Neutral Citation Number: [2022] EWHC 2599 (Admin)

Case No: CO/2134/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

14th October 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

REHAN MALIK	**Applicant**
- and -	
GOVERNOR OF HM PRISON HINDLEY	**Respondent**

- -
- -

The **Applicant** in person
(with Michael Shrimpton and Nevazish Mirza of Harper Law Ltd Solicitors in attendance)
Will Hays (instructed by Government Legal Department) for the **Respondent**

- -

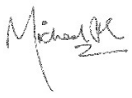
Hearing date: 13.10.22

Judgment as delivered in open court at the hearing

- -

Approved Judgment

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



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THE HON. MR JUSTICE FORDHAM

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

MR JUSTICE FORDHAM:

Introduction

1. The background to this case is that the Applicant was extradited to Germany on an accusation European Arrest Warrant in April 2019 having been unsuccessful in legal proceedings which included a judgment of McGowan J on 19 December 2018: Malik v Germany [2018] EWHC 3479 (Admin). In Germany, he was then tried, convicted and sentenced. Arrangements were then made pursuant to the Repatriation of Prisoners Act 1984 for the Applicant to be brought back to England and Wales to serve that German prison sentence here. A warrant under section 1 of the 1984 Act was issued on 28 September 2021, his return to the UK was on 28 October 2021 and a section 6 replacement warrant was issued on 26 January 2022. His sentence expiry date is 12 April 2025 and his half-time conditional release date is 21 July 2023. Two substantive applications have been made to this Court. Each of them directly concerns the liberty of the individual. The first is an application issued in June 2022 for habeas corpus on the grounds that the Applicant is unlawfully detained. Two prominent legal arguments feature in that application. The first is an argument that aspects of the extradition process involving a German public prosecutor as purported issuing authority, an issue on which the Luxembourg Court ruled on 27 May 2019 (see Minister for Justice and Equality v OG & PI C-508/18 & C-82/19 PPU), have a legally vitiating consequence for the extradition, whose domino effect renders unlawful the Applicant's subsequent and current incarceration. The second is an argument that aspects of the Brexit process relating to whether or not the date for leaving the EU was lawfully extended from 29 March 2019 have a similar legally vitiating consequence with a similar domino effect. That is a provisional outline summary only. I am not on any view dealing directly with the substantive application for habeas corpus today. The second substantive application is one issued on 5 September 2022 for bail pursuant to the Court's jurisdiction to grant bail in habeas corpus proceedings. That application for bail was issued following two orders of this court on 29 June 2022 and 19 August 2022 giving various directions in the habeas corpus proceedings.

Today's hearing

2. Today's hearing was a remote hearing by CVP, scheduled to deal with the question of bail. The formal position is that the Applicant appeared in person. But also involved in this hearing are Mr Mirza of the firm of solicitors Harper Law (where he is an "Administrative Assistant") and Michael Shrimpton a former barrister who was disbarred in May 2019 (see Shrimpton v Bar Standards Board [2019] EWHC 677 (Admin)) and who is also the subject of an order under section 43 of the Solicitors Act 1974 (preventing remuneration by a firm of solicitors).

A hearing scheduled for 27.10.22

3. A further hearing (currently half a day and in person) is scheduled on 27 October 2022, in 13 days' time, before me in Manchester, in the habeas corpus proceedings. That hearing is presently scheduled as a case management hearing. My provisional view was that it ought in principle to be possible, and ought still to be possible, to deal on that occasion with the substance of the habeas corpus arguments in the light of the very clear way in which they have set out been set out in all the documents and given

the nature of the legal arguments. Mr Shrimpton tells me that if he is making the oral submissions, he is likely to need the full half a day. I posed this question through my clerk yesterday: "Whether it should be possible for the Court to take steps to ensure it can deal with the habeas corpus application substantively on 27.10.22. If not, why not? If so, what directions would be appropriate, and where does this leave bail?" Mr Shrimpton sent an email saying: "The Claimant would have preferred the matter to be dealt with substantively at that hearing, but the issues are complex and time would be an issue". GLD told me: "We consider that the habeas application should proceed substantively on 27 October 2022… As for bail, if the Court decides that the matter can be dealt with substantively on 27 October 2022 then we submit it would not be proportionate to determine the bail application now, given that the Applicant will in any event and in short order either be released or remain in custody". One complication is that, as I understand it, a preliminary issue has been ventilated by the Respondent as to whether the wrong procedural route has been taken in this case and it ought to be (or be transferred to be) judicial review proceedings. It remains to be seen whether it will prove possible and appropriate to deal substantively with habeas corpus on 27 October 2022 at a half-day in-person hearing. I have told everyone at today's hearing that I would certainly want to be able to make the maximum progress at that hearing on substantive matters. One possibility that occurs to me is that, if habeas corpus and bail are both still live substantive applications (and there is in light of what I will come on to say no reason to suppose that they will not be), the substance of the habeas corpus application could first be considered – at least in terms of the Applicant's arguments – in some detail, using some of that Court time. It may then prove appropriate, informed in that way, to adjourn the habeas corpus part-heard but be able to deal, on a more informed basis, with the question of bail having allowed sufficient time at the end of that hearing to do so. All of that remains to be seen.

The position today

4. It became clear to me, on considering the papers for today's hearing, that Harper Law were wishing to continue to communicate with the Court and deal with the case on behalf of the Applicant but without considering themselves to be "on the record"; and that Mr Shrimpton was going to be asking the Court to give permission for him to act as advocate on the two substantive applications which I am scheduled to hear. I posed this question, yesterday afternoon, through my clerk:

> ***Whether there is any instrument, authority or commentary that assists the Court on whether it is appropriate or not appropriate for solicitors and a disbarred former barrister to 'assist' a litigant in person, with the former barrister practising as a "legal consultant", without the solicitors being 'on the record', without the solicitors supplying or instructing an advocate with rights of audience, in circumstances where both the solicitors and the former barrister are receiving remuneration (as [I understood had] been confirmed), and with the disbarred former barrister addressing the court as a private individual. Whether there is any body or authority who should be notified of the proceedings who may have a legitimate interest in assisting the Court on these questions.***

5. I received detailed representations by email yesterday afternoon from Mr Mirza; and yesterday evening from Mr Shrimpton, each of which contained several detailed points. The bottom line is that a request is being made for this Court to grant Mr Shrimpton "rights of audience" in this case so as to constitute him an "exempt person" for the purposes of section 19 and Schedule 3 to the Legal Services Act 2007 as a person who is not an authorised person but has a "right of audience" which is

"granted by the Court in relation to the proceedings" (Schedule 3 §1(2)(b)). Mr Shrimpton's communications and observations today draw a distinction between "lay representative" with a "right of audience" and a McKenzie Friend (the limited usual role played by whom is described in the Admin Court JR guide 2022 §§4.6.2 and 4.6.3).

6. There is a temptation in the case such as the present simply to press on and get to the substance, welcoming and receiving such assistance as the Court can be given by anyone who is present, grasping the nettle and – so far as today's case is concerned – dealing with the question of bail. That temptation is all the stronger because this is a case of liberty of the individual. But I have decided that there are two matters which I would want to be able properly to think through, and on which I would want to make an informed, reasoned ruling before I dealt with either of the substantive applications in this case, given the circumstances. Pragmatism and practicality are important. But so are full visibility, proper reflection and principle. It is, in my judgment, important – for everybody – that such matters are carefully and thoroughly approached. I make clear that I have not, at this stage, granted Mr Shrimpton a right of audience in these proceedings. Nor, in my judgment, has any other judge . But insofar as a previous judge has, it was only in any event in connection with an earlier directions stage and – as Mr Shrimpton properly accepts – is to be regarded as having been "temporary". The two previous orders for directions record that the judges who made those orders permitted Mr Shrimpton, at and for those directions hearings, to appear "with the court's permission as a lay representative for the claimant". I have read everything that Mr Shrimpton and Mr Mirza have written, and I have allowed each of them, and the Applicant himself, the opportunity to speak to me – not on any aspect of the substantive applications – but solely on the question of how I should deal with the two matters discussed below, and what directions are appropriate.

7. I have raised with the parties that, in the context of both and each of the two matters that have concerned me, I would also like to know whether the Bar Standards Board and/or the Law Society would wish to seek to make any representations or provide any assistance to the Court, possibly in writing, but done at speed. I have not been persuaded that it suffices for Mr Shrimpton to observe that the BSB is "well aware" of his practice. I would want any available assistance as to the approach I should take. I add this. If, on reflection, either of the parties or those involved consider that there is any other body who may be able to assist or may have an appropriate voice to be heard, it is open to them to inform such a body who would then be in a position to seek permission to make brief observations at speed in order to assist this Court.

8. In relation to both matters which have concerned me, one potentially relevant question is whether Harper Law and Mr Shrimpton are receiving remuneration for assisting the Applicant. Mr Shrimpton's email says: "So far as I am aware Mr Mirza is assisting both the Claimant and the Court pro bono". Mr Mirza's email did not tell me whether or not Harper Law were being remunerated. It said:

> ***The Claimant's funds are limited and Mr Shrimpton's fees are only a fraction of what counsel might charge. There is no sensible prospect of the Claimant being able to instruct solicitors and counsel in the usual way.***

I had taken Mr Mirza's email to be saying that both Harper Law and Mr Shrimpton were receiving or to receive remuneration for dealing with this case. But Mr Mirza

has told me at today's hearing that there is no remuneration, so far as he and the firm are concerned, and that the steps being undertaken by them are purely "pro bono" and "in the interests of justice". Mr Shrimpton tells me he is remunerated, by payment direct to him by the Applicant's brother.

9. The Applicant has told me that he is strongly reliant on the assistance he is receiving from Mr Mirza and Mr Shrimpton, and that these proceedings would not be possible from his point of view (and in prison) without their help.

Solicitors, but not "on the record"

10. The first matter of concern is this: whether Harper Law are "on the record" or are going to come "on the record"; if not, why not, and with what consequences; and whether it is appropriate for the Court to continue to communicate with Harper Law. Mr Mirza tells me that the firm is assisting only by forwarding on and receiving communications; that they act as a post-box, to assist the Applicant who is in prison, and all on a pro bono basis. Mr Mirza says they are not "on the record" because it is not an area of specialism with which they deal. In terms of what the implications would be of being "on the record", he fairly told me he and the firm would need to think about that. Mr Shrimpton says he could not be instructed if Harper Law were on the record, because of an order under section 43 of the Solicitors Act 1974 to which I have referred, but that the firm could instruct his company (Shrimpton Associates). He says the s.43 order prevents him from being paid directly by solicitors, but they could remunerate the company (Shrimpton Associates). Mr Shrimpton suggested that there might be "considerable difficulty" if Harper Law were on the record, because they may be required to charge the Applicant fees. He says a previous Judge was content that Harper Law should be a point of contact, and indeed welcomed this helpful role.

11. This first matter of concern can I think be dealt with by me giving the opportunity for the filing of brief observations, and a witness statement from somebody at the firm (which can also be brief), and any relevant documents or materials. The Respondent could also further assist. There could be assistance from the Law Society. I do think clarity is needed, to assist me, including as to: the implications of being on the record, or not; and whether in fact Harper Law are the solicitors acting for the Applicant (see eg. CPR 42.1). I observe that, in the bail application, the "address to which documents should be sent" was given as Harper Law. I emphasise that I have reached no view on this first aspect. I should also say this. If this were the only point of concern, I would have proceeded to deal today with bail and then made directions relating to this aspect so that it could be considered as the habeas corpus case proceeds.

Power to grant rights of audience

12. The second matter of concern is whether it is appropriate to grant Mr Shrimpton a right of audience in relation to the proceedings, pursuant to the 2007 Act, for either or both of the substantive applications. This is necessarily a prior question, before dealing with bail. That is because, very understandably, the Applicant wishes Mr Shrimpton to advance his case on bail at an oral hearing. One possibility which I briefly ventilated, simply so it could be thought about, was whether in the light of everything that has been written about bail I could properly deal with bail today by allowing any oral representations to be made by the Applicant in person. He, very

understandably, did not encourage that course. Mr Shrimpton's observation about it was, definitively, that what was needed was an oral bail hearing and that what was needed was prior determination of the right of audience question. His starting point had been that rights of audience should be granted today, to deal with the bail application, and I should proceed to hear that substantive application. However, for the reasons that I am explaining in this judgment, I am not prepared to take that course and will be adjourning the question of bail.

13. In relation to this second matter of concern, I would need to think about the following: what is the purpose of the statutory power and how should it be approached; what are the implications of granting, or refusing? Mr Shrimpton says in his oral observations today that the "overriding" duties owed by an "advocate" to the court, and duties owed to the opponent, would be owed by a person on whom the court grants rights of audience pursuant to the statutory power. He says that consequence is "implicit" (in the legislation and/or the grant of the right). In my judgment, that is a very important point. But I need to be clear about it, about its source, and about how secure this conclusion can be. I would want further assistance with that. Mr Shrimpton also says his practice of acting as a "lay representative" in the Courts has been "working well" now for "6 years"; that he can act for those who cannot afford fees which would be charged by a barrister, and who are not able to secure legal aid. He says there is no "harm" to the interests of justice, in granting leave for "an experienced advocate" (albeit disbarred), who is able to "build up a good reputation" and able to "hold themselves out" as assisting the Court, where otherwise the litigant being helped would go unrepresented. He says this statutory power is a broad discretion, that the test is simply "the interests of justice". He also invoked, orally: equality of arms, the Human Rights Act 1998 Article 6; and the administration of justice. Again, I want further assistance, in writing, with support, in authority or commentary, if it can be made available. I also want to be able to consider and reflect on this question: if an 'ad hoc' right of audience were to be granted, pragmatically, for the substantive applications in the present case, then logically why would it not be granted in <u>any</u> case, and therefore in <u>every</u> case? I would also like to be clear whether, and what, attempts have been made to use any solicitor or barrister with rights of audience. Again, I emphasise: I have reached no view on this aspect.

14. Both Mr Mirza and Mr Shrimpton relied strongly, in their emails, on previous occasions (to which descriptions I will return below) on which it is said that Courts including the High Court and Court of Appeal have given Mr Shrimpton permission to act as an advocate, with rights of audience, with the leave of the court. Today, Mr Shrimpton has described a number of cases, including a ruling (by email) by Gloster LJ in the Court of Appeal (in response to an opposed application and representations); and a case in this Court involving a decision by Ouseley J (albeit without a reasoned ruling). I have read and heard what has been said. But I want to see the materials which show me: all occasions where permission to address a Court as advocate has been sought by Mr Shrimpton; whether it was granted or refused; what representations were made; and what reasons were given. I record that I was given these descriptions. Mr Mirza's email refers to:

> ***… the many other cases where Mr Shrimpton has been granted leave since commencing to practise as a legal consultant in February 2016. We understand that Ouseley J granted leave to appear in that year in the High Court and the Court of Appeal (Civil Division) granted leave the following year. In that case (<u>Tiuta International plc v Wawman</u>) the***

> ***judgment appealed was for over £5 million and leave was granted by the then Deputy Head of Civil Justice, Gloster LJ. None of these precedents are binding but they are nonetheless precedents… We understand that in the last month Mr Shrimpton has been given leave to appear in a motoring case in the Magistrates' Court and by Chief ICC Judge Briggs in the Business and Property Court (IG Index plc v Card). We understand that the Magistrates' Court matter was in Medway Magistrates' Court and was the first time Mr Shrimpton appeared as a lay representative in a criminal matter. Mr Shrimpton has also been regularly appearing before tribunals where leave to appear was not required, including a professional disciplinary hearing before the Nursing and Midwifery Council. He has apparently appeared in the First Tier Tribunal (Immigration and Asylum Chamber), the Upper Tribunal, the Employment Tribunal and the Land Registration Tribunal.***

Mr Shrimpton's email tells me:

> ***As Mr Mirza has pointed [out], I have appeared as a lay representative with leave before the Court of Appeal, in 2017. I also assisted in a planning appeal (judicial review) in 2019 without objection, settling the grounds of appeal and skeleton argument after the appellant ran out of funds to pay solicitor and counsel. PTA was refused on the papers, by Lindblom LJ. At the enforcement stage I appeared as a McKenzie Friend before the Telford Magistrates' Court, settled the grounds of appeal and skeleton argument for the Divisional Court, which effectively accepted my arguments below. A copy of the decision [Jones] is attached as a courtesy, referring back to the 2019 appeal. In that case the local authority, without invitation or agreement, treated me in effect as a solicitor and served the summons on me, which I promptly passed to my client, inviting the authority to re-serve. As I pointed out, I was only a consultant and service had to be direct on the client, as I was not his legal representative…***
>
> ***The majority of applications for me to appear as a lay representative have been granted. Michael Green J refused leave in a short PTA hearing in the Chancery Division in multi-million pound professional negligence litigation in 2021 but was not taken to the Agassi case [[2005] EWCA 1507] and I suspect was unaware that the Court of Appeal had granted me leave in 2017. I had previously been given leave in the same case by a learned Deputy Master and was thanked for my assistance. In the Court of Appeal I acted in the same way as I acted on 19th August, that is to say as a lay representative, not as a McKenzie Friend, addressing the court (David Richards LJ) from the solicitor's row, not counsel's. Particular difficulties arose in a case involving the welfare of a child, where a District Judge granted leave by email but a Circuit Judge had already refused it at a hearing. Normally I would not agree to appear in a child welfare case, but that case was unusual as it had started out as a private law matter and was then merged with a public law case, after I had agreed to assist. The only Crown Court application, made by solicitors before the s.43 order, was refused, the learned judge being uncertain that the 2007 Act applied in the Crown Court. With respect it does but lay representatives in the Crown Court are highly unusual, or at any rate were before the Criminal Bar Association decided with respect that they were employees not professionals and went on strike. (The Court may agree with respect that suitably trained lay representatives could probably help bring the Crown Court backlog down.)***

Mr Shrimpton has provided the Jones case, where he is described as having acted as a "McKenzie friend" in 2019 proceedings in the planning sphere: Jones v Shropshire Council [2022] EWHC 1103 (Admin) at §§7, 40. He has supplied me with a copy of his "Legal CV" which says he is a "legal consultant" whose role includes "informally advising members of the Bar" and says: "I am not currently able to accept instructions due to a disputed s.43 order …" It says:

> ***Since starting to practise as a legal consultant in February 2016 I have appeared as a McKenzie Friend in the Court of Appeal, the High Court and the Bankruptcy Court, in each case with the leave of the court. I have also appeared in the Central Family Court, in County Courts as far afield as Manchester and Margate, the Upper Tribunal (Immigration***

> ***and Asylum Chamber), the First-Tier Tribunal (Immigration and Asylum and Property Chambers) and the Employment Tribunal. Put shortly, my advocacy skills are up to date. I have also done 'police station' type work, accompanying clients to Home Office interviews in Liverpool and a Border Force interview in Dover. In addition I have done a great deal of drafting work. In 2019 I assisted as a McKenzie Friend in a planning judicial review appeal in the Court of Appeal and drafted grounds of appeal to the Supreme Court in a Habeas Corpus appeal.***

15. I also record the Respondent's position. First, these observations in an email (12.10.22):

> ***This is a case that appears to have been driven entirely by Mr Shrimpton, who is a barrister who, as he acknowledges in the CV he previously filed, was previously struck off. Against that background, the Defendant is neutral, but the considerations that the court may wish to take into account include the following. On the one hand, given that the claim has been (in effect) pleaded by Mr Shrimpton from the start it may be that the Claimant would not be in a position personally to add much (if anything) to the written grounds. In other words, to the extent that the Court requires assistance on the issues over and above that which the Defendant has provided and will provide, the court is more likely to be assisted by Mr Shrimpton than the Claimant. On the other hand, there is a risk that if the Court agrees to hear Mr Shrimpton it may be regarded as, in effect, granting Mr Shrimpton rights of audience in circumstances where the relevant regulator has decided to remove them. There may also be a risk of precedent-setting whereby lawyers who are not permitted to practise are nonetheless permitted to take an active de facto role in legal proceedings.***

Secondly, in a further email yesterday (13.10.22):

> ***The Court of Appeal gave guidance in Paragon Finance PLC v Noueiri [2001] EWCA Civ 1402, which may assist the Court, about "the scope of the activities unqualified people are now permitted to pursue in our courts when they are not concerned with litigation in their own right". Paragraphs 59-62 deal with rights of audience and the Court states in paragraph 61, citing D v S [1997] 1 FLR 724, that "Courts should pause long before granting rights to individuals who made a practice of seeking to represent otherwise unrepresented litigants". The Court continues in paragraph 74, quoting the guidance given in D v S: "[The 1990] Act does give a discretion [to grant advocacy rights]. In my view, it is quite clear from the terms in which the Act as a whole is written that it is giving a discretion which is to be exercised only in exceptional circumstances … [The grant of advocacy rights in specific cases] is the responsibility of the courts who have been given that responsibility by Parliament. Those who have rights of audience are subject to very stringent requirements…. The law must be administered fairly. If the position was otherwise than I have indicated, others can do exactly the same as [X] and that would be monstrously inappropriate having regard to the requirements that are place upon those who have normal rights of audience." The power to grant rights of audience is now contained in the Legal Services Act 2007 which post-dates Paragon Finance; although the power is stated in similar terms under the 2007 Act (at paragraph 1(2)(b) of Schedule 3) to its predecessor in s. 27(2)(c) of the Courts and Legal Services Act 1990.***
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> ***The 2010 Practice Guidance on McKenzie Friends, which postdates the 2007 Act, may further assist…. Paragraph 19 states that "Courts should be slow to grant any application from a litigant for a right of audience [...] to any lay person, including a MF." These final words suggest that this part of the guidance applies to any lay advocate and is not confined to McKenzie Friends. It continues: "This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice." Paragraph 21 contains examples of the circumstances in which such applications have been granted. Paragraphs 27-30 deal with remuneration. We suggest that the BSB may have an interest in these matters. In the time available, we have not been able to fully investigate all aspects of Mr Justice Fordham's***

> ***question but we hope the above assists. Should the Court require further assistance from the Defendant on this point ahead of the hearing listed for 27 October 2022 we would be happy to oblige.***

The way forward

16. In all the circumstances, I am making an Order which will be designed to achieve the following. (1) The application for bail is adjourned to the scheduled hearing on 27 October 2022. (At that hearing the Court will progress the substantive applications to the extent that it is able in the circumstances as they then are.) In the meantime: (2) The Respondent's solicitors are to notify this afternoon the Bar Standards Board and Law Society providing a gist and subsequently this judgment. (3) Mr Shrimpton and Mr Mirza (and Harper Law) shall have until 4pm on Monday 17 October 2022 to provide any further materials in the light of the judgment today of the court. (4) The BSB and Law Society have until 4pm on Wednesday 19 October 2022 to file any observations or materials to assist the Court should they wish to do so. (5) The Respondent shall have until 6pm on Wednesday 19 October 2022 to file any observations or materials in light of this judgment and anything that has been received by the Court. (6) Mr Shrimpton and Mr Mirza (and Harper Law) have until 4pm on Thursday 20 October 2022 to file any observations or materials in reply. (7) The Court will deal on the papers by way of a written determination with the question of rights of audience and if appropriate any issue arising out of the "on the record" matter. (8) Liberty to the parties to apply to Fordham J for any variation of the directions of any further directions to be considered in the first instance on paper. I will ask for assistance in the drawing up of an order to embody all of that. I ought to make clear that it was accepted, by all those who addressed me today, that the rights of audience question (and anything relating to "on the record") could and should be addressed by the Court on the papers and determined on the papers with a ruling to be released giving the Court's decision and reasons. So, in all those circumstances the application for bail is adjourned and I make the order in the terms outlined. I will ask for assistance in the drawing up of an order to embody all of that. I ought to make clear that it was accepted, by all those who addressed me today, that the rights of audience question (and anything relating to "on the record") could and should be addressed by the Court on the papers and determined on the papers with a ruling to be released giving the Court's decision and reasons. So, in all those circumstances the application for bail is adjourned and I make the order in the terms outlined.

14.10.22