, 6<sup>th</sup> February 2007); *Chraidi v. Germany* (App. No. 65655/01, 26<sup>th</sup> October 2006); *Ilijkov v. Bulgaria* (App. No. 33977/96, 26<sup>th</sup> July 2001); and *Dereci v. Turkey* (App. No. 77845/01, 24<sup>th</sup> May 2005).

<sup>71</sup> [1966] I.R. 501.

<sup>72</sup> *Matznetter v Austria* (App. No. 2178/64, 10<sup>th</sup> November 1969).

requirements under Irish law before bail might be refused on the ground of a risk of commission of serious offences.

- ❖ Article 5 § 3 of the Convention has been interpreted as requiring that the amount of any bail be assessed principally “by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond.”<sup>73</sup> The amount set for bail must take into account the accused’s means and capacity to pay.<sup>74</sup> The Irish courts have set down similar principles in their jurisprudence.

There are, however, other areas where the standards set down by the European Court of Human Rights have not made their way into Irish law. For example, insofar as the Strasbourg court has held that domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify the continued deprivation of liberty in pretrial detention, no such standard has been prescribed for the Irish courts.<sup>75</sup>

Ireland has not taken steps to implement the 2009 Framework Decision on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.<sup>76</sup> As such, this Decision has not had any impact on bail law and pretrial detention in Ireland to date.

## **7. Conclusion with Issues for Further Investigation**

There is a high degree of procedural fairness evident in the Irish approach to the use of pretrial detention. The fact that legal representation for the accused is provided almost as a matter of course is another strong protection for the accused person. In addition, the adversarial nature of the proceedings and the presumption of entitlement to bail are further safeguards for those facing the prospect of pre-trial detention. Further investigation is needed as to

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<sup>73</sup> *Mangouras v. Spain* (App. No. 12050/04, 28<sup>th</sup> September 2010) at § 78.

<sup>74</sup> See *Hristova v. Bulgaria* (App. No. 60859/00, 7<sup>th</sup> December 2006) and *Toshev v. Bulgaria* (App. No. 56308/00, 10<sup>th</sup> August 2006).

<sup>75</sup> See, for example, *McKay v. United Kingdom* (App. No. 543/03, 3<sup>rd</sup> October 2006); *Bykov v. Russia* (App. No. 4378/02, 10<sup>th</sup> March 2009); and *Idalov v. Russia* (App. No. 5826/03, 22<sup>nd</sup> May 2012).

<sup>76</sup> Council Decision 2009/829/JHA of 23.10.2009.

whether these factors account for the comparatively low proportions of pre-trial detainees in the Irish prison population.

Though of course bounded by legislative provisions, and subject to increasing restriction following the Bail Act 1997, there remains a high level of discretion amongst judges in Ireland. The majority of hearings concerning pre-trial detention are also held in public.

Whether this level of judicial discretion leads to consistent outcomes is also worthy of further investigation, as is the extent to which judges provide accessible explanations for their decisions.

The kinds of conditions and the frequency of their imposition also merit further examination.

It would also be of interest to determine whether there has in fact been a decline in the number of bail applications granted in recent years by the High Court; whether the prospects of success vary to a material degree depending on the presiding judge; and the nature of the attempts made to explain a decision to the applicant in the case.

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