Neutral Citation No: [2023] NIKB 94 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **FOW12275** *ICOS No:* *Delivered:* **02/08/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY MINA BOUNAR FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

_____

Mr Robert McTernaghan BL (instructed by Phoenix Law) for the Applicant
Ms Marie Claire McDermott BL (instructed by the Crown Solicitor) for the proposed Respondent

_____

FOWLER J

Introduction

[1] On 8 June 2023 Judge Buchanan sitting in the First Tier Tribunal (FTT) Immigration and Asylum Chamber, granted the applicant bail subject to suitable accommodation being identified in which the applicant is to reside. The grant of bail was further conditional on such residence arrangements being in place within 28 days of the date bail was granted.

[2] The applicant is challenging the proposed respondent's decision not to exercise power under paragraph 9 of Schedule 10 to the Immigration Act 2016 (the 2016 Act) to provide accommodation to the applicant who has been granted immigration bail. It is claimed by the applicant that the refusal to provide accommodation is a frustration of the grant of bail and an unlawful fettering of the proposed respondent's discretion. It is this decision which is under challenge in these proceedings.

Background

[3] The applicant is Mina Bounar, who was born in Italy in 1993. She was a cared for child and placed with a foster family from the age of 12 to 18. Shortly after leaving foster care, she came to the UK when she was 19 years old. She has never been married and has no children. It appears she has a past history of theft, shoplifting, disorderly behaviour, and assault. While she has no issues concerning her physical health, she does have a history of bipolar disorder. In terms of her mental health issues, I have considered in detail the report of Dr East, consultant psychiatrist. On 1 July 2016 she was detained in hospital having exhibited paranoid, aggressive, and irritable behaviours. Subsequently, on 8 May 2020 she attended at a psychiatric clinic where she was diagnosed with bipolar effective disorder.

[4] While detained in custody in July 2022 she presented as acutely unwell and had relapsed, this required a further admission to a hospital psychiatric intensive care unit where she remained until August 2022. However, it appears that in September 2022 she became more compliant with a new medication and has been symptom free of her bipolar condition since then. Dr East concluded in his report of 27 March 2023 that the applicant has been symptom free since September 2022, compliant with her most recent medication regimen and her bipolar disorder is in a state of remission. Dr East is of the opinion that she was suffering from her bipolar illness at the time of her recent offending. He concluded that her bipolar disorder and alcohol intoxication were contributory factors in her offending behaviour.

[5] The applicant's most recent court appearances of 15 and 30 March 2023 and 10 May 2023 resulted in suspended sentences which may well have reflected Dr East's explanation for her behaviour in these index offences. On 30 May 2023 she concluded the last of the custodial sentences she had been detained on. The applicant's last remaining criminal matter yet to be determined is before Belfast Magistrates Court on 27 July 2023. Hopefully, this will conclude all matters within this jurisdiction and allow her to return to Italy.

[6] Since 30 May 2023, the applicant is not subject to any criminal sentence and is presently being held at HMP Hydebank on immigration detention. There are no long-term immigration detention facilities in Northern Ireland. This exposes the applicant to potential risk of transfer to an Immigration Removal Centre in England. The concern is that she will lose the present support scaffold she has from her medical and social care professionals who have worked to achieve and promote the period of remission she is now benefiting from. It is suggested that if she were removed from this jurisdiction, she may not have access to her prescribed mood stabilising medication which is deemed critical to her care and mental well-being.

[7] On 8 June 2023, the applicant was granted immigration bail by Judge Buchanan. This was subject to '… suitable accommodation being identified for release, the applicant is to reside at that address.' This grant of immigration bail was also conditional 'on arrangements being in place within 28 days of suitable

accommodation for the applicant either by way of agreement between the applicant and respondent or on the provision of support in accordance with paragraph 9 of Schedule 10 to the Immigration Act 2016.' If no suitable accommodation is identified within 28 days, this conditional bail will lapse.

[8] It is the applicant's case that her friend, Louise Campbell, proffered her home as a bail address. Unfortunately, this address is unsuitable because Arbor Housing, the housing association who manage the proposed bail property, will not allow the applicant to be bailed to this address. The respondent did not raise an objection to this address as suggested by the applicant, it was the relevant housing association. However, since this bail accommodation becoming unavailable to her, the applicant has not sought to obtain any other alternative suitable address. Rather, the applicant reverted back to the proposed respondent asking that she now be considered for accommodation provided under paragraph 9 to Schedule 10 to the 2016 Act. This has been refused by the proposed respondent and the applicant remains in HMP Hydebank on immigration detention.

[9] The applicant has consented to her deportation back to Italy and to demonstrate this to the proposed respondent she withdrew her EU Settlement Scheme application and has applied for return to Italy under the Facilitated Return Scheme. However, her deportation may not be imminent given the fact of her pending prosecution in Northern Ireland being a bar to deportation. In these circumstances, and since she has resided in the UK for approximately 12 years, the applicant argues it is reasonable for her to be assisted to obtain accommodation in order to perfect bail. That this is necessary to avoid her prolonged detention, protect her mental health and to allow her to arrange her affairs prior to returning to Italy.

Applicant's Case

[10] It is the applicant's case that the decision of the respondent to refuse to grant her accommodation under Schedule 10 to the 2016 Act is irrational on the basis that the applicant:

(a) has no alternative accommodation and if released she will be street homeless [Guidance page 11-12];

(b) She has consented to deportation and withdrew her EU settlement scheme application;

(c) The expert medical evidence on the applicant's mental condition from Dr East does not appear to have been considered [Guidance page 11-12];

(d) There is a material barrier to her deportation currently with an open-ended timeframe in the Magistrates Court;

(e) The respondent has fettered their discretion in applying a rigid test to this vulnerable applicant, with complex medical needs contrary to their guidance [page 13 ECHR rights & her exceptional circumstances];

(f) The proposed respondent in their refusal decision has unfairly create a chicken and egg situation this is contrary to the FFT's grant of bail thus breaching the common law principle from the Supreme Court in *Evans.*

[11] It is the applicant's case that she has been granted bail by the FTT subject to an address and it is the responsibility of the Secretary of State to provide that accommodation and facilitate her release. The authority of *AC (Algeria) v SSHD* [2020] EWCA Civ 36 is cited as authority for such a proposition. That while a 'grace period' may be granted for practical purposes to put in place accommodation arrangements this is limited and should be measured in days not months (*DM (Tanzania) v SSHD* [2019] EWHC 2351. It is further argued by the applicant on the basis of *R v Humnyntskyi v SSHD* [2020] EWHC 1912, that the relevant immigration bail guidance is systemically unfair and that the applicant's position in the present case is similar to the three applicants in *Homnyntskyi,* and she in being unlawfully detained absent accommodation being provided under Schedule 10. That ultimately the decision in this case defies logic, is irrational and contrary to the available policy guidance and case law.

Respondent's case

[12] It is the respondent's case that the applicant is effectively ineligible for Schedule 10 accommodation as she in not a person on immigration bail who is subject to a bail condition requiring her to reside at a specified address. It is argued that she has been granted immigration bail by the FTT subject to 'suitable accommodation' being identified for her to reside at. That there is a nuanced difference between a bail condition requiring a foreign national offender (FNO) to reside at a 'specified address' identified and/or provided by the Home Office, whereas suitable accommodation can be provided by anybody – often friends, family or previous accommodation used by the applicant in the past.

[15] Further, the respondent argues that if the court accepts the applicant is subject to a residence condition, that does not mean the applicant will necessarily come within Schedule 10. The applicant will still have to establish on balance, that there are exceptional circumstances which justify the exercise of the power. That it is to be observed that while the applicant's mental health issues were operating at the time of her offending they are presently in remission and do not amount to exceptional circumstances.

Legislative framework

[16] Section 61 of the IA 2016 gives effect to Schedule 10 to that Act and came into force on 15 January 2018. Para 1 confers a power on the Secretary of State and the

First-tier Tribunal (FTT) to grant bail to any detained person pending their deportation from the United Kingdom. Para 2(1) requires that any grant of bail must be subject to conditions. Such conditions may include a condition about the person's residence (para 2(1)(c)), electronic monitoring (para 2(1)(e)) and any other conditions as the person granting immigration bail thinks fit. The Secretary of State and the FTT must also have regard to certain prescribed matters in determining whether to grant immigration bail and those conditions to be attached to any such grant. These matters will include factors such as the likelihood of a person committing an offence while on immigration bail and other such matters as the Secretary of State or the FTT thinks relevant (para 3(2)(f)).

[17] Schedule 10 to the IA 2016 also makes provision for the Secretary of State to arrange for the provision of accommodation to enable persons to meet bail conditions. This is provided for in paragraph 9 of Schedule 10 which states:

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

Home Office Guidance

Accommodation

[18] Immigration Bail Guidance version 2.0 was published on 9 July 2021, following the decision in *Humnyntskyi,* and provides guidance to decision makers concerning the provision of accommodation under Schedule 10, it states that:

> "There may be circumstances where a person is granted immigration bail subject to a residence condition requiring them to live at a specified address, and the person would not be able to support himself or herself at that address without the assistance of the Secretary of State. Under paragraph 9 of Schedule 10 the Secretary of State may provide or arrange for the provision of facilities for the person's accommodation at that address to enable the bail condition to be met, but only in exceptional circumstances."

Exceptional circumstances

[19] Support will only be provided if the Secretary of State considers there are exceptional circumstances to justify doing so. The bail policy gives three exceptional circumstances (i) Special Immigration Appeals Commission (SIAC) cases; (ii) Other harm cases involving high or very high risk to the public; and (iii) European Convention on Human Rights: Usually, Article 3 cases but not limited to these types of cases.

Human rights assessment

[20] The question of whether being homeless/destitute was considered in the case of *R (Limbuela and others (Shelter intervener)) v SSHD* [2005] UKHL 66. It was decided that where it appears on a fair and objective assessment of all relevant facts a person is left in imminent danger of serious suffering caused or aggravated by denial of shelter, food, or the basic necessities of life by the state there could be a breach of article 3.

[21] In human rights cases, applicants are expected to demonstrate they lack access to shelter, food, basic necessities of life and adequate accommodation. So in practice, and assessment of homelessness will be required. It may be necessary to consider if the person can obtain accommodation and support from charitable or community sources or through the lawful endeavours of their families or friends. Only where the decision-maker concludes that there is no support from any of these sources then there will be a positive obligation on the Secretary of State to accommodate the individual in order to avoid a breach of article 3 of the ECHR. However, if the person is able to return to their country of origin, including using support available under the Voluntary Return Service, within a reasonable period of time and in so doing be able to avoid being left without shelter or funds, there is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home. Conversely, if there are obstacles in place that mean the person cannot leave the United Kingdom or they are taking reasonable steps to put themselves in a position whereby they can leave but there is likely to be an unavoidable delay in those steps reaching fruition, then it may be necessary to provide accommodation support to avoid a breach of article 3. Each individual case

must be assessed on its own merits, having regard to all available evidence and the contents of any applications carefully considered to ensure matters capable of being considered exceptional have been identified.

Requests for accommodation

[22] Detained FNOs are not required to make a separate request for accommodation under paragraph 9 of Schedule 10, they should set out their needs in the bail application form BAIL409. These needs will be assessed, including accommodation needs, as part of the bail consideration process.

Consideration

[23] The Secretary of State's power to make available accommodation under paragraph 9 of Schedule 10 is controlled and restricted. Such power is limited and may only be exercised where:

(i) The person is on immigration bail;

(ii) The person is subject to a bail condition requiring them to reside at a specified address;

(iii) The person would not be able to support himself or herself at the address without the provision of accommodation by the Secretary of State;

(iv) The Secretary of State thinks that there are exceptional circumstances;

(v) The Secretary of State thinks that those exceptional circumstances justify the exercise of the power to grant accommodation.

[24] Each of these conditions require to be satisfied before the Secretary of State has power to provide accommodation under Schedule 10. It is evident that these conditions are stringent and only to be applied exceptionally. As identified in *R (Humnyntskyi) v SSHD* [2020] EWHC 1912 (Admin) at para [12]:

> "It is unsurprising that the power is limited in this way. Otherwise, there is a risk that any person who is in the United Kingdom unlawfully could demand the provision of accommodation at public expense."

However, the Secretary of State must act lawfully, fairly, rationally, and compatibly with Convention rights when determining whether or not to provide Schedule 10 accommodation.

[25] In the present case I am satisfied that the applicant while not on bail at present has been granted bail in principle by the FTT and satisfies (i) above. In my

view there is no circularity argument as suggested by the applicant. (See *Humnyntskyi* paras [18]–[19].)

[26] In relation to restriction (ii) I am of the view the applicant has not been made subject to a requirement to reside at a specified address. The restrictions in the provision of accommodation by the Secretary of State in para 9 requires such a condition. No specified address requirement was imposed by Judge Buchanan sitting in the First Tier Tribunal (FTT) Immigration and Asylum Chamber on 8 June 2023.

[27] A specified address has a connotation that the application will reside at this specific address exclusively and for very good reason for example accommodation which provides a level of supervision and/or security required for public protection. The applicant and her advisors knew or ought to have known suitable accommodation, which is stated in the grant of bail is much more flexible and less restrictive for the applicant. This is confirmed by there being no objection by the respondent to the suggestion the applicant reside with her friend Louise Campbell. This address only becoming unavailable due to the housing associations refusal to allow her to stay at that address. The applicant clearly knew it was an option for her to put forward this and any other suitable address and to make her own enquiries concerning suitable accommodation with other bodies and charities which provide accommodation to those at risk of becoming street homeless. This situation is fundamentally different from that envisaged for specified accommodation designed to ensure a higher level of security, supervision and protection required for certain classes of FNOs.

[28] In short compass a suitable address is not an imposed 'specified accommodation' bail condition. The applicant is not subject to a bail condition requiring her to reside at a specified address. It is not possible to enforce an obligation on the Secretary of State which the legislation does not provide for. The applicant has offered one address but when it was withdrawn by the housing association as an option, she consciously determined not to make any further attempts at obtaining suitable accommodation. It follows from this, that the applicant is not in a position to say there is no accommodation or no suitable accommodation since she has not explored any of the other avenues to secure a suitable address (eg charitable and or other statutory bodies), other than moving straight to seeking Schedule 10 accommodation. While the applicant has cooperated with the authorities to return to Italy this does not overcome the legislative limitation placed on Schedule 10 accommodation which requires a bail condition that the applicant resides at a specified address.

[29] There is a difference in real and practical terms between specified address and a suitable accommodation in the context of immigration bail. I agree with the respondent that specified address is specific accommodation to cater for identified risks posed either by or to an applicant, this is not the case in relation to the applicant in this case. Accordingly, any suitable address available to the applicant

could be put forward for agreement. No alternative available addresses were suggested or sought, and I have not been told of any other steps taken by the applicant to obtain a suitable address. In these circumstances this application fails in respect of (ii) above, in that her bail is not subject to a condition she is to reside at an address specified in the grant of immigration bail.

[30] Concerning restriction (iii) while I have heard no evidence on the point, for present purposes I accept that the applicant is unable to support herself on bail.

[31] Concerning restrictions (iv) and (v) it is the case that if the applicant were to be left street homeless and without shelter, food, or the basic necessities of life by the state this could amount to a breach of her article 3 rights. It is evident that at present there is a legal impediment to her voluntary removal from the UK. She has pending criminal proceedings in the Magistrates' Court. It is not clear how long it will take before these proceedings are dealt with or whether this matter will proceed as a plea or contested hearing. It is also the case that the applicant has a confirmed diagnosis of bi-polar disorder, but this is presently in remission. However, even if the court were to have found a specific accommodation condition to have been imposed, it is not accepted that at this stage the applicant is street homeless and capable of coming within the exceptionality category justifying the grant of accommodation in (iv) and (v) above on the grounds of homelessness of mental health issues.

[32] The court has been told that the applicant has made no further attempts to secure suitable accommodation within the community. No evidence was produced as to her most recent accommodation, what type of accommodation this was, where it was, why it was no longer available to her. No details have been given of where she lived in the past 12 or so years she has been in the UK. Accepting her most recent accommodation may not be available, particularly after her recent custodial sentence, it would have been possible for her in the 28 days since being granted bail to have contacted charities and/or other statutory bodies concerning availability of accommodation. I have been told no such contacts were made. There appears to have been no approach to or attempts at engagement with any charitable support bodies in terms of accommodation or help. While I have been told she has a robust care plan for her release into the community I have heard nothing about the care plans suggestions on accommodation or assistance from social services to secure accommodation. Unfortunately, nothing appears to have been done other than make application for Schedule 10 accommodation. The applicant appears to have failed to pursue other avenues to avoid street homelessness. Absent taking these steps I do not conclude the position has been reached that she is in imminent risk of becoming street homeless constituting a breach of her article 3 rights so as to justify her case being considered so exceptional as to justify the exercise of the power to grant accommodation.

[33[In terms of her psychiatric condition, it is clear she has suffered periods of crisis in the recent past, however her new medication regimen appears to have stabilised her mental health. There is no evidence to suggest this medication or

appropriate support would not continue to be available to her either in Northern Ireland or elsewhere. At present her psychiatric condition doe does not present as exceptional.

[34] I consider the applicant's case fails in that I am not satisfied she is subject to a condition to reside at an address specified in the grant of immigration bail and the respondent was entitled to conclude this in its determination. Accordingly, I am not satisfied the threshold for leave to apply for judicial review is surmounted and leave is refused.