Neutral Citation Number: [2018] EWCA Civ 2770

Case No: C2/2017/1081

IN THE COURT OF APPEAL (CIVIL DIVISION)
IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER (UTIAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2018

Before :

LORD JUSTICE UNDERHILL
VICE-PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION
LADY JUSTICE ASPLIN
and
LORD JUSTICE HADDON-CAVE

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
SM (RWANDA)	**Respondent**

- -

Mr Sarabjit Singh QC (instructed by **Government Legal Department**) for the **Appellant**
Ms Amanda Weston QC (instructed by **Birnberg Peirce & Partners**) for the **Respondent**

Hearing date : Tuesday 6th November 2018

- -

Approved Judgment

LORD JUSTICE HADDON-CAVE :

Introduction

1. The issue in this appeal is whether a failure by a First-tier Tribunal Judge to comply with the provisions of paragraph 22 of Schedule 2 of the Immigration Act 1971 when granting bail to a detained person rendered that grant of bail invalid and of no effect in law. On this question turns the validity of restrictions simultaneously imposed on the Respondent ("SM") by the Secretary of State for the Home Department ("SSHD").

2. The SSHD appeals from an order of Upper Tribunal ("UT") Judge Peter Lane (as he then was) dated 13th March 2017 whereby he declared that SM remained on bail granted by the First-tier Tribunal on 30th July 2015 and quashed two decisions of the SSHD made on 3rd December 2015 and 4th January 2016 imposing bail restrictions.

3. Mr Sarabjit Singh QC appeared for the SSHD and Ms Amanda Weston QC appeared for SM.

Background facts

4. SM was born on 10th January 1982 and is a national of Rwanda.

5. On 14th April 1997, SM arrived in the UK with his mother and siblings. His mother claimed asylum and SM was named as a dependant. The asylum claim was refused on 25th April 2001 but the family was granted 4 years' exceptional leave to remain.

6. On 21st April 2005, SM's mother applied to the SSHD for indefinite leave to remain. This was granted on 10th November 2005. On 16th November 2005, SM was granted indefinite leave to remain in line with his mother.

7. From February 2001 onwards, SM committed a series of criminal offences. On 12th September 2006, he was convicted of 10 counts of robbery. On 13th November 2006, he was sentenced to life imprisonment on each of the 10 counts with a minimum term of 7 years, and was recommended for deportation. On appeal on 2nd April 2007, SM's life sentences were quashed and replaced with a term of imprisonment for public protection with a minimum tariff of 7 years, and the recommendation for deportation was upheld.

8. On 13th November 2012, the SSHD made a deportation order against SM. SM appealed and on 3rd July 2013 his appeal was dismissed by the FTT. He was granted permission to appeal on 5th September 2013 and on 19th February 2014 his appeal was dismissed by the UT, on the basis that there was no material error of law in the FTT's decision. On 13th April 2014, the UT refused to grant SM permission to appeal to the Court of Appeal and on 17th November 2014 the Court of Appeal refused him permission to appeal. SM's appeal rights were exhausted on 27th November 2014.

9. SM's 7 year tariff for the 10 robberies expired on or around 17th December 2012. On 31st March 2015, following a hearing on 30th March 2015, the Parole Board directed SM's release from criminal custody on licence. However, he was thereafter detained by the SSHD under her immigration powers, having entered immigration detention on 30th March 2015.

10. On 2nd April 2015, SM (through his solicitors) applied to revoke the deportation order in force against him. On 17th September 2015, the SSHD refused to revoke the deportation order, with no right of appeal, but following receipt of a letter before claim from SM dated 2nd October 2015, on 28th October 2015 the SSHD withdrew her decision dated 17th September 2015 and stated that SM's submissions would be reconsidered.

FTT's Bail Form dated 30th July 2015

11. On 30th July 2015, SM was released from immigration detention by FTT Judge Narayan, purportedly on bail. The usual FTT bail form was filled out. It recorded the name and residential address of SM and a *"Recognizance"* from SM's mother in the sum of £300 and was signed by them as *"Applicant"* and *"First Surety"* respectively below the following standard declaration:

> *"We, the applicant and the sureties, have read and understood this bail decision and agree to pay the sums of money set out above if the applicant fails to comply with the following primary condition: …"*

12. The bail form stated the *"Primary Conditions of Bail"* as follows:

Primary Conditions of Bail
Insert relevant section from Annex B with details. *"The applicant [SM] is to appear before his Offender Manager"*

13. The bail form listed six *"Secondary Conditions of Bail"* as follows:

Secondary Conditions of Bail
Insert relevant section from Annex B with details. ✓ *"Bail is granted subject to (i) the applicant cooperating with the arrangement for electronic monitoring ("tagging")….* ✓ *Bail is granted in the same terms as the licence.* ✓ *That in the event of the applicant applying for any variation of address or bail that the Home Office be notified of the details of the application.* ✓ *Must not enter paid employment, or engage in any business or profession.* ✓ *The applicant is also required to comply with the terms of his licence.* ***and*** *1. The applicant shall live and sleep at the address set out above."*

14. The bail form was signed by the FTT Judge below the following standard form declaration:

> *"I certify that I have granted/continued bail to the applicant subject to the conditions set out above and have taken the recognisance of the applicant and the first and second surety."*

SSHD's Notice of Restriction dated 30th July 2015

15. On the same day as SM was granted bail, 30th July 2015, the SSHD issued a *"DO4 (EM)"* document to SM, namely a *"Notice of Restriction"* comprising restrictions imposed on SM under paragraph 2(5) of Schedule 3 to the Immigration Act 1971.

16. The SSHD's *"Notice of Restriction"* comprised the following restrictions:

    i) Within 24 hours of receiving the notice, SM had to report in person to the immigration officer in charge of the Home Office Reporting Centre at Becket House in London.

    ii) Thereafter, SM had to report in person to the immigration officer in charge of that reporting centre between the hours of 10am and 4pm every Friday, or on such other day in each week as the officer to whom he made his last weekly report might allow.

    iii) SM had to live at a particular address.

    iv) SM was to be monitored electronically by means of tagging/tracking.

    v) SM had to be present at his address between 7pm and 9pm on 31st July 2015 for an induction relating to the electronic monitoring equipment.

    vi) Following induction, he had to be present at his address every day between the hours of 8pm and 7am.

    vii) SM was not allowed to enter employment, paid or unpaid, or engage in any business or profession.

SM's challenge

17. On 30th September 2015, SM's solicitors emailed the SSHD claiming that she had no power to impose restrictions and asked for them to be withdrawn. It was also contended that the Bail Form had included a restriction on voluntary working in error. The SSHD replied on 19th October 2015, defending the imposition of restrictions. She stated:

> *"… It is noted that your client is no longer on Immigration Judge bail and is now on restrictions imposed by the Home Office. Consequently, this allows the Home Office to make changes to your clients['] conditions without the need to making [sic] a further application to the court. Therefore the restrictions imposed on your client are maintained."*

18. On 19th October 2015, SM repeated his challenge to the imposition of restrictions. On 4th November 2015, the SSHD replied, maintaining her position.

19. On 6th November 2015, SM asked the SSHD to withdraw the restriction that prohibited him from entering unpaid employment. On 3rd December 2015, the SSHD refused to do this, on the basis that the FTT's bail condition imposed on 30th July 2015 prohibited SM from engaging in any business or profession, including a prohibition on him engaging in any voluntary unpaid work.

20. On 2nd December 2015, SM's Offender Manager from the National Probation Service asked the SSHD to change SM's curfew hours from 8pm to 7am to 11pm to 6am. On 4th January 2016, the SSHD refused to do this.

21. On 26th January 2016, SM sent a letter before claim to the SSHD, challenging her decision dated 3rd December 2015. On 29th January 2016, SM sent a supplementary letter before claim to the SSHD, challenging her decision dated 4th January 2016. On 4th February 2016, the SSHD replied to SM's letter before claim dated 26th January 2016, maintaining her position.

22. On 2nd March 2016, SM issued the judicial review proceedings which are the subject of the present appeal. In a decision sent to the parties on 17th May 2016, the UT refused SM permission to apply for judicial review. On 22nd August 2016, permission to apply for judicial review was granted by the UT at an oral hearing. The substantive judicial review hearing took place before UT Judge Peter Lane on 25th January 2017, who gave judgment on 13th March 2017 as aforesaid.

The Legal Framework

Schedules 2 and 3 to Immigration Act 1971

23. I set out below the relevant provisions from Schedules 2 and 3 to the Immigration Act 1971. (It should be noted that Schedule 10 of the Immigration Act 2016, which came into force on 15th January 2018, repeals paragraphs 21 to 25 of Schedule 2 and amends paragraph 2 of Schedule 3 of the 1971 Act).

> *"**Schedule 2, paragraph 22:***
>
> *(1) The following namely—*
>
> > *(a) a person detained under paragraph 16(1) above pending examination; [...]*
> >
> > *(aa) a person detained under paragraph 16(1A) above pending completion of his examination or a decision on whether to cancel his leave to enter; and*
> >
> > *(b) a person detained under paragraph 16(2) above pending the giving of directions,*
>
> *— may be released on bail in accordance with this paragraph.*
>
> *(1A) An immigration officer not below the rank of chief immigration officer or the First-tier Tribunal may release a person so detained on his entering into a recognizance … conditioned for his appearance before an immigration officer at a time and place named in the recognizance … or at such*

other time and place as may in the meantime be notified to him in writing by an immigration officer.

(2) The conditions of a recognizance or bail bond taken under this paragraph may include conditions appearing to the immigration officer or the First-tier Tribunal 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 First-tier Tribunal may determine."

(3) In any case in which an immigration officer or a First-tier Tribunal has power under this paragraph to release a person on bail, the officer of the First-tier Tribunal may, instead of taking the bail, fix the amount and the conditions of the bail (including the amount in which any sureties are to be bound) with a view to its being taken subsequently by any such person as may be specified by the officer or the First-tier Tribunal; and on the recognizance or bail bond being so taken the person to be bailed shall be released.

(4) A person must not be released on bail in accordance with this paragraph without the consent of the Secretary of State if –

(a) directions for the removal of the person from the United Kingdom are for the time being in force, and
(b) the directions require the person to be removed from the United Kingdom within the period of 14 days starting with the date of the decision on whether the person should be released on bail."

"Schedule 3, paragraph 2:

(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom…

(4A) Paragraphs 22 to 25 of Schedule 2 to this Act apply in relation to a person detained under sub-paragraph (1), (2) or (3) as they apply in relation to a person detained under paragraph 16 of that Schedule.

(5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence as to his employment or occupation and as to the reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.

(6) the person to whom sub-paragraph (5) applies are –

(a) a person liable to be detained under sub-paragraph (1) above, while by virtue of a direction of the Secretary of State he is not so detained; and

> *(b) a person liable to be detained under sub-paragraph (2) or (3) above, while he is not so detained."*

FTT President's Bail Guidance

24. Guidance to FTT Judges granting bail is given by the President of the FTT, Mr Clements, in *Presidential Guidance Note No. 1 of 2012* entitled "*Bail Guidance for Judges presiding over Immigration and Asylum Hearings*" ("the Bail Guidance"). Paragraph 3 of the Bail Guidance makes it clear that it is not exhaustive or binding because "*First-tier Tribunal Judges must apply the law and, if there is any divergence between the law and this guidance, the law will always be preferred*". Paragraph 4 provides:

> *"4. In essence, a First-tier Tribunal Judge will grant bail where this in no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control."*

25. The Bail Guidance refers to the conditions imposed under sub-paragraph 22(1A) as the "*primary conditions*" of bail and the conditions imposed under sub-paragraph 22(2) as the "*secondary conditions*" of bail (and at Annex 8 includes a *pro forma* Bail Form in those terms). The Bail Guidance also provides *inter alia* as follows:

> *"33. <u>The first condition is to specify when bail will end.</u> 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 it to reside when released and will often specify that the application should answer to an Immigration Officer within seven days.*
>
> *35. Once the applicant has answered to an Immigration Officer <u>in accordance with that primary condition</u>, the duration of any further grant of bail will be made by a Chief Immigration Officer rather than the Tribunal."* [Emphasis added]

UT judgment

26. SM's challenge to the SSHD's *"Notice of Restriction"* before UT Judge Peter Lane was put on the basis that the SSHD was not entitled in law to attach additional conditions to a person who was already the subject to bail imposed by an FTT judge properly seized and, in any event, such restrictions were unnecessary and unjustified restrictions on SM's liberty.

27. The SSHD argued that the FTT's imposition as a primary condition of bail of a requirement for SM to appear before his *"Offender Manager"* rather than an *"Immigration Officer"* was 'manifestly non-compliant' with paragraph 22(1A) of Schedule 2 and rendered the FTT's grant of bail void *ab initio* and, accordingly, the SSHD was free to impose her own restrictions.

Construction

28. UT Judge Peter Lane rejected the SSHD's submission that the FTT's grant of bail was void *ab initio*. He held that, notwithstanding the FTT Judge's error, on the true construction of paragraph 22 of Schedule 2, the FTT's grant of bail was valid and SM remained subject to the FTT's bail and therefore the SSHD's "*purported bail conditions, set out in the notice of restriction… can have no legal effect*" (paragraph [63] of his judgment). It is this finding that is the subject of this appeal. I consider the UT Judge's reasoning in detail below. (It should be noted that the reference to "*bail conditions*" is erroneous because the restrictions in the SSHD's *"Notice of Restrictions"* were technically not 'bail' conditions – the SSHD never having granted bail.)

Other findings

29. The UT made a number of further findings which it is appropriate to record.

30. The UT quashed the SSHD's decision dated 3rd December 2015 whereby she declined to vary her restriction in her *"Notice of Restriction"* prohibiting SM from entering into paid or unpaid employment on the basis that the FTT had itself prohibited such work on 30th July 2015 by prohibiting SM from engaging in any business. The UT Judge nevertheless held that the SSHD's restriction did have legal effect because: (i) the condition imposed by the FTT, which was intended to permit SM to undertake voluntary unpaid work, did not appear to be a condition which the FTT could make under paragraph 22(2) of Schedule 2 to the 1971 Act; (ii) the UT agreed with the SSHD's submission that "*responsibility for operating the statutory regime concerning restrictions on employment etc in respect of those who are subject to immigration control lies with the [SSHD]*"; (iii) the FTT's condition could not affect the SSHD's "*freestanding ability to impose restrictions on employment or occupation under paragraph 2(5) of Schedule 3 [to the Immigration Act 1971]*", and (iv) such a restriction on employment covered both paid and unpaid work and/or employment.

31. The UT also quashed the SSHD's decision dated 4th January 2016 whereby she maintained the curfew against SM that she had purported to impose under paragraph 2(5) of Schedule 3 in her *"Notice of Restrictions"*. In the light of the Court of Appeal's subsequent ruling in *R (Gedi) v SSHD* [2016] EWCA Civ 409, [2016] 4 WLR 93, published on 17th May 2016, which made it clear that the SSHD had no power to impose a curfew under paragraph 2(5) of Schedule 3, the SSHD did not challenge the UT Judge's decision.

UT Judge's reasoning on construction

32. UT Judge Peter Lane upheld the SSHD's argument that the *"primary"* bail condition imposed by FTT Judge Narayan (namely, *"The applicant [SM] is to appear before his Offender Manager"*) was defective because it required SM to appear before *"his Offender Manager"* rather than an *"Immigration Officer"* in accordance with sub-paragraph 22(1A) of Schedule 2.

33. Although not mentioned by the UT Judge, there was also a second reason why FTT Judge Narayan's grant of bail was defective, namely, that his bail order also failed to specify any *"time and place"* of recognizance as required by sub-paragraph 22(1A) of Schedule 2.

34. Despite finding the FTT's bail order was defective, the UT Judge nevertheless rejected the SSHD's submission that the FTT's grant of bail was void *ab initio* for essentially four reasons. First, the consequences of finding that a decision to grant bail was of no legal effect are likely to be "*serious*" and he, therefore, approached the question of statutory construction on the basis that Parliament was "*unlikely*" to have intended that bail decisions should be nullities (paragraphs [48] and [51]). Second, a "*primary*" bail condition in sub-paragraph 22(1A) fell within the category of *"conditions of a recognizance or bail bond taken under this paragraph"* in sub-paragraph 22(2) and, there is thus "*a conceptual difference between the power to release on bail and the conditions to be imposed, including the primary condition*" (paragraph [52]). Third, the words in sub-paragraph 22(1) *"in accordance with this paragraph…"* applied to the whole of paragraph 22 and included any condition imposed under sub-paragraphs 22(1A) or 22(2); and, accordingly, this meant that any defect in the grant of bail would render it a nullity - which was "*highly problematic*". Fourth, the way in which sub-paragraph 22(3) was framed underlined the difference between "*taking*" bail, which when done results in release, and fixing the "*conditions of bail*", which does not automatically have that effect.

35. It was on this basis that UT Judge Peter Lane went on to hold that the continued existence of the FTT's bail meant that the conditions imposed by the SSHD could have no legal effect.

Submissions

36. Mr Singh QC raises three Grounds of Appeal on behalf of the SSHD: (i) first, the UT erred in finding that the grant of bail by the FTT was valid; (ii) second, the UT erred in finding that the SSHD's "*Notice of Restriction*" had no legal effect; and (iii) third, the UT erred in impermissibly creating a species of FTT bail of 'non-finite' duration. Mr Singh QC submitted that the FTT's grant of bail was outwith its powers under sub-paragraph 22(1A) of Schedule 2 the Immigration Act 1971 and was, therefore, *ultra vires* and void *ab initio*; and, accordingly, the UT erred in treating the SSHD's subsequent imposition of terms in her "*Notice of Restriction*" as invalid.

37. Ms Weston QC argued on behalf of SM that the FTT's decision was not vitiated by the FTT Judge's error (or errors), and the FTT's grant of bail remained valid and effective until set aside by the FTT itself or quashed by a superior court or tribunal. She submitted in summary that: (i) sub-paragraph 22(1A) of Schedule 2 did not state that the statutory bail conditions to the recognizance were conditions precedent to having jurisdiction to grant bail; (ii) it was not open to one party unilaterally to disregard the court's order; (iii) the question of whether an order was 'void' or 'voidable' is properly determined by the court and not a party and the SSHD could not usurp the court's supervisory jurisdiction; (iv) invalidity does not automatically flow from the breach of a statutory requirement; and (v) Article 5(4) of ECHR (the right to liberty and security) supported upholding the validity of grants of bail until otherwise set aside or quashed.

Analysis

38. I turn first to highlight the relevant principles and guidance as to statutory construction which apply in the present administrative law context.

Statutory bail provisions are to be strictly and restrictively construed

39. First, the fundamental principle of statutory construction that statutory provisions relating to restrictions on the liberty of the subject are to be "*strictly and restrictively*" construed applies equally to statutory provisions concerning bail. This has recently been confirmed by the Supreme Court in *B (Algeria) v SSHD (No.2)* [2018] AC 418.

40. In *B (Algeria) v SSHD (No.2)*, Lord Lloyd-Jones reiterated the 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*" (at paragraph [29]) and cited *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 75, 122 *per* Lord Bridge of Harwich; and Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131D-G (see further below). He quoted the following well-known observation of Laws J observed in *In re Wasfi Suleman Mahmod* [1995] Imm AR 311 (at page 314):

> *"While, of course, Parliament is entitled to confer powers of administrative detention without trial, the court will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards."*

41. Lord Lloyd-Jones continued (at paragraph [29]):

> *"29. ... In the present case our particular focus is not on a power of executive detention, but on a power to grant bail. Nevertheless, and despite the fact that the purpose may be to effect a release from detention, I consider that this similarly attracts the presumption of statutory interpretation because the conditions which may be attached to a grant of bail are capable of severely curtailing the liberty of the person concerned. It was common ground before us that bail under the 1971 Act may be subject to conditions which constitute a deprivation of liberty within article 5(1)(f) ECHR. As Mr Tam frankly accepts, the ability to exercise control through the use of what may be stringent conditions of bail in part underlies the purposive interpretation for which he contends. Moreover, this is, to my mind, a situation where the principle of legality is in play. As Lord Hoffmann observed in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, 131D-G:*
>
> > *"Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*
>
> *In these circumstances, we are required to interpret the statutory provisions strictly and restrictively."* [Emphasis added]

42. In my view, Lord Lloyd-Jones' observations apply to all statutory provisions relating to bail and apply equally to *"primary"* and *"secondary"* conditions of bail. My reasons for this view are as follows. First, Lord Lloyd-Jones' statement in expressed in general terms, applying to bail as a whole: "*the power to grant bail… attracts the presumption of statutory interpretation…*". Second, his explanation reinforces this intention: "*…because the conditions which may be attached to a grant of bail are capable of severely curtailing the liberty of the person concerned*". He adds that it is common ground that bail under the 1971 Act may be subject to conditions which amount to a deprivation of liberty within article 5(1)(f) of the ECHR. Third, he does not suggest that the application of the presumption of statutory interpretation in the context of bail should depend upon either (i) the precise nature of the particular bail provision or condition in question or (ii) whether a *"primary"* and *"secondary"* condition of bail is in issue or (iii) how restrictive certain bail conditions might be. Fourth, his comprehensive approach is clearly right: the bail regime is a balanced *package* of measures available to the authorities to exercise control of persons as an alternative to detention. It makes no sense to discriminate between conditions. There should be one consistent principle of construction applicable to the entire bail regime. Fifth, the *"primary"* conditions mandated by sub-paragraph 22(1A) (surrender to bail "*…before an immigration officer at a time and place named in the recognizance"*) are a *sine qua non* to release on bail and part of the necessary mechanism of the exercise of the *power* to release immigration detainees on bail under sub-paragraph 22(1). They are, therefore, clearly subject to the general presumption of strict statutory interpretation which applies to "*the power to grant bail*" to which Lord Lloyd-Jones refers. Sixth, immigration officers and the FTT have a wide discretion under sub-paragraph 22(2) to impose *"secondary conditions"* of bail which amount to a 'curtailment of liberty'. Similarly, *"primary conditions"* also self-evidently amount to a 'curtailment of liberty' because, by definition, the person concerned is not at liberty to go where he/she pleases but has to surrender him/herself, in the future, to a particular official at a particular time and place as recorded in the bail form. Seventh, both *"primary"* and *"secondary"* conditions form part of the 'alternative means of control' short of detention which the immigration bail regime represents (as described in paragraph 4 of the Bail Guidance).

Rigid legal classifications should be avoided

43. Second, formalistic legal classifications should be avoided when deciding the consequences of a defect in the exercise of an administrative power. The ultimate question is one of construction as to whether Parliament can fairly be taken to have intended total invalidity.

44. In the course of his judgment, UT Judge Peter Lane described the issue before the court in terms of whether the FTT's bail order could be described as 'void' and 'voidable'. This approach was echoed by Ms Weston QC in her skeleton.

45. In my view, however, this language is redolent of an outmoded approach to questions of construction and *vires* in administrative law contexts such as the present. Administrative law has moved on since the days of Lord Denning's famous dissent in *Ridge v Baldwin* [1964] QB 40. The House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 put paid to the suggestion that that there was a distinction in administrative law between orders or acts which were 'void' as opposed to merely 'voidable'. An administrative act or order which is a nullity is, by definition, void, *i.e.* utterly without existence or effect in law. As Lord Reid said in *Anisminic*, "*there are no degrees of nullity*" (*ibid*, at p.170).

46. In *F Hoffmann La Roche v SSTI* [1975] AC 295 at page 365, Lord Diplock said the correct term was 'void' in the administrative law context:

> *"It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any less consequence in law than to render the instrument incapable of ever having had any legal effect…"*

47. Lord Irvine LC quoted this passage with approval in *Boddington v British Transport Police* [1999] 2 AC 143 at page 158 and re-iterated that when an act or regulation has been pronounced by the court to be unlawful, it is then recognised as having had no legal effect at all. This consequence flows from the *ultra vires* principle or from the rule of law.

48. In a well-known passage in *London & Clydesdales Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, Lord Hailsham explained the dangers of using rigid legal classifications in the field of administrative law (at pages189-190):

> *"…[T]hough language like "mandatory," "directory," "void," "voidable," "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."*
> [Emphasis added]

49. In *R v Soneji* [2006] 1 AC 340, a case concerning a failure to comply with time limits in confiscation proceedings, Lord Steyn echoed Lord Hailsham's *dictum* (at paragraph [15]):

> *"15. … The rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, …the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."*

Two-stage test

50. In *North Somerset District Council v Honda Motor Europe Ltd & Others* [2010] EWHC 1505 (QB), Burnett J (as he then was) conducted a magisterial analysis of the authorities in this area. The case concerned the validity of notices of business rates which had not been served by the council within the required time. Burnett J's analysis demonstrated that the traditional dichotomy between regulations which were to be regarded as 'mandatory' or 'directory' - invalidity being the consequence of the former but not the latter - has long since given way to a less formulaic approach to questions of validity in administrative law which is focussed on determining objectively the intention of Parliament.

51. Burnett J formulated the following two-stage test approach for determining the question of validity in his case, which concerned the consequences of a failure to comply with a statutory time limit:

> *"43. It is clear from the analysis [by the House of Lords] in Soneji that in any case concerning the consequences of a failure to comply with a statutory time limit, there are potentially two stages in the inquiry. The first is to ask the question identified by Lord Steyn: did Parliament intend total invalidity to result from failure to comply with the statutory requirement? If the answer to that question is 'yes', then no further question arises. Yet if the answer is 'no' a further question arises: despite invalidity not being the inevitable consequence of a failure to comply with a statutory requirement, does it nonetheless have that consequence in the circumstances of the given case and, if so, on what basis? It is at this second stage that the concept of substantial compliance may yet have a bearing on the outcome."* [Emphasis added]

52. I respectfully endorse and adopt Burnett J's two-stage approach which, in my view, is applicable in all administrative law cases where questions of statutory construction and validity arise. His two-stage and structured approach has the benefit of (a) giving appropriate primacy to the actual words used by Parliament and (b) ensuring, if necessary, careful consideration is given to the consequences of non-compliance when determining validity.

53. I turn to apply the test to the present case.

Did Parliament intend total invalidity to result from failure to comply with the provisions of paragraph 22(1A)?

54. The first question is: Did Parliament intend total invalidity to result from failure to comply with the provisions of sub-paragraph 22(1A) of Schedule 2? In my judgment, the answer to this question is 'Yes' for the following reasons.

55. First, the bail provisions of paragraph 22 of Schedule 2 must be "*strictly and restrictively*" construed. Sub-paragraph 22(1) of Schedule 2 grants a senior immigration officer (*i.e. "not below the rank of chief immigration officer"*), or the FTT, power to release a detained person "*in accordance with this paragraph*". It is stating the obvious that, therefore, they have no power to release a detained person on bail other than in accordance with the terms of paragraph 22.

56. Second, sub-paragraph 22(1A) empowers either a senior immigration officer, or the FTT, to release a detained person on bail if that person enters into a recognizance "*conditioned for his appearance before an immigration officer at a time and place named in the recognizance*". There are, therefore, two specified conditions of bail mandated to which any grant of bail by the senior immigration officer or FTT to any detained person must be made subject: (i) appearance before *"an immigration officer";* (ii) appearance *"at a time and place"* named in the recognizance. A senior immigration officer or the FTT has no power to release a detained person on bail on any other basis.

57. Third, the two conditions mandated by sub-paragraph 22(1A) are to be contrasted with the permissive conditions referred to in sub-paragraph 22(2). Sub-paragraph (2) permits the immigration officer or FTT (i) to include conditions which appear to them likely to result in the appearance of the person bailed "*at the required time and place"* and (ii) to require recognizance *"with or without sureties"* as they may determine.

58. Fourth, the contrast between the conditions mandated in sub-paragraph 22(1A) and conditions permitted in sub-paragraph 22(2) is highlighted in the Bail Guidance which refers to the sub-paragraph 22(1A) conditions as the *"primary conditions"* of bail and the sub-paragraph (2) conditions as the *"secondary conditions"* of bail (and see the Bail Form above). This dual categorisation is reflective of the fact that the *"primary conditions"* are self-evidently fundamental aspects of the grant of immigration detention bail itself since (i) the designation of an *"immigration officer"* to whom the person bailed must surrender is an essential feature of control of immigration detention bail by the immigration authorities; and (ii) the condition that *"a time and place"* must be stipulated in the recognizance is essential in order to specify the duration of bail, *i.e.* when the bail will end.

59. It follows that, where an immigration officer, or the FTT, purport to release a detained person on bail but fail to make the recognizance subject to both *"primary"* conditions mandated by sub-paragraph 22(1A), such purported grant of bail is necessarily invalid and 'void' in the sense described by Lord Diplock (above). It is plain from the language that Parliament intended total invalidity to result from such a fundamental failure.

60. In the present case, FTT Judge Narayan's grant of bail was deficient and non-compliant with sub-paragraph 22(1A) in two fundamental respects: (i) first, it specified appearance before SM's *"Offender Manager"* rather than *"an immigration officer"*; and (ii) second, it failed to specify any surrender date, *i.e.* appearance *"at a time and place"* named in the recognizance. Accordingly, the FTT's purported grant of bail was, therefore, totally invalid, void and unlawful.

61. In summary, in my view, the terms of paragraph 22 of Schedule 2 are pellucid and the question of construction is straightforward. Given that the answer to the first question posed by Burnett J is 'Yes', no further question arises.

'Non-finite' immigration bail is impermissible

62. Mr Singh QC submitted that the FTT's failure to specify a *"time and place"* for surrendering to bail had the additional consequence that the purported grant of bail was of a 'non-finite' duration and was, therefore, impermissible in any event. Mr Singh QC relied upon Longmore LJ's judgment in *R (AR (Pakistan)) v Secretary of State for the Home Department* [2016] EWCA Civ 807 at paragraph [27], where he held "*there is no sub-scenario of FTT bail of non-finite duration*".

63. In *R (AR (Pakistan)) (supra),* the claimant was bailed by the FTT to appear before an immigration officer 8 days later pursuant to paragraph 22 of Schedule 2 subject to conditions. After remaining on bail for ten months, the claimant sought to review the conditions. Before the claim was heard by the UT, the Home Secretary agreed to vary the bail conditions so that they ceased immediately and the claimant accordingly withdrew his claim for judicial review. The UT nevertheless proceeded to determine the issues before it, declaring that the FTT had exclusive power to determine the issues before it and neither the Home Secretary nor any of her immigration officers had any

power to interfere with such orders or bail conditions. The claimant appealed, supported by the Home Secretary. The Court of Appeal allowed the appeal on the basis that bail conditions imposed on the true construction of paragraph 22 of Schedule 2 ceased on surrender, whereupon it was for the person to whom the detained person surrendered to re-fix bail; and that, therefore, to the extent that conditions of bail imposed by the FTT continued after surrender, they were to be treated in law as having been imposed by the immigration officer to whom the detained person had surrendered and could be varied or discharged by the Home Secretary.

64. Longmore LJ, who gave the leading judgment, described the words in sub-paragraph 22(1A) "*on his entering into a recognizance … conditioned for his appearance before an immigration officer at a time and place named in the recognizance*" as follows (in paragraph [26]):

> *"26. … This is a time-honoured form of words to express the idea of surrendering to bail. Once a bailed person surrenders to his bail (whether to magistrates or the Crown Court in a criminal case or to an immigration officer in an immigration case) it is then for the person to whom he surrenders to re-fix bail, if he or she considers it appropriate to do so and to determine any appropriate conditions."*

65. Longmore LJ went on to explain (in paragraph [27]):

> *"27. It is fair to say that there are no express words in paragraph 22 saying that bail conditions are to cease on surrender but in my view Mr Clement's [Bail Guidance] correctly states the position as a matter of necessary inference from the terms of paragraph 22 and particularly paragraph 22(1A). It follows that there is no sub-scenario of FTT bail of non-finite duration in a case where there is no pending appeal to the FTT. …"* [Emphasis added]

66. Longmore LJ's judgment has recently been applied by the Court of Appeal in *R (Lucas and Aboro) v. Secretary of State for the Home Department* [2018] EWCA Civ 2541.

67. In my view, the FTT's failure to specify *"a time and place"* for recognizance meant, in effect, that it had purported to grant bail on a 'non-finite' basis, *i.e.* with no end date. I agree that, for the reasons explained by Longmore LJ, this was impermissible (as well as being an express breach of sub-paragraph 22 (1A)).

UT approach to construction was incorrect

68. In my judgment, UT Judge Peter Lane's approach to this statutory construction exercise was incorrect. He did not have the advantage of seeing Lord Lloyd-Jones's judgment in *B (Algeria)* (*supra*) which post-dated his. He did not apply Burnett J's two-stage test when considering the question of construction and *vires.* Indeed, he appears to have allowed his view as to the second stage of the test (*i.e.* that the consequences of invalidity would be "*serious*") to have coloured his view as to the first (*i.e.* the anterior question of pure construction). Neither did he construe the words of paragraph 22 of Schedule 2 "*strictly and restrictively*" in accordance with the presumption as to statutory construction (although, in my view, the meaning of the language is pellucid even without the presumption).

69. He also failed to appreciate the distinction between sub-paragraphs 22(1A) and 22(2), *i.e.* the two *"primary"* conditions mandated by the former and the *"secondary"* conditions permitted by the latter. The main reason he gave for rejecting Mr Singh QC's argument on construction was that "*…it would be highly problematic if any unlawful condition [under sub-paragraph 22(2)] were to have the effect of rendering the entire grant of bail void*" (paragraph [53] of the judgment). However, whilst the concluding words of sub-paragraph 22(1) *"in accordance with this paragraph"* clearly apply to the whole of paragraph 22 (*i.e.* to the entirety of sub-paragraphs 22(1A) to (4)), it does not follow, as the UT Judge said, that "*…the same consequence [i.e. nullity] must follow in respect of any condition, not just the primary condition*" (paragraph [53] of his judgment). In my view, it is plain from the language of sub-paragraphs 22(1A) and 22(2) that the *"primary"* and *"secondary"* conditions were qualitatively different and that Parliament intended the consequence of non-compliance with the *"primary"* conditions under sub-paragraph 22(1A) to be total invalidity.

70. In my view, the distinction that UT Judge Peter Lane drew between "*taking*" bail and fixing the "*conditions of bail*" makes no difference to the analysis.

71. UT Judge Peter Lane also appears not to have appreciated the significance of *AR (Pakistan) (supra)* in the context of the present case. He said this (at paragraph [50]):

> *"50. With respect to Mr Singh, I do not consider that AR (Pakistan) has anything material to say about this question of statutory construction. The fact that there is 'no sub-scenario of FTT bail of non-finite duration" in a case where there is no pending appeal to the First-tier Tribunal (paragraph 27 of the judgments) does not mean that bail is necessarily void, if, through error, a judge fails to comply fully with the legislative requirements."*

Respondent's arguments

72. Ms Weston QC raised a variety of arguments on behalf of SM in support of the UT's construction. I mean no discourtesy by just dealing with what appeared to be her three main arguments.

73. First, Ms Weston QC argued that paragraph 22 did not expressly state that the two statutory conditions in sub-paragraph 22(1A) amounted to a statutory 'condition precedent' and, whilst a failure by the FTT might give rise to an 'error on the face' of the order, this did not deprive the FTT of its jurisdiction (as she put it). It is trite law, however, that a statute does not have to use the language of condition precedence to be clear as to *vires*. For the reasons explained above, in my view, the terms of paragraph 22 are pellucid and the intention of Parliament is clear: the inclusion of the two (primary) statutory conditions in sub-paragraph 22(1A) is a *sine qua non* to the valid grant of bail and neither the immigration officer nor the FTT have power to grant bail to a detained person on any other basis.

74. Second, Ms Weston QC argued that the FTT's grant of bail remained valid and effective until either set aside by the FTT itself or quashed by a superior court or tribunal. In support of this argument, she relied upon a number of authorities which articulated the well-known general rule that orders of the court are binding until set aside or varied (*e.g. Director of Public Prosecutions v T* [2007] 1 W.L.R. 209 *per* Richards LJ at paragraph [27] and *KW (by her litigation friend) and others v Rochdale*

Metropolitan Borough Council [2015] EWCA Civ 1054 at paragraph [22]). Ms Weston QC's point is, however, academic. The matter is now before this superior court which is properly seized of the issue. An order has been sought declaring the FTT's grant of bail a nullity. If such an order is made (which, in my view, it should be for the reasons which I have explained), this court's order will necessarily declare the FTT's grant of bail void *ab initio*. In these circumstances, there would have been no failure by the SSHD to respect the order of the FTT because it was a nullity and there would *ex hypothesi* have been no order to respect.

75. Third, Ms Weston QC submitted that it was highly unsatisfactory that SM should have been unlawfully at large for months through no fault of his own and the law would set its face against such a result. It is right to say that the result of some administrative decisions being found, or held, to be void may sometimes lead to unsatisfactory outcomes or state of affairs. However, this does not mean that proper effect should not be given to the intention of Parliament as expressed in the statutory language, or that the courts should ignore questions of *vires* when such difficulties are pointed out.

Good practice

76. Nevertheless, this case does raise an important point as to what parties should do when faced with a situation such as the present. When it became apparent that there was an issue as to the validity of the FTT's grant of bail and the efficacy of the SSHD's *"Notice of Restriction"*, it would have been good practice for the SSHD to have brought the matter quickly back before the court for appropriate resolution. In my view, it was not appropriate for the SSHD simply to sit back and assert her right to impose restrictions on SM in the face of the FTT's extant bail order, thereby requiring the claimant after several months to have to resort to judicial review proceedings. The SSHD should immediately have sought to re-list the matter before the FTT for mention and resolution. I do not accept Mr Singh QC's suggestion that there was no power under the FTT Rules (*The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014)* to rectify the matter. The FTT would have been bound to do so in accordance with the overriding objective.

Conclusion

77. In conclusion, therefore, in my judgment, it is clear that Parliament intended total invalidity to result from a failure by an immigration officer or the FTT to impose the two *"primary"* conditions required by paragraph 22(1A) of Schedule 2 of the Immigration Act 1971 when granting bail to a detained person. The FTT's grant of bail on 30th July 2015 was, therefore, *ultra vires*, void and a nullity. Accordingly, there was no bar to the SSHD imposing her own conditions on SM on 30th July 2015 by way of a *"Notice of Restriction"*.

78. For these reasons, I would allow this appeal.

LORD JUSTICE UNDERHILL:

79. I agree that this appeal should be allowed for the reasons given by Haddon-Cave LJ, subject only to one qualification. Contrary to what he says at para. 68 of his judgment (see also para 42), I would not myself regard the observations of Lord Lloyd-Jones in *B (Algeria)* as applicable to the particular issue in this appeal. Those observations are directed at the construction of statutory provisions allowing the imposition of conditions which have the effect of constraining the liberty of the person subject to

them. The conditions required by paragraph 22 (1A) are not of that character: they are simply part of the necessary mechanism of a release on bail. (In fact, the strict construction which we have felt obliged to adopt – that is, by treating the requirement for such conditions as, in the old language, "mandatory" – has, in the context of this case, an outcome which is positively prejudicial to SM's liberty since it means that he has, strictly speaking, been unlawfully at large since his release.) This qualification does not affect my view of the outcome, since the other reasons given by Haddon-Cave LJ still require the conclusion that the defects in the FTT's order of 30 July 2015 rendered it a nullity; but I record it in case it is relevant in a different case.

80. It will be clear from Haddon-Cave LJ's summary of the history that, despite his success in the appeal, this case has not been well handled by the Secretary of State. The point on which he now succeeds should have been identified as soon as the defective order was made, and in any event at the point at which SM challenged the notice of restrictions, and the case should, as Haddon-Cave LJ says, have been restored forthwith before the FTT for the problem to be resolved. Instead the Secretary of State sought, until after the initiation of the present proceedings, to defend her position on the basis that the FTT's decision was valid but that it was not inconsistent with her own notice of restrictions.

LADY JUSTICE ASPLIN:

81. I agree with Haddon-Cave LJ that the appeal should be allowed for the reasons he gives. I note the differences of opinion between Haddon-Cave and Underhill LJJ about the application of the observations of Lord Lloyd-Jones in *B (Algeria)* to the issue in this appeal. As they do not affect the outcome of the appeal, it is not necessary for me to express a view.

82. I also agree that this matter has not been handled well by the SSHD. In my view, it was inappropriate merely to assert her right to impose restrictions upon SM, despite the FTT's bail order causing SM to have to bring judicial review proceedings. The SSHD should have brought the matter back to the FTT for resolution, without delay.