IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 3491 (Admin)

No. AC-2023-LON-003746

Royal Courts of Justice

Friday, 29 December 2023

Before:

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

B E T W E E N :

THE KING
on the application of
RAOL BARIZI — Claimant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

MR A SCHYMYCK (instructed by Duncan Lewis Solicitors) appeared on behalf of the Claimant.

MR G DINGLEY (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T
(Via Microsoft Teams)

(Transcript prepared without the aid of documentation)

MRS JUSTICE ELLENBOGEN:

1 By way of urgent interim relief, the claimant seeks his immediate release from immigration detention into accommodation provided by the defendant pursuant to Schedule 10 to the Immigration Act 2016, pending determination of his claim for judicial review. The application is made on an urgent basis given that it concerns his liberty. This hearing was listed by Murray J on 15 December 2023.

2 The claimant's current period of immigration detention is his seventh. He first entered the UK in August 1998, subsequently leaving to visit countries in continental Europe and returning on an unknown date. From March 2002 onwards, he has acquired many convictions, including those for which he received custodial sentences, the longest of which being of twenty-four months and relating to his conviction for robbery, theft from a person and assault occasioning actual bodily harm. Notice of liability to deportation was issued on 28 September 2011.

3 The claimant asserts that he is an Italian national of Romany descent. At a time when he was in prison, the defendant made efforts to arrange an emergency travel document ("ETD") interview. On 16 March 2012, the claimant completed a bio-data form, at the defendant's request, which was sent to the Italian authorities. Following investigations regarding his nationality, the defendant decided to issue a non-EEA stage deportation notice, on 25 April 2012. On 30 October 2012, the claimant requested that the defendant arrange an ETD interview with Italy as he wished to return. On 5 November 2012, the Italian Embassy responded to the defendant, stating that it had no record of the claimant. On 7 December 2012, the defendant initiated an identity search for Spain. On 7 March 2013, the Spanish authorities confirmed that they had no record of the claimant. On 3 April 2013, the defendant initiated further checks with the Algerian authorities, in light of information received from the French authorities. On 27 June 2013, the defendant made a Stage Two decision and signed a deportation order. On 17 July 2013, the Belgian authorities confirmed that they had no record of the claimant. On 15 September 2013, the defendant again detained the claimant under immigration powers. His records of 21 March 2014 state that checks had been requested from Serbia, Montenegro, Bosnia and Herzegovina, Kosovo, Croatia and Albania, and that checks in Italy, Lebanon, Holland, Germany, Morocco, Tunisia and Algeria had been chased. On 18 June 2014, the First-Tier Tribunal granted bail. In October 2014, the claimant was arrested. He was later convicted of theft and sentenced to two years in prison. Some efforts to conduct an ETD interview were made during that time. On 15 September 2015, he was asked to complete an Algerian ETD form, in Arabic or French, but was unable to comply as he spoke neither language. On 9 October 2015, the defendant detained the claimant under immigration powers. On 27 October 2015, he organised a telephone call with one of his officials, who stated that the claimant spoke fluently in Italian but did not speak like a native Italian. The defendant decided to write to the claimant in Italian in order to test whether he had been educated in Italy. It sought information about his nationality. The claimant responded in Italian on 4 January 2016. On 2 June 2016, the First-Tier Tribunal granted him immigration bail and he was released on 15 June 2016 but was recalled to prison on 13 July 2016, having left his approved accommodation. On 27 September 2016, the defendant noted:

> "Further work on request to the MDA/Algiers identify this man as Raouf Manallah — from Annaba — Algeria. His mother's details

already known and this should be used to support the ETD application to ALGERIA — his country of provenance."

4 On 11 October 2016, at the end of his custodial sentence, the claimant was again detained under immigration powers. On the previous day, the detention gatekeeper had noted that:

> "The barrier to removal is the ETD and the caseworker is working closely with the Investigations Team to provide evidence for an ETD application. If the subject continues to refuse to comply with the ETD process, S35 action will be considered."

On 23 November 2016, the defendant applied for an ETD from the Algerian Embassy in the suspected identity of Raouf Manallah. The claimant completed a bio-data form and provided fingerprints and photographs. That application was rejected on 28 January 2017, the Algerian Deputy Consul stating:

> "… Investigations carried out on the identification of the above named have been unsuccessful. The information provided does not correspond to an Algerian National. In case you have gathered any fresh and relevant information or evidence likely to help in establishing his citizenship, please do not hesitate to forward it to us."

5 On 2 February 2017, the defendant released the claimant. On 26 May 2017, the defendant noted that the claimant had been arrested for burglary, but determined that she would not detain him if he were not remanded, owing to the ETD issues and a report previously issued by the detention centre GP, under r.35(1) of the Detention Centre Rules 2001, which had raised concerns about the impact of detention on the claimant's health. On 27 July 2017, the claimant was sentenced to sixteen weeks' imprisonment for going equipped for burglary. On 3 September 2017, he was detained under immigration powers for a fifth time. On 8 September 2017, the claimant provided the defendant with fingerprints and allowed his photograph to be taken when requested. On 18 September 2017, the defendant's investigation officer stated, in an email:

> "Mr Barizi (not his believed true identity) was put in front of the Algerian officials at Colnbrook on Thursday and verification checks have been sent to Algiers. The information we provided is believed to be his true identity, which has been uncovered through various checks made in Algeria, on social media and with associates of his. A copy of the bio-data submitted by the ETD pack is enclosed, however, we have not amended CID with these details yet as he was unaware that we had this information (although he may know now after the interview with the Algerians)."

On 14 September 2017, the defendant had submitted a second ETD application to the Algerian Embassy, which the embassy confirmed had been sent to Algeria on 29 September 2017. On 11 October 2017, the defendant's investigations team noted that it had obtained information from the claimant's telephone and sent it to the Algerian authorities. The officer stated:

> "I would continue to detain until we receive a response from the Algerians, who are now in possession of what we feel is quite compelling information that would hopefully allow for an ETD to be issued at long last."

The defendant released the claimant on 18 October 2017.

6 On 6 February 2018, the Algerian authorities rejected the second ETD application. On 8 August 2018, the defendant's investigating officer stated, in an email, his confidence that the claimant's nationality was Algerian. By 31 January 2019, the team had concluded that it had exhausted all avenues for obtaining an ETD from Algeria:

> "Following a number of checks and searches, we uncovered what we believed were his family details as a member of the Manallah family, from Annaba, Algeria. Further checks conducted by (MDO in Algiers) provided further confirmation of the details we held and provided further information for an ETD application. However, the application was refused and RL have advised that no further applications should be made without further evidence. I believe we have exhausted all avenues in our [sic] and we are unable to provide any further evidence to support an ETD application."

On 7 August 2019, the defendant's criminal casework team stated:

> "A huge amount of work and resource-intensive checks have been completed and exhausted on this case. He is a persistent offender, who claims to be Italian but this has been disproven. He is highly likely to be a national of Algeria according to our MDO/Algiers, although the Algerians refuse to issue him a document. The subject has been interviewed on multiple occasions (one where he attempted to attack a member of HO staff), his mobile phone content examined, [REDACTED] checks to various countries, property searches, and even data communications/phone number subscriber checks have been carried out which identified the subject had a network of family/friends in Algeria. All attempts to verify the subject in Algeria have still failed. The issue with this case lies with the Algerian authorities. It may require some diplomatic engagement to unblock this case."

7 On 6 September 2019, the claimant's then latest custodial sentence came to an end. The Director of Criminal Casework determined that he should not be detained:

> "This is slightly dispiriting to see, as Mr Barizi has reoffended each time released and the likelihood of his doing so again must be considered high. However, as we are not in a position to document him at present and therefore his removal is not reasonably imminent, I am content to agree with the recommendation to release him under the conditions set out in the summary."

Following his recall to prison on 12 September 2019 and subsequent further period of imprisonment on 8 February 2020, on 28 September 2020 the defendant, once again, determined that the claimant should not be detained at the conclusion of his sentence. He was recalled to prison on 8 October 2020.

8 On 9 March 2021, the defendant detained the claimant. On 23 March 2021, the defendant's Assistant Director authorised his detention, but stated:

> "I recognise that Mr Barizi has an extremely poor immigration and criminal history, we cannot ignore the fact that we have not been able to deport him in the past 7-8 years primarily due to the difficulties in documenting him. He has repeatedly committed a crime or been non-compliant with the conditions of his licence and had been recalled into detention, then transferred to IS detention and then released, only then to repeat the cycle.
>
> While I understand that we need to detain him for a short period (which I am happy to authorise), we should put up a release referral asap because we cannot reasonably conclude that his removal is possible within a reasonable timescale. I note that [REDACTED] authorised his release in Nov before he was recalled back to prison.
>
> Can you also kindly refer the case to SCQ for them to liaise with the chief case work team to consider a grant of DL."

9 On 1 April 2021, the defendant was informed that the claimant was being held on remand and sought a copy of the remand order from the court. On 6 April 2021, the defendant's Returns Logistics Team noted:

> "The subject's ETD application was rejected in 2018. Verification checks were carried out by the Algerian authorities, without any positive results. Nothing further can be done until new evidence or details regarding his identity different from those already provided previously are provided to RLO Team 2 …".

10 Further periods of imprisonment followed, in August 2021 and January 2022. At the end of the claimant's sentence in June 2022, the defendant again considered whether to detain him or release him on bail. On 23 June 2022, the defendant's Returns Logistics Team advised the FNO [foreign national offenders] Returns Team on the possibility of making a new ETD application:

> "As the details will be the same, you might not get a different response. But I would suggest a new ETD application is made with as much information as possible… If you have no supporting evidence, then this case will go to the FCDO in Rabat to review the details on the application form — it will be a good idea [REDACTED] within the email referral which could help in evidencing proof of nationality."

11 On 30 June 2022, the defendant's Strategic Director authorised a release referral and the claimant was released at the end of his sentence on 1 July 2022, but was later recalled. Albeit that no new information or evidence was then available, on 1 August 2023 the defendant decided to apply, once again, for an ETD from Algeria. The claimant's current period of detention began on 7 August 2023. The initial detention decision stated that detention was to be solely for the purpose of completing the ETD form and that, thereafter, a release referral should be completed:

> "Returns logistics have noted that there remain no consistent timescales for an agreement in this case. Hence a conditional release referral should be submitted once the ETD is applied for."

The claimant completed a further bio-data form on 24 August 2023, to allow the defendant to make a third ETD application to Algeria.

12 On 3 November 2023, the First-Tier Tribunal granted the claimant bail in principle, pending the provision of Schedule 10 accommodation by the defendant and the approval of that address by the claimant's Offender Manager. On 28 November 2023, the defendant refused the claimant's application for Schedule 10 accommodation, on the basis that he did not believe there to be exceptional circumstances to justify the provision of accommodation, having assessed that he did not have a duty under Article 3 ECHR to support a foreign national who, in his belief, could freely return home to Algeria. The claimant made representations against that decision the following day and, on 30 November 2023, sent a pre-action protocol letter to the defendant challenging the lawfulness of his detention and the defendant's failure to have provided Schedule 10 accommodation. On 1 December 2023, the First-Tier Tribunal maintained its decision to grant the claimant bail in principle, pending provision of Schedule 10 accommodation by the defendant. On 7 December 2023, the defendant replied to the claimant's pre-action protocol letter, maintaining his position that the claimant's ongoing detention was lawful and that he had lawfully refused the claimant's application for Schedule 10 accommodation. He stated that he had come to that conclusion on the basis that:

> "The claimant failed to comply with bio-data and interviews to obtain further information about his nationality. Therefore it is not considered that the claimant is complying with the Home Office's processes to obtain an emergency travel document to facilitate his return."

13 On 15 December 2023, the claimant made this application for urgent interim relief. It is his position that he has been detained repeatedly since 2013, has repeatedly provided fingerprints, bio-data and photographs for ETD applications; material which has been supplemented by the defendant's own intelligence, efforts and evidence, but that, nevertheless, the Algerian authorities do not recognise him as an Algerian national and will not issue an ETD. On 31 January 2019, he points out, the defendant had stated that he had *"exhausted all avenues … And we are unable to provide any further evidence to support an ETD application."* On 7 August 2019, he had acknowledged that "*the issues with this case lie with the Algerian authorities"*. The claimant says that there is clearly a practical and lasting impediment to his removal from the UK, meaning that, under Article 3 ECHR, the defendant is under a legal duty to accommodate him and that the refusal of accommodation is unlawful. He contends that he remains unlawfully detained because there is no prospect of removal within a reasonable time, the defendant having been attempting, since 2012, to obtain an Algerian ETD, but having repeatedly failed to do so, and with no prospect of any new evidence which would change that situation. It is on those bases that the claimant's claim for judicial review and today's application for interim relief are founded. The claim encompasses a challenge to the claimant's allegedly unlawful detention, said to run contrary to *Hardial Singh* principles, together with claims for false imprisonment over the period 9 March to 7 April 2021 and for unlawful removal from association on 20 October 2023.

14 In its conditional bail update form, dated 18 December 2023, the defendant noted that no update had been received on accommodation:

> "The only barrier to his removal is obtaining an ETD, which he is deliberately not complying with to frustrate a removal. Mr Barizi has

> been assessed as a high risk of absconding based on his criminal and immigration history. He is fully aware of the Home Office's intention to deport him. He has a poor history of complying with reporting and bail conditions. He also fails to comply with bio-data and interviews to obtain further information about his nationality. Mr Barizi has amassed 41 convictions for over 78 offences between 5 March 2002 to 4 October 2022, and is assessed as a high risk of reoffending. The ongoing detention is subject to regular detention reviews during all stages to ensure his detention remains appropriate. Detention is considered necessary whilst suitable accommodation is sourced. Therefore, it is considered that detention is not unlawful. On 18 December 2023, a new JR seeking immediate release and schedule support was received. A court order has been issued requiring our response by 4.30pm on Friday, 22 December 2023."

The claimant's submissions

15 On his application for interim relief, the claimant submits that, as a matter of basic constitutional principle, once the First-Tier Tribunal has granted bail, the defendant is under an obligation to obey that decision: *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46. In *R (Humnyntskyi) v SSHD* [2021] EWHC 1912 (Admin), having reviewed the case law on release orders, Johnson J noted, at para.179, that, when making an order, the court will typically require accommodation to be provided within seven days or fewer.

16 The claimant submits that para.9 of Schedule 10 to the 2016 Act provides for a power for the defendant to provide accommodation to an individual who is subject to immigration bail, and that the defendant's "Immigration Bail – Interim Guidance" policy, version 2.0, dated 9 July 2021, states that provision of accommodation will normally be justified where there is a high risk of the individual causing serious harm. The claimant asserts that he has a record of serious offending, having become stuck in a cycle of immigration detention/imprisonment, release to street homelessness and reincarceration, either through recall to prison or having been convicted of further offences. It is said that his Offender Manager has identified that the provision of accommodation would help to address his offending but that, in any event, the risk of offending cannot itself justify detention in circumstances in which there is no realistic prospect of his removal. The refusal to provide him with accommodation is said to be unlawful as a breach of s.6 of the Human Rights Act 1998 because there is a practical impediment to his leaving the UK. The Italian Government has refused to recognise his Italian nationality and, even on the defendant's account, he cannot return to Algeria because the Algerian Government has repeatedly refused to provide an ETD, notwithstanding its receipt of detailed biographical information. The defendant's officials had been confident that their information was accurate and that there was nothing further which could be provided. In 2019, they had acknowledged that responsibility for the impasse lay with the Algerian authorities. In any event, it is submitted, the defendant has failed to consider whether the claimant ought to be accommodated owing to the risk of harm which he poses. On 5 December 2023, his Offender Manager had confirmed that she had asked the defendant to provide the claimant with accommodation in order to reduce the risk of harm to the public posed by his release, yet neither the defendant's original decision nor his pre-action protocol response had made reference to that obvious issue. It is said that the defendant has failed properly to consider the claimant's application under his policy and that the only rational conclusion, in light of the Offender Manager's position, is that Schedule 10 accommodation be provided to the claimant.

The defendant's submissions

17 By his response to the claimant's application for interim relief, the defendant states that two issues arise: (i) the need to show cause why the claimant should not be released from detention on the ground that there is no reasonable prospect of his removal within a reasonable timeframe; and (ii) his response to the application for interim relief in determining whether or not the claimant should be given Schedule 10 accommodation. He submits that the claimant will be removed within a reasonable period of time; the only barrier to removal has been the defendant's inability to secure an ETD from Algeria to facilitate removal; and that that process has been frustrated by the claimant's non-compliance with the redocumentation process, said to be an accepted fact in para.107.1 of the grounds for judicial review. [I interpose that the highest that the referenced paragraph puts matters is *"Even if the claimant was initially uncooperative …"*.] The defendant submits that the claimant cannot rationally assert that his detention is unlawful or that the defendant is not acting with reasonable diligence when he is directly responsible for impeding his removal to Algeria: *R (WL (Congo)) v SSHD* [2010] EWCA Civ 111, at [102]. In that respect, the defendant is said to have complied with his guidance "Detention: General Instructions", v 3.0, published on 28 September 2023. The defendant states his anticipation that the procurement of an ETD will be resolved "shortly", with the claimant's compliance. No details are given as to the material said to be outstanding; the conduct of the claimant which is said now to be frustrating the issue of an ETD; what is meant by the term "shortly"; or the source of the defendant's asserted confidence, given the history of this matter. It is said that the claimant is a prolific offender with a high risk of reoffending, combined with an appalling immigration history, who has little or no incentive to comply with any conditions which are imposed upon him. In those circumstances, it is submitted, the period of his detention has been entirely proportionate and reasonable: *Lumba v SSHD* [2011] UKSC 12, at [52] to [55]; [107] to [110]; and [121], where the Supreme Court had held that substantial weight ought to be given to the risk of reoffending and absconding as rebutting the presumption against release. In the exercise of his discretion, the defendant did not presently deem it appropriate to provide the claimant with Schedule 10 accommodation. The basis for refusal is said to be that the only barrier to his impending removal is his obtaining of an ETD, which remained a reasonable prospect but had been delayed owing to the claimant's continued non-compliance. In any event, under para.9(2) of Schedule 10, assistance ought only to be granted in "exceptional circumstances". It is the defendant's position that, if there are legal or practical obstacles to removal, that criterion is not engaged because the claimant is able to avoid any risk of serious harm by returning to Algeria and being compliant in that process. Secondly, and as set out in the defendant's "Immigration Bail – Interim Guidance" policy, version 2.0, dated 9 July 2021, "a genuine obstacle to removal" only exists where (materially):

> "(b) the person is unable to leave the UK because he does not have the necessary travel documentation but is taking steps to obtain one."

Reasonable steps should usually be taken to mean that the individual has applied for the necessary travel document from his national embassy, but might include where he is complying with Home Office processes to obtain an ETD to facilitate return. It is the defendant's contention that the claimant is unwilling to return home to Algeria, rather than being unable to do so, and that there is no duty under the ECHR to support foreign nationals who are freely able to return home: *R (Kimani) v Lambeth LBC* [2003] EWCA Civ 1150, at [49]. It is submitted that the fact that ETD applications might have been unsuccessful on

previous occasions, over four years ago, does not mean that they will fail on this occasion, with his cooperation. For such reasons, the court is invited to refuse the application for interim relief.

18 In reply, the claimant submits that the sole question to be determined at the interim relief hearing is whether the balance of convenience favours an order for provision by the defendant of Schedule 10 accommodation pending the determination of the claim for judicial review. Consideration of the claimant's release is not in issue, as the First-Tier Tribunal granted bail on 3 November 2023. It is said that two distinct underlying issues arise: (a) whether the defendant is required to provide the claimant with accommodation under Schedule 10, to avoid a breach of his ECHR rights; and (b) whether the defendant is required to provide the claimant with accommodation under his published policy because of the risk of harm to the public if he is released to homelessness. It is said to be apparent from the defendant's disclosure bundle that the defendant has taken no action to remove the claimant since his detention on 7 August 2023; and that the OASys report demonstrates that the claimant has been assessed by the Probation Service as presenting a risk of reoffending greater than 70 per cent and that the lack of accommodation is related to his offending history. The court must identify whether there is a serious issue to be tried and where the balance of convenience lies. A recent example of a mandatory order to provide Schedule 10 accommodation to an immigration detainee in order to facilitate release on immigration bail was to be found in the judgment of Chamberlain J, *R (ER) v SSHD* [2023] EWHC 3187 (Admin). The claimant submits that the defendant does not dispute that his release to street homelessness would constitute a breach of Article 3 ECHR. Accordingly, the dispute appears to be over whether the claimant could cure that problem by leaving the UK. The claimant's position is that he cannot leave the UK because, even if the defendant is correct that he is an Algerian national, the Algerian authorities will not issue an ETD and, as the defendant had concluded in 2019, the issue lies with those authorities rather than with anything done by the claimant or the defendant. The claimant is said to have complied with the completion of the Algerian ETD forms and allowed his fingerprints and photograph to be taken in support of the application. His initial refusal to provide biographical information had been circumvented by the defendant, such that the defendant had been in possession of a complete biographical portrait of the claimant as long ago as 2017. If the defendant had believed that the claimant was not complying with the ETD process, he would have sought to prosecute the claimant under s.35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The Algerian authority's refusal to issue an ETD constituted a practical obstacle to the claimant leaving the UK, such that, without Schedule 10 accommodation, he would remain in the cycle previously noted. Furthermore, the defendant had failed to consider the provision of accommodation on the basis of his policy on providing accommodation to high risk offenders. It is submitted that this is a paradigm example of a case in which the defendant can protect the public by providing the claimant with accommodation, and that he has failed to follow his published policy and/or that the only rational conclusion would be to provide accommodation. It is the claimant's position that, were the court to consider that he has a prima facie case on either issue one or two, the balance of convenience favours an order to provide him with Schedule 10 accommodation. He had now been detained for almost five months, during which period the defendant had taken no steps towards removing him from the UK. He had a strong case for unlawful detention and ought to be released pending final determination of his claim for judicial review. Taking account of the New Year's Day Bank Holiday, the claimant sought an order requiring provision of accommodation and his release within eight days, that is by 4:00pm on 6 January 2024.

Discussion and disposal

19 Paragraph 9 of Schedule 10 to the Immigration Act 2016 provides (materially):

> "(1) Sub-paragraph (2) applies where—
>
> (a) a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and
>
> (b) the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised.
>
> (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.
>
> (3) But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.
>
> …".

20 It is for the Secretary of State, not the court, to determine whether circumstances are exceptional. The court's role is limited to a review of that assessment on public law grounds: *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768, per Sir Thomas Bingham MR at pages 784 to 785. In considering whether to grant Schedule 10 accommodation, the Secretary of State must act compatibly with Convention rights (within the meaning of s.1(1) of the Human Rights Act 1998) unless he is compelled to do otherwise by Schedule 10 (or some other primary legislation): see s.6 of the 1998 Act. Moreover, the statutory power to provide accommodation must, so far as possible, be given effect in a way which is consistent with Convention rights: see s.3(1) of the 1998 Act. In *R(Humnyntskyi)*, at para.15, it was accepted that there are circumstances in which the Secretary of State is compelled to treat the circumstances as exceptional, and to grant accommodation under Schedule 10 (and to grant or support the imposition of a bail residence condition). Those include cases in which (i) a person has been granted bail by the tribunal, with a residence condition; (ii) by reason of lack of accommodation, that person is at real and immediate risk of suffering inhuman and degrading treatment within the meaning of Article 3 ECHR; and (iii) that person is unable himself to avoid that risk, for example by securing accommodation from another source, or returning to his country of origin. Under Home Office internal guidance on the provision of Schedule 10 accommodation, promulgated on 15 January 2018, addressed to the Secretary of State's caseworkers, certain accommodation could be provided to a high risk foreign national offender, even if the denial of accommodation would be compatible with Article 3 and vice versa. The defendant also has a published policy, dated 9 July 2021, entitled "Immigration Bail – Interim Guidance", version 2.0, to which both counsel referred, which includes the following material content (emphasis original):

> "**Accommodation**
>
> There may be circumstances where a person is granted immigration bail **subject to a residence condition requiring them to live at a specified address, and the person would not be able to support himself or herself at that address** without the assistance of the

Secretary of State. Under paragraph 9 of Schedule 10, the Secretary of State may provide, or arrange for the provision of, facilities for the person's accommodation at that address to enable the bail condition to be met, but only in exceptional circumstances.

Exceptional circumstances

The power may be exercised only if the Secretary of State thinks that there are exceptional circumstances to justify doing so. The types of cases where exceptional circumstances will normally justify providing accommodation under paragraph 9 of Schedule 10 are …, Harm cases and European Convention on Human Rights: Article 3 cases but are not limited to these types of cases.

…

Harm cases

Cases involving:
• people – including Foreign National Offenders (FNOs) – who are granted bail and who are currently assessed by HM Prison and Probation Service (HMPPS) as being at a high or very high risk of causing serious harm to the public

• FNOs at high risk of harmful reoffending against an individual – for example, offences of domestic burglary, robbery, sexual assaults and violence – who are assessed using the Offender Group Reconviction Scale (OGRS) with a minimum score of 70%

where that person has nowhere suitable to live in accordance with their probation licence and/or multi-agency public protection arrangements (MAPPA), for a limited period, or otherwise at the discretion of the Home Secretary in the interest of public protection.

…

Undertaking a Human Rights Assessment

The consideration of whether the provision of accommodation is necessary to avoid a breach of the person's human rights will usually require an assessment of whether they are likely to suffer inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights (ECHR) if they are not provided with accommodation and other assistance to meet their daily living needs while they are in the UK. However, decision makers should only provide accommodation for these reasons if it is clear that the person cannot reasonably be expected to leave the United Kingdom. Otherwise, individuals can avoid a breach of their human rights by leaving the UK.

Article 3 of the European Convention on Human Rights (ECHR) is the prohibition on torture or inhuman or degrading treatment or punishment.

When it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life, this is likely to be considered inhuman or degrading treatment contrary to Article 3 of the ECHR (see: *R (Limbuela) v Secretary of State* [2005] UKHL 66).

The decision maker will therefore need to assess whether the consequences of a decision to deny a person accommodation would result in a person suffering such treatment. To make that assessment it may be necessary to consider if the person can obtain accommodation and support from charitable or community sources or through the lawful endeavours of their families or friends.

Where the decision maker concludes that there is no support from any of these sources then there will be a positive obligation on the Secretary of State to accommodate the individual in order to avoid a breach of Article 3 of the ECHR.

However, if the person is able to return to their country of origin, including using support available under the Voluntary Returns Service, and thus avoid the consequences of being left without shelter or funds, the situation outlined above is changed. This is because of the following:

• there is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home (see: *R(Kimani) v Lambeth LBC* [2003] EWCA Civ 1150)

• if there are no legal or practical obstacles to return home, the denial of support by a local authority does not constitute a breach of Human Rights (see: *R (W) v Croydon LBC* [2007] EWCA Civ 266)

A genuine obstacle would only usually exist if either:

- …

• the person is unable to leave the UK because they do not have the necessary travel documentation but are taking reasonable steps to obtain one: reasonable steps should usually be taken to mean that they have applied for the necessary travel document from their national embassy, but may include where they are complying with Home Offices processes to obtain an emergency travel document to facilitate their return

Unwillingness to return is not the same as inability to return, so where there is a genuine obstacle to return the person can be expected to take steps to resolve the obstacle where it is reasonable to do so (for example by applying for a travel document through the national embassy or high commission).

> If there are no legal or practical obstacles preventing the person leaving the United Kingdom, it will usually be difficult for a person to establish that the Secretary of State is required to provide support in order to avoid breaching their human rights.
>
> Clearly, however, if there are obstacles in place that mean the person cannot leave the United Kingdom, or they are taking reasonable steps to put themselves in a position whereby they can leave the United Kingdom but there is likely to be an unavoidable delay in those steps reaching fruition, then it may be necessary to continue to provide accommodation support to avoid the inhuman treatment and breach of Article 3 rights described above."

21 It is not disputed that the defendant has an obligation to comply with his published policy, in the absence of a good reason not to do so. Notwithstanding the OaSys assessment, under which the claimant was assessed as posing a risk of harm in excess of 70 per cent, Mr Dingley acknowledges that no assessment has been made of the claimant by reference to the risk of harm to others which he poses in light of the extent and nature of his offending to date.

22 The test on an application for interim relief is as set out in *American Cyanamid v Ethicon Limited* [1975] AC 396, as modified in public law cases: is there a serious question to be tried and, if so, where does the balance of convenience lie? Where, as here, the application is for mandatory relief, there is a live question on the authorities as to whether the applicant must demonstrate a strongly arguable case or whether the strength of his case is a matter going simply to the balance of convenience. In this case, as Mr Dingley candidly acknowledges, nothing turns on the distinction. I am satisfied that the higher threshold is met in relation to the defendant's failure to provide Schedule 10 accommodation in the face of orders from the First-Tier Tribunal, which are not suggested to have been irregular or, hence, a nullity; the absence, contrary to the defendant's published policy, of any assessment of the harm posed by the claimant if not accommodated (there being no suggestion that he would otherwise have anywhere suitable to live in the UK); and the approach which the defendant has adopted to his consideration of the claimant's ability to return to Algeria, which the defendant believes to be his country of origin. As to the last such matter, the claimant has been detained under immigration powers, most recently since 7 August 2023, in order to effect a deportation order which has been in place since June 2013. The defendant has been attempting to obtain an ETD from Algeria since 2012. Applications were rejected in 2017 and 2018. In 2019, the defendant acknowledged that only diplomatic intervention would be likely to lead to a change in Algeria's position. The lack of likelihood of a change in the absence of fresh evidence has been noted on a number of subsequent occasions.

23 Pressed to identify the non-compliance which had inclined the defendant to the view that the claimant was unwilling, rather than unable, to return to Algeria, Mr Dingley first indicated that he relied upon a sole instance of failure to attend an interview as requested by the Home Office on a date which he was unable to specify. At a later stage, he pointed to a form by which the claimant had been asked to provide biometric data and, on 24 August 2023, had supplied details relating to his asserted name and country of origin (Italy). Mr Dingley had been furnished with no instructions or evidence as to the circumstances in which that form had been provided to the claimant for completion, or how it was that the material provided had frustrated the ETD process in light of the fact that the first rejected ETD application had been made in the "correct name" of Raouf Manallah, and the claimant had previously provided fingerprints, photographs, etc. Noting that an interview with the Algerian

authorities appeared to have taken place on 17 October 2023, Mr Dingley acknowledged that he could provide the court with no information as to its content or outcome. Taken at its highest, the defendant's case is that it had not been until September 2021 that Interpol had confirmed his own intelligence as to the claimant's true identity and country of origin. He could provide no explanation of the leisurely course which matters have taken to date, in particular in light of the conclusion which the defendant had reached in 2019, and which was reinforced subsequently.

24 Even accepting that the claimant has not always been compliant in relation to ETD applications, the defendant has not identified the information which it now requires, but which it lacks, whether or not such information could have been provided by the claimant rather than through his own endeavours. There is also force in the claimant's submission, to put it at its lowest, that it is unattractive for the defendant to rely upon asserted non-compliance in the absence of any referral of the claimant for prosecution under s.35 of the 2004 Act. Mr Dingley has made no submissions as to how it is proposed to break the impasse reached with the Algerian authorities, which has now been the position for a considerable period, or indicated any intention on the part of the defendant to consider the position by reference to the harm which the claimant poses to others if not suitably accommodated. Almost two months after the grant of bail in principle, there has been no evidence filed by the defendant suggestive of any substantive difficulties which he has encountered in the provision of accommodation. Indeed, notwithstanding the orders of the First-Tier Tribunal, implicit in the defendant's position is that he has made no efforts to secure it, instead refusing the claimant's application on a basis which is strongly arguable to have been unlawful.

25 In any event, the strength of the claimant's case weighs in his favour when considering the balance of convenience, which is the focus of the defendant's resistance of this application. Further, absent the order sought today, it would appear that there is no prospect of accommodation being provided within a reasonable time. Indeed, and again without any supporting evidence, Mr Dingley submits that it would take in the order of weeks to find accommodation suitable for the claimant's needs, in the context of a shortage of housing stock. Ambitiously, given the history of this matter, Mr Dingley submits that the process of obtaining an ETD can be "fast-tracked" for an individual in detention in a way which is not possible whilst he remains in the community. If true, the history of this case shows that that has not been the case here and, as Mr Schymyck submits, there is no reason why a further ETD application cannot be progressed whilst the claimant is in the community and, once the ETD has been obtained, he can then be re-detained and removed.

26 I am satisfied that the harm which will be sustained by the claimant were the order sought not to be granted patently outweighs any administrative inconvenience or expense to which compliance with the mandatory order which I consider it appropriate to make would put the defendant. No other prejudice has been advanced by Mr Dingley.

27 That leaves the period for compliance. In *R (AC (Algeria)) v SSHD* [2020] EWCA Civ 36, at [44], a case concerned with the "grace period" to be accorded to the Secretary of State to make suitable arrangements for release once detention has ceased to comply with *Hardial Singh* principles, Irwin LJ held:

> "I would add that, in future, when the question of a "period of grace" arises or might arise, the Respondent should be expected to advance some evidence and to make considered submissions as to what period would be appropriate and why."

That principle applies with equal force to a defendant in circumstances such as the present, who submits that anything other than a short period for compliance with a mandatory order should be accorded, consistent with the cases in this area summarised at para.179 of *R (Humnyntskyi)*. Mr Dingley's generic submission does not satisfy that requirement. Taking account of the festive period, I consider that, exceptionally, ten days is the appropriate period in this case, that is by 4:00pm on Monday, 8 January 2024.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.