



## **Extradition: electronically monitored curfews and Article 8**

### **Introduction**

In almost every extradition case where bail is granted, an electronically monitored curfew (“EMC”) condition is imposed on the requested person (“RP”). Given the length of time that it can take to progress an extradition case through both Westminster Magistrates’ Court and the High Court, this means that RPs may be subject to EMCs in extradition proceedings for a substantial period of time.

Luckily for RPs, the English courts have repeatedly held that the time that the RP has spent subject to an EMC is a relevant consideration in the balancing exercise to determine whether extradition is a disproportionate interference with the RP’s rights under Article 8 of the European Convention on Human rights (“Article 8”).

But what weight is to be placed on an EMC in the Article 8 balance? This article sets out several factors that practitioners should be aware of. It starts by considering the situation where the EMC can affect the sentence that the RP will serve in the Requesting State: it discusses the court’s approach to expert evidence on how the Requesting State will treat the EMC, and the considerations that arise depending on whether the EMC wholly or partially offsets the RP’s sentence. It then moves on to discuss the weight that an EMC carries even if it does not wholly or partially offset the RP’s sentence: it will be seen that whilst an EMC will not carry significant weight in and of itself, it is often capable of tipping the balance in borderline cases. Finally, the article considers factors relating to the EMC itself which can increase or decrease the weight to be afforded to it.

### **Does the EMC affect the sentence that the RP will serve in the Requesting State?**

The first question practitioners should ask themselves when considering an EMC is whether (and how) the EMC would be offset against the sentence that the RP will serve (or would be likely to serve on conviction) in the Requesting State.

Of course, under section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Act 2020, every day subject to a “qualifying curfew” (i.e. an EMC of at least 9 hours’ duration per day) will count as half a day deemed served against any sentence imposed in England and Wales. However, these provisions do not apply in extradition proceedings.

Instead, the key question is how under the law of the Requesting State, the time spent subject to an EMC whilst extradition proceedings are ongoing will be treated.

### ***Obtaining expert evidence on how the Requesting State will treat the EMC***

Our key question can be answered by obtaining expert evidence. If the RP adduces clear evidence as to how the EMC in the extradition proceedings will be treated under the law of the Requesting State, then the English court is entitled to accept that evidence and proceed on the basis that that evidence is reliable, “*in the absence of reasoned opposition*” in the form of further information from the Requesting State.<sup>1</sup> Crucially, this means that the English court is not required in all cases to simply leave the application of the law of the Requesting State to the Requesting State itself.

For example, *Doga v France [2023] EWHC 2561 (Admin)* concerned whether the time that the RP had spent subject to his EMC during the extradition proceedings would be offset against his French sentence. In this case, it was not in dispute that as a matter of French law, one day subject to an electronically monitored house arrest (“EMHA”) must be treated as one day of imprisonment. However, it was disputed whether the period of EMC should be treated as a corresponding period of EMHA under French law.

The RP adduced expert evidence in the form of a report by a French lawyer. The report concluded that every day the RP had spent subject to his EMC would correspond to a day of EMHA (and thus be deducted from his sentence). The French authorities responded to this report by stating that whether the EMC would constitute EMHA “*can only be decided by the court which delivered the sentence, seized by the person concerned with an appeal on the grounds of difficulty of execution; the ruling being made after a full hearing of all parties and a rigorous examination of the material conditions of the house arrest abroad...*”.

Notwithstanding this response, the High Court accepted the expert’s opinion of how French law would be applied in the RP’s individual case (and thus accepted that the EMC would offset the sentence in full). In doing so, Farbey J stated that the French authorities’ response did not deal with the case in any individualised manner or indeed challenge the way that the expert had applied the law to the RP’s case, but instead provided a general statement of law that

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<sup>1</sup> See *Doga v France [2023] EWHC 2561*, at §33.

was consistent with the expert's general statement of French law. Farbey J made clear however that if the French authorities had provided "*reasoned opposition*" to the expert's report, then this opposition would be taken at face value in accordance with the principle of mutual trust and confidence, and the English court would not "*become embroiled with disputed questions [as to the application of the Requesting State's law]*".

***What if time spent subject to an EMC will offset the (likely) sentence in full or in part?***

Suppose then that the RP obtains evidence that the RP's time spent subject to an EMC will be offset in some way against the sentence that the RP will serve (or would be likely to serve on conviction) in the Requesting State. If this evidence is accepted by the court, then what is the upshot of this? This will depend on whether the time spent subject to an EMC will offset the whole of the sentence or only part of it.

If the time spent subject to an EMC will offset the whole of the sentence, then the outcome is clear: discharge must be ordered. This is because where there is no remaining sentence to be served, extradition would constitute a breach of the RP's Article 8 rights (and also, the proceedings would constitute an abuse of process): *Doga* at §§33-35.

If the time spent subject to an EMC will offset only part of the sentence, then the position is more complicated. Even if most of the sentence is offset and only a small amount remains, this is not enough in and of itself to render extradition a disproportionate interference with the RP's Article 8 rights. The authorities make this clear: in *Malar v Slovakia [2018] EWHC 2589 (Admin)*, Supperstone J said that "*there is nothing inherently disproportionate in the surrender of the appellant to serve a sentence that amounts to weeks rather than months*";<sup>2</sup> similarly, in *Molik v Poland [2020] EWHC 2836 (Admin)*, Fordham J stated that "[t]he Court considering Article 8 proportionality must, in principle, respect the time left to be served and which is required, by the requesting state authorities, to be served there ... The court does not evaluate whether sufficient time has been served".<sup>3</sup> However, this does not mean that an EMC that only partially offsets a sentence is of no significance at all. Plainly, the length of any remaining sentence affects the public interest in extradition. Depending on the circumstances of the particular case, it may be that whilst an RP's Article 8 argument would not be strong enough to outweigh the public interest in extraditing the RP to serve their full sentence, that same Article 8 argument would be just about strong enough to render extradition disproportionate where the sentence has been substantially offset by an EMC.

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<sup>2</sup> *Malar*, at §13.

<sup>3</sup> *Molik*, at §11.

### **The weight an EMC carries even if it does not offset the RP's (likely) sentence**

Even if the EMC does not offset the RP's (likely) sentence in any way, the RP's EMC is a relevant factor in the Article 8 balancing exercise. This is so regardless of whether it would constitute a "qualifying curfew" in England and Wales.<sup>4</sup> The question is what weight will be placed on the EMC in the Article 8 balancing exercise.

#### ***An EMC will not be of great weight in and of itself***

If the RP's Article 8 argument is relatively weak, then the fact that they have been subject to an EMC for a long time is unlikely to make a difference to the Article 8 balance. In other words, the length of time that the RP has been subject to an EMC will not be of great weight in and of itself. This is hardly surprising given that "[i]t is not for [the English] Court to ask or answer the question whether someone ... [has] sufficiently been punished."<sup>5</sup>

Two working examples demonstrate the point:

In *Begum v District Court of Zutphen (Netherlands) [2023] EWHC 3291 (Admin)*, the RP was wanted to serve a sentence of 5 months' imprisonment for benefit fraud totalling just over €74,000 across a 4.5-year period. Johnson J held that the RP's Article 8 argument was weak and the fact that the RP had spent a substantial period subject to EMC (indeed, enough to serve the sentence had it been imposed in England and Wales) did not now render extradition disproportionate:

*"25. The effect of the curfew is that the appellant has, over a substantial period of time, had her freedom of movement significantly restricted, at times of the day where she might well otherwise have spent time outside her home. That means that the appellant will, if discharged from the arrest warrant, not have achieved impunity. She will, on the contrary, have been subjected to something that could be seen as a significant degree of punishment. Under domestic legislation, as Ms Hill points out, it would mean that the sentence imposed would, in effect, have been served.*

*26. There is, however, a significant difference between being subject to a curfew in this country and being subject to imprisonment in the Netherlands. The fact is that the appellant had been convicted of serious offending. Although the offences were committed by omission as opposed to any positive act, she had received a substantial sum in benefits from a country she knew she was not residing in over a five year period when she knew*

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<sup>4</sup> See, for example, *Prusianu v Braila Court of Law (Romania) [2022] EWHC 1929 (Admin)* at §49.

<sup>5</sup> *Dobrowolski v Poland [2023] EWHC 763 (Admin)*, §5.

*that she was not entitled to the benefits. The offending took place over a long period of time and involved a high degree of culpability. The court in the Netherlands took the view that, notwithstanding that the appellant had dependant children, the appropriate sentence was five months' imprisonment.*

*27. The judge was generous in saying that the Article 8 factors were finely balanced. The factors that weighed against extradition at the point of his decision were relatively slight and those that weighed in favour were substantial. Notwithstanding the passage of time, and the further period of time to which the appellant has been subject to a curfew, the public interest in favour of extradition, and the obligation to show mutual respect to another Category 1 country, are important factors in the balance. It is for the Netherlands to decide what weight to attach to the curfew, and the impact and length of that curfew can be spelt out in any order. It is not for this court to superimpose domestic sentencing policy on the judgment that would be made by the respondent judicial authority.”<sup>6</sup>*

Similarly, in *Dedza v Regional Court in Olsztyn (Poland) [2022] EWHC 838 (Admin)*, Holman J rejected the argument that on the facts of this non-marginal case, the circumstance that the RP had been subject to an EMC for 25 months should render extradition disproportionate:

*“26. There is, of course, the difference today that the time spent subject to tagged curfew is now not 7 months but 25 months, as I have explained. I accept the submission of Ms Hinton that 25 months spent subject to a curfew, which requires a person always to sleep at the same address, does represent a restriction or restraint on liberty. Certainly, in a marginal case, 25 months spent on curfew might be sufficient to tip the balance. But I cannot accept that even 25 months subject to a curfew between the hours of midnight and 6 a.m., when most people might reasonably expect to be in bed at home anyway, begins to outweigh 1 year 1 month and 22 days of imprisonment. The degree of restriction on liberty of a tagged curfew is altogether different from the restriction of being imprisoned 24 hours a day within a prison. So, I accept that the fact that he has been subject to a curfew for 25 months should go into the Article 8 balance, but it is not a factor which could now tip that balance the other way from the manner in which the district judge decided this case.”<sup>7</sup>*

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<sup>6</sup> *Begum*, §§25-27.

<sup>7</sup> *Dedza*, §26.

### ***An EMC can tip the balance in borderline cases***

So, it is clear that an EMC carries little weight in and of itself in the Article 8 balance. However, as stated in *Dedza* above, an EMC is often capable of tipping the balance in borderline cases.

Here are two recent working examples which demonstrate this:

In *Prusianu v Braila Court of Law (Romania) [2022] EWHC 1929 (Admin)*, the RP was a transgender Roma woman who was sentenced to 12 months' imprisonment for five shoplifting offences which occurred when she was 19-20 years old. The Judge stated that "*the cumulative effect of those features of the case which weigh in favour of extradition are, in my judgment, outweighed by the cumulative effect of those features which weigh against it.*"<sup>8</sup> One of those many features which weighed against extradition in the case was the fact that the RP had been subject to an EMC for 15 months, which was described as "*a real restriction on freedom of movement and autonomy*".<sup>9</sup>

In *Toma v Romania [2024] EWHC 183 (Admin)*, the RP was sentenced to 10 months' imprisonment in respect of a Romanian offence akin to failure to provide a specimen for analysis, contrary to section 7(6) of the Road Traffic Act 1988. Discharge was ordered on appeal. In coming to this conclusion, Hill J referred to several factors, including that the offence was of "*no great gravity*", there would be "*exceptionally severe*" consequences on the RP's son if the RP was extradited, the RP's community ties and the passage of time. Hill J also stated that she had had regard to the 14 months that the RP had spent on EMC in the UK, confirming, as per *Prusianu*, that it was "*a real restriction on freedom of movement and autonomy*".<sup>10</sup> The EMC was plainly a relevant factor in reinforcing the conclusion that extradition would be disproportionate.

### ***Factors relating to an EMC that increase/decrease the weight to be afforded to it***

An EMC is therefore only capable of making a difference in borderline cases. The specific weight that will be placed on an EMC will depend on all the circumstances of the case.

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<sup>8</sup> *Prusianu*, §50.

<sup>9</sup> *Ibid*, §49.

<sup>10</sup> *Toma*, §50 (quoting *Prusianu*, §49).

Practitioners should be aware that there are several factors relating to the EMC itself that may also increase/decrease the weight to be afforded to it:

- **Length of time the RP is subject to the EMC:** Clearly, the longer the RP has been subject to the EMC, the greater the restriction to their individual liberty, and so the greater the weight the EMC should be given.
- **The hours the EMC is in operation:** Again, the greater the number of hours the EMC is in operation for, the greater the restriction to the RP's individual liberty, and so the greater the weight the EMC should be given. By contrast, curfews of limited hours in the middle of the night restrict liberty to a much lesser degree and will be given less weight.<sup>11</sup>
- **Has the RP breached the EMC (and if so, how many times):** When an RP breaches their EMC condition, the EMC has not resulted in the intended restriction of liberty, and so the EMC may be given less weight. However, if the breaches are few and if the reason for the breaches are acceptable to the court, the court may consider it fair to disregard these breaches.
- **The specific impact of the EMC on the RP:** In *Hojden v Poland [2022] EWHC 2725 (Admin)*, Lane J noted that one of the circumstances that would affect the weight to be afforded to the EMC would be the specific impact of the EMC on the RP. He stated: *"The significance to be afforded to curfew conditions will vary, depending on all the circumstances. Where there is evidence that a curfew has had a material effect on a person's ability to work or study or to maintain a family life, it is likely to be afforded greater weight than where the effect has merely been to prevent late-evening socialising. Even in the latter scenario, a long-standing set of restrictions may make the difference, if the case would otherwise be finely balanced."*

## **Conclusion**

In conclusion, EMCs give practitioners a lot to think about and can be of vital importance in Article 8 cases, either by offsetting the RP's sentence or by tipping the balance in borderline cases. The key points for practitioners are as follows:

- The first question practitioners should ask is whether the EMC will offset the (likely) sentence that the RP will face. Expert evidence can assist with answering this question and may be accepted in the absence of "*reasoned opposition*".

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<sup>11</sup> See, for example, *Jencz v Poland [2023] EWHC 132 (Admin)*, §28.

- If time spent subject to an EMC offsets a sentence in full, discharge under Article 8 is assured. If the time spent subject to an EMC offsets a sentence in part, then although extradition is not inherently disproportionate, an RP's Article 8 argument may be more likely to succeed.
- Even if the EMC is not capable of offsetting the sentence, it is still of relevance. It is highly unlikely to be of much weight in and of itself. However, it can be vital in tipping the balance in borderline cases.
- The weight to be placed on an EMC in the Article 8 balance depends on all the factors. There are also several factors relating to the EMC itself which may increase or decrease the weight to be afforded to it. These include the length of time the RP has been subjected to the EMC, the hours the EMC is in operation, whether there have been any breaches, and the specific impact of the EMC on the RP.

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