Neutral Citation Number: [2020] EWHC 2348 (Admin)

Case No: CO/645/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 August 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

AB	**Applicant**
- and -	
PROSECUTOR GENERAL'S OFFICE, LITHUANIA	**Respondent**

- -
- -

Saoirse Townshend (instructed by Oracle Solicitors) for the **Applicant**
Jonathan Swain (instructed by the Crown Prosecution Service) for the **Respondent**

Hearing date: 27 August 2020

Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

1. This is an application for a variation of the conditions on which the applicant has been granted bail in extradition proceedings. This hearing was a BT conference call. Like the lawyers, I was satisfied that this was a suitable mode of hearing and did not prejudice the interests of either party. As always, a remote hearing eliminates any risk from any person – whether associated with the parties or a member of the public or press – needing to travel to and be present in a Court. As regards open justice, the hearing and its start time were published in the cause list, together with a note with an email address, allowing any person to seek permission to observe the hearing. The hearing was recorded and this judgment will be released in the public domain. Any interference with, or qualification of, any right or interest arising from this mode of hearing was, I am satisfied, justified as necessary and proportionate.

2. The applicant is 33. She is wanted for extradition to Lithuania. She has been in the United Kingdom since May 2012, having come here then with the two oldest of her now four children. She is wanted on an accusation European Arrest Warrant. It relates to 21 alleged offences of forgery and fraud said to have taken place in 2017 and 2018, said to be offences attracting maximum sentences between 2 and 8 years' custody. Bail conditions were set after her arrest on 2 July 2018 and in conjunction with what was ultimately her release on bail on 30 July 2018. They included £1,000 pre-release security, the retention of a passport and identity card, a condition that she live and sleep at a stated address, and a curfew between 4am and 7am which was to be electronically monitored. Ms Townshend tells me, and I accept, that there was originally a reporting requirement which was subsequently scaled down and eventually removed.

3. The applicant's extradition was ordered by a district judge on 8 February 2019. An appeal against that order on article 8 grounds was dismissed by this Court on 6 November 2019. On 12 June 2020 an application was made to this Court to reopen the appeal on updated article 8 related evidence. On 2 July 2020 Swift J directed an oral hearing of that application, which is scheduled to take place on 28 October 2020.

4. The application to vary the bail conditions is an application to remove the 'electronic monitoring' component of the curfew, leaving the curfew itself in place but supervisable as a 'doorstep' condition, that is to say enabling the police to attend at the relevant hours (4am to 7am) to check that the applicant is at home.

5. The same application was made to the senior district judge who dismissed it on 24 July 2020. Ms Townshend's starting point, in making the application to me, is that my jurisdiction involves addressing the question "afresh": that is to say, putting to one side the view arrived at by the senior district judge and forming my own conclusions 'de novo' on the materials before me. There is no dispute between the parties that that is the correct approach in law. The authorities cited so far as bail itself is concerned is Tighe [2013] EWHC 3313 (Admin) at paragraph 5. The statutory provision relevant to this court considering whether bail should be granted or refused, when it has been refused by a district judge, is section 22(1A) of the Criminal Justice Act 1967. That same statutory provision applies in relation to a variation that has been refused. I am quite satisfied that Ms Townshend is right, and Mr Swain is right not to suggest otherwise: I have to make up my own mind.

6. The case put forward in writing and orally for the variation of this aspect of this bail condition, namely to remove the electronic monitoring element to enable instead a doorstep supervision element, is – as I see it – as follows. This is what is said on the applicant's behalf:

   i) There are three important reasons why the variation is necessary justified and appropriate. First and foremost, the applicant has a crucial opportunity for work as a self-employed beautician away from her home (work at home being an option no longer available given Covid-19) and with a business with which she has been in contact, and had been prior to the decision of 24 July 2020 on this same variation application. The problem is that her ankle bracelet (or anklet), which is said to be "large and bulky and visible", blocks her from being able to take the course of taking up that vital opportunity to be able to work. That is because a uniform is required, and a photograph of that uniform has been put before the Court. The appellant believes, and reasonably believes that she would not be permitted to wear an item of clothing which would conceal the anklet and she believes that she would not be allowed to work if the anklet were visible to a client. It means a lot to her and the family finances that she should be able to take that opportunity. They as a family have been really struggling, and she is the subject of a benefit if she is not able to work, as well as being denied the income that would arise from the work.

   ii) A second reason put forward is that the electronically monitored curfew is resulting in ongoing intrusive phone calls including in the middle of the night. That is highly disturbing to all members of the family but particularly affects the baby who wakes up and is recognised as being a matter of concern in relation to the 6-year-old child. A list of examples of intrusive phone calls and their timings is before the Court: 30th July 2020 (01:20) 31st July 2020 (03:03); 3rd August 2020 (02:30, 03:00, 04:00), 15 August 2020 (01:00, 03:00).

   iii) The third reason which Ms Townshend today has accepted is one which is not as weighty as the others, particularly not the first but nor the second, is this. The family lives in Brighton; they enjoy the beach. This is summer. The children are embarrassed when their mother has to go to the beach with them with her anklet visible. She therefore has to cover it up.

   Those are the reasons why the changes are sought and they are good and legitimate reasons. So submits Ms Townshend, in the essence of the case for the variation which I am summarising. The case for the variation continues – as I see it – as follows:

   iv) It is not necessary in this case to have an electronically monitored component of the curfew. The implications in this case are unjustified and disproportionate. The applicant has two full years of impeccable compliance with the bail conditions. That includes compliance with the reporting conditions when they were imposed.

   v) There have been three periods when the anklet has been removed and there has been no attempt to abscond. The first was a family holiday in August 2019. The second was hospitalisation in February 2020 when she gave birth to the youngest child. The third was a period, originally to be 4 July 2020 to 21 July 2020, in connection with being admitted to hospital with a stomach condition. On that

occasion she was discharged after 3 days on 9 July 2020 and she proactively informed the relevant persons, by an email which is before the Court, that she had been discharged. The anklet was not refitted until 21 July 2020. So that would have been the perfect opportunity for her to attempt to abscond had she wished to do so. She did not.

vi) Absconding is and would be "extremely difficult", to say the least. The applicant is a single mother of four children. Her youngest child is 6 months old and has no passport. The applicant does not have the means to relocate and has nowhere to go even if she wanted to. This family survives on social security. If the applicant had intended to try and abscond, she would have done it by now, particularly on the date in July (9 July 2020) after being discharged from hospital when she had a window of time. She has an opportunity every day to attempt to abscond given that the curfew only applies for 3 hours in the middle of the night.

vii) The applicant has been in the United Kingdom for over 8 years and is firmly anchored here, with the children, who (the older ones) are in schools. It is unthinkable that she would leave them behind, including with her mother in Kings Lynn. She has every reason to stay and fight her corner with her lawyers' assistance. She has an oral hearing coming up of the application to reopen the appeal.

I have endeavoured to encapsulate in this summary the case put forward for granting the variation of the bail conditions in this case.

7. I have carefully considered the powerful points that have been made by Ms Townshend, who has said everything that could be said on her client's behalf. The variation is opposed by the respondent. I am not prepared to grant it. My assessment, forming my own view looking at this question afresh, and in the light of all the circumstances, is this. In my judgment, the electronic monitoring component is necessary. In my assessment, there are substantial grounds to believe that if the condition were varied the applicant would fail to surrender. I am going to explain the key reasons that have led me to arrive at that conclusion, notwithstanding the points that have been put forward on behalf of the applicant.

8. I want to deal first with the intrusive calls in the middle of the night. They should be unnecessary and should not be happening. The point of the 'electronically monitored' element is that it should automatically identify whether or not the applicant is within her residence between the three relevant hours in the middle of the night. Calls should not be happening during that time, as I understand the technology. If there were intended to be the prospect of calls being made, at that time of the night, the intrusive implications for family life would need to be addressed: I suspect it is highly likely that a different time window would be identified. That, however, everybody accepts, is not the way the curfew with electronic monitoring is intended to work. Nor, of course, should there be calls being made at different hours. None of that, however, is a reason to lift the electronic monitoring element, if the curfew with the electronic monitoring is necessary. In my judgment, it is necessary. There are two further points to make about this aspect of the case.

i) The first is that a 'doorstep' equivalent of this 3 hour curfew being monitored would itself also be intrusive in principle. It would involve the prospect of the police arriving between 4am and 7am and knocking on the door in order to check that the applicant is at home. That would itself have implications for the children and for the sleeping baby. I accept it would not be the same as the electronic beeping that is particularly said to be matter of concern for the 6 year old. It might possibly though have other implications. As Ms Townshend points out, in reality the 'doorstep' condition would not involve anything like daily arrival (4am-7am) of the police, to check that the family are there. But therein lies an important point. It supports Mr Swain's submission that there is a very real difference between (a) electronic monitoring that everybody knows will automatically be triggered if the family are not at home on any given night on the one hand and (b) the prospect of far less frequent monitoring of curfew on the 'doorstep' on the other.

ii) The second point I want to emphasise is this. The problem of the catalogue of telephone calls or 'electronic beeping' being experienced by this family in the middle of the night, does need to be addressed and resolved as Mr Swain has very fairly for the respondent accepted. I have seen a response from the monitoring company, dating back to 30 July 2020 and recognising that there had been a malfunction and apologising for it. I have not seen any further follow-up, either from the applicant to that company or any response from them, thereafter. It is important that the technology works. It is important that these intrusive incidents should not be occurring, and the family should be protected against them. It matters. If these observations, with which I know both parties in this case would agree, are of assistance to the applicant in any communications she may have subsequently, then that will be a good thing.

9. Next, I deal briefly with the point about Brighton Beach (or the nearby beach environment) and embarrassment. I do not belittle that point but it cannot be a reason for varying this bail condition if the condition is a necessary one. It is a consequence with which the applicant and the family needs to live: in particular, the 'covering up' of the anklet, even on a hot and sunny day, rather than facing any embarrassment so far as it being conspicuous is concerned.

10. The removal of the electronic monitoring element would, in my assessment, substantially weaken the bail package which has, properly, been regarded as necessary and appropriate in this case. 'Doorstep' monitoring would be significantly different and would be likely to be highly irregular. Everybody would know that that was the position. The effectiveness, and the perceived effectiveness, would be very different. With an electronically monitored curfew the applicant knows that she simply cannot take the chance of not being at home on any night when she is wearing the anklet. She knows that the authorities will be alerted if she tries to leave, at the latest within 24 hours.

11. It is also relevant that she is currently at the stage where she may very well perceive that she is in the 'last chance saloon' so far as resisting extradition is concerned. The 21 alleged offences of forgery and fraud and the criminal proceedings that she faces in Lithuania, with the prospect of the custodial sentences gives rise to a significant incentive to seek to avoid that situation if possible, particularly given its implications for the family and then being parted from each other. The appeal failed and there were

then extensions of the removal date. The application to reopen has made been made. I make no observations or findings as to the strength of that application. But in my assessment this case is now entering a final and critical phase. It is a situation in which proper and effective bail conditions that serve to secure that the applicant is every night at her residence are necessary and justified. It is a situation where, in my judgment, it is necessary to ensure that the bail package is not substantially weakened

12. I have paused and reflected on what seems to me to be the most critical point. It is that the applicant was discharged from hospital on 9 July of this year, and thereby achieved a window where she was without her anklet until 21 July 2020. Notwithstanding what her physical condition must have been after having to be 3 days in hospital with a stomach condition, it is nevertheless highly relevant that she notified the authorities and had the anklet subsequently refitted (though they did not refit it until 21 July 2020: the end of the time window that had been identified for the electronic monitoring condition to be relaxed). I have reflected and considered, anxiously, whether that – alongside the other circumstances of this case – renders the electronic monitoring component unnecessary or disproportionate. I am not persuaded that it does. In my judgment, it was necessary and proportionate that the monitoring be re-established after that time (ie. from 21 July 2020). The sequence of events in July 2020, of itself, does not persuade me that electronic monitoring is unnecessary and that the bail package should now be weakened in the days and weeks going forward.

13. Against all of that, I put the work opportunity and the inability to work. There is, in my assessment, a problem with the evidence on this.

    i) I know that the applicant first made this application to the senior district judge, who made a decision on 24 July 2020. I have witness evidence in writing from the applicant prepared for this application before me today (27 August 2020). It is clear that the applicant has spoken to the beautician business, because she says 'I have spoken to them' and 'they are happy to accommodate the hours'. She then describes the uniform and says in her evidence that she 'would not be able to wear any clothing covering up the anklet'. Her evidence states: "I do not believe they would be happy" for her to work with the anklet visible. It is far from clear to me what enquiry has in fact been made and what the business has in fact said.

    ii) There is every reason, in my judgment, to think that a responsible business would consider, with flexibility and sympathy, a request to cover up an anklet while acting as a beautician. Particularly in the modern circumstances (Covid-19) which involve, to say the least, some very unusual modifications to what people are currently required to wear including on their faces. I can also, to consider a further point, posit the example of particular items that might have religious significance. When I look at the photograph that I was given, there are obvious questions arising as to flexibility.

    iii) I simply do not have the evidence to tell me whether that has been enquired about or addressed, or what the response was, or what the basis for the response was. Mr Swain's skeleton argument (filed yesterday) stated in terms that the respondent's position was that it was 'unclear how in fact the anklet does prevent the applicant from working'. Ms Townshend, very fairly and properly,

tells me she is not able to go beyond the way it is put in her client's written evidence.

iv) This troubles me. It is a central point, in the key reason being put forward for the variation of the bail condition. I am being told that this is a family for whom the applicant's ability to pursue some hours of work in this way would be so significant, and I accept that it would be. I have been told that the application for a variation is based on this consideration, and that there is no risk or danger that something else might be going on. But I am concerned, on this central point, that the evidence on the issue is so sparse. It does not, to me, indicate that a clear enquiry in which a clear response has been forthcoming. I also bear in mind the multiple instances in which exchanges have been exhibited in documents that are before me. On the face of it I, would have thought that the 'uniformity' that accompanies 'uniforms' could be expected to involve an adjustment allowing for a sock to be worn to cover up an anklet. I simply do not have before me the material that satisfies me that that has been raised and responded to and that is, itself, a matter of concern.

v) In fairness though, to everybody including the applicant, I do wish to make this clear. If the position in this case truly is that – regrettable though it would be that the beautician business, that would otherwise be keen to accommodate the applicant and enable her to work some hours, would not be prepared to have her covering up an anklet (or working with it visible), my conclusion would be the same. Regrettable though that decision would be, in my assessment and at this critical time in the chronology for these extradition proceedings, it is vitally important that the package of bail conditions should be retained and that the strength of those bail conditions should not be materially undermined.

14. Finally, I ought also to say this. The application put before me did not put forward, as an alternative, reporting requirements being re-imposed, to require this family (or the applicant at least) regularly to attend a police station. I do not propose to go into that in any more detail. However, as currently advised and on the basis of all the materials and submissions before me, I would not have been satisfied that that was an appropriate alternative and would have justified that sort of different variation if being put forward.

15. In all those circumstances, and for all those reasons, this application for a variation is refused.

27th August 2020

NOTE: An application for anonymisation of this judgment was subsequently made in writing and was granted (as it had been in respect of the judgment of 6 November 2019 [2019] EWHC 2991 (Admin)) by a separate and subsequent Order of Fordham J made on 28 August 2020.