Schedule 10 to the Immigration Act 2016

R (Kaitey) v SSHD

1. In my talk I am going to give the gist of a case I argued last week in a remote hearing in the High Court before Laing J, but in which judgment has been reserved. It will help to have paragraphs 1 and 10 of schedule 10 to the Immigration Act before you. Robin Tam Q.C. and Emily Wilsdon acted for the Defendant, Laura Dubinsky, Anthony Vaughan and Eleanor Mitchell for the intervener BID and Alex Goodman and Matthew Fraser acted for the Claimant. I have prepared this talk as a written paper which will be made available by email to delegates on the address provided. Necessarily, this is only a snapshot of the argument.

2. The claim was one in a series of claims, all previous claims having been settled favourably to the Claimants. The judgment is likely to be subject to an attempt at appeal whichever side succeeds. It raises an important legal issue concerning the scope and limits of the powers of the Secretary of State ("**SSHD**") and the First-Tier Tribunal ("**FTT**") to impose conditional bail under para. 1 of Sch. 10 to the Immigration Act 2016 ("**the 2016 Act**"). It is also important in terms of the scale of its impact. Pierre Makhlouf's evidence on behalf of BID was that the total number of individuals subject to conditional immigration bail is likely to be in excess of 90,000, so schedule 10 bail now affects a large number of people. It is worth recalling at the outset that the Immigration Act 2016 abolished "temporary admission" so anyone who does not have leave or status is now on "bail" (unless they are simply at large).

3. The question at issue in the claim is whether a person may remain on bail where it would be unlawful to exercise a power of detention in respect of them. The most obvious circumstances in which that might arise are where to detain a person would offend against the *Hardial Singh* principles for example because there is no realistic prospect of removing them to another country in a reasonable period of time. There are many people from countries to which removal is difficult in this position: Algeria, Morocco, Eritrea, China, Palestine, Iran are notable examples. And that is the position in Mr Kaitey's case. But the question of whether a person can be on bail even though they cannot be detained for breach of bail might also arise where it would be unlawful to detain a person because for example of their vulnerability, or because the are a

trafficking victim, or because they are a disputed minor. A further issue in the claim is whether there are- independently- implied limits on the exercise of the bail powers: whether for example there comes a point when it is unreasonable to maintain bail any longer. The claim has the potential to resolve a longstanding problem, sometimes referred to as "limbo" relating to people who cannot be removed but whom the Secretary of State does not wish to grant leave. Previous case law relating to the system of temporary admission suggested that the harshness of near-indefinite temporary admission was not unlawful.

4. The facts were that Mr Kaitey has been in the UK since 2008. The Claimant was released from immigration detention on bail by order of the First Tier Tribunal in January 2011 subject then to electronic monitoring and has been on bail in the 9.5 years since. In that time his bail conditions have been relaxed to the extent that he is no longer subject to electronic monitoring; he is permitted to work and he has committed no further offences. In that time it has also become clear that there is – to use Lord Dyson's words at paragraph 103 of *Lumba* – no realistic prospect of deportation within a reasonable period of time. Were the Claimant to be detained today, he would seek a writ of habeas corpus as Mr Hardial Singh did, or judicial review of his detention on that basis and be released. It is quite obvious- said Mr Kaitey- that a court would say "there has been no progress over the past decade, what has changed; why is there now a realistic prospect of deportation in a reasonable period of time? And there would and could be no answer to that: his detention would not be compatible with the *Hardial Singh* principles. The Defendant did not dispute that: she said she had never even <u>thought about</u> detaining him.

5. In *B (Algeria) v SSHD* [2018] A.C. 418 the Supreme Court and before that the Court of Appeal recognised that the term "bail" was a legal term of art with hundreds of years of consistent meaning. The Supreme Court held in that case that because Mr B could not be detained, he could not be held on bail because bail under the Immigration Act 1971 could only subsist where there was an underlying power to detain. That, the Court held, reflects the ordinary meaning of bail, but it went on to hold that the "clearest possible words" could be deployed so as to exclude such a meaning of bail. It is a remarkable judgment in that it distinguished the venerable House of Lords case of

Khadir which had held that where a person was liable to detention and could be maintained on temporary admission where a detention power existed, even if the power could not be exercised. The Supreme Court held that distinction in respect of temporary admission did not apply to bail powers because the canons of construction which require detention powers to be "strictly and narrowly" construed applied with rigour to such powers. For example at paragraph 29 of the judgment of the Court it was held that:

> "It is a fundamental principle of the common law that in enacting legislation Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear"

6. The Claimant therefore argued in *Kaitey that* a grant of conditional immigration bail under the Immigration Act 2016 is also derivative of a power to detain- as is ordinarily the case. For that reason, a writ of habeas corpus may issue so as to bring bail to an end: the writ will issue so as to mark the exhaustion of the power from which the bail derives. For that reason, a corollary of a breach of bail is therefore that a person may be re-detained. And indeed, the Claimant relied centrally on the argument that under schedule 10, where a person breaches a condition of bail granted by paragraph 1(2) to schedule 10 the FTT or Secretary of State "must"- according to paragraph 10(12) of schedule 10 - detain them under the power to which they are liable to detention. The claimant argued that is a clear indication that schedule 10 creates is an ordinary form of bail. The significance is that if it creates an ordinary form of bail, then where a person cannot be detained, they cannot be on bail. *B (Algeria)* does not rule out that parliament could bring into existence what it described as an extraordinary form of bail which operates not along the lines of ordinary bail, but more like a legal status equivalent to the now repealed 'temporary admission' status. Indeed, the contention in *B (Algeria)* was that bail under schedule 2 to the Immigration Act 1971 did operate in just such a way but that argument was rejected. The Supreme Court held that it would require "the clearest possible words" to create an extraordinary form of bail that could persist even where a breach of bail did not entail re-detention.

7. The Defendant argued that schedule 10 does just that: it creates an extraordinary form of bail which may be maintained even where a person is not liable to lawful detention.

In other words, the Defendant contended that in those cases "bail" morphs into something similar to a status like temporary admission or limited leave.

8. That means that if detention would exceed or be incompatible with the limits parliament implied into the powers as to the exercise of the power to detain for immigration purposes (as determined in ***R v Governor of Durham Prison, Ex p Hardial Singh*** [1984] 1 WLR 704), then there is no power to impose immigration bail (and thus no power to impose conditions that "are capable of severely curtailing the liberty of the person concerned"[1]). Alternatively, the Claimant said, if there is any ambiguity, the canons of construction helpfully summarised in *B (Algeria)* and applicable where a statute empowers deprivation of liberty (strictly and narrowly; restrictively; do not presume to authorise tortious conduct absent clear words etc.) reach the same result.

9. The Claimant, supported by Bail for Immigration Detainees ("**BID**"), contended that the power to impose conditional bail cannot lawfully be exercised unless the person concerned could be lawfully detained. In that respect the submission in relation to schedule 10 mimicked the findings of the Supreme Court and indeed the Court of Appeal before it as to the essential meaning and function of bail in the common law. In particular, the Claimant submitted that there needs to exist a power, capable of being exercised, by which the Claimant can, if he breaches conditions of bail, be redetained under the powers in paragraph 10 to schedule 10.

10. The SSHD, contended on this first point that the imposition of conditional immigration bail is not predicated on a power to lawfully detain a person under immigration powers.

11. It was common ground that where there is no prospect of deporting a person, then that person is not liable to detention and consequently no power to impose bail exists. That was because all parties accepted that *Tan Te Lam* was correctly decided and indeed it has not been doubted in half a dozen Supreme Court authoritites since. The Claimant said, on the facts his position is no different to that of *Tan te Lam* and his co-appellants in the Privy Council.

[1] See ***B (Algeria) v SSHD*** [2018] AC 418 at [29].

12. Broadly put, the legal question might be said to be whether the relatively new provisions governing bail in schedule 10 to the Immigration Act 2016 which have replaced most of the former bail provisions in the 1971 Act should be interpreted in kind with the reasoning in *B (Algeria),* the latest Supreme Court authority on the interpretation of bail powers (under the 1971 Act) or should be steered instead by the 2004 House of Lords' decision in *Khadir* which related to the scope of powers to grant what was then temporary admission, a form of status that has since been removed.

Article 5

13. The Claimant also argued if his interpretation of the statute is not correct as a matter of common law construction, then what results is incompatible with article 5 ECHR.

14. Article 5(1) permits detention but only in accordance with a procedure prescribed by law and only for one of the prescribed purposes. By article 5(1)(f) detention "with a view to deportation" is one such prescribed purpose. However, it is well established that the jurisprudence under article 5 roughly mirrors the *Hardial Singh* principles: where there is no realistic prospect of deportation in a reasonable period of time, detention in the meantime is not "with a view to deportation": see *Mikolenko*. Consequently, if the statute permits bail and in turn permits detention for breach of bail of a person who is not liable to be detained because in turn there is no realistic prospect of deportation, then the scheme is incompatible with article 5.

The Consequence of Bail being Unlawful.

15. The Claimant submitted that the only statutory alternative to bail is what section 3 of the Immigration Act 1971 calls "limited leave". Limited leave is what the Supreme Court said must be granted to the Appellant *George* in circumstances in which he could not be deported. In that case they approved successive grants of conditional limited leave for six month periods. Limited leave is in substance little different to bail, because it can be granted subject to conditions controlling residence, prohibiting work and study, prohibiting recourse to public funds and requiring reporting. The conditions attached to immigration bail additionally include an electronic monitoring condition and a possible curfew condition.

16. The Claimant argued that there is every reason to suppose that Parliament expects that mechanism to be used rather than a stretched notion of bail for controlling persons whose presence in the UK is undesirable. As a matter of what the Supreme Court called "regularity" or more fundamentally the rule of law, the Claimant submitted it is not acceptable for a person to simply be left in a netherworld without status. That said, the restrictions on leave under section 3 to the Immigration Act 1971 are not much less restrictive, but they do at least mean that a person is on a path to settlement if in the long run there is no resolution to the impasse.

17. By contrast, the Secretary of State's case was that the court should sanction a netherworld where a person has no rights or obligations or even any status other than their very presence being criminalised yet being unable to escape that state is offensive to any civilised notion of humanity and to the rule of law.

18. The SSHD's case was that she can lawfully keep people on conditional immigration bail long after it would cease to be lawful to detain them under immigration powers (for example because there is no prospect of deporting the individual or no realistic prospect within a reasonable period). The main effect of that rather than a restricted and conditioned form of leave is to suspend or limit people's ability to establish stability or a private life which correspondingly attracts less weight in any ultimate attempt to resolve the limbo.

Schedule 10- a bit more detail

19. Paragraph 1(1) provides that the Secretary of State may grant a person bail if they are being detained under any of the immigration detention powers.

20. Paragraph 1(2) to schedule 10 to the Immigration Act 2016 provides:

> (2) The Secretary of State may grant a person bail if the person is liable to detention under a provision mentioned in subparagraph 1.

21. There are three points to note: First, it is a power to grant bail conferred on the Secretary of State not on the FTT. Second, it is the power to grant bail: contrast para 1(5) which is not a power at all, it is declaratory. I shall come to this in turn. Third it is a power to grant bail to a person who is liable to detention. The meaning of liable to

detention is a main point at issue in this claim. The Claimant says it is limited to a person who is liable to lawful detention.

22. The Defendant's position is that a power can exist even where to exercise that power would in respect of a given person be unlawful. The Defendant then extends the notional existence of the power to mean therefore that a given person can be liable to detention even where they cannot be lawfully detained on the basis that hypothetically, but for the fact it is unlawful to actually apply a power to detain them, that power would apply if it could apply.

23. Paragraph 1(5) to schedule 10 is the key provision. This provides that

> A person may be granted and remain on immigration bail even if the person can no longer be detained if (a) the person is liable to detention under a provision mentioned in sub paragraph 1, or (b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1)

24. Paragraph 10 to schedule 10 provides a series of powers of arrest and detention in the case of a breach or apprehended breach of bail. First, a person may be arrested, then they may be detained under the authority of the secretary of state to determine whether they have breached or are likely to breach bail, and then by paragraph 10(12) if it is decided that a person has breached bail, or is likely to do so the Secretary of State or the FTT as the case may be MUST either direct that the person be detained under the power to which they are liable to detention under paragraph 1(1) or grant the person bail

25. Paragraph 10(12) thus makes it mandatory to detain a person who is liable to detention under the powers mentioned in paragraph 1(1) for breach of bail condition, or to re-bail them. Unlike the initial power of arrest for breach of condition, the re-detention here is under the power to which that person is liable to detention. The Claimant argued that is therefore integral to the statutory scheme read as a whole that a breach of bail may entail re-detention pursuant to the underpinning power to which that person is liable to detention. It is therefore evident that the scheme, when it refers to a person "Liable to detention" under a provision in paragraph 1(1) is referring to a person who may lawfully be detained under such a provision. And it is also evident that the scheme adopts the ordinary approach to bail that bail falls within the ambit of the underlying

detention power. It does not adopt what Lord Lloyd Jones at para 31 **B (Algeria)** called the extraordinary alternative which the Defendant asserted.

26. Putting the matter the other way round, if a person could be granted bail because they were "liable to detention" but that did not mean liable to *lawful* detention, then paragraph 10(12) is mandating that the relevant authority must detain a person unlawfully- it requires a person such as in the Claimant's case to be falsely imprisoned! Thus, for example if he breaches the conditions by, say, working in a job not on the SOL, etc. then his re-detention is mandated under paragraph 2(3) even though that detention would be *Hardial Singh* incompatible.

27. Returning to Para 1(5) to schedule 10 which says that a person may remain on bail if they are liable to detention even if they "can no longer be detained". The Claimant argued that this refers not to people who are not liable to lawful detention because that makes a nonsense of the power to re-detain. It clarifies that when a person is granted conditional bail that is lawful even though implicit within such a grant will be recognition that while they are liable to detention, it is not proportionate or justified to detain them.

28. The Secretary of State's case focused on the history of the legislation. It was argued that section 61 of the Immigration Act 2016 was passed so as to reverse the decision in *B (Algeria)* and that section 1(5) was a successor to that provision. It was said that the intention of parliament was to use the "clearest possible words" so as to dislodge the usual meaning of "bail" and to permit bail where a person could not be detained for a breach of bail.

29. BID argued in the alternative, with the support of the Claimant that if the Claimant's interpretation is wrong, then the bail powers must themselves be presumed to be subject to constraints of a *Padfield* and *Wednesbury* type. That is undoubtedly correct, and the Defendant indeed agreed to an extent with that, though not so far as to accept the *Hardial Singh* limitations could be adapted to bail powers.

30. A further point for the SSHD was that the Claimant should have pleaded a separate ground for judicial review to establish that, applying *RA (Iraq) v Secretary of State for the Home Department* [2019] 4 WLR 132, the Claimant should be granted leave

pursuant to Article 8 ECHR so as to arrest the state of "limbo". The Claimant argued that was a separate issue- and indeed one the Claimant would be pursuing in an appeal in the Tribunal.

31. The above is only a snapshot of the argument, but it is likely to be a significant judgment however it turns out and is likely to be handed down in the near future, so I hope it has been helpful to put it on your radar.

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