R (on the application of AR) v Secretary of State for the Home Department (Bail – conditions – variation – Article 9 ECHR) IJR [2016] UKUT 00132 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of

AR

Applicant

v

Secretary of State for the Home Department

Respondent

The Honourable Mr Justice McCloskey, President
Upper Tribunal Judge Storey

(i) *Presidential Guidance Note No 1 of 2012 "Bail Guidance for Judges Presiding over Immigration and Asylum Hearings" is an instrument of guidance and not instruction. The guidance should, however, normally, be followed and good reason is required for not doing so.*

(ii) *The First-tier Tribunal ("FtT") is empowered to adjudicate on applications to vary the terms of its bail orders.*

(iii) *The FtT retains exclusive power to vary any of its bail orders during their lifespan. The Chief Immigration Officer has no power to interfere with such orders or make any other order in such circumstances.*

(iv) *In cases where there is no appeal pending, an application for bail can be made to either the FtT or the Chief Immigration Officer.*

(v) *While every case will be fact sensitive, a curfew and electronic monitoring restriction in a bail order will not normally constitute a disproportionate interference so as to infringe Article 9 ECHR, Article 10 of the Fundamental rights Charter or the Equality Act 2010.*

On this application for permission to apply for judicial review and following consideration of the documents lodged by the parties and having heard Mr C Buttler, of counsel, instructed by Duncan Lewis Solicitors and Mr Z Malik, of counsel, instructed by the Government Legal Department at a hearing conducted at Field House, London on 12 October 2015.

And having considered the further written submissions of both parties completed on 10 December 2015.

DECISION

The Applicant is granted permission to withdraw his judicial review claim pursuant to Rule 17(2) of the Tribunals (Upper Tribunal) Procedure Rules 2010 and a declaration order is made under section 15 of the Tribunals, Courts and Enforcement Act 2007 in the terms of [72] of this judgment.

McCLOSKEY J

Introduction

(1) This application for permission to apply for judicial review was adjourned into Court and granted expedition. Further, it proceeded on an *inter-partes* basis, the Respondent's Acknowledgement of Service ("*AOS*") having been lodged.

(2) The Applicant, a national of Pakistan now aged 34 years, has been living in the United Kingdom since January 2005. His history is one of a refusal of his claim for asylum, an unsuccessful appeal against this decision and, since 2009, a series of further representations seeking leave to remain in the United Kingdom, all of which have been rejected by the Respondent, the Secretary of State for the Home Department (hereinafter the "*Secretary of State*"). This is one of two judicial review permission applications brought before the Upper Tribunal. In the second (JR/11223/2014), in which the Applicant challenges the Secretary of State's decision that his most recent further representations, advanced under Article 8 ECHR, did not constitute a fresh claim, permission to apply for judicial review was refused by order dated 13 September 2014. An oral renewal application was then made. Following a partial hearing on 06 October and a further hearing on 12 October 2015, the refusal of permission was affirmed and permission to appeal to the Court of Appeal was refused.

(3) As noted in the preamble to this judgment, the Applicant's challenge was ultimately resolved consensually between the parties. This outcome crystallised on the day of hearing. In exchanges with the parties' representatives, the panel suggested that this did not necessarily preclude consideration of the substantive issues and expressing their views in a considered judgment. We took into account in particular the somewhat unusual and important nature of the issues raised by the Applicant's challenge and the substantial investment of resources

in the proceedings by both the Tribunal and the parties. We also had regard to the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Salem [1999] AC 450, at 456g/457c, which contains the following guidance, per Lord Slynn of Hadley:

> "*My Lords, I accept, as both Counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se …….*
>
> *The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.*"

While this guidance was formulated in the context of an appeal to the highest court, it has, in practice, been applied subsequently in judicial review proceedings at all tiers of the legal system. We refer to the recent decision of this Chamber in R (on the application of Bhudia) v SSHD (para 284(iv) and (ix)) IJR [2016] UKUT 25 (IAC).

(4) Lord Slynn, emphatically, did not purport to prescribe any inflexible rules or principles to be applied in the kind of circumstances which arose in Salem and which have materialised in the present proceedings. We have highlighted certain features of the Applicant's challenge above. Having considered the submissions of the parties' representatives, we gave directions for the filing of further written argument. Having considered the parties' further submissions, our provisional view that the Tribunal should pronounce upon the main issues raised by the Applicant's challenge is confirmed. This judgment is provided accordingly.

The Challenge

(5) In the Judicial Review Claim Form, the target of the Applicant's challenge is formulated in the following terms:

> "*The Respondent's failure to respond to the Applicant's requests to revoke or vary the requirements that he wear an electronic tag and abide by a home curfew.*"

In a letter dated 30 December 2014 written by his solicitors it is stated:

> "*Our client was released on bail on 07 October 2014 with the conditions to live and sleep at his wife's address, reporting conditions between 10am and 4pm*

every Wednesday and subject to electronic monitoring between 7pm and 7am."

In the same letter it was suggested that the Applicant had complied with his conditions of temporary admission to the United Kingdom and bail conditions faithfully and without exception. The letter makes the following protest:

> "*It is contended that the continued electronic monitoring is an unnecessarily restrictive condition upon our client ….*
>
> [It] *is having a serious detriment to his attempts to acquire formal identification from the Pakistan Embassy, his religious life as he has been unable to participate in important ceremonial occasions for Shia Muslims and his social life, which is particularly important for him before Christmas as he may be prevented from enjoying it with his wife's family.*"

The letter ends with a request that the electronic monitoring condition be removed.

(6) The bail order containing the offending conditions is dated 07 October 2014. It was made by a Judge of the First-tier Tribunal (the "*FtT*"). The only evidence relating to the bail hearing and its outcome is the order itself, which is unremarkable. It contains provisions relating to sureties, coupled with three "secondary"conditions: the Applicant was required to live and sleep at a specified address, to report to the UK Border Agency in the terms indicated once weekly and to observe a curfew, with electronic monitoring, between 19.00 hours and 07.00 hours daily. The Order also contains a so-called "primary condition" requiring the Applicant to appear before the Chief Immigration Officer in accordance with the time, date and location specified "*and at any other place and on any other date and time that may be ordered*".

(7) In the Pre-Action Protocol ("PAP") letter written by the Applicant's solicitors it is asserted:

> "*The claimant* [sic] *applied for variation of bail to have his tagging removed and this was refused by Judge Clayton on 16 February 2015 as she was of the view that electronic tagging was appropriate for the claimant. The Judge was of the view that the electronic* [tag] *was not intrusive despite the claimant not being a criminal or having any history of absconding and stated that the tag was a 'discrete gadget'. She also stated that the tag was a penalty for entering the UK in the back of a lorry clandestinely. Since then we have made numerous requests to varying Home Office Departments by letter and telephone to have the client's tagging removed* [without response] …..
>
> *The claimant then made a further application for a bail variation hearing, which was heard on 14 July 2015. We were informed that the* [FtT] *did not have jurisdiction to hear this matter and the appropriate body to make a decision on bail variation would be the Chief Immigration Officer at North Shields.*"

To summarise: the FtT made an order releasing the Applicant on bail; some four months later the FtT considered, and refused, an application to vary the conditions of the bail order; and, some five months later, declined to consider a further variation application on the ground that it lacked jurisdiction, the outcome being a withdrawal of the application.

(8) In the evidence filed on behalf of the Applicant, which consists mainly of his two written statements, there is some emphasis on two religious festivals. The first is that of Muharran, which is described uncontentously as an important event for practicing Muslims. It was scheduled to commence on 13 October 2015, with a projected duration of 40 days. In his first witness statement, the Applicant avers:

> "*I am a Shia Muslim ….. I am a practising Muslim and my religion is very important to me ….*
>
> *I attend at my local mosque …. and take part in prayers every week. This is an important part of my religion. I currently attend at the mosque approximately three to four times a week during the day. I would like to attend more prayers at the mosque. However my tagging restrictions prevent me from doing so ….*
>
> *There are currently three evening prayers per day at the mosque, so I am currently unable to attend approximately 12 prayers per week on the four days that I would normally attend. The prayers that I am unable to attend start at approximately 6pm, 8.45pm and 10pm ….*
>
> *The times of evening prayers change depending on the time of year. In winter I will be unable to attend 1 evening prayer a day as it starts at 6pm and in summer I miss 3 evening prayers per day.*"

Next, the Applicant turns his attention to the religious festivities of Ramadan. He avers that during the Ramadan period, which began on 18 June 2015, he was unable to attend any of the evening or night prayers which, he suggests, "*should be carried out with a congregation*". He continues:

> "*Although I was praying at home, attending evening prayers at the mosque throughout Ramadan is extremely important to me and other Muslims …..* [when] *…. we are expected to attend at the mosque for evening prayers unless there is something extremely important that someone has to do ….*
>
> *To not be able to attend evening prayers left me feeling isolated from the rest of my community during this important time of worship.*"

(9) The Applicant's evidence was amplified at a late stage, via an unscheduled second written statement. In this the focus is on two particular periods of Muslim religious observance, Ramadan and Muharran. During the first of these periods, the Applicant's complaint, taken at its zenith, is that while he was able to attend three of the five daily prayers on the days of his choice, three or four times weekly, the offending bail conditions precluded him from attending the two evening prayer sessions, at 7pm and 9pm. As regards the Muharran period,

the complaint is that the Applicant was unable to attend one evening prayer session, beginning at 8pm. This limitation was of finite duration, given the change of bail conditions effected from 08 October 2015. There is no evidence to suggest that at any material time the Applicant could not engage in congregational prayer at home during evenings. His case, in substance, is that this would not be an adequate substitute for praying at a mosque

(10) Notwithstanding a catalogue of solicitors' letters, including the aforementioned PAP letter, there was no substantive response on behalf of the Secretary of State at any time. Bearing in mind that judicial review proceedings are designed to operate as a last resort and having regard to the importance of pre-proceedings interaction between the putative parties and the overriding objective, to all of which one superimposes the factor of restriction of liberty, this abject failure must be strongly deprecated.

(11) The submissions on behalf of the Applicant have sought to make much of the fact that the Secretary of State has not filed any evidence. However, we would observe that there was no obligation on the Secretary of State to do so, subject to fulfilment of her duty of candour as set forth in R (on the application of Bilal Mahmood) v Secretary of State for the Home Department (candour/reassessment duties; ETS :alternative remedy) IJR [2014] UKUT 439 (IAC). While one hallmark of the pre-proceedings phase was inexcusable inertia on the part of the Secretary of State's officials, having considered all the evidence we have no reason to conclude that there has been any breach of the duty of candour owed to this Tribunal.

(12) At the eleventh hour, following the adjournment and rescheduling of the hearing date, the Secretary of State's legal representative wrote a letter dated 09 October 2015 to the Applicant's legal representatives. This contains the following passage:

> "*I have taken instructions from my client and confirm that there is currently an ongoing review of all cases subject to electronic monitoring provisions and on this occasion, having regard to all the circumstances, the decision has been taken to relax those conditions in your client's case. A letter confirming that electronic monitoring condition will cease with immediate effect was issued to your client yesterday.*"

Next, a justification is proffered for making no reply to the ten letters written by the Applicant's solicitors spanning the period December 2014 to July 2015, namely the absence of any written statement of the Applicant until August 2015. The remainder of the letter consists of a recitation of the Applicant's immigration history and a pleading akin to what was already contained in the AOS. Finally, the letter puts in issue the following matter:

> "*It is notable that the Applicant has entirely failed to provide any evidence as to why he could not participate in evening prayers, during the religious period of Moharam* [sic] *or at any other time, in his own home. There is a complete lack of*

evidence as to why congregation could not be arranged at his home ….."

It would appear that this was the main impetus for the Applicant's second statement, considered above. We cannot leave the subject of correspondence without observing that the Secretary of State's professed justification for ignoring ten solicitors' letters spanning a period of nine months is woefully inadequate.

(13) The Applicant's grounds of challenge are these:

(a) Breach of Article 9 ECHR.

(b) Breach of Article 10 of the Charter of Fundamental Rights of the European Union (which we shall describe as the "*Lisbon Charter*").

(c) Breach of Article 8 ECHR.

(d) Breach of section 19 of the Equality Act 2010.

While we shall consider these grounds presently, we are in no doubt that the first issue to be addressed is immigration bail.

Immigration Bail

(14) We begin by drawing attention to the following statement in the letter dated 09 October 2015 written by the Secretary of State's lawyer:

> "….. *It has been decided in the exercise of the Secretary of State's discretion to cease the electronic monitoring condition. The Respondent …. maintains that* ***her decision*** *to impose and maintain electronic monitoring conditions was entirely lawful and reasonable ….*"

There are two features of the passage quoted which appear to us fundamental. First, the Secretary of State did not make any decision to subject the Applicant to electronic monitoring. This was, rather, the decision of the FtT. Second, insofar as the Secretary of State "*decided*" to discontinue the electronic monitoring and curfew conditions, this begs the question of whether she was empowered to do so. If this question yields a negative answer, the cornerstone of the Applicant's challenge will be demolished and it will follow inexorably that the Secretary of State did not commit any of the public law wrongs alleged on behalf of the Applicant in the omissions attributed to her throughout the period under scrutiny.

(15) The various statutory provisions regulating the grant of immigration bail are contained in, firstly, Schedule 2 to the Immigration Act 1971 (the "*1971 Act*"). There is no suggestion that the provisions in paragraph 16 – 20, which concern the detention of persons liable to examination or removal, have any application to the Applicant's case. Equally, the power of an immigration officer to release a

person detained from detention, under paragraph 21, does not arise, for reasons which we shall develop *infra*. Paragraph 22(1A) is material. This empowers a Chief Immigration Officer ("CIO") or the FtT to release on bail certain types of detainee upon execution of an appropriate recognizance. We shall examine this interesting dual jurisdiction at greater length presently. Pausing, it is clear that this is the power which the FtT exercised in making the bail order dated 07 October 2014. Paragraph 22(2) is of obvious materiality:

> "*The conditions of a recognizance or bail bond taken under this paragraph may include conditions appearing to the immigration officer or the* [FtT] *to be likely to result in the appearance of the person bailed at the required time and place; and any recognizance shall be with or without sureties as the officer or* [the FtT] *may determine*."

By paragraph 23, the FtT is empowered to declare the forfeiture of a recognizance executed under paragraph 22. By paragraph 24, where a person released has been arrested subsequently, he must be brought before the FtT which is empowered to direct his detention or to release him on the same or revised terms. Finally, by paragraph 34 of Schedule 2, the provisions of paragraph 22 – 25 also apply to a person in respect of whom removal directions have been made and who has been detained in accordance with Part 1 of the Schedule.

(16) Electronic monitoring in the realm of immigration bail was introduced by section 36 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. The legislative device adopted was to align this new measure with the grant of immigration bail as defined, namely (*inter alia*) bail granted by the FtT. Section 36(8)(a) conferred on the Secretary of State a rule making power in respect of "*arrangements for electronic monitoring for the purposes of this section*". The exercise of this power is found in Part 5 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "FtT Rules"), which came into operation on 20 October 2014 and its predecessor, Part 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (the "*2005 Rules*").

(17) The procedural outworkings of the broad bail powers conferred on the FtT by Schedule 2 to the 1971 Act are contained in the FtT Rules. The main provisions are found in rules 38 – 44. In the regime thus established, the Secretary of State must receive notice of a bail hearing and, further, must file a written statement of reasons for contesting the application (per rule 40). Where bail is granted the FtT's notice of decision must contain the conditions of bail and the amount in which the applicant and any sureties are to be bound, per rule 41(2). Any order refusing bail or forfeiting a recognizance must include reasons, per rule 41(3). Mindful that the bail order of the FtT in this case was made on 07 October 2014, it suffices to note that the main bail provisions in the 2005 Rules did not differ materially from their successors.

(18) It is of particular note that rule 37 contemplates an adversarial process, with two parties. The first is the "*bail party*", defined as a person released on bail or

applying for such release. The second party is the Secretary of State. The rules do not make specific provision for an application to vary bail conditions. However, rule 38(2) provides:

> "*A bail application must specify whether it is for –*
>
> *(a) the bail party to be released on bail;*
>
> *(b)* ***variation of bail conditions****;*
>
> (c) *continuation of bail; or*
>
> (d) *forfeiture of a recognisance.*"
>
> [Emphasis added.]

By rule 38(3), every bail application, which would embrace a variation application, must contain, *inter alia*, the grounds upon which it is made and, where appropriate, "*details of any material change in the circumstances*" since a previous refusal. Rule 38(6) provides:

> "*On receipt of a bail application, the Tribunal must record the date on which it was received and provide a copy of the application to the Secretary of State as soon as reasonably practicable.*"

By rule 39(1) and (2):

> *"(1) Subject to paragraph (3), where a bail application is for the bail party to be released on bail, the Tribunal must, as soon as reasonably practicable, hold a hearing of the application.*
>
> *(2) In all other bail proceedings, the Tribunal may determine the matter without a hearing if it considers it can justly do so."*

We construe this latter provision to mean that in an application to vary bail conditions, the FtT need not necessarily convene a hearing.

(19) There is a further element in the legal framework, namely the Presidential Guidance Note No 1 of 2012 "Bail Guidance for Judges Presiding Over Immigration and Asylum Hearings" (the" Guidance"), made in the exercise of the powers conferred by section 7 of Schedule 4, Part 1 of the Tribunals, Courts and Enforcement Act 2007. This has not yet been revised to reflect the introduction of the new FtT Rules. Notable provisions in the Guidance include the obligation on both parties to bring to the Tribunal's attention any relevant evidence in their possession (per paragraph 29) and the detailed guidance relating to the imposition of conditions (paragraphs 32 – 44).

(20) Of particular note in the Guidance are the following provisions:

> *"32. The Tribunal will always set some conditions when granting bail to*

ensure that the person concerned answers when required to do so. However, the stringency of the conditions set will vary according to the circumstances and the level of monitoring of the applicant that may be required.

33. The first condition is to specify when bail will end. Where no immigration appeal is pending, a First-tier Tribunal Judge should grant bail with a condition that the applicant surrenders to an Immigration Officer at a time and place to be specified either in the bail decision itself or in any subsequent variation.

34. The Judge will usually specify the immigration reporting centre nearest to where the applicant is to reside when released and will often specify that the applicant should answer to an Immigration Officer within seven days.

35. Once the applicant has answered to an Immigration Officer in accordance with that primary condition, the duration of any further grant of bail will be made by a Chief Immigration Officer rather than the Tribunal. It is to be expected that the Tribunal's decision as to the principle of release will be followed in the absence of a change of circumstances. If a person does not answer as directed, then forfeiture proceedings are likely to commence in the Tribunal."

This discrete group of provisions is addressed to the no appeal pending scenario.

(21) The next two provisions in the Guidance, paragraphs 36 and 37, address the separate scenario of a pending immigration appeal. They do so in these terms:

"36. Where an immigration appeal is pending, the primary condition for bail will be as follows:-

i. to attend the next and every subsequent hearing of the appeal at such places and times as shall be notified or as otherwise varied in writing by the Tribunal; and

ii. following final determination of the appeal, unless bail is revoked by the Tribunal or by operation of law, to appear before an Immigration Officer at such time and place as directed by the Tribunal; and

iii. the terms of bail may be varied at any time during their currency by application or at the Tribunal's own motion.

37. To enable the Tribunal to promote the achievement of the primary condition, a First-tier Tribunal Judge is likely to impose a secondary condition. Secondary conditions usually relate to the place of residence of the person to be released on bail and how the person released on bail should maintain contact with the immigration authorities."

A dichotomy is thus established. Paragraph 38(6) adverts to the electronic monitoring provisions of the 2004 Act. It includes the following passage:

"This condition is most likely to be imposed if bail is to be granted to a person

who has previously committed a criminal offence where the immigration authorities have requested it as an additional safeguard for the protection of the public. However, it remains for a First-tier Tribunal Judge to consider if such additional safeguards are required and the immigration authorities must substantiate such a request. Judges will also take into account the guidance in Annexes 5 and 8 regarding the terms of the bail conditions that should be imposed if electronic monitoring is deemed necessary."

It is appropriate to highlight the inexhaustive and purely illustrative terms in which the first sentence of this passage is framed.

(22) The Guidance contains a self-contained cluster of provisions arranged under the banner of "Variation of Bail Conditions". These are as follows:

"55. It may be necessary to vary bail conditions particularly where bail has continued for some time. Responsibility for considering such variation lies: (a) with the Tribunal while an appeal is pending; (b) with an Immigration Officer in all other circumstances.

56. The standard conditions of bail set out in para. 35 above enable the Tribunal to vary the conditions of bail on its own motion or on application wherever it is considered appropriate to do so. The following points apply only where the Tribunal is responsible for considering a variation request.

57. The Tribunal will consider variation requests without a hearing, where possible. A request to vary the residence address, reporting conditions or electronic monitoring will require confirmation from the immigration authorities that the change is acceptable. Therefore the person on bail should seek the consent of those authorities before applying for such a variation. If the person on bail does not seek such consent, then the Tribunal will contact the immigration authorities. This is likely to delay the consideration of a variation request.

58. In cases where the consent of the immigration authorities is withheld, the Tribunal may arrange a bail variation hearing but will not always do so.

59. Where the variation request involves a proposed change of surety, the Tribunal should arrange a bail variation hearing. This is so a First-tier Tribunal Judge can consider the new surety, and release the previous surety from the previous obligations."

We would emphasise that these provisions do not <u>empower</u> the FtT to vary bail conditions. Rather, they have the status of guidance to be considered and, where appropriate, applied in cases where the FtT Tribunal has statutory power to act. We shall address this discrete issue *infra*.

(23) What is the status of the Guidance? Instruments of guidance made in the exercise of statutory powers are commonplace in the United Kingdom legal system. Constant alertness to the status and effect of such instruments is required on the part of the various members of the audience to which they are

directed. In R v Ashworth Hospital Authority, ex parte Munjaz [2005] UKHL 58, Lord Bingham of Cornhill stated, at [20]:

> "*There is a categorical difference between guidance and instruction.*"

This distinction, it may be said, is fundamental. Turning next to address the instrument under scrutiny, a code of practice made by the Secretary of State for the guidance of various health professionals and institutions providing mental health care, Lord Bingham continued, at [21]:

> "*It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction.*"

Continuing his analysis, however, Lord Bingham characterised the code in question as "*more than mere advice*" and something from which hospitals should depart only with "*cogent reasons*".

(24) What is the function of the Guidance? It is, fundamentally, designed to promote fair and consistent decision making by FtT Judges in the sphere of bail. It also contains elements of advice, clarification and information directed to its audience. An appreciation of the membership of this audience is essential: it consists of litigants, practitioners, Judges and interested third party agencies. Viewed through the prism of public law, instruments of this kind have the potential to generate substantive legitimate expectations which the Courts will vindicate. This too should be borne in mind in cases where Judges are contemplating departure from any of its provisions. While it should normally be followed, departing from it in appropriate cases is permissible.

(25) In this context, it is appropriate to emphasise that the jurisdiction of the FtT in the sphere of bail is exclusively statutory. It has no inherent jurisdiction. In this respect, it is to be contrasted with, for example, the High Court of Justice in Northern Ireland: see Re Maughan's Application [2010] NIQB 16 at [4]. Furthermore, judicial decision making is more likely to be error free if judges bear constantly in mind that a constitutional value, namely the liberty of the citizen, is in play.

(26) As we have highlighted in the dichotomy identified in [21] above, the Guidance contemplates, indeed assumes, that the statutory power of the FtT to grant bail will be exercised in one of two scenarios, the first where there is an appeal pending and the second where there is no appeal pending. In this context, we draw attention to [55] of the Guidance, set out in [22] above. As appears from the analysis which follows, we disagree with the suggestion that the FtT is empowered to vary a bail order only in cases where an appeal is pending, as this is confounded by the statutory language. It is the second of the scenarios with which we are concerned in these proceedings. Within this latter scenario, we have identified two sub-scenarios:

(i) Cases in which the FtT makes a bail order of finite duration containing a condition that the Applicant surrender to an Immigration Officer or the CIO in accordance with the relevant stipulations, whereupon the order will expire.

(ii) Cases where the FtT bail order lacks a clearly expressed finite duration provision of this species.

(27) In the former category identified above we consider that the FtT becomes *functus officio* upon the expiry of its order. The order contains a self-limiting lifespan which comes to an end on the date specified. We consider that, in such cases, the FtT has power to vary the order during its lifetime, but not thereafter. Once the order expires, the applicant has the choice of applying to either the FtT or the CIO, under Schedule 2 to the 1971 Act, for a fresh bail order. In cases belonging to this category, the FtT will have given effect to [33] of the Guidance.

(28) Cases belonging to the second sub-scenario adumbrated in [24] above are, however, very different. These cases embrace, in principle, FtT bail orders made in both the appeal pending and no appeal pending scenarios. Where the bail order of the FtT does not contain a lifespan limiting provision of the type of contemplated above, the FtT has a continuing role which endures for as long as the bail order remains in existence. The reasons for this proposition may be stated briefly.

(29) First, in this scenario, no statutory power is conferred on the CIO. Second, absent clear and unequivocal statutory prescription, any suggestion that the CIO could interfere with an order of the FtT – whether by the mechanisms of revision, amendment, termination, substitution or otherwise – would be inimical to the rule of law. The executive, absent unambiguous legislative authority, cannot tamper with the order of a court or tribunal. The separation of powers prohibits it from doing so. This prohibition is of such fundamental constitutional importance that it extends to cases where the order seems obviously legally defective. In such cases, the effect of the *omnia praesumuntur* principle, sometimes formulated as the principle of presumptive regularity or validity, is that the order remains in force unless and until set aside, varied or substituted by a further order of a court or tribunal of competent jurisdiction. This principle was highlighted recently by the Court of Appeal in KW (by her litigation friend) and others v Rochdale Metropolitan Borough Council [2015] EWCA Civ 1054, at [22]:

> *"An order of any court is binding until it is set aside or varied. This is consistent with principles of finality and certainty which are necessary for the administration of justice: R (on the application of Lunn) v Governor of Moorland Prison [2006] EWCA Civ 700, [2006] 1 WLR 2870, at [22]; Serious Organised Crime Agency v O'Docherty (also known as Mark Eric Gibbons) and another [2013] EWCA Civ 518 at [69]. Such an order would still be binding even if there were doubt as to the court's jurisdiction to make the order: M v Home Office [1993] UKHL 5; [1994] 1 AC 377 at 423; Isaacs v Robertson [1985] AC 97 at*

101-103."

Especially of note in this passage is the emphasis on the common law principles of finality and certainty.

(30) There is one further matter to be addressed prior to expressing our conclusions on this issue. While the proposition that the FtT is empowered in the scenarios identified above to vary its bail order was not contested before us, Schedule 2 to the 1971 Act does not expressly empower the FtT to do so. However, we are in no doubt that the power exists by implication. This is one of the long established powers in the history of the development of bail in the United Kingdom, wherein the hallowed importance of the liberty of the citizen has been recognised for centuries as a value of constitutional status. Bail conditions do not deprive a citizen of his liberty. On the contrary, they form part of a mechanism designed to liberate the person concerned from detention. However, as in the present case, they frequently have the effect of granting restricted liberty. Variations of bail applications, where pursued at the suit of the litigant, are most commonly designed to remove or relax such restrictions. Based on this analysis and applying well recognised principles of statutory construction, the conclusion that the FtT has an <u>implied</u> statutory power to vary the terms of its bail orders is readily made. See <u>Bennion, Statutory Interpretation</u> (Sixth Edition), pages 459 – 460 ET SEQ. Insofar as necessary, this conclusion is further fortified by the presumption that common law principles and the rules of constitutional law apply: *op.cit.* pp938 – 942. The alternative analysis is that the secondary legislation viz the FtT Rules confers this power, via a combination of paragraph 25(1) of Schedule 2 to the 1971 Act and rule 38(2).

(31) Finally, we take cognisance of one of the Applicant's further written submissions, which contains the following passage:

> "… *Everyone* ***detained*** *under the Immigration Act 1971 may seek bail from either the immigration authorities <u>or</u> the First-tier Tribunal under paragraph 22 and 34 of Schedule 2 to the* [Immigration Act 1971]."

We have highlighted the word "*detained*" for an elementary reason. Clearly, the Applicant was detained at the time of the application for bail to the FtT in October 2014. However, he was no longer detained following the grant of bail and the steps taken by him to perfect same. Thereafter, with effect from 14 October 2014, the Applicant was at liberty, albeit subject to restrictions. There is no suggestion that the restrictions operated so as to convert his conditional liberty into *de facto* or *de jure* detention. Rather, the thrust of his challenge is that the impugned restrictions infringed his rights under certain measures of United Kingdom and EU law. The striking *lacuna* in the otherwise detailed submissions of both parties is the failure to identify the powers, if any, available to the Secretary of State to take steps to vary the order of the FtT by the removal or relaxation of the offending conditions.

(32) We apply our analysis above to the bail order of the FtT in the instant case in the

following way:

(i) The bail order of the FtT dated 07 October 2014 was lawfully made.

(ii) This order had no self-limiting provision. While it contained a condition requiring the Applicant to report to the CIO, this did not bring the order to an end.

(iii) The application to the FtT to vary the bail order and the ensuing refusal order of the FtT, dated 16 February 2015, were both lawfully made.

(iv) When the FtT, on 14 July 2015, refused to entertain the merits of a second variation application on the ground that it did not have jurisdiction it erred in law.

(v) The Secretary of State, whether acting through the Chief Immigration Officer or otherwise, in purporting to vary the order of the FtT in October 2015, acted *ultra vires*: there was no power to take this action.

(vi) The bail order of the FtT dated 07 October 2014 remains in force.

(33) In the interests of certainty and finality, we consider it desirable that the FtT make a further order at this stage. It retains jurisdiction to thus act. It is recorded unambiguously in the Tribunal's computerised record that the July 2015 variation application was withdrawn. Even if the Applicant's assertion that this application was adjourned is correct, this makes no difference in principle since the order remains in force. Insofar as there is any doubt about the FfT's power to act of its own volition in these original circumstances, finality and clarity will be achieved by an application on the part of the Secretary of State under rule 38 (2) of the FtT Rules.

Our Primary Conclusion

(34) The effect of our analysis and conclusions above is that the Applicant could not have succeeded in this judicial review challenge as the Secretary of State was not the author of the impugned bail order and had no power to vary the order subsequently. Ultimately, in purporting to vary the order, the Secretary of State has acted *ultra vires*. Notwithstanding this conclusion, we shall give consideration to the substantive issues raised by the Applicant's challenge, given their relative novelty and importance coupled with the substantial investment of time and resources on the part of the parties' representatives and the Tribunal.

Article 9 ECHR

(35) By Article 9 ECHR:

"1. Everyone has the right to freedom of thought, conscience and religion; this

right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.

2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others.*"

As the factual framework outlined above makes clear, the Applicant cannot complain that the impugned measures infringed his right to hold and espouse religious convictions and beliefs. Rather, his case was (and must be) that his freedom to manifest his religion and beliefs was unlawfully restricted by the impugned measures. Thus this challenge is not concerned with the absolute freedom protected by Article 9. Rather, its focus is the qualified right protected by Article 9(2).

(36) The main submission developed by Mr Buttler on behalf of the Applicant was that the curfew hours are "*indirectly discriminatory and interfere with the freedom to manifest religion*". He described this as a stark case, lacking the kind of strong countervailing interest justifying a restriction within the compass of Article 9(2) in some of the leading reported cases (discussed *infra*). He highlighted the fundamental nature of the freedom to manifest one's religious beliefs and the special recognition accorded to this right by section 13 of the Human Rights Act 1998. He submitted, in terms, that the Applicant's ability to engage in prayer in his home during the prohibited hours was not an adequate substitute for doing so at a mosque. Thus, it was contended, an interference with the right was established. This interference had no identifiable legitimate aim and, in any event, was disproportionate as the curfew period imposed was not the least restrictive interference available. Counsel's arguments highlighted that the Secretary of State has adduced no evidence addressing the Article 9(2) framework.

(37) The riposte by Mr Malik on behalf of the Secretary of State invoked several aspects of the pleading in the AOS, namely the absence of any statement of the Applicant prior to 04 August 2015; the Applicant's failure to bring an application for judicial review against the FtT; and the assertion that the Applicant has an "*appalling*" immigration history, such that the offending conditions in the bail order were amply justified. This latter factor is digested in the Secretary of State's letter of 09 October 2015 in these terms:

> "*The Applicant arrived in the United Kingdom illegally on 06 January 2005 and was served with IS151A, Notice of Liability for Removal as an illegal entrant ….*
>
> *The Applicant claimed asylum on 14 January 2005. This was refused on 20 January 2005 and his subsequent appeal failed on 20 May 2005. The Applicant should have left the United Kingdom when his appeal rights were exhausted on 27 June 2007 …..*

> [He was initially] *released* [on bail] *on 15 February 2005. He was put on reporting conditions. However …….* [he] *failed to report as required on 28 July 2010 ……* [and] *again failed to report as required on 02 April 2013 and 07 May 2013. The Applicant was encountered during an enforcement visit and was detained as an immigration offender on 28 May 2014*."

Thereafter, the Applicant successfully avoided removal by initiating the second of his judicial review challenges, noted in [2] above and securing a restraining order. He remained in detention and it was in this context that the FtT made the bail order lying at the heart of these proceedings.

(38) We note that in the PAP letter there is an elaborate passage taking issue with any suggestion that the Applicant had previously absconded. However, this does not engage with the fourfold assertion in the AOS that the Applicant entered the United Kingdom illegally; he has been an unlawful overstayer since his appeal rights were exhausted in June 2007; he breached his reporting conditions on three different occasions; and his detention in May 2014 was precipitated by an enforcement visit. Furthermore, based on our assessment of all the evidence, this occurred in circumstances where, on his own case, he had been "off the radar" during a period of some 2 ½ years, beginning in January 2010 (and, perhaps, post -2012 also): this is based on his own chronology of events.

(39) Notably, the Applicant's first witness statement, unimpressively, glosses almost entirely this 2 ½ year period. While he asserts that during this phase there was contact between the Secretary of State's agents and his representatives and further representations were made on his behalf, the detailed chronology in the solicitor's letter is strikingly silent as regards these matters and, further, indicates that the further representations were not made until over two years later, in July 2014. Furthermore, there is no evidence of the alleged communications during the preceding four year period. Finally, we note that in the Applicant's second witness statement, generated in mid-proceedings in October 2015, is notably silent on this issue.

(40) The hierarchical ranking of Article 9 ECHR in the realm of human rights was addressed by the ECtHR in Eweida v United Kingdom [2013] 57 EHRR 8 at [79] – [80]:

> *"The Court recalls that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*
>
> *Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any*

religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions. Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein".

In [83], the Court addressed the issue of circumvention of limitations imposed on a person's freedom to manifest religion or belief. It noted in particular:

> *"More relevantly, in cases involving restrictions placed by employers on an employee's ability to observe religious practice, the Commission held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee's religious freedom."*

This was followed by the adoption of a different juridical analysis:

> *"Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."*

Finally, in [84] the Court recalled the consistently acknowledged margin of appreciation accorded to States parties "*… in deciding whether and to what extent an interference is necessary*".

(41) The distinction between the absolute and qualified freedoms protected by Article 9 was noted by the House of Lords in R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246 at [16]. Lord Nicholls also acknowledged the truism:

> "*To a greater or lesser extent adherents are required or encouraged to act in certain ways, most obviously and directly in forms of communal or personal worship, supplication and meditation.*"

The question of whether there is a truly insurmountable obstacle to manifestation of one's religion has featured in several cases, frequently in the employment context. In these cases the ECtHR has held that the freedom has not been violated because the person concerned voluntarily accepted the restriction under scrutiny and was at liberty to leave their employment. See, for example, Kalac v Turkey [1999] 27 EHRR 552 and Stedman v United Kingdom

[1997] 23 EHRR CD 168. Similarly, in Ahmad v United Kingdom [1981] 4 EHRR 126, where a Muslim teacher sought an extended Friday lunch break to attend the nearest Mosque for prayers, no violation of Article 9(1) was found on the basis that the applicant –

> "…. *remained free to resign if and when he found that his teaching obligations conflicted with his religious duties.*"

At [135].

(42) In every case where an Article 9(2) enquiry is required, the first question is whether an interference with the right is demonstrated. In Williamson, Lord Nicholls stated, at [38]:

> "*What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably be expected to be at liberty to manifest his beliefs in practice.*"

Demonstrating interference may not be straightforward and can be contentious, to the extent of dividing the two most senior courts in the realm. In Williamson there the majority of the Court of Appeal considered that whereas the impugned statutory provision prevented corporal punishment and, further, that the application of such punishment by certain parents entailed the manifestation of their religious belief, there was no interference with the right protected as the parents were not prevented from attending the schools to administer punishment themselves. The House of Lords did not agree, preferring to decide the appeal on the basis of proportionality.

(43) Clearly, the determination of whether there is an interference in any given case will invariably be an intensely fact sensitive exercise. This is illustrated by decisions such as Gallagher (Valuation Officer) v Church of Jesus Christ of Latter Day Saints [2008] UKHL 56 (no rates exemption for a private Mormon temple) and Campbell v South Northamptonshire District Council [2004] EWCA Civ 409 (no housing benefit payable to church members who would have qualified had they chosen to procure their tenancies from a private landlord). Further, in R (SB) v Governors of Denbigh High School [2006] UKHL 15, the majority held that the school's prohibition on wearing a Jilbab did not interfere with the manifestation of the pupil's religious beliefs. Their reasoning was intensely prosaic: the family had chosen the school for the pupil with knowledge of the uniform policy and, further, there was no evident restriction in opting for a school which did not operate this prohibition.

(44) The onus rests on the Applicant to establish an interference with the right engaged. Assuming his main assertions to be correct, we consider that the most significant factors to be evaluated are the following. As regards the Ramadan period, the first is his ability to engage in uninhibited congregational prayer at the mosque during daytime periods, which account for the majority of the prayer sessions. The second is his ability to engage in the same prayer, at his

home during evenings. There is a third factor to be weighed, namely the Applicant's unrestricted ability to manifest his religious belief at a time and location of his choosing throughout the greater part of the calendar year. We also weigh the absence of any suggestion that communal worship is a matter of cult obligation. Furthermore, the Applicant has not made the case that any norm or rule of the religious belief which he professes precludes or discourages domestic prayer during either of the festivals in question.

(45) As regards the Muharran Autumn 2016 prayer period, we take into account that, based on the Applicant's second witness statement, the offending bail conditions were discontinued before this began. Finally, it seems realistic to assume that many practising Shia Muslims would be unable to attend every prayer session during the two periods under scrutiny, both daytime and nightly, at their mosque for a host of prosaic reasons. An evaluative judgment on the part of the Tribunal is required. While we are mindful that section 6 of the Human Rights Act 1998 encompasses both actual and prospective infringements of protected rights, balancing all of these factors, we conclude that the threshold for interference has not been overcome. It follows that no infringement of the Applicant's rights under Article 9(1) ECHR has been established.

(46) The effect of this conclusion is that there is no further exercise to be performed under Article 9(2) ECHR. However, to cater for the possibility that our no interference conclusion is incorrect, we shall proceed to consider the issues of legitimate aim and proportionality.

(47) By virtue of Article 9(2) ECHR the freedom to manifest one's religion or beliefs can be limited if it is prescribed by law, has a legitimate aim and is necessary in a democratic society. The requirement of legal prescription was considered by the ECTHR in Hasan and Chaush v Bulgaria [2002] 34 EHRR 55, where a government agency decided to replace the Chief Mufti and other senior Muslim Clerics with the State's own preferred religious leaders. Finding that this was not prescribed by law, the Court reasoned, at [86]:

> "…. *The interference with the internal organisation of the Muslim community and the Applicant's freedom of religion was not 'prescribed by law' in that it was arbitrary and was based on legal provisions which allowed an unfettered discretion to the Executive and did not meet the required standards of clarity and foreseeability.*"

This is to be contrasted with the present context, in which the relevant measure, namely the bail order of the FtT, was made in accordance with the statutory regime outlined in [14]-[17] above. There being no suggestion that this regime is deficient as regards the essential qualities of accessibility and foreseeability, we are satisfied that the restrictions were imposed in accordance with the law.

(48) The second requirement of Article 9(2) is that the restriction pursue one of the specified legitimate aims: public safety, the protection of public order, health or morals or the protection of the rights and freedoms of others. In SB, the

legitimate aim recognised was that of respecting and accommodating a range of religious beliefs and convictions and doing so in an inclusive, unthreatening and uncompetitive way: see [32] especially. In Williamson, the legitimate aim was that of protecting children from the harmful effects of the infliction of physical violence, embraced by the protection of the rights and freedoms of others. As decisions such as Manoussakis v Greece [1997] 23 EHRR 387 illustrate, in the Article 9(2) context, as in others, the ECtHR has consistently accorded a certain margin of appreciation to the Contracting States: see [44].

(49) The legitimate aims in play are readily identifiable. They are rooted in the various aspects of the Applicant's conduct since his arrival in the United Kingdom some nine years preceding the bail order, highlighted in the AOS and the letter of 09 October 2015. As regards the factual foundation on which we are to proceed, in this respect, we consider that the Secretary of State has discharged any onus resting on her under Article 9(2) ECHR of establishing the asserted facts to our satisfaction. While the Applicant has disputed some of the assertions made, belatedly, in his unscheduled second statement, based on our analysis above we are singularly unconvinced by his protestations. The legitimate aims to which the offending bail conditions were directed were, plainly, the maintenance of effective immigration control, the prevention of crime and the protection of the rights and freedoms of others.

(50) The next question to be addressed is whether the offending conditions were necessary in a democratic society viz a proportionate mechanism of securing the legitimate aims engaged. The court, or tribunal, is the arbiter of proportionality and the exercise is one of objective adjudication: SB at [30], per Lord Bingham. The contours of the principle of proportionality have been restated by the Supreme Court in Bank Mellat v HM Treasury No 2 [2013] UKSC 39, at [20]. The tests to be applied are the following:

(a) Whether the objective is sufficiently important to justify the limitation of a fundamental right.

(b) Whether the measure is rationally connected to the objective.

(c) Whether a less intrusive measure could have been employed.

(d) Whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

(51) For the avoidance of doubt, everything which follows in this paragraph focuses on the FtT, rather than the Secretary of State. In our judgment, these tests are satisfied for the following reasons. In summary, the offending conditions were clearly designed to keep a tight rein on the Applicant, in circumstances which included three factors in particular, namely his highly unsatisfactory history, his obvious incentive to disappear from the radar (as he had done previously) and the consideration that, in terms of legal challenges, he had virtually reached the

end of the road. The requirement of rational connection is plainly satisfied. Theoretically, of course, a less intrusive measure such as the imposition of a shorter curfew beginning later in the evening was possible. However, this is no basis for concluding, at this remove, that the conditions imposed were excessive and unbalanced to the extent of being disproportionate. In this context, we further consider that an appropriate margin of appreciation is to be accorded to the FtT, the judicial body which was seized of all relevant information and formed the evaluative judgment now under review. The FtT obviously considered the curfew and electronic monitoring conditions to be necessary in the circumstances and we have no basis for concluding that it should have opted for a less restrictive measure. Furthermore, in our application of all of the Bank Mellat tests, we bear in mind our assessment of the actual impact of the limitations imposed upon the Applicant, rehearsed in [41] above. Our conclusion is that the offending conditions were proportionate.

(52) We reject Mr Buttler's submission that it is not open to this Tribunal to conclude that the offending conditions were proportionate on the basis that the Secretary of State has not filed any evidence. This is misconceived. Fundamentally, this complaint is advanced on the fallacious basis that the Secretary of State was the public authority legally responsible for the perpetuation of the offending bail conditions. Furthermore and in any event, the available evidence readily permits the inference that on the occasions of the two bail hearings before the FtT, the Secretary of State complied with her duty under rule 40 of the FtT Rules to file evidence. We would add that in common with many judicial review cases, the Secretary of State's AOS consists of a mixture of evidence and legal argument. The task for this tribunal has been, in part, to evaluate this evidence and accord to it such weight as we consider appropriate. Further, as appears from [45] above, insofar as there is any onus resting on the Secretary of State, we are satisfied that this has been discharged. Finally, as demonstrated above, the related contention that the Secretary of State has made no response to the Applicant's case is unsustainable.

(53) We also consider it apposite, in this context, to recall that the provision of evidence on the part of the public authority concerned is not an invariable prerequisite to the judicial determination of justification. This is illustrated particularly in Williamson: see in particular [44] - [47], per Lord Nicholls. The gist of this reasoning is that in certain contexts the court, or tribunal, is well equipped, without the reception of evidence, to form its judgment on the various elements of justification under Article 9(2). Finally, the Applicant's argument is at odds with the principle that in human rights cases what matters predominantly is the outcome, to be contrasted with the subjective claims, assessments and deliberations of the public authority decision maker. This feature of human rights adjudication was highlighted by this Tribunal recently in R (SA) v Secretary of State for the Home Department (Human Rights Challenges: Correct Approach) IJR [2015] UKUT 536 (IAC).

(54) For this combination of reasons we conclude that the offending provisions within the bail order satisfied all of the requirements of Article 9(2) ECHR.

Article 10 of the Lisbon Charter

(55) Article 10 of the Lisbon Charter, under the rubric of "Freedom of Thought, Conscience and Religion", provides:

> "*1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*
>
> *2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.*"

The Charter is primary EU Law. It is, in tandem with the Lisbon Treaty (the "TEU") and the TFEU, one of the three supreme instruments of governance of the Union. It entered into operation on 01 November 2009. Its driving forces are those of Union citizenship and the creation of an area of freedom, security and justice. In its recitals it recalls that the UE "*places the individual at the heart of its activities*". The recitals further enunciate that the Charter is designed "*to strengthen the protection of fundamental rights*" [emphasis added], the derogation whereof is the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters and the jurisprudence of the two main European Courts.

(56) The Charter's field of application is regulated by Article 51(1) which provides

> "*The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States* ***only when they are implementing Union law***."
>
> [Our emphasis.]

As appears from the words which follow, when the Charter is engaged the duty thereby triggered is to respect the rights which it enshrines, observe the principles which it establishes and promotes the application thereof, while "….. *respecting the limits of the powers of the Union as conferred on it in the Treaties*". This is followed by, in Article 51(2), a clear acknowledgement of the principle of subsidiarity:

> "*The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*"

This reflects an underlying intention that the Charter will not operate to confer new competences on the Union. The Charter is generally considered to be a codifying instrument which endeavours to assemble comprehensively all of the rights recognised by the Union.

(57) One of the leading pronouncements of the CJEU on the scope of the Charter is contained in Aklagaren v Fransson, Case C-617/10 of 2013. The CJEU opted for an expansive interpretation of Article 51(1). The principal mechanism which it employed for doing so was its pre-Charter jurisprudence. See [18]:

> "[Article 51(1)] *confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the Union.*"

Pausing here, one recalls that, during a period of some two decades, the CJEU had progressively assumed responsibility for the recognition and protection of fundamental rights and freedoms in the EU legal order. See, for example, Kremzow v Austria [1997] ECR I-2629. The judgment continues, at [19]:

> "*The Court's settled case law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable* ***in all situations governed by European Union law****, but not outside such situations.*"
>
> [Emphasis added.]

In the next passage, the Court coins the test of whether the measure in question "*falls within the scope of European Union law*". Accordingly, in every case in which the Charter is invoked, the first question for the court or tribunal must be whether the Charter applies to the subject matter of the litigation.

(58) The Tribunal asked for the Applicant's specific submission on the issue of whether the Charter applies at all, having regard to Article 51. The submission developed in response was that the treatment of illegally staying third country nationals is regulated by Directive 2008/115/EC. This is the so-called "Return Directive", a measure of EU law which regulates the common standards and procedures in Member States for returning illegally staying third country nationals. We consider that this does not bring the Applicant's case through the gateway of Article 51 of the Charter, for two reasons. First, this Directive, which entered into operation on 14 January 2009, does not apply to the United Kingdom. Second, while the Directive addresses the issue of detention, it is entirely silent on the question of bail and kindred issues such as bail conditions and the variation thereof. Furthermore, while our attention was drawn to the decision in Mukarubega v Prefet de Police [2015] 1 CMLR 41, without any accompanying argument, we note that this case is concerned with the question of the person's right to be heard in the decision making process prior to being removed from the host country. We consider that this has nothing to do with the context of the Applicant's challenge, which is focused on bail conditions allegedly infringing his Art. 9 ECHR rights. We would merely add that if the Applicant were able to establish an interference with his right to respect for private life under Article 8(1), this would be justified under Article 8(2) on the basis set forth in [45] – [52] above.

(59) In the Applicant's pleaded case, the main emphasis is on section 19 of the Equality Act 2010. Article 9 ECHR and Article 10 of the Charter are rolled together, with no suggestion that the latter adds anything to the former. In counsel's submissions, it is acknowledged that Article 10(1) of the Charter is the analogue of Article 9 ECHR which adds nothing except, it is contended, a directly enforceable right to an effective remedy for its breach under Article 47. There is no suggestion that, in the context of the present challenge, Article 47 enlarges or enriches the Applicant's case in any way. In particular, there is no argument to the effect that any remedy available in principle to the Applicant for establishing a breach of Article 10 of the Charter is any better than a remedy for a breach of Article 9 ECHR under the machinery of the Human Rights Act 1998.

(60) For this combination of reasons, we conclude that the Applicant's challenge under Article 10(1) of the Lisbon Charter leads nowhere.

Article 8 ECHR

(61) While Article 8 has been pleaded, we consider that it is a mere makeweight. The real question in this case is whether the impugned measures interfere with the Applicant's religious manifestation right under Article 9(1) and, if so, whether such interference is justified under Article 9(2). Any *excursus* into Article 8 in these proceedings would be a misguided and otiose diversion.

The Equality Act 2010

(62) The Applicant makes the case that the impugned measures are tantamount to unlawful indirect discrimination. He founds this discrete challenge on section 19 of the Equality Act 2010, which provides:

> *"1. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *2. For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> >
> > *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> >
> > *(c) it puts, or would put, B at that disadvantage, and*
> >
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
>
> *3. The relevant protected characteristics are -*

age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation."

(63) In the Applicant's grounds, his challenge under the Equality Act is structured in the following way:

(1) The characteristic in question is being a Muslim. The Respondent would apply the bail condition to a Muslim as to a non-Muslim.

(2) The condition puts a Muslim at a particular disadvantage because he is unable to attend evening prayer at the Mosque, which is not a disadvantage that would be suffered by a non-Muslim.

(3) The Applicant is put to that disadvantage.

(4) The Respondent cannot show this to be a proportionate means of achieving a legitimate aim.

Developing this challenge, Mr Buttler submitted that bail conditions are embraced by the terminology "*provision, criterion or practice*" in section 19(2), highlighting the analysis of Pill LJ that this is of broad scope: R (Bailie) v Brent LBC [2012] LGR 530, at [9]. This contention was not disputed and we accept it. Emphasising that under section 19 the burden of proof rests on the Secretary of State, Mr Buttler also drew attention to the statement of Mummery LJ in R (Elias) v Secretary of State for the Defence [2006] 1 WLR 3213, at [130] – [133], that a respondent will find it difficult to justify indirect discrimination where it has not recognised the discriminatory impacts and, still less, has not had due regard to them in accordance with the duty imposed by section 149 of the statute.

(64) The concept of less favourable treatment lies at the heart of discrimination in every field. This, in turn, conjures up the notion of disadvantage or disbenefit and frequently stimulates detailed and sometimes complex enquiries into so-called comparators. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, the existence of this latter phenomenon and its potential to generate "*needless problems*" were highlighted by Lord Nicholls: see [8]. His Lordship noted the practice whereby tribunals frequently adopt a two stage approach. First, they consider the question of whether the claimant received less favourable treatment than the identified comparator. Next, they examine the issue of whether the less favourable treatment was perpetrated on the relevant proscribed ground. Lord Nicholls observed:

"*No doubt there are cases where it is convenient and helpful to adopt this two step*

approach to what is essentially a single question: ***did the claimant, on the proscribed ground, receive less favourable treatment than others?***"

[Emphasis added.]

His Lordship advocated the virtues of "*concentrating primarily on why the complainant was treated as* [he/she] *was*": see [11]:

(65) To like effect, in R v Secretary of State for Work and Pensions, ex parte Carson and Reynolds [2005] UKHL 37, the House of Lords, in the context of Article 14 ECHR, advocated a similarly simplified approach: per Lord Nicholls at [1] and Lord Rodger at [43] – [44]. Lord Carswell stated at [97]:

> "*Many discrimination cases resolve themselves into a dispute, which can often seem a more than a little arid, about comparisons and identifying comparators, where a broader approach might more readily yield a serviceable answer which corresponds with ones instincts for justice …..*
>
> *Much of the problem stems from focusing too closely on finding comparisons …*"

We bear in mind these exhortations.

(66) We consider that the effect of section 19(2) (a), (b) and (c) of the 2010 Act is to require of the court or tribunal concerned an exercise in comparison. Those to be compared are, in shorthand, the Applicant (on the one hand) and those who do not share the relevant characteristic (on the other). The relevant characteristic in this context is that of "*religion or belief*". The question is whether the offending bail order conditions place the Applicant "*at a particular disadvantage*" when compared with those who do not share this characteristic. Who, therefore, are the comparators put forward? The Applicant compares himself with those who do not have any religious belief. While we consider that both this comparison and the requirement of demonstrating "*a particular disadvantage*", (with emphasis on the adjective "*particular*") are demanding of considerably more detailed argument than that received, we shall, for present purposes, assume these matters in the Applicant's favour. Adopting this approach, the question then becomes: has the Secretary of State demonstrated that the offending bail conditions are a proportionate means of achieving a legitimate aim?

(67) Referring to our conclusions in [29] above, this aspect of the Applicant's challenge was doomed to failure *ab initio*, on the elementary basis that the author of the measure containing the impugned conditions – the bail order – was the FtT, not the Secretary of State and the latter was guilty of no assailable omission thereafter.

(68) Further, Mr Buttler's submissions acknowledged, correctly in our view, that the proportionality question under section 19(2)(d) of the 2010 Act does not differ from its analogue under Article 9(2) ECHR. This we have addressed in full in [46] – [49] above. This conclusion, logically, applies fully to the Applicant's inequality challenge, considered in the abstract.

Omnibus Conclusion

(69) We express our main conclusions in the following terms:

(i) As the Secretary of State did not make the bail order and had no power to vary its terms, the whole of the Applicant's challenge is misconceived.

(ii) No interference with the Applicant's right to manifest his religion or beliefs, protected by Article 9 ECHR, is demonstrated.

(iii) In the alternative to (ii), any interference with the Applicant's right aforesaid is justified under Article 9(2).

(iv) The Applicant's invocation of Article 10 of the EU Charter of Fundamental Rights is misconceived, since, per Article 51, the measure under challenge, namely the bail order made by the First-tier Tribunal, does not fall within the ambit of EU law.

(v) In the alternative to (iv), the Charter adds nothing of substance to the Applicant's challenge in any event.

(vi) The Applicant's challenge under Article 8 ECHR adds nothing of substance.

(vii) The Applicant's challenge under the Equality Act 2010 is not established.

(70) We draw attention to the context in which this judgment has been prepared: see [1] – [4] above. Given the terms in which the parties ultimately resolved their differences, which contemplated the possibility that the Applicant will pursue a claim for damages in another forum, we wish to emphasise that we have decided this case on the basis of the evidence available to this Tribunal, which may not necessarily be identical to the evidence generated in another judicial forum. We would also highlight that the evidence considered by this Tribunal, bilaterally, was not tested by cross examination.

Order

(71) The first part of our Order is set out in the preamble to this judgment. We have granted the Applicant permission to discontinue his judicial review application. We decline, however, to approve the terms of the draft consent order as this reflects both parties' belief and understanding that the Secretary of State/Chief Immigration Officer was empowered to discontinue the offending bail conditions, which we have found to be erroneous in law. The Order which we have made suffices to dispose of these proceedings. While our evaluation of the further issues addressed in this judgment speaks for itself, we consider that the bail issues are of sufficiently elevated importance to warrant the making of a

declaration under section 15 of the Tribunals, Courts and Enforcement Act 2007.

Declaration

(72) (i) Presidential Guidance Note No 1 of 2012 "Bail Guidance for Judges Presiding over Immigration and Asylum Hearings" is an instrument of guidance and not instruction. It should, however, normally be followed and good reason is required for not doing so.

(ii) The First-tier Tribunal ("*FtT*") is empowered to adjudicate on applications to vary the terms of its bail orders.

(iii) The FtT retains exclusive power to vary any of its bail orders during their lifespan. The Chief Immigration Officer has no power to interfere with such orders or make any other order in such circumstances.

(iv) In cases where there is no appeal pending, an application for bail can be made to either the FtT or the Chief Immigration Officer.

Permission To Appeal

(73) The application made by the Applicant for permission to appeal to the Court of Appeal, supported by Mr Malik for the Respondent, is refused: first, because the parties previously resolved by agreement the central matters in dispute in the judicial review challenge, namely the offending bail condition and, second, because the principal argument relied on, that the Secretary of State has power to vary the conditions of a bail order made by the First-tier Tribunal where the latter remains seized of bail jurisdiction, does not satisfy the governing threshold. Furthermore, as the production of this judgment is the result of applying the principle in Ex parte Salem, it is considered that the decision on whether to grant permission to appeal is more properly made by the appellate court. Finally, we are mindful that significant statutory reforms in the realm of immigration/asylum bail appear imminent.

Costs

(74) The Applicant has applied for costs against the Secretary of State on an indemnity basis. The cornerstone of this application is that the Secretary of State has "*given the Applicant the relief sought*": see R(M) v LB Croydon [2012] 1 WLR 2607 at [61]. Next, the Applicant prays in aid the need to apply the governing principles rigorously because the legal aid system and the survival of legal aid depends upon lawyers recovering their fees where claims have been successful: R (E) v JSS Governing Body [2009] 1 WLR 2353, at [24] – [25]. Third, the Applicant relies on the Secretary of State's failure to take the action clearly required by the terms of the PAP letter. The Applicant refers to the PAP of the High Court, which does not, of course, apply to the Upper Tribunal, drawing attention to the possibility of indemnity costs being awarded where there is a breach, per paragraph 16(b). Finally, the Applicant relies upon the egregious

failures on the part of the Secretary of State to respond to a total of 11 letters, including the PAP letter.

(75) Given our conclusions in [34] above, there are clearly no grounds for ordering the Secretary of State to pay the Applicant's costs on an indemnity basis. While the effect of our analysis and conclusions is that both parties were fundamentally misguided from July 2015, when the FtT declined to consider the bail variation application on the erroneous ground that it had no jurisdiction to do so, we take into account that this was misconceived in law, albeit the correct course for the Applicant was to challenge this refusal by judicial review. While the Applicant ultimately secured the benefit he was seeking, we have found that the Secretary of State acted *ultra vires* in purporting to act as she did. We must also balance the Secretary of State's failure to make any substantive response to the Applicant's repeated requests during a period of some nine months, which we have deprecated above. Subject to the various qualifications thus highlighted, by a rudimentary analysis the contention that the Applicant ultimately secured the benefit he had been seeking via these proceedings is correct. We conclude, on balance, that the Secretary of State should pay the Applicant's costs, to include those incurred after 09 October 2015, on the normal basis, to be assessed in default of agreement.

Stay

(76) The imposition of a stay on the whole of this judgment is inappropriate, given that the judgment is declaratory in nature and has resulted in the making of a declaratory order. Judgments of this *genre* are not executory – to be contrasted with, for example, a judgment resulting in a mandatory order. See Zamir and Woolf, The Declaratory Judgment (3rd ed) paragraph 1.02. Further and in any event permission to appeal to the Court of Appeal has been refused. However, given the intimation that one or both parties may seek permission from the Court of Appeal, we shall impose a stay on the costs order only, with liberty to apply.

Signed: _____

The Honourable Mr Justice McCloskey
President of the Upper Tribunal

Dated: **16 January 2016**