SPECIAL IMMIGRATION APPEAL COMMISSION

Field House
Breams Buildings
London

Friday, 16th May 2014

BEFORE:

THE HONOURABLE MR JUSTICE EDWARD STUART
UPPER TRIBUNAL JUDGE PERKINS
SIR BRIAN DONNELLY

BETWEEN:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Applicant

and

J1

Respondent

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MR S KOVATS QC (instructed by the Treasury Solicitor) appeared on behalf of the Applicant.

MS S HARRISON QC and MR E GRIEVES (instructed by Birnberg Peirce and Partners) appeared on behalf of the Respondent.

MR A McCULLOUGH QC (instructed by the Treasury Solicitor Support Office) appeared as Special Advocate.

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PROCEEDINGS - BAIL ISSUES
JUDGMENT

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MR JUSTICE EDWARD STUART:

1. This is an application by the Secretary of State to vary the conditions of bail of a person known as J1. At present, J1 has to wear a radio tag at all times and he is subject to a curfew which prescribes the times during which he can leave his house. The Secretary of State wishes to substitute a GPS tag in place of the radio tag.

2. The present tag is a binary device. That is to say that it tells the monitoring body whether or not J1 is within a certain distance of a signalling unit installed in the house. In fact, we understand that there are two units, one upstairs and one downstairs. The obvious disadvantage from the Secretary of State's point of view is that, if J1 leaves the area within which the tag can communicate with the base unit, all contact is lost. The proposed GPS tag, as its name suggests, is a device that can keep track of the wearer's movements wherever he is. It is unnecessary to go into the details of its operation. If one wants to keep track of the wearer's movements, its advantages over the radio tag are perfectly obvious.

3. However, the GPS tag has at least two major physical disadvantages from the wearer's point of view. First, it is much larger, and we have now had an opportunity to see it, and it is, therefore, much more obvious than the radio tag. Secondly, it has to be charged on a daily basis. Apparently, it needs about a one and half hour's charging a day or, alternatively, say, two charging periods of half an hour to one hour each. If the battery runs flat, we are told that it needs rather more, something of the order of two to two and a half hours.

4. The difficulty is, of course, that the tag cannot be taken off by the wearer, so he or she has to remain physically connected to the charging unit by a lead whilst the tag is charging. The lead, we are told, is about three metres long, although we have not seen one.

5. To go into a little more detail, the present tag is on what looks like a rubber strap and is a small object, perhaps, about the diameter of a two-pound coin, but very much thicker. It is reasonably bulky, but, on the other hand, one can readily understand that it can be concealed by objects, such as a medical ankle support strap or something of that sort. The new tag, the GPS tag, by contrast, is a much bulkier device. It is about the size of the iconic Nokia mobile phone, so it is plainly something that cannot be concealed by, for example, a medical support strap.

6. It is said on behalf of the Secretary of State that the wearer can charge the tag whilst he is in bed, thereby minimising the inconvenience. However, this, of course, is possible only if there is a socket near the wearer's bed in which the charging unit can be plugged and the arrangements are practicable.

7. At this point we should make it clear that we have not, actually, seen the charging unit itself. Contrary to our expectations, instead of what we had expected to see, which was something equivalent to a USB port or a small socket on the tag, it appears to have two contact points and an associated groove which appears to accommodate some form of jaw-like charging device that must in some way clamp over it. Unfortunately, we have not seen that. We have absolutely no means, therefore, of knowing how robust this device is when worn, for example, by someone asleep in bed and turning over. We simply do not know.

8. In these circumstances, and against this background, J1 objects to the proposed change of tag. He has small children and he says that it would make life very difficult in the house, given the presence of the children, if he had to charge the tag whilst they were up and around. It is submitted also that the enlarged tag has social problems; for example, if a person is seen in public wearing a rather curious looking device attached to their ankle, other people will wonder what is going on. They will think he or she might be some form of criminal and so there are clear social disadvantages that are involved in wearing a very obvious tag and, indeed, recent changes to the bail conditions have reflected to some extent the problems that this Commission has accepted are faced by members of the family of someone who is having to wear a tag 24 hours a day.

9. Now, it is very relevant to this application that by a letter dated 3 April 2014 addressed to the parties, this Commission made these points, and I will read the letter.

> "The Chairman has read the appellant's letter of 2 April and the witness statement concerning the GPS tag. The Secretary of State needs to indicate if she maintains the application. If she does, then there will need to be a hearing. The points which will need to be addressed following the appellant's letter would seem to include; 1) the differential size and appearance of the tags; 2) the charging process and the time involved; 3) any risk of failure; and 4) the security gain of a GPS tag. That list is, of course, not intended to be exhaustive. Assuming there needs to be a hearing, parties are asked to agree a time estimate and, if possible, a date convenient to the Commission. The Chairman would be helped at any hearing by seeing both kinds of tag so as to compare appearance and size."

10. That, of course, as we now know, did not, in fact, anticipate all the aspects of the tag that the Commission would need to see. I have already mentioned the rather unexpected arrangement by which the charger appears to fit over the tag. We have absolutely no idea how bulky or heavy the charger is or how robust is the connection. As I have mentioned, we have, therefore, only seen half of the apparatus. We have not seen the lead, we do not know how robust it is, or how resistant it may be to a determined attack by a three-year old child. We have not been told, although we asked, whether the charging lead is carrying high voltage and high current or is one that is connected to a transformer so that it is only carrying a low voltage and, therefore, limits the harm should, by any unfortunate accident, a child should come into contact with the live lead. This, we have to say, is profoundly unsatisfactory.

11. In addition, the Secretary of State has produced no information in relation to the request about the risk of failure and the general reliability of the tag. This is against a background of anecdotal evidence that these tags have proved unreliable. However, to be fair to the Secretary of State, we are not clear how much information has been communicated to her in relation to complaints by wearers of the tags. But, as we pointed out during the opening of this application, we regard it as wholly unsatisfactory that these points have not been addressed. It is not difficult for somebody with experience of these tags in operation to say how they work and to give some indication of what types of failure have occurred in practice and the problems which have arisen as a result of them.

12. In addition, J1 made a witness statement in early April this year setting out the problems that he anticipated the new tag would cause. There has been no specific response to this witness statement in the form of any form of risk assessment, however

cursory, or any survey of J1's house to assure the Commission that there is the infrastructure to support the proposed new tag. In particular, are there sockets in places, for example, near the matrimonial bed or in other rooms in the house, which are suitably placed so as to enable the tag to be charged? We simply do not know.

13. In the face of questions raised by the Commission, at the outset of this application, to Mr Kovats QC, who appears for the Secretary of State, he was able to take further instruction whilst the Commission was looking at the tags. As a result of that brief adjournment, Mr Kovats tells us that his instructions now are that it is accepted on behalf of the Secretary of State that this application cannot go ahead today, given the matters that have been canvassed and, therefore, he applies for an adjournment.

14. Ms Stephanie Harrison, QC, who appears for J1, opposes that course. She invites us to dismiss the application. She says, putting it bluntly, that the Secretary of State should have come today prepared to deal with all the points that have been raised and was not prepared. She submits that, when the Secretary of State seeks to impose an additional condition, particularly one which is likely to be more onerous, then the burden is on the Secretary of State to consider all the consequences and, in particular, the effect on the applicant's children. The applicant has six children, I think, of which five are under the age of about eight. His three-year old son, unfortunately, suffers from fairly severe autism, with all the usual problems that that condition brings, and, finally, there is a young baby and J1's wife, Rachel, is, in fact, still breastfeeding. It is perfectly clear that this is a house where the parents have their hands full and we consider that Ms Harrison's point is entirely well made, that the impact of the change proposed on the management of these children is something that should be considered by the Secretary of State and, as far as we can tell, has not. She says, further, that there is a need for a proper risk assessment, especially with the three-year old autistic child, to make sure that there is no risk that this child will come to harm if it starts interfering with the tag or its lead or its charging equipment.

15. Ms Harrison tells us also that there is to be a further hearing in this case on 14 July this year, which may resolve J1's status and his future. We know nothing about that hearing and for present purposes that does not matter, but the point is that it means that events may change in the course of the next two months, which could possibly either make this application wholly unnecessary or, indeed, require it to take a different form. She submits that J1's solicitors are not a large firm, they do not have limitless resources and it would be unfair at this stage to distract them from the preparation for a major hearing in just under two months' time in order to deal with the question of what type of tag J1 should wear, given that he has worn the radio frequency tag perfectly satisfactorily for the best part of a year or maybe more without incident.

16. Mr Kovats, in response, submits that there has been no failure to address the impact on the family and the application is only concerned with this particular case and, therefore, the appropriate course is to adjourn it.

17. So far as the role of the Special Advocates' Support Office is concerned, they have been helpfully represented here today by Mr McCullough, QC. His position, really, is that this is an application which does not require any inquiry into closed material. We should mention that there is some closed material but, really, it is of fairly limited compass or relevance to the real issues in this application and we are inclined to agree that Mr McCullough's analysis, which is unsurprisingly supported by Ms Harrison, is correct. Although Mr Kovats has made it clear that he cannot give any undertaking today that there will be no reliance on any other closed material, we can only say at this stage that it ought to be discouraged, because, as things stand at the moment - and I

emphasise “as things stand at the moment” - it seems to us that this is not an application where the contents of any closed material are really going to have any serious impact or even material impact on its outcome, but that, of course, must always be a matter for the Secretary of State.

18. However, in all these circumstances, we have concluded that we should accept the submissions of Ms Harrison. The Secretary of State needs to present an application that is properly prepared and, on this occasion, she has not done so.

19. It is, indeed, not clear, given how things may turn out, whether, in fact, if this application were to be dismissed, the Secretary of State would between now and 14 July make a fresh application at all; we are just not in a position to form a view about it, but the difficulty of adjourning the application is that it keeps it alive and may result in costs being generated that, were it not alive, would not be incurred and those costs would then be abortive. The primary position is that this is an application which should not have been brought before the Commission without appropriate and full preparation. That was not done and, in those circumstances, and for the other reasons I have given, we consider that this application should be dismissed.