

CO/2089/2015

Neutral Citation Number: [2015] EWHC 2337 (Admin)  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
DIVISIONAL COURT

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 7 June 2015

**B e f o r e:**

**LORD JUSTICE AIKENS**

**MR JUSTICE OUSELEY**

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**Between:**

**THE QUEEN ON THE APPLICATION OF O.**

**Claimant**

v

**METROPOLITAN POLICE.**

**Defendant**

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(Official Shorthand Writers to the Court)

**Mr R Bowers QC** (instructed by JD Spicer Zeb) appeared on behalf of the **Claimant**

**Mr N Yeo** (instructed by the Metropolitan Police Service) appeared on behalf of the **Defendant**

**J U D G M E N T**  
(As Approved by the Court)

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1. MR JUSTICE OUSELEY: The claimant is a foreign national who challenges the decision of the defendant, for these purposes treated as taken on 23 March 2015, to continue his conditional police bail rather than to release him without bail at all.
2. We have ordered that reporting restrictions be in force for reasons which will become apparent and the details into which I shall go are accordingly somewhat attenuated.
3. The claimant's now ex-wife alleged to the police on 11 March 2014 that she had been sexually assaulted and raped by him in September 2013. He was arrested the next day (that is 12 March 2014) and interviewed. He offered a prepared statement but made no comment by way of response to specific questions about the alleged incident.
4. The Custody Sergeant determined that the evidence then available was insufficient to charge the claimant and released him on police bail subject to three conditions. The first, that he surrender his passport and should not apply for travel documents. The second, that he was not to contact the complainant except via the family solicitor. Thirdly, he was to live at a specified address. He was bailed to re-attend the police station on a specific date. He either attended on that date and four subsequent dates as required or he was released from attending.
5. On 30 April 2015, bail was extended and later extended by the Custody Sergeant to 12 August 2015. Bail was therefore extended after the decision which is at issue.
6. There have been changes to the first condition to which I referred. Appeals have been made to the Magistrates' Court in relation to the passport. The passport has been returned. There is no longer such a condition and the claimant has undertaken foreign travel with permission. All that there is now is an agreement between him and the police that he would give 48 hours' notice of his intention to travel.
7. On about 22 March 2015, the claimant's solicitors emailed the officer with responsibility

for the case asking him to cancel bail, as it was put. This email referred to the length of time which the claimant had already been on bail for. It also said that the investigation was not a complicated one. The main point of the request, however, was that it was said that there were now difficulties with his application to UK Visas for an extension of his work permit. The email said that he had been told that the application could not be granted "while the present investigation remains unresolved". His passport would not be returned until the application for the extension of the visa had been granted, but it would be returned to him were he to withdraw his application for an extension.

8. He obviously sought cancellation of bail not so that he could go into custody but to be free of the associated obligation to attend the police station as and when required. Of course, the cancellation of bail, as it was put, could not prevent the investigation continuing but it would mean that he was no longer compelled under the threat of the exercise of a power of arrest and criminal sanction to attend the police station. It is the reply to that email which has given rise to the challenge here but I will turn to the terms of that reply when dealing with the submissions made by Mr Rupert Bowers QC, on behalf of the claimant.
9. I simply point out at this stage that the decisions on bail are made by the custody officer (see section 47(4) of the Police and Criminal Evidence Act 1984 ("PACE")). If an extension of bail or its cancellation is to be sought from the custody officer by the investigating officer, the officer needs the permission of an Inspector, and that is the permission which Detective Inspector Rawlinson, who replied to the claimant's solicitor's email, in effect said he would refuse to ask for.
10. The claimant contends in relation to that decision that the main reasons given for the decision for not cancelling bail in the email fall outside the scope of the statutory power

to grant bail and to impose conditions and that there was no objective basis either for the exercise of the power to release the claimant on bail or to impose conditions at all. It was also said by way of background and emphasis that Article 5 ECHR was engaged by the existence of bail with the concomitant power of arrest and criminal sanction. Mr Bowers also submitted that it had become disproportionate to maintain bail and the conditions.

The longer the investigation went on, the longer the bail went on, and the harder it was to justify. It was necessary to look at matters as they now stood. He also invited the court to consider the steps undertaken in the investigation and why they had taken so long.

11. I make one point at this stage concerning the alleged impact on the extension of the visa.

The claimant thought, from what he said he was told when he was sent to UK Visas for the extension, that it was the bail which meant that a decision on the further extension of his work permit would be put on hold. The email from his solicitors says that it is the investigation itself which is the cause of the holdup. There is information garnered second hand by Detective Inspector Rawlinson which confirms that impression, that it is the criminal investigation which caused the examination of the visa extension to be put on hold.

12. Mr Bowers accepted that the question as to whether it is bail or the investigation which caused the holdup is not one that can be resolved here. I suspect that it is the question of character rather than the question of form in terms of bail which is at issue.

13. I also point out that save in respect of condition 1, in respect of which considerable success was achieved, the claimant has not appealed to the Magistrates' Court against conditions 2 and 3. No appeal lies to the Magistrates' Court against release on bail itself but it does exist in relation to the conditions. The existence of that power emphasises the task which Mr Bowers faces in this application. He has to show that the decisions that

have made in relation to bail and in relation to conditions on bail are unlawful in the traditional Wednesbury sense, together with of course an appropriately heightened degree of scrutiny as Article 5 is engaged as well.

14. The relevant statutory provisions are as follows. Section 37(2) of the Police and Criminal Evidence Act 1984 permits the custody officer to release an arrested person either on bail or without bail where there is insufficient evidence to charge. That, so far as one can tell, is the power that was issued here. The power to impose conditions is dealt with under section 47(1) and (1A). The normal powers to impose conditions of bail are contained in section 3(6) of the Bail Act 1976, modified by section 3A in relation to police bail. The effect of that modification is that the powers to impose conditions cannot be exercised unless it appears to the constable necessary to do so for the purposes of preventing a failure to surrender to custody, the commission of an offence while on bail, preventing interference with a witness or the course of justice, or for the person's own protection (see section 3A(5)).
15. I turn to consider first of all the exercise of the power to release on bail at all. There has been some discussion before us in relation to the role which section 34(2) of PACE plays, and in particular section 34(5), which says that where release is ordered under (2) the release is to be "without bail unless it appears to the custody officer (a) that there is a need for further investigation of any matter in connection with which he was detained". The interaction between section 34 and section 37 has been considered in a number of cases, notably R v Windsor & Ors [2011] EWHC 842 (Admin), in particular between paragraphs 33 and 42, and the conclusion of the court at paragraph 40 is in point.
16. For my part, I do not consider it necessary to consider whether section 34(5) provides a legislative steer or not. It seems to me perfectly clear that a power to grant bail without

conditions is obviously usable where the custody officer considers that it is necessary to compel, with a power of arrest and criminal sanction, attendance at the police station at specific future dates. It is obvious that that power is most likely to be exercised, indeed may perhaps only be exercised, where there is an ongoing investigation. It is necessary for Mr Bowers to show that that use of the power to impose bail was unlawful, that is to say an irrational use of the powers.

17. In my judgment, it simply was not. There is an ongoing investigation. Some evidence has been garnered, more is being sought to further inquiries, the claimant is a foreign national with sufficient means to depart from the country were he minded to do so and the interference with his liberty is very limited indeed. In my judgment, the exercise of a power to release on bail is a perfectly reasonable use of the power. In the summary grounds of defence at paragraph 30 the defendant said (and this may be what Mr Bowers is relying on) that "bail is justified by the need to impose conditions". That could be taken as suggesting that there was no independent purpose to the grant of bail other than as the hook upon which to hang conditions. Mr Yeo said that that was not the purpose of the grant of bail. But it would be easy enough to put that point to the test if an appeal were made to the Magistrates' Court for the removal of the conditions themselves. But if the conditions are necessary, it is difficult to see how a grant of bail in order to impose to them could be unlawful. No part of the conditional bail would be unlawful.

18. I turn from that to the conditions. The relevant document at the time when the conditions were imposed upon release on 12 March 2014 gives the grounds for imposing conditions on bail as being, as I have indicated, that they were necessary to prevent that person from failing to surrender, committing an offence and interfering with witnesses: the language of section 37 read with section 3A. There has not been a subsequent form.

19. In my judgment, it is inevitably to be inferred from the subsequent grants of bail that, save to the extent that consequent upon an appeal to the Magistrates' Court condition 1 was varied and then removed, those reasons were considered to apply to the remaining conditions by successive custody officers. On the face of it, those are sound reasons, objectively justified. A serious allegation is being investigated. If there is a charge followed by trial and conviction, a substantial prison sentence is likely, quite apart from any other form of personal and professional impact. The claimant has the means and, with his passport returned, would have the ability to travel. There is clearly an objective basis for saying that there is a risk of contact with a former wife in a serious domestic violence allegation case.

20. In my judgment, therefore, it cannot be said that the reasons given for the imposition of conditions are unlawful, nor can it be said that if those reasons continue that they have ceased to have effect.

21. It is here that the content of the email of 23 March 2015 comes into play. Mr Bowers' contention is that what is said in that letter shows that the continuation of bail was not for any lawful reason but was for entirely extraneous reasons. The email says that the length of time the claimant has been on bail is beyond the control of the police; it explains that the case was sent to the CPS, who requested an international letter of request for inquiries in his home country, explained that that was a lengthy process, and that Detective Inspector Rawlinson had no timescale for how long it would take to complete, they were beyond his control. He continued, saying that he completely understood the claimant's frustration but said that he was not willing to cancel bail:

- i. "If I were to do so, then this would send completely the wrong message to the victim of this crime. We are a victim based unit and seeing her through the Criminal Justice System is of high importance to us. It would also cause us difficulties at the conclusion of the investigation should the CPS authorise charges

as your client would be under no obligation to return to the police station. I'm sure you are aware that extradition is a lengthy process and this may frustrate justice."

22. The latter point is relevant to the proper basis upon which bail and conditions can be imposed but the point about the message being sent to a victim of crime is a bad point. Quite apart from the fact that she is the complainant at present rather than a victim proven, it is not a relevant basis upon which the decision to release on bail or without bail should be taken, nor a basis upon which conditions should be imposed, that messages must be or must not be sent to a particular person, or that they are a victim based unit and seeing her through the process is of high importance.
23. But it is my judgment that those considerations, irrelevant as they are to a decision in relation to bail, are not the basis upon which bail and conditions were imposed. Those are simply responses to the points raised in the email. They deal with the length of time that the investigation has taken and they deal with the riposte to the inconvenience which the investigation or bail is said to be placing on the claimant. They put, in one sense, the other side of the picture in response to that. In my judgment, that email has to be understood as being written on the basis that bail continued to be justified for the lawful reasons set out in the bail condition form, and that the Detective Inspector is explaining why, in the circumstances, what the claimant said is not sufficient to outweigh the continuing justification for bail. In my judgment, the letter does not contain any basis upon which it can be said that bail and its conditions were unlawfully imposed or continued.
24. Mr Bowers next says that the continuation of bail has become disproportionate.
25. In my judgment, insofar as that relates to the visa issue, for reasons I have given that cannot properly be resolved. I accept Mr Bowers' submission that it is important to look



at the position now and to take account of the experience that the police have of the way in which the claimant has conducted himself on bail. I also accept that it has been a long time that he has been on bail. But that has been explained. In particular, I decline to be persuaded by the suggestion that the investigation is taking unduly long and the court should examine and consider carefully the steps that have been taken to obtain evidence from abroad, notably by the use of letters of request, as opposed to emailing witnesses and finding out what they might say. A court should be exceptionally reluctant to intervene in an investigation either directly, or indirectly here because of the effect on bail; (see for example what Moses LJ said at paragraph 5 of R(ABC) v Director of Public Prosecutions [2014] EWHC 3286 (Admin)).

26. In my judgment, bail and the conditions imposed were lawfully imposed and continued.

They are have not been shown to be unlawful at all. For my part, I would dismiss this application. It will be (and I say this without encouraging it) for the claimant to make such appeals as he regards as appropriate to the magistrates to seek the removal of the conditions and then, if removed, to suggest to the police that there is no purpose for the bail at all. But that would be a matter for the police.

27. LORD JUSTICE AIKENS: I agree.

28. MR YEO: There is an application for costs. I do not know if the schedule made it to your Lordships. Can I pass it up.

29. LORD JUSTICE AIKENS: Hopefully you have seen this?

30. MR BOWERS: I have.

31. LORD JUSTICE AIKENS: Mr Bowers, what do you have to say about costs?

32. MR BOWERS: My Lord, nothing to say about quantum. Whether costs follow in principle, I cannot draw anything from the judgment that has been given but obviously

this application was precipitated by the length of time this investigation has taken to date and it may be that the court takes a view of that in relation to whether costs are appropriate. In my respectful submission, there should be no order for costs.

33. LORD JUSTICE AIKENS: But you have no comment to make on the quantum?

34. MR BOWERS: Not on quantum, my Lord, no.

35. LORD JUSTICE AIKENS: We think this is a case where there should be an order for costs. The investigation may have taken some time but that is not the basis in truth upon which this application was made. Therefore, we are going to make an order that the costs be paid by the claimants and that we will summarily assess those costs in the amount of £5,040.60. How long to pay?

36. MR BOWERS: A month?

37. MR JUSTICE OUSELEY: 21 days is normal.

38. MR COOPER: Thank you.

39. LORD JUSTICE AIKENS: We will say 21 days. So will you between you draw up an order to deal with the reporting restrictions et cetera, as well as the substance of it. I am very grateful to you both, thank you very much indeed.