Case No: CO/3731/2015

Neutral Citation Number: [2016] EWHC 3215 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2016

Before :

MRS JUSTICE THIRLWALL DBE

- -

Between :

JONAS LAUZIKAS	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Ms Laura Dubinsky and Ms Alison Pickup (instructed by **Lawrence Lupin Solicitors**) for the **Claimant**
Mr Jack Anderson (instructed by **GLD**) for the **Defendant**

Hearing: 7th and 8th April 2016, further written submissions June 2016, September 2016.

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JUDGMENT

MRS JUSTICE THIRLWALL :

1. This is a claim for judicial review. The claimant, an EU citizen, challenges the Home Secretary's service upon him of a notice preventing him from working in the United Kingdom while he was on bail awaiting the resolution of an earlier claim for judicial review and determination of his appeal against a decision by the Home Secretary to deport him. He seeks a declaration and damages for the financial losses he suffered as a result of being prevented from working for a period of 2 months and 12 days before he left the UK voluntarily in August 2015.

2. The defendant resists the claim for judicial review and submits that even were it to succeed the claimant is not entitled to damages. It was agreed that I would hear the question of liability first.

Facts

3. The claimant is a Lithuanian national. He came to this country in 2012. From his arrival until his imprisonment on remand in 2014 he worked in the construction industry. In June 2014 he was involved in an altercation with his former wife's current partner. He threatened him with a BB gun which he discharged, injuring the other man. He was arrested, charged and remanded in custody. On 4th December 2014 he pleaded guilty to possession of an imitation firearm. He was sentenced on 27th January 2015 to 14 months' imprisonment. He had already served 7 months on remand, the equivalent of a 14 month sentence and so was entitled to immediate release. The same day he was notified by the defendant of his liability to be deported and detained under regulation 24(1) of the Immigration (European Economic Area) Regulations 2006 (EEA Regulations 2006).

4. On 24th February 2015 the defendant decided to make a deportation order in accordance with regulations 19(3)(b) and 21 of the EEA Regulations 2006. At the same time she certified the claimant's case under regulation 24AA (2) of the EEA Regulations 2006 (that his removal would not be unlawful under section 6 of the Human Rights Act 1998) in order to permit his removal pending any appeal against the decision to deport him. On 5th March the claimant was served with directions for his removal on 12th March. On 10th March his lawyers lodged a notice of appeal against the deportation order with the First-tier Tribunal (FtT).

5. On 11th March judicial review proceedings were issued challenging the certification of his appeal under regulation 24AA and the ongoing detention. On 24th March further judicial review proceedings were issued challenging the defendant's refusal to grant accommodation. The removal directions were cancelled in light of the claim for judicial review and the claimant remained in the UK.

6. On 10th April the defendant granted the claimant's application for accommodation under section 4(1)(c) of the Immigration and Asylum Act 1999 and acknowledged that her previous refusal to do so was unlawful. The claimant remained in immigration detention.

7. On 29th April the claimant's application for bail was heard by the FtT. Notwithstanding the defendant's objections, the FtT released the claimant on bail with conditions of residence and reporting. The defendant sought a condition to

prevent the claimant from working. The FtT refused to impose it. When the claimant reported at Middlesbrough police station on 8th May he was served with a notice of restrictions from the defendant. Restrictions on residence and reporting were the same as the conditions of bail imposed by the FtT but to them was added a prohibition on taking employment. The restrictions appeared on a pro forma document. No reason was given for any of them, despite requests from the claimant's solicitor who assumed there had been an error. In these proceedings it was said on behalf of the defendant that the restriction on employment would encourage the claimant to leave the country. The reporting restrictions and the residence restrictions were imposed so that, if he remained in the United Kingdom pending his appeal, he did not go to ground.

8. On 13th July 2015 the claimant informed the Home Office that he wanted to return to Lithuania as his mother was ill and he wished to be with her. He withdrew his challenge to the certification of his case under regulation 24AA and left the country in August at his own expense. His appeal against the deportation was heard on 24th June 2016. The decision was promulgated on 10th August 2016. The appeal was successful. Having analysed all the evidence the FtT judge was not satisfied that the personal conduct of the claimant posed a genuine, present and sufficiently serious threat to one of the fundamental interests of the United Kingdom and the decision of the Secretary of State to deport him was set aside. It was common ground before me that I must approach the case on the basis of matters as they stood at the time the restriction on employment was imposed.

9. Ms Dubinsky, who appeared with Ms Pickup, attacked the restriction on employment under EU and domestic law. She submitted that it was an unjustified and disproportionate interference with the claimant's right of free movement as an EU worker. She further submitted that the interference was not permitted by domestic law because the Secretary of State had no power to impose restrictions where an individual is bailed to appear before the FtT. Alternatively, she submitted that the employment restriction was an unreasonable exercise of her power under paragraph 2(5) of Schedule 3 to the Immigration Act 1971(the 1971 Act).

10. Mr Anderson submitted that the employment restriction was part of the justified and proportionate interference with the claimant's freedom of movement in accordance with EU law. As to domestic law he submitted that there was no unreasonable exercise of the power which the Secretary of State undoubtedly has under the 1971 Act to impose restrictions on a person awaiting deportation.

11. During the hearing before me it emerged that decisions which may affect the outcome of this case were to be made in the Court of Appeal and Supreme Court respectively. I therefore agreed that the parties would send further submissions in the light of *R(Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16 and *R(Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409. They were provided in June by which stage a further relevant decision was expected from the Court of Appeal and so in September I received further submissions from the parties on the decision of *R (AR) Pakistan v Secretary of State for the Home Department* [2016] EWCA Civ 807.

The claim under European Law

12. There is no authority on the central point in this case. I approach it from first principles.

The legal framework

13. It is not disputed that the employment restriction interfered with the claimant's rights under Article 45(3), the Treaty for the Functioning of the European Union (TFEU), Article 3(1) of Regulation EU 492/2011 and Article 7 of Directive 2004/38/EC (Citizens Directive). The right to work is an aspect of the freedom of movement. It is a qualified right.

14. The relevant part of Article 45(3) of TFEU reads (my emphasis throughout this and all other provisions):

> "1**. Freedom of movement for workers shall be secured within the Union**.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
> 3. **It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health**:
> (a) **to accept offers of employment actually made;**
> (b) **to move freely within the territory of Member States for this purpose;**
> (c) **to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;**
> (d) **to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission."**

15. Throughout this judgment where I refer to the claimant's right to work I mean the right as set out in paragraph 14 above.

16. There is no need to set out the Preamble to Regulation EU 492/2011 which underlines that freedom of movement should be secured within the Union.

17. Article 27(2) of the Citizens Directive contains procedural protections for an EU national in respect of a restriction on freedom of movement:

> "Article 27
> General Principles
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
> 2. **Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned**.
>
> Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
> **The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental**

interests of society. Justifications that are isolated from the particulars of the case or that rely on consideration of general prevention shall not be accepted."

18. Article 28 of the Citizens Directive requires a state to take into account certain factors before deciding to expel an EU national:

"Article 28

Protection against expulsion

1. **Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.**

.."

19. Procedural safeguards are set out in Article 31:

"Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2 Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or
- where the persons concerned have had previous access to judicial review; or
-where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. **Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serous troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."**

Thus Member States have a broad discretion as to the method by which the protection is achieved.

20. In the United Kingdom regulation 19(3)(b) of the EEA Regulations 2006, provides that

(3) ….. an EEA national who has entered the UK…may be removed if -

…

(b) The Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21;

21. Regulation 21 provides for the procedural safeguards required by the Citizens Directive:

(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

…

(5) where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation be taken in accordance with the following principles-

(a) **the decision must comply with the principle of proportionality;**

(b) **the decision must be based exclusively on the personal conduct of the person concerned;**

(c) **the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;**

(d) **matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision; a person's previous convictions do not in themselves justify the decision.**

(6) **Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration in the United Kingdom and the extent of the person's links with his country of origin.**

22. By operation of regulation 24(3) of the EEA Regulations 2006, the claimant "is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act (liability to deportation) applied, and section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly".

23. Regulation 24AA provides –

(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom [as here] regulation 24(3) applies, in circumstances where-

(a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b) P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) **for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken,** except-
(a) Where the expulsion decision is based on a previous judicial decision;
(b) Where P has had previous access to judicial review; or
(c) Where the removal decision is based on imperative grounds of public security.
(5) In this regulation, "finally determined" has the same meaning as in Part 6.

24. In coming to my decision on the substance of the EU law point I have left out of account i) the fact that the claimant withdrew his application for suspension and voluntarily departed the United Kingdom and ii) the defendant's contention that the original judicial review proceedings were unmeritorious and iii) as mentioned above, the decision of the FtT to allow the claimant's appeal, given the agreed position that I approach the matter as at the time the restriction order was imposed.

The decision to remove

25. Before considering the effect of suspension it is necessary to look at the decision to remove, made on 24th February 2015. EU law required that decision to be justified on grounds of public policy, public health, public security and be otherwise proportionate. The justification had to be based upon the personal conduct of the claimant, considerations of general prevention being prohibited. This is the effect of Articles 27 and 28 of the Citizens Directive, the contents of which were foreshadowed in earlier decisions of the CJEU; see for example *Orfanopolous v Land Baden-Wurttemberg (C-482/01) [2005]* 1 CMLR 18 at paragraph 66, *Ministre de l'Interieur v Oteiza Olazabal* (C-100/01)[2005] 1 CMLR at paragraphs 31 and 44, *Nazli v Stadt Nurnberg (C-340/97)* [2000] at paragraph 61 and *Rutili v Ministre de l'Interieur (36/75)* [1976] 1 CMLR 140 at paragraph 28.

26. The defendant was not required, when deciding whether removal was justified, separately to justify a restriction on the claimant's right to work in the United Kingdom or any other restriction which was, like the restriction on the right to work in the United Kingdom, inherent in the decision to remove the claimant from the United Kingdom. Considerations of the right to work in the United Kingdom cannot be detached from considerations of the claimant's presence in the United Kingdom. In any event a separate exercise seeking to justify a restriction on work would have been sterile, the outcome inevitable. It was not submitted that such an exercise was required at that stage.

The position post suspension of enforcement of the decision to remove

27. As at 29th April 2015 the defendant had suspended enforcement of the decision to remove and the claimant had been released on bail by the FtT. Ms Dubinsky submits that "an expulsion measure which cannot yet be given effect does not vitiate the express and directly effective protection conferred by article 45(3) TFEU and Article 3(1) of Regulation 492/11" and so it follows, she submits, that before

imposing the restriction on the claimant's right to work the defendant was required to justify that restriction on grounds of public policy, public security or public health; the decision had to be proportionate and the personal conduct of the claimant must have represented a genuine, present and serious threat affecting one of the fundamental interests of society, that threat arising from the claimant's employment.

28. The requirement to justify the restriction on the right to work post suspension of removal for which the claimant contends, arises only if, in addition to preventing removal, the effect of suspension is to vitiate the decision that (in short) the claimant's presence in the United Kingdom is a threat to public policy, security or health.

29. The claimant relied on a decision of the Grand Chamber of the CJEU in *C-601/15 PPU JN v Staatssecretaris voor Veiligheid en Justitie.* Although the court was there dealing with different EU legislation which does not bind the United Kingdom, Ms Dubinsky sought to rely on the decision as an illustration to support her argument that even where an expulsion decision made on public order grounds becomes final, before a decision can be taken to detain the individual (or, she submits, take any other measure restricting his EU law rights and freedoms) it is still necessary for there to be a separate consideration, balancing the public interests at stake against the interference in the individual's rights, of the proportionality of that second, ancillary measure. It follows, she submits, that post suspension it was necessary for there to be separate consideration of the restriction on the right to work.

30. Two things arise: First, there is nothing in *JN* to extend its application beyond consideration of the decision to detain. Other measures restricting other EU law rights and freedoms were not considered. Second, detention, unlike a restriction on the right to work, is not inherent in the decision to deport. The decision in *JN* does not assist.

31. Ms Dubinsky also relied on the decision of the Supreme Court in *Nouazl* for two propositions:-
i) A decision to detain a person exercising EU law rights pending his or her expulsion must itself satisfy the criteria for a restriction of freedom of movement.
ii) Each restriction of free movement must itself be justified.

32. The proposition at (i) above is not controversial. Nor is it in dispute that the decision to detain had to be proportionate; the Supreme Court concluded that compliance with *Hardial Singh* principles would sufficiently import proportionality into the decision making.

33. As to the second proposition, the principal issue in *Nouazli* was whether the Court of Appeal had correctly held that Regulations 21 and 24 of the EEA Regulations 2006 were compatible with EU law. The Supreme Court upheld the Court of Appeal's decision. They were concerned with the decision to detain (incidentally taken before the decision to deport had been taken). A decision to detain an EU national is not inherent in a decision to deport him. Detention is, as Lord Clarke said at paragraph 82, ancillary to deportation. This case is not authority for the proposition at (ii), still less for the proposition that suspension of removal vitiates the decision that the claimant's presence in the United Kingdom is a threat to public policy, security or health. This case does not assist the claimant.

34. The claimant also relied on the decision of the CJEU in *Olazabal* where the court considered a decision of the French Government to restrict the freedom of movement of an EU citizen by preventing him from visiting or residing in certain areas of France. The question for the court was whether such a restriction was prohibited by EU law. At paragraph 45 the Court concluded that "The answer to the question referred must therefore be that neither Article 48 of the treaty nor the provisions of secondary legislation which implement the freedom of movement for workers preclude a Member State from imposing, in relation to a migrant worker who is a national of another Member State, administrative police measures limiting that worker's right of residence to a part of the national territory, provided:-
- that such action is justified by reasons of public order or public security based on his individual conduct
- that, by reason of their seriousness, those reasons could otherwise give rise only to a measure prohibiting him from residing in or banishing him from, the whole of the national territory ; and
- that the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designated to combat it."

35. This decision does not assist the claimant either. As Mr Anderson points out, in the claimant's case it was the Secretary of State's judgment that removal from the United Kingdom was justified for reasons of public order and security based on his individual conduct and in light of the risk he posed and his personal circumstances. It follows, he submits, that while the removal was suspended the lesser restriction on the right to work in the United Kingdom was permissible.

36. Mr Anderson further submits that the effect of suspension was to prevent removal, no more. A decision to remove remains in place until, as a minimum, the appeal is heard. The effect of the claimant's submission would be that by bringing an application for interim relief a person liable to expulsion could acquire a right to continue to work in the United Kingdom, notwithstanding the pre-existing decision that his presence here was a threat to public policy, public security or public health. This would undermine the balance between the right to freedom of movement and public policy considerations which the Citizens Directive seeks to achieve.

37. I accept that submission. The suspension of actual removal (to use the words of Article 31) or suspending enforcement of the decision to remove (to use the words of regulation 24AA(4)) has the effect of preventing removal, no more. It does not operate so as to vitiate the decision to remove or the justification for it. That remains in place at least until the appeal is heard. In this case suspension did not lead to a requirement that the restriction on the claimant's right to work had to be justified.

38. I should add that I reject the submission that where a restriction on the right to work is being considered the threat must arise from the claimant's employment per se. It may be that in a given case the personal conduct which affects one of the fundamental interests of society occurs in the context of employment but there is no requirement that the threat must arise from employment. What is required, as set out at length above, is that the personal conduct of the individual concerned must represent a

genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Supplementary matters

39. Mr Anderson submits that a restriction on working was a lesser means to give effect to the defendant's decision to remove the claimant because it would encourage him to leave the UK. This was an explanation that first appeared in the detailed grounds in February 2016, very late in the day, as Ms Dubinsky put it, but it means no more than that although removal was prevented the defendant was entitled to give effect to that part of the decision which was neither suspended nor vitiated.

40. Two further points arise:-
i) Ms Dubinsky submits, correctly, that to impose a restriction for reasons of general deterrence or prevention is impermissible. That did not happen here. The restriction was imposed as a consequence of the judgment made by the defendant as to removal after considering the claimant's personal conduct, his personal circumstances and all the other matters to which I have already referred including the risk that he posed. Questions of general deterrence or prevention did not arise. Common sense suggests that where someone has come to this country to work and is prevented from doing so he may wish to leave. It goes no further than that.
ii) Ms Dubinsky makes the separate point that in imposing an employment restriction with the intention or at least expectation that it may persuade the claimant to leave the UK while his appeal was pending, the defendant breached rights guaranteed by EU law namely the right to pursue remedies against expulsion, including the pursuit of suspensory interim measures. That is not a legitimate aim, she submits.

41. I do not accept that analysis. The effect of the suspension of removal was to allow the claimant to remain in the UK so as to pursue here his application for judicial review. While in the UK the claimant was provided with accommodation and modest financial support. There was no breach of his rights to pursue remedies against the Secretary of State.

42. It follows that I do not accept that the restriction on employment was imposed in breach of EU law.

Domestic Law

43. As all members of the Court of Appeal observed in **Gedi** (paragraphs 17 and 46) the statutory framework in respect of immigration bail conditions and restrictions is not easy to follow. After some confusion as to the position in this case and some further research by Ms Dubinsky, the parties agreed, correctly in my view, that bail was granted by the FtT pursuant to Paragraph 29 of Schedule 2 of the 1971 Act which applies where " a person…has an appeal pending under Part 5 of the Nationality Immigration and Asylum Act 2002 and is for the time being detained under Part I of this Schedule". Paragraph 3 of Schedule 3 applies this power to detention under Schedule 3 (which was the case here); and regulation 29(7) of the EEA Regulations 2006 applies it to the case of a person who has an appeal pending under regulation 26 of those regulations.

44. Ms Dubinsky's principal submission is that where a person has an appeal pending and bail has been granted by the FtT, questions of continued detention and

conditions of bail are for the FtT only and the defendant had no power to impose restrictions or conditions. Alternatively if the Secretary of State does have power to impose restrictions or conditions it was unreasonable to exercise it in this case.

Bail

45. Paragraph 29 (1) of Schedule 2 sets out the power to release on bail where a person has an appeal. By operation of subparagraph 2 the power may be exercised by a Chief Immigration Officer. By subparagraph 3 it is exercised by the FtT which "may release an appellant on his entering into a recognizance for his appearance before the FtT at a time and place named in the recognizance". In other words he is released on condition that he surrenders to his bail at the time and place specified.

46. By paragraph 29(5) "The conditions of a recognizance…**may** include conditions appearing to the person fixing the bail to be likely to result in the appearance of the appellant at the time and place named." Such conditions are not compulsory and where imposed, their purpose is to make it likely that the appellant appears as required.

47. In his guidance to Immigration Judges, recently approved by the Court of Appeal in *R (AR) (Pakistan)*, Mr Clements, President of the First-tier Tribunal (Immigration and Asylum Chamber), sets out at paragraph 36 the uncontroversial primary condition to be imposed where an immigration appeal is pending – namely to attend all hearings of the appeal. He then sets out the secondary conditions that may be imposed in order to promote the achievement of the primary condition namely conditions as to residence and reporting. Sureties may also be considered. There is no reference to employment conditions.

48. When refusing to impose the condition preventing employment sought by the defendant the FtT judge did so on the basis that he did not consider that any further conditions were necessary or appropriate in the circumstances. Given the conditions of residence and reporting in this case the FtT judge, correctly applying the law, was bound to conclude that a condition preventing employment was unnecessary. In my judgment the request to impose it was misconceived; being in employment is not considered a risk factor for failing to attend court in the criminal jurisdiction. There is no reason to think it would be different in this context.

49. I need no persuasion that the FtT has the power to vary the conditions of bail it has granted. Such a power is implicit. Its existence is taken for granted in the guidance at paragraph 55 and in the Tribunal Procedure (First–tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which at Rule 41(2) sets out the procedure to be adopted where bail is "granted, varied or continued…" Paragraph 55 of the guidance deals with variations of bail. There is no need to rehearse it here. Mr Anderson did not seek to argue that the FtT did not have power to vary bail.

50. The defendant is entitled to be heard on the question of the grant of bail, the imposition of conditions and on the question of variation. In certain circumstances (which did not arise here) the defendant may prevent a person being released on bail. Otherwise, where the matter is properly before the FtT all decisions about whether or not bail should be granted and the conditions pertaining to it, and any variations are for the FtT.

51. Where a person appears to be in breach of his bail conditions he is liable to be arrested under paragraph 33 of Schedule 2. He is brought before the FtT for a decision as to whether he has broken any of the conditions of his bail. If he has he may be detained, released on his original terms or on new terms.

52. Mr Anderson relies on the decision of the Court of Appeal in *R (AR) (Pakistan) v SSHD [2016] EWCA Civ 807* as authority for the proposition that the Secretary of State has power to vary or relax conditions of bail imposed by the FtT when an individual surrenders to an immigration officer. That is not this case. In *R (AR) (Pakistan*) the claimant had been on FtT bail which came to an end on his surrender to the Chief Immigration Officer. He had no appeal pending and so, as the Court of Appeal found, the FtT's role was at an end. Nothing in the decision supports the contention that the Secretary of State has the power to vary conditions of bail imposed by the FtT where a person is still on bail with an appeal pending. Ms Dubinsky rightly submits that pending hearing of the appeal the bail conditions imposed by the FtT subsisted until varied, if at all, by the FtT.

53. Ms Dubinsky submits that the restriction order effectively frustrated the refusal of the FtT judge to impose a condition preventing employment. This was an impermissible, unconstitutional interference by the executive with a decision by a member of the judiciary. She relies on the decision of the Supreme Court in *R(Evans) v Attorney General [2015] AC* 1821 where Lord Neuberger sets out in the clearest terms that a decision of a court (which includes a FtT) is binding between the parties and cannot be ignored or set aside by the executive.

54. The power to impose restriction orders is contained in Paragraph 2 of Schedule 3 to the Immigration Act 1971 which provides:

"…
(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision)] of a decision to make a deportation order against him, [and he is not detained in pursuance of the sentence or order of a court], he may be detained under the authority of the Secretary of State pending the making of the deportation order.
(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 (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).
…
(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 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) above applies are-
…; and

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

55. Contrary to Ms Dubinsky's submission, the power is not restricted to those cases where the Secretary of State has agreed to the release of a person. The plain language of subparagraph (3) applies it to a person who is released on bail (see paragraph 51 above). In fact the document headed "Notice of Restriction" records, wrongly, that "the Secretary of State has decided that you should not be detained." The correct position was that the FtT had granted bail. An error on the notice does not change the reality, the contrary was not argued.

56. An order under Paragraph 2 of Schedule 3 does not grant bail. The language is not of conditions but is of restrictions. Unlike conditions of bail, the purpose of which is to secure a person's attendance at a hearing, restriction orders reflect immigration policy in respect of those liable to deportation who are not in detention. This power may be invoked in respect of all those within its scope, not just EU citizens, not just those on bail.

57. In this case the Notice of Restriction does not cut across the bail conditions. The restrictions on residence and the reporting requirement are to precisely the same effect as the bail conditions imposed by the FtT. There is no inconsistency.

58. The FtT judge considered that it was not necessary to impose a condition of bail preventing the claimant from working in order to secure his attendance before the tribunal. In those circumstances it was not open to him to impose that condition and he did not do so. His (in my view entirely correct) decision did not preclude the defendant from exercising her power under Paragraph 2 of Schedule 3. The restriction order reflects the decision of the Secretary of State to remove the claimant from the country. It does not interfere with his ability to answer to his bail or to comply with the conditions. There has been no frustration of the decision of the FtT.

59. It follows that in my judgment there has been no interference by the executive with a decision by the FtT and the constitutional arguments Ms Dubinsky deploys simply do not arise. We are not in *Evans* territory. The question whether the defendant would be entitled to impose (eg) restrictions on residence or reporting requirements that were more stringent than those arising on the conditions of bail imposed by the FtT does not arise for consideration in this case. I have little doubt that restrictions which cut across or frustrate conditions of bail, would be amenable to judicial review. That has not happened here.

60. The defendant had the power to impose the restriction and to do so was not unreasonable. It follows that the domestic law challenge fails.

Conclusion

61. Accordingly the claim for judicial review is dismissed.