

JERSEY / JUDGMENT

AG -v- Bhojwani [2009]

JRC 199 (19 October 2009)

[2009] JRC 199

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JUDGMENT

THE commissioner: 1. On 8 th September 2009 the Court:- (i) Refused the defendant's application to vary the conditions of his bail in order to allow him to reside in the United Kingdom pending his trial, or, in the alternative, to allow him to travel to and stay in the United Kingdom from time to time on notice to the Attorney General and (ii) Granted the defendant's application to direct the Viscount to release from the bail sureties the interest earned from 28 th February 2007

- 30 th June 2009. The defence requested the Court to give its reasons in writing which we now do. Charges 2. The defendant stands indicted for two counts of converting the proceeds of criminal conduct and one count of removing the proceeds of criminal conduct, contrary to the provisions of Article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999 . His trial is due to commence on 9 th November 2009. Personal background 3. The defendant was born in Calcutta in 1957 and has been married for 26 years with 4 children, aged 24, 23, 21 and 15 respectively. In the 1960s, the defendant's father moved the family to Nigeria and together with his two brothers formed the family business Bhojwani Brothers (Nigeria) Limited. In January 1985, the family business was divided between the defendant and his two uncles. He is now the eldest surviving male within his extended family group. He was from the age of 4 educated in Nigeria, attending the University of Lagos, and obtaining a BSc in business administration. He and his family are Hindu Sindhis. He is an Indian national holding an Indian passport 4. His wife and children now live in India but they have a substantial connection with the United Kingdom, in which the defendant, together with his children, his wife and mother have an unqualified right of residence. He has been a UK taxpayer since 1978/9 and has been on the Electoral Roll for over 15 years. Three of his children are UK born citizens. The material part of his business has been based in and has operated from the United Kingdom for in excess of 30 years through a permanent office employing local staff. The family own a flat in London. Judicial process 5. On 8 th February 2007, the defendant was arrested at Heathrow Airport when boarding a flight for Chicago, pursuant to a Jersey arrest warrant backed by a warrant executed from a Sussex court. It is not suggested that he was boarding this flight in order to avoid arrest under the warrant, of which it would appear he had no prior knowledge. He was transferred to Jersey, where he was held in custody until bail was granted on 22 nd February 2007. It is clear from the transcript of that hearing that

the Crown consented to bail on what it described as most stringent conditions because of its concern that he presented "the clearest conceivable flight risk".. He had no connection or ties with Jersey other than through bank accounts maintained here. Those conditions as subsequently amended and in as far as is material to the application are as follows:- (i) That the defendant reports to Rouge Bouillon Police Station 3 times weekly. (ii) That the defendant surrenders all passports and other photographic identification immediately to the Viscount. (iii) That the defendant does not apply for any passport, any photographic identification or travel documents. (iv) That the defendant does not leave the Island of Jersey without the prior express consent of Her Majesty's Attorney General, to be applied for on not less than 48 notice. (v) That the defendant resides at Ker Du Pons, La Route du Petit Port, St Brelade and that he give notice in writing immediately of any change of his address to the Law Officers' Department, the Viscount's Department, the States Police and his advocate; notice to be given at the latest on the day on which the change of address takes place. (vi) That before the defendant be admitted to bail, he surrender and/or cause to be surrendered as surety to the Viscount, and, if he absconds, the entire amount be forfeited absolutely to the Crown, a number of bank accounts containing £5,587,328.92 and US\$ 51,469,840.02. It would seem that the bail monies constitute what the Crown alleges are the proceeds of his criminal conduct. 6. The defendant entered a plea of not guilty to the offences charged on the indictment. Since that time, there have been 42 substantive hearings, including two sittings over 6 days of the Jersey Court of Appeal. There are 19 as yet unpublished interlocutory judgments addressing issues of law and procedure relevant to the conduct of the defendant's trial. In January 2009, the defendant made the first of two applications for special leave to appeal to the Judicial Committee of the Privy Council on an interlocutory basis and on a point of law. The first application was heard on 11 th February 2009 and dismissed by order of the Privy Council dated 8 th March 2009. As to the date of this bail application, the defendant had pending a further application for special leave to appeal to the Judicial Committee of the Privy Council. In addition to the sittings of the Royal Court, the prosecution and defence counsel have spent some four weeks taking evidence of 3 defence witnesses at a commission convened for that purpose in Chennai, India. 7. In the case of each matter dealt with at a preparatory hearing (which includes the Court of Appeal and Privy Council sittings) either (a) the Attorney General agreed that the relevant matter was fit for dealing with as a preparatory hearing or (b) the Court has, after argument, ruled that the issue was so fit. As a consequence of the hearings the pre-trial process has been protracted. It has required successive vacations of trial dates as follows:- (i) th May 2008 (ii) th October 2008 (iii) th January 2009 (iv) th April 2009 (v) th May 2009 8. Thus the bail conditions have required the defendant to reside within the Island for some 2½ years. There have been a number of applications by the defendant to the Attorney General for leave to leave the Island for religious and family purposes, which applications have been declined because of the flight risk. An application to the Court to leave the Island for similar purposes on 13 th March 2008 was similarly declined. Legal principles to be applied 9. The legal principles to be applied on bail applications are helpfully summarised in the "Guidelines to Prosecutors and Crown Advocates on ECHR aspects of Bail" issued by the Attorney General,

from which we draw. Article 5 of the Convention is the relevant Article for the purpose of this application. Article 5(1) provides, so far as it is relevant, that:- "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;" Article 5(3) provides that:- "Everyone arrested or detained in accordance with the provisions of paragraph 5(1)(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within reasonable time, or to release pending trial. Release may be conditioned by guarantees to appear for trial." 10. Article 5(3) applies only to criminal offences. The twin aims of this provision are (a) to limit the period of detention by the police before a detainee's first court appearance and (b) to establish a *prima facie* right to bail pending trial. 11. Although reasonable suspicion that the detained person has committed an offence can be sufficient to justify pre-trial detention for a short time, thereafter national authorities must show additional grounds for detention. Five such additional grounds are recognised under the Convention, namely where the purpose of detention is to avoid a real risk, were the defendant released, that:- (i) the defendant would fail to attend trial; or (ii) the defendant would interfere with evidence or witnesses, or otherwise obstruct the course of justice; or (iii) the defendant would commit an offence while on bail; or (iv) the defendant would be at risk of harm against which he or she would be inadequately protected; or (v) a disturbance to public order would result. 12. The case of *Wemhoff v Germany* (1979-80) 1 EHRR 55 establishes that a person charged with an offence should be released pending trial unless the state can show that there are 'relevant and sufficient' reasons to justify his continued detention. Additionally, the Court is obliged to pay due regard to the presumption of innocence, and must record the arguments for and against release in a reasoned ruling. 13. It is only the first ground that was relevant in this application, namely that the defendant would fail to attend trial and in this respect a number of principles apply:- (i) Refusal of bail on this ground requires "a whole set of circumstances Which give reason to suppose that the consequence and hazards of flight will seem to the defendant to be a lesser evil than continued imprisonment" - *Stögmüller v Austria*

(1969) 1 EHRR 155, para 15. (ii) The relevant considerations are the those set out in *Neumeister v Austria*

(1968) 1 EHRR 91 , para 10, i.e. those "relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted which may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial" . (iii) " The severity of the potential sentence is not an independent ground and cannot, in itself, justify the refusal of bail ". (*Neumeister*) (iv) "If risk of absconding is the only justification for detention, the defendant should be released pending trial if it is possible to obtain

guarantees that will ensure his appearance at trial." (*Wemhoff v Germany*). Grounds for the application to reside in the United Kingdom pending trial 14. The defendant's restriction within the jurisdiction of the Island has given rise to a number of serious consequences which amount, in Mr Kelleher's submission, to a material change in the circumstances:- (i) Affidavit evidence sworn by the defendant's wife and mother attested to the cumulative trauma caused to his family, reflected not only in the collective damage to the cohesion of his immediate family, but also in the individual circumstances of his mother, his wife, his eldest daughter and his son. Out of respect for the privacy of his family, we will not detail their circumstances in this judgment, but we had no reason to doubt the evidence before us. Contemplating the consequences of conviction if that were to occur, the defendant had discussed and agreed with his family that they should relocate from India to London, and he would wish to spend as much time as he could prior to the commencement of the trial being with them in London, addressing with each individual member of his family the issues which they will confront as a consequence of relocation. These were matters which could not be achieved in either Jersey or India, but could, with the permission of the Court, be achieved in London. (ii) Again, as attested by affidavits sworn by his wife and mother, a consequence of his confinement to Jersey, was a deterioration in the business founded by his late father, to the point of collapse. 15. The imperative which underpinned the application lay therefore in the personal trauma of the family and his business circumstances and a prudent acceptance of the issues he must and will confront at trial and, notwithstanding his continued and proper defence and belief in its outcome, the need to address and put in order his family and business affairs. First and foremost, he put his application for a variation of his bail conditions as a request for understanding of his position as a family man and of his wish to observe his religious beliefs. His application was fundamentally a request for fair treatment having regard to the circumstances in which he found himself and his family. 16. Nevertheless, Mr Kelleher submitted that there were proper and compelling grounds as a matter of law for a finding by the Court that the defendant's application should be granted. Most particularly, it was submitted that maintenance of the existing restriction on his movement amounted to a breach of his Convention rights and gave insufficient weight to the role of his financial sureties as a full and appropriate "guarantee" of his attendance at trial. 17. Although the Court had delegated to the Attorney General the discretion to permit the defendant to leave the Island, the Attorney General's refusal of the requests made to date amounted to a de facto deprivation of liberty and/or a "restriction on movement" which have the cumulative effect of depriving the defendant of effective family life and of the ability to practise his religion in community with others. They have also caused the effective destruction of his business and livelihood. 18. Mr Kelleher submitted that the risk of absconding must be more than speculative, citing *R (on the application of F) v Southampton Crown Court*

(2009) where the trial judge refused to continue F's bail on the basis that he was not sure whether F would turn up or stay out of trouble. It was held that this was the wrong test which was whether there were substantial grounds for believing that F would abscond or commit further offences. 19. In objecting to the application to the Court for permission to travel in March 2008, the Crown offered no evidence of any predisposition on the defendant's part to abscond. Instead, the Crown simply asserted that the opportunities to abscond from the United Kingdom would be greater than exist in Jersey. Mr Kelleher submitted that this argument was flawed and improper for two reasons. Firstly, the existence of opportunity for flight does not discharge the prosecution's burden for establishing substantial grounds for believing that the defendant will abscond. Secondly, the assertion that the United Kingdom compares adversely to Jersey as a jurisdiction from which a person may disappear does not bear sensible scrutiny. He acknowledged that if there is a basis for believing that a defendant may abscond, the problems of opportunity become relevant to the conditions which the Court may reasonably impose in order to address a perceived risk. If, however, there is no basis shown for a belief that the defendant is disposed towards absconding, the existence of opportunity does not and cannot justify either detention in custody or deprivation of liberty. He accepted that in order to address a significantly enhanced "opportunity risk" of absconding, a proportionate use of restrictions on movement may be justified as a condition of bail; for example, a restriction on unsupervised access to airports and ports. 20. In the defendant's case, the asserted "increase in opportunity risk" must be weighed he argued, firstly against the fact that the Crown can show no predisposition or propensity to abscond and against (i) the very purpose for which the defendant wishes to reside in the United Kingdom, i.e. to relocate his extended family there (ii) the surrender of his passport and other means of identification and (iii) the existence of very substantial financial guarantees of his attendance at trial in the form of his sureties. 21. Mr Kelleher further submitted that whilst the defendant was not being held in custody within the Island, his restriction to the Island amounted to deprivation of his liberty in breach of Article 5(1) of the Convention. He cited the case of *Guzzardi v Italy*

(1980) 3 EHRR 333 . Under the provisions of two Italian statutes aimed at curbing the activities of the Mafia, Guzzardi, who was suspected of Mafia-type associations, was placed under supervision for three years and required to reside in a part of the Island of Asinara. Such measures were designed to separate an individual from his milieu and render his contacts with it more difficult. Although he was under investigation for suspected crimes, these measures had no connection in law with any such investigations. They were imposed irrespective of whether there was a charge against the person under supervision and did not prescribe any subsequent appearance "before the competent legal authority" (see paragraph 102). The conditions under which he was kept were described as follows (Paragraph 95):- "Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which

was occupied by a prison. Mr Guzzardi was housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment which were in a state of disrepair or even dilapidation, a carabinieri station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The permanent population of Asinara resided almost entirely at Cala d'Oliva, which Mr Guzzardi could not visit, and would appear to have made hardly any use of its right to go to Cala Reale. Consequently, there were few opportunities for social contacts available to the applicant other than with his near family, his fellow "residents" and the supervisory staff. Supervision was carried out strictly and on an almost permanent basis. Thus, Mr Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his correspondent whenever he wished to use the telephone. He needed the consent of the authorities for each of his trips to Sardinia or the mainland, trips which were rare and, understandably, made under the strict supervision of the carabinieri. He was liable to punishment by "arrest" if he failed to comply with any of his obligations. Finally, more than sixteen months elapsed between his arrival at Cala Reale and his departure for Force." 22. The European Court found that whilst it was not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, cumulatively and in combination, they did raise an issue. In certain respects the treatment complained of by Guzzardi resembled detention in an "open prison" or committal to a disciplinary unit. The Court explained:- "In order to determine whether someone had been "deprived of his liberty" within the meaning of Article 5 (Art.5) the starting point must be his concrete situation and account must be taken of the full range of criteria such as the type, duration, effect and manner of implementation of the measure in question". 23. The Court found that on balance and cumulatively the facts amounted to a breach of Article 5. Furthermore, the case did not come within any of the exceptions set out in Article 5 of the Convention and in particular Article 5(1)(c), which permits the lawful detention of a person for the purpose of bringing him before the competent legal authority on suspicion of having committed an offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing after having done so (paragraph 102). 24. Mr Kelleher also cited the case of *Secretary of State for the Home Department v AP*

- (2008) EWHC 2001 (Admin) where the Administrative Court considered the scope of a control order in the context of Article 5 of the Convention. Mr Justice Keith noted paragraph 94 of the judgment:- "94. Art. 5 of the Convention prohibits the deprivation of liberty. Whether a particular set of obligations imposed under a control order amounts to the deprivation of the controlled persons's liberty, or merely a restriction on his movements, was considered by the House of Lords in *Secretary of State for the Home Department v JJ*
- (2008) 1 AC 385 . The principles which emerge from *JJ* were summarised by Mitting J in *Secretary of State for the Home Department v AH*

- (2008) EWHC 1018 (Admin) , and I adopt that summary with which I agree. Those principles are as follows:- (i) There is no "bright line" separating deprivation of liberty from restriction on movement. As the European Court of Human Rights said in *Guzzardi v Italy*
- (1980) 3 EHRR 333 at (93), borderline cases fall within the area of "pure opinion", though we would perhaps call it judgment. (ii) The test is an objective one. The task of the Court is to assess the impact of the measures on a person in the situation of the person who is subject to them. For that reason, Counsel for AH accepted that it is not possible for the same measures to amount to a deprivation of liberty in one case, but not to amount to a deprivation of liberty in another case, simply because of their impact on the morale or mental health of the person subject to them. (iii) Many relevant factors must be taken into account, such as the nature, duration, effects and manner of execution of implementation of the measure in question, but the starting point - what Lord Bingham in *Secretary of State for the Home Department v E*
- (2008) 1 AC 499 at (11) called "the core element of confinement" - is the length of the curfew. (iv) Social isolation is a significant factor, especially if it approaches solitary confinement during curfew periods. 95. Thus, although the paradigm examples of deprivation of liberty are detention in prison and house arrest, deprivation of liberty can take many other forms, and the court's function is to look at the package of measures as a whole. To these principles, though, I would add two more. First, Lord Brown commented at (108) on the explicit reluctance of his colleagues to suggest the point at which curfews would, by virtue of their length, involve the deprivation of liberty. He went on to say that in his view a curfew which did not exceed 16 hours was "insufficiently stringent" as a matter of law to effect a deprivation of liberty. Secondly, a sense of social isolation would be felt particularly acutely where the controlled person was required to live in an area unfamiliar to him in which he had no family, friends or contacts. If he was cut off from his old haunts and acquaintances, his ability to lead any kind of normal life during non-curfew hours as well as curfew ones would be affected: see, for example, Lady Hale at (61). I would characterise it as a form of internal exile. 98. Arts. 8 and 9 of the Convention - which protects one's right to respect of one's private and family life and to practice (sic) one's religion - are relevant here as well. The obligations imposed on AP unquestionably interfere with his private and family life and his ability to pray at a mosque of his choosing, the issue here being whether those obligations are necessary in the interests of national security ... The difference between Art. 5 and Arts. 8 and 9 is that the rights protected by the latter may be interfered with on grounds of national security, whereas the right not to be deprived of one's liberty may not be interfered with at all." Again AP did not come within the exceptions to Article 5 of the Convention and in particular Article 5(1) (c). 25. Mr Kelleher argued that the Court should consider the cumulative effect on the defendant of his restriction to the Island over a period of some 2½ years, the effect of which had been punitive. It had brought ruin to his business, impacted significantly to the detriment of his family, imposed social isolation and prevented the observance of his religion in community with others. These factors were capable of converting the

restriction of movement into a deprivation of liberty in breach of Article 5 of the Convention. 26. Even if these factors were not sufficient to amount to a deprivation of liberty, this case clearly involved a significant level of social isolation which has caused a breach of his rights to respect for private and family life and to practise his religion. Those rights are enshrined in Articles 8 and 9 of the Convention as follows:- Article 8 provides:- "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 9 provides:- "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or beliefs, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." 27. The Court was told that there is no Hindu Sindhi community in Jersey and thus no temple in which the defendant could practise his religion in community with others. 28. Finally, Mr Kelleher argued that insufficient weight had been given to the very substantial sureties provided by the defendant. It is the case that the Court when first imposing bail, had not itself gone through the exercise of setting the quantum of the financial guarantees; the amount of the sureties had been agreed between the prosecution and the defence and was approved by the Court. Mr Kelleher referred us to the following extract from the judgment of the European Court in *Skrobol v Poland*

- (2008) 46 EHRR 4 :- "57. The Court further recalls that according to its case-law, the amount of the bail must be assessed principally by reference to him (the accused), his assets, his relationship with the persons who are to provide the security, in other words to the extent to which it is felt that the prospect of the loss of the security or of action against the guarantors in the case of his non-appearance at the trial will act as sufficient deterrent to dispel any wish on his part to abscond (*Neumeister v Austria* judgment of 27 June 1968. Series A, p. 40 (...) 14). The accused whom the judicial authorities declare themselves prepared to release on bail must faithfully furnish sufficient information, that can be checked if need be, about the amount of bail to be fixed." 29. We were told that the defendant was prepared to depose, if required, that the surety monies provided by him represented in excess of 95% of his available personal wealth and in aggregate vastly exceeded the value of any amount which might possibly be assessed as a guarantee of his attendance at trial. During the course of the proceedings, the defendant did provide a short affidavit confirming this and valuing his net assets outside of Jersey at approximately US\$3.6M. He deposed that the current position reflected a very significant

reduction in his net asset position since the date of his arrest in February 2007. Grounds for opposition 30. Mr Jowitt submitted that the conditions originally imposed on the granting of bail were there to address the risk of the defendant, who has no connection with the Island, absconding. On the one occasion the defendant had sought to vary those conditions, the Court refused. The onus was not therefore on the Crown to persuade the Court all over again about that which it had been persuaded since February 2007. The onus was on the defendant to show that the risk of flight was no longer substantial. He cited the following extract from Archbold 2004 , paragraph 3-17:- "The Divisional Court considered the question of the extent of the obligation of courts of first instance to entertain renewed applications for bail in a number of cases prior to the amendments to the 1976 Act effected by the Criminal Justice Act 1988. The general effect of the decisions was that a court was not bound to entertain an application for bail, after it had previously been refused, unless it was satisfied that there had been a material change of circumstances. A decision to refuse bail presupposed that the court had found as a fact that there were substantial grounds for believing that one of the events described in paragraph 2(a), (b) or (c) of Schedule 1 to the Act (post, § 3-48) would occur. A later court was bound to accept that finding of fact, otherwise it would be acting as an appellate court unless there was a material change of circumstances." 31. In the Crown's view there had been no material change in the material circumstances of the defendant. All of those matters which the defendant sought to suggest amounted to a change in circumstances had existed since the time of his arrest. He cannot suggest that the fact that he has only woken up to those risks at this late stage and therefore feels the need to move his family closer to him is a material change in circumstances. In any event, Mr Jowitt submitted that such concerns are not uncommon for defendants facing the prospect of conviction and prison. They were not a basis for applying for bail or seeking a variation in conditions. Indeed the Crown was inevitably concerned that the apprehension of conviction and imprisonment goes to the heart of the risk which has founded the basis of every refusal of both the Attorney General and the Court for the defendant to travel outside the Island, namely that he will abscond. 32. Furthermore, Mr Jowitt argued that the defendant cannot properly suggest that the length of time since his arrest gives rise to a material change in circumstances. The lapse of time between his arrest and trial has been caused exclusively, he argued, by the manner in which the defendant has chosen to conduct his defence. He conceded that such delay should not accrue to the defendant's detriment but it was impossible to argue in his view that it should accrue to his benefit and justify a variation in bail. At the highest the defendant's case for variation was that he personally, his family members and his businesses were under intense stress because he continued to await trial for serious offences in Jersey for which he might be convicted and imprisoned. These things cannot amount to a material change in circumstances. 33. Mr Jowitt addressed the risk of absconding as follows:- (i) The trial was now a little under two months away. If the defendant is convicted he must know that he is likely to receive a substantial prison sentence. (ii) The defendant and his lawyers have spent the majority of 2008 and all of 2009 thus far pursuing arguments that there is no case for him to answer as

a matter of law, which arguments have failed. Whatever the outcome of the extant application for leave to appeal to the Privy Council on ECHR Compliance and Transposition, it will not dispose of the trial in this case. (iii) The defendant is a wealthy man quite apart from his Jersey wealth. He currently occupies generous rented accommodation in St Brelade, owns property in London, Nigeria and India and in his last application his lawyer indicated that he possessed assets internationally. The level of legal fees incurred by the defendant suggests that he was wealthy independently of his Jersey funds. (iv) The defendant is a habitual traveller, as the current and spent passports seized on his arrest demonstrate. (v) It was clear to the Crown that he had the means to abscond, a property and a family in India to go to if he does and a clear reason to do so. There was real doubt as to whether there were any enforceable arrangements allowing a person to be extradited from India to Jersey. (vi) Whatever arguments the defendant may seek to employ to suggest that England is no easier a jurisdiction to abscond from than Jersey, such is not the case. Jersey has a small airport, a small private aero club and a small ferry port. It is much easier to police exit points in a small island than a large country with a substantial population and which contains four busy international airports within a 70 mile radius of London alone. It was obvious, Mr Jowitt submitted, that the defendant could abscond far more easily from the UK than from Jersey. (vii) The affidavits of the defendant's wife and mother deposed to family difficulties occasioned by the defendant's arrest and that the defendant's businesses in India and Nigeria have suffered by his absence to the point of collapse. The defendant's family are resident in India. These, in fact, provide very good reasons, Mr Jowitt argued, to believe that the risk he will abscond is substantial. 34. Jersey is a separate jurisdiction from England. The defendant was in effect asking for permission to live in another country shortly before his trial on serious charges. It would, in the Crown's view in these circumstances, be surprising for any court to vary bail to allow such a defendant to leave for another country shortly before his trial. It would be surprising if any court could properly conclude that it was a breach of such a defendant's human rights to forbid him to leave the country shortly before his trial. 35. Mr Jowitt submitted that the defence had accepted that the surety was designed to address the risk of the defendant absconding from Jersey and not from anywhere else. It was not open to the defendant to suggest that the surety was intended to serve or should serve any wider purpose. In the absence of that surety, the Crown would not have agreed to bail at all, even within the Island. Conclusions 36. The Court recognised and gave anxious consideration to the effect of the defendant's restriction within this jurisdiction over some 2½ years from his arrest upon his family and businesses and the difficulties he must have faced personally living in an Island in which he has no previous connection, separated from his family; an Island in which there was no Hindu Sindhi community with which he could socialise and practise his religion. 37. However, we concluded that the conditions in which he is required to live, taken cumulatively, do not amount to a breach of his Article 5 "right to liberty" for two reasons:- (i) The conditions in which he lives cannot be compared to those of Guzzardi, namely what the European Court described as an open prison. Whilst Jersey is a small Island, it has a population of some 91,000 people with a thriving

economy based on international financial services, agriculture and tourism and with good communications. The defendant enjoys unfettered freedom of movement within the whole of the jurisdiction of the Royal Court, unfettered freedom to communicate with anyone he chooses at any time and unfettered freedom to receive any guests for any period at any time of his choosing. (ii) In any event, the defendant comes within one of the exceptions to Article 5, namely sub-section (c) which permits the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or where it is considered necessary to prevent his committing an offence or fleeing after having done so. 38. Although we accepted the Crown's proposition, supported by Archbold, that we were not bound to entertain an application for bail which had previously been refused, unless satisfied there had been a change in circumstances, we were conscious of the fact that the Court that had originally set the bail conditions had approved an agreement reached between the prosecution and the defendant and the Court that refused the defendant's application for a variation to his bail conditions on 13 th March 2008 did not set out its reasons as fully as it might have done. Furthermore we concluded that in view of the delay, fairness indicated that we should approach the issue of the defendant's risk of absconding afresh. In so doing, we applied our minds to the Neumeister factors. 39. In our view it is not just a question of the prosecution having to show that the defendant has a "predisposition or propensity to abscond", difficult if not impossible to show save where there is evidence of such conduct, but whether all of the factors confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial. 40. The defendant is a man of previous good character, and we have no reason to doubt his morals, but he has no links with the Island whatsoever, save for his use of bank accounts here. The only sensible conclusion we could reach was that the Neumeister factors confirmed the existence of the danger of flight. Furthermore, we accepted the Crown's submission that the timing of the application (8 weeks from trial) enhanced that danger. 41. We then turned our minds to Article 5(3) of the Convention which provides that the release may be conditioned by guarantees to appear for trial. 42. It is important to note that the defendant has from the outset been released from custody on the guarantee provided by the surety monies. His release has been into this jurisdiction where he has complete freedom. The issue before us was whether, on the eve of the trial, we should allow the defendant out of the jurisdiction and therefore out of the power of the Court. Once out of the jurisdiction were there substantial grounds for believing that he would abscond? 43. We recognise that the sums lodged are very substantial although we note that there has been no disclosure of the defendant's means at any of the previous bail hearings and the disclosure given to us was very general, and certainly in no way verifiable. It fell well short of the requirements set out in Skrobol , namely that the accused must "faithfully furnish sufficient information, that can be checked if need be, about the amount of bail to be fixed." There was no information volunteered by either his wife or mother about the financial circumstances of the family, apart from a general description of the problems faced by what she described as the family's investments. 44.

The requirement that defendants remain within the jurisdiction is a standard requirement imposed on all defendants however strong their links with the Island whenever bail is granted and is there for a good reason - it keeps them within the power of the Court. In our view the risk of flight must be greater where a defendant is out of the jurisdiction of the Court in which he is to face trial. 45. Placing this defendant outside the jurisdiction of this Court, facing for the first time in his life, a potential custodial sentence (if found guilty) gave us reason to suppose that the consequences and hazards of flight to say India, where we are informed it is doubtful whether extradition arrangements are in force, and where his family are currently based, would not seem to him to be a lesser evil, notwithstanding the potential loss of the surety monies. There is a certain naivety in the suggestion that once in England, freed from the power of this Court, the defendant, if he determines to travel to India, will feel constrained by bail conditions that he should not attend an airport or port. 46. In our view we have given sufficient weight to the substantial sureties provided by the defendant but we agree with the Crown that they address the risk of flight from the Court's jurisdiction and are sufficient to justify bail when combined with the standard condition that he remain within the jurisdiction. We think it would be surprising for any court to allow a defendant out of its jurisdiction on the eve of a trial for serious offences. 47. We do not accept Mr Kelleher's submission that allowing the Attorney General to give consent to the defendant leaving the jurisdiction constitutes an improper delegation to the Attorney General as a non judicial authority of a discretion which has the effect of imposing a "deprivation of liberty" on the defendant. We have already found that restricting the defendant to the Island does not amount to a deprivation of his liberty. A defendant subject to such a restriction will already be at liberty within the Island. Delegating to the Attorney General the power to consent to a defendant leaving the jurisdiction upon application, is a sensible administrative act which allows flexibility for the enormous variety of circumstances that will face individual defendants on bail within the Island. The Court could impose a rigid restriction on a defendant leaving the jurisdiction but that would place the burden on defendants of having to apply to the Court in every single case where permission is sought to leave. It is in the interests of defendants generally that such applications can be made to and granted by the Attorney General. 48. Nor do we accept that restricting the defendant to this jurisdiction is in breach of his Convention rights to respect for private and family life and freedom of thought, conscience and religion. There should be no interference by public authority with the exercise of the defendant's rights to family life under Article 8 except such as is in accordance with the law and is necessary in a democratic society for the prevention of disorder or crime. The defendant's right to freedom to manifest his religion or beliefs under Article 9 is subject to such limitations as are prescribed by law and are necessary in a democratic society for the protection of public order. The maintenance of public order requires that offences shall be tried and punished (see Wemhoff at paragraph 5) and it is manifest that such rights are subject to due criminal law process. To argue otherwise would be to say that no defendant in a criminal case with for example a family could be detained in custody. In any event, in this case the defendant is not in custody but has

complete liberty within the jurisdiction. There is nothing to prevent his family visiting or coming to live with him in the Island and nothing to prevent him practising his religion alone, or in community with his family or other guests he may invite. 49. The problems faced by the defendant's family and businesses, if they amount to a change in circumstances, are relevant in so far as they impact upon the risk of flight and we agreed with the Crown that they enhance rather than reduce that risk. They are also relevant to whether the Court wished to act exceptionally on compassionate grounds, but as much as we sympathised with the circumstances of the defendant and his family, we concluded that this was not a case for us to so act. 50. Finally, Mr Kelleher suggested that in bail applications the presiding judge should direct the learned Jurats as to the law in relation to the granting of bail in open court prior to retiring. We declined that invitation. The principles to be applied on bail applications are clear and the task of the Court in any application is to apply those principles to the great variety of circumstances and facts that will be presented to it. On occasions the Court will be moved to act entirely on compassionate grounds. Bail applications are usually made during public business on a Friday morning, often without notice, and we see no good reason to place further pressure upon court time by requiring the presiding judge to formally direct the Jurats on the law in open court. Application for the release of surety interest 51. Mr Kelleher submitted that to the extent the interest earned on the surety monies did not form part of the required "guarantee" for the defendant's bail, it must be held by the Viscount to order of the defendant and the third party sureties. By directing the Viscount to release the interest earned the quantum of the sureties will remain precisely as it was ordered on 27th February 2007. If the Crown objects to the application, it must be for the Crown to justify an effective increase in the amount of the guarantees from that ordered on 27th February 2007. 52. The Crown responded that as a matter of construction the interest forms part of the surety under the bail conditions and is not refundable. The Court required the defendant to surrender or cause to be surrendered the balances on a number of accounts, which balances must include the interest earned on them subsequently from time to time, since the interest forms part of the balance. The bail condition never stated any fixed maximum amount of surety. 53. In the absence of any authority or research into the past practice of the courts in Jersey, we concluded that where money is lodged with the Viscount by way of surety for the appearance of an accused person, the surety extends not only to the capital sum but to any interest earned on that sum, pending the appearance of the accused person. There is thus no obligation upon the Viscount in the interim to remit any interest earned on the capital to the person who provided the surety. 54. The Court has the power to vary the terms of bail at any time. In this case, we took into account the quantum of the monies lodged by way of surety, the length of time that had elapsed since those monies were lodged and the financial circumstances of the defendant (albeit provided in the most general of terms) and in the exercise of our discretion determined that the interest earned on those monies from 28th February 2007 to 30th June 2009 should be released, leaving the capital amount originally furnished on 28th February 2007 as surety for the appearance of the defendant. For the avoidance of doubt,

interest earned from 30 th June 2009 will be retained by the Viscount pending the appearance of the defendant or further order. Authorities Proceeds of Crime (Jersey) Law 1999. "Guidelines to Prosecutors and Crown Advocates on ECHR aspects of Bail" issued by the Attorney General. Wemhoff v Germany (1979-80) 1 EHRR 55. Stögmüller v Austria (1969) 1 EHRR 155. Neumeister v Austria

(1968) 1 EHRR 91 . R (on the application of F) v Southampton Crown Court (2009). Guzzardi v Italy

(1980) 3 EHRR 333 . Secretary of State for the Home Department v AP

(2008) EWHC 2001 (Admin) . Skrobol v Poland

(2008) 46 EHRR 4 . Archbold 2004. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 26 October 2026 · Esheria