

IN THE COURT OF APPEAL (CIVIL DIVISION)

Case No. CA-2024-000255

ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

[2023] EWHC 2230 (Admin)
CO/ 1606 /2022

B E T W E E N:

The King, on the application of
FAJR ELLIS

Appellant

-v-

(1) THE SECRETARY OF STATE FOR EDUCATION

-and-

(2) THE SECRETARY OF STATE FOR JUSTICE

Respondents¹

APPELLANT’S SKELETON ARGUMENT FOR THE APPEAL (10th/11th June 2025)
(Paginated for bundles 20.2.25 – 228-page core; (to be) 180-page supplemental)

Paragraph references to the judgment of the Court are in parentheses in the form {x}

Pagination references are to the Tab/Page of the Core (C) & Supplemental (S) bundles

1. This case concerns education provision, and the application of Article 2 of the First Protocol to the ECHR (“A2P1”). This appeal raises particular issues of law of general importance.
2. The Court below found a breach of public law obligations, i.e. that an unlawful decision was taken by the Secretary of State for Justice to temporarily remove the use of IT facilities and withdraw a Chromebook from the Appellant: {80}-{81} [C5/71-72]). The Secretary of State for Justice acted unlawfully and breached domestic law obligations in the withdrawal of the Chromebook. However the learned Judge below did not allow the claim under A2P1.

¹ The appeal is concerned directly with the actions and omissions of the Secretary of State for Justice, though there was below and continues to be joint representation of both departments by the GLD.

3. It is notable that the jurisprudence concerning A2P1 has received relatively little domestic consideration hitherto. It is respectfully submitted that the decision below does not sit correctly with the Strasbourg jurisprudence.
4. The important questions of law arise as to:
 - i. Whether the Administrative Court applied an incorrect legal test or threshold for a violation of A2P1; and/or
 - ii. Whether, when considering a claim of an ongoing violation of A2P1 that is brought procedurally by way of judicial review (in order to seek quashing or mandatory relief for an ongoing situation) a court should have regard to events that post-date the date of issue of the claim form.

Grounds of appeal

5. On any or all of the following grounds (at [C2/18-19]) it is submitted that the learned Judge below erred by:
 - i. Wrongly setting the threshold for an unlawful interference with A2P1 rights at a level not equivalent to that set in Strasbourg.
 - ii. Wrongly refusing to consider the events that occurred following the issue of the claim form challenging an ongoing violation of A2P1.
 - iii. Wrongly, on the facts, not upholding the claim for breach of section 6 of the Human Rights Act 1998 on account of violation of A2P1 by the respondent state authorities.

Permission

6. Permission to appeal was granted by this Court by Order of Nugee LJ sealed on 13 December 2024. His Lordship explained that “despite the well-reasoned judgment of Foster J, I consider that the proposed appeal would have a real

prospect of success for the reasons set out in A's skeleton" [C1/4]. (This skeleton is largely a reproduction of the content of that PTA skeleton).

Material Facts

7. By way of introduction to the issues on the appeal the following summary is provided (and contains some additional facts in evidence not referred to within the judgment below).
8. Rehabilitation is an integral purpose and objective of imprisonment². Education performs an important role, in turn, in building to a positive lifestyle achieving rehabilitation and reintegration to society. There is a public interest in the proper ability of prisoners to pursue higher education in preparation for future release: that public benefit being consistent also with the private interest of the individual.
9. This appeal is concerned with restrictions that impede higher education or the absence of assistance or support that endangers and prejudices a student's ability to successfully complete postgraduate degree or doctorate studies to the best of his potential. The concerns include the facilities and conditions necessary to be able to effectively undertake and complete higher education courses, including:
 - i. Access to tuition (and access to his course co-ordinator) {48}-{49} [C5/64];
 - ii. Access to word processing (including a Chromebook) and electronic storage {33} [C5/62]; {45} [C5/64];
 - iii. Access to the internet and online resources for study {85} [C5/73]; and
 - iv. Access to learning materials, including the necessary books and library services. {44}; {47} [C5/64].

² Including indeterminate imprisonment post-tariff: see Brown v Parole Board for Scotland, Scottish Ministers and another [2018] AC 1; R (Massey); (Robinson); (Haney); (Kaiyam) v Secretary of State [2015] 1 WLR 76.

10. The Appellant is a prisoner who has sought to educate himself in prison. At material times he was undertaking a research-based MSc in sustainable development from the School of African and Oriental Studies (“SOAS”), University of London. At the material time he was located at HMP Hull. He has pursued and he presently continues to pursue higher education, ultimately seeking to undertake his doctorate. The importance of educational attainment to the rehabilitation of a prisoner and to his prospects of reintegration and prosocial employment in society upon release is self-evident. The claim concerns actions impacting upon his ability to realise his potential by educational attainment in making the most of degree opportunities that are made available.
11. The Appellant received a discretionary life sentence in 1996 for attempted murder. He was aged 19. The punitive term or tariff was 7 years, and that expired more than 20 years ago, in 2002.
12. *Inter alia*, for the period from 28 January to 6 April 2022 the Appellant was denied access to the virtual campus computer (known as the “VC2”) system in the Education Department {7} [C5/51-55]. That meant he had no access to IT facilities {34} [C5/62]. Further, from 14 February to 26 April 2022 the Respondent removed those books, documents and case papers that the Appellant had in his possession {36} [C5/62]. The Judge below found that the decision and action to remove the Chromebook from the Appellant and impose these restrictions was unlawful and that decision could not be justified by the Respondent on the evidence {80}-{81} [C5/71-72].
13. Multiple impediments were suffered by the Appellant in conducting the necessary reading and research required to undertake and complete his Master’s degree to the best of his ability (and of course a university requires the independent academic research required of a Master’s degree course of this type to be undertaken):
- i. No access was permitted to specialist online resources such as the University’s online library.

- ii. Following a sequence of applications from May 2022 onwards³, after September 2022 (less than two months before the final dissertation completion, on the extended timetable that had been reached) access was given to a Mega Nexus virtual campus [14]⁴; though even that did not provide access to his University's online resources.
- iii. The Appellant had no way of attending the University's library in person to conduct research or borrow books [7]⁵;
- iv. There was an extremely limited selection of books in the prison library, inadequately stocked for a specialised Master's degree with a research-led focus [7]; [29]⁶.
- v. No access was permitted to his University's website (even for the prison's Distance Learning Co-Ordinator Danny Birch⁷).

14. Two elements of the facts should be emphasised. The first is the evidence of Dr Annabel de Frece⁸, the Programme Director for the Appellant's Master's degree course. On 24 January 2022 Dr de Frece sent an email to the prison that records some of the problems that have been caused by the prison, or challenges to the Appellant seeking to complete his education⁹. Dr de Frece also provides more detailed evidence (dated 3 March 2022¹⁰) reproduced in part at paragraph 30 of the detailed facts and grounds¹¹. On 15 February 2022 Dr de Frece sent an email to the prison which, *inter alia*, confirmed the material for the Islamic

³ [S9/169]ff

⁴ [S3/20-21] (second witness statement of the Claimant below). Julia Anderson's witness statement refers to the position at the very *end* of the course at [34] [S4/43]

⁵ [S3/18/] (C's second w/s)

⁶ [S3/25] (C's second w/s)

⁷ HMP Hull General Application Form no. 3520, 29 April 2020 (reply 7 July 2020) (to be added as [S15/180] [*former page D/223 in bundle below*]).

⁸ Senior Lecturer in Sustainable Development and Programme Director, MSc Sustainable Development, at the Centre for Development, Environment and Policy at SOAS University of London.

⁹ Her email is at [S7/163-164]. This is partly summarised at Grounds paragraph 21: [C14/200-201].

¹⁰ [S8/165-167]

¹¹ [C14/203-205]

charity system WAQF is indeed part of the dissertation. Her email contains these points:

I would be grateful for an update on Fajr's coursework which he informed me had been printed and sent to the University last week, however, unfortunately, I have not received it. I am a little concerned as we are now in the final week of the course and Fajr has had to complete coursework without the majority of the course key readings. I am concerned this will affect Fajr's academic performance and place him at a disadvantage...

...

Finally, I would like to confirm the material written by Fajr on Waqf (which was not sent to me) was part of his dissertation. Whilst not immediately central to the main piece of work, he was using the work as an example of how communities may go about gaining funding and personnel for sustainable projects. His dissertation is on creating sustainable desert communities through the use of a system of multiple green technologies and community¹²

15. The second factual matter to emphasise is that one of the specific requests the Appellant had made (repeatedly indeed) was to be granted access to the University's e-learning resources or virtual campus. Given the law set out below, and guidance as to the principles to follow, it is particularly notable that there was no justification provided for the continued and long endured absence of any facility for the Appellant to access the University's online library/resources website.

16. This issue was and is raised in the Grounds for judicial review (at paras. 12(ii) and 65¹³) and the Claimant's skeleton below (paras. 15, 18 and 55¹⁴).

17. At the hearing the Court was taken to the specific requests made for access to the University website (elearn.soas.ac.uk), set out at bundle pages [S9/169-170]¹⁵ and [S10/171-172]¹⁶, [S11/173-174]¹⁷, [S14/178-179]¹⁸ (point (1) on each page). Notwithstanding this, these repeated requests, and the complete absence of any response to the same – and particularly absence of any

¹² [S6/162]

¹³ [C14/195] and [C14/217] respectively

¹⁴ [C8/109] and [C8/110] and [C8/123]

¹⁵ 23 May 2022; response 1 June 2022

¹⁶ 9 June 2022; response 28 June 2022

¹⁷ 15 June 2022.

¹⁸ 29 August 2022; response 6 September 2022.

justification suggested that could justify preventing access to that educational website – are not identified or addressed within the judgment below.

18. A need to access specialist library materials to undertake a post-graduate course is trite. There is not equivalent or alternative access via a local authority library or prison library. The Appellant identified to the prison that it was specialist material he needed access to that Hull public library does not have.
19. A chronology of the events in relation to the Appellant's case is set out by the Judge at {7} [C5/50-55].

Essential Legal Framework

20. Prisoners have the right to education guaranteed by Article 2 of The First Protocol to the European Convention on Human Rights 1950 ("A2P1"), as given effect by Schedule I to the Human Rights Act 1998 ("HRA 1998"), and sections 3 and 6 of that Act.
21. By section 2 HRA 1998 a court must take into account the jurisprudence of the European Court of Human Rights when interpreting the protections of the Act:
 2. Interpretation of Convention rights.
 - (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
 - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - ...
 - whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.
22. Lord Bingham noted in R (Ullah) v Special Adjudicator [2004] 2 AC 323, HL, that the 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'. In R. (Hicks) v Commissioner of Police of the Metropolis [2014] 1 W.L.R. 2152 the Court of Appeal examined the principles to be applied:
 - "80. What conclusions can be drawn from this domestic case law on how English courts should deal with Strasbourg decisions on the interpretation of the ambit of a provision of the Convention itself[...]? We think that the following principles are clear:
 - (1) It is the duty of the national courts to enforce domestically enacted

Convention rights.

(2) The ECtHR is the court that, ultimately, must interpret the meaning of the Convention.

(3) The UK courts will be bound to follow an interpretation of a provision of the Convention if given by the Grand Chamber as authoritative, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which, properly explained, would lead to that interpretation being reviewed by the ECtHR when its interpretation was being applied to English circumstances.

(4) The same principle and qualification applies to a 'clear and constant' line of decisions of the ECtHR other than one of the Grand Chamber.

(5) Convention rights have to be given effect in the light of the domestic law which implements in detail the 'high level' rights set out in the ECHR.

(6) Where there are 'mixed messages' in the existing Strasbourg case law, a 'real judicial choice' will have to be made about the scope and application of the relevant provision of the Convention...

23. Pursuant to the Apprenticeships, Skills, Children and Learning Act 2009, the Secretary of State for Justice "must" secure the provision of such facilities as she considers appropriate for education suitable to the requirements of persons subject to adult detention (s.86(1)(b); including prison: s.121(4)), or for those over-19 undertaking specified qualifications (s.87 and Sched. 5).

24. Rule 32(2) of the Prison Rules 1999 (as amended) provides that: (1) "Every prisoner able to profit from the education facilities provided at a prison shall be encouraged to do so"; and (2) "reasonable facilities shall be afforded to prisoners who wish to do so to improve their education by training by distance learning, private study and recreational classes, in their spare time".

25. The *Prison Education & Library Services for adult prisons in England Policy Framework* ("the Policy Framework") (issued 01/04/2019) provides, *a purpose to* education in prisons to give individuals the skills they need to unlock their potential, gain employment and become assets to their communities. It should also build social capital and improve the wellbeing of prisoners during their sentences and once released [1.1]. Prisoners are to be engaged and supported to access learning and education that best ensures they can attain their personal, learning and employment goals and enhances their ability to get and keep employment on release. At {23} [C5/57] the Judge summarised that paragraph 3.1 indicates "that prisons should offer learning provision *"appropriate to the*

needs and aspirations of its prisoners”, taking account of the prisoner cohort; prisoners should be engaged and supported to access the learning and education that best meets their needs; and all prisoners should regularly be able to access appropriate stocked libraries which support them in their learning and personal development”.

26. Prison Service Instruction 25/2014 *IT Security Policy* (the “IT Policy”) governs internet access by prisoners. Relevant provisions are [16.6]-[16.14]. The judgment below sets out those provisions at {24} [C5/57-58]. This permits balancing of security against access to internet resources, on a case-by-case and individualised assessment basis.

The judgment below

27. The Judge allowed the claim challenging the decision to remove from the Appellant the Chromebook and IT access for a period of time as unlawful. However she went on to conclude that that challenge succeeds as a public law breach but is not a breach of obligations arising out of A2P1 {88(iii)} [C5/74].
28. The challenged decision to remove the Chromebook (and consequent restrictions imposed) was unlawful as it “failed to take relevant material into account alternatively reached a logically unsustainable conclusion” {81} [C5/71-72]. The decision was quashed {85} [C5/73].
29. *NB.* A separate issue as to student finance regulation was raised below. That is not raised on or relevant to this appeal. This appeal is concerned with the challenge that the learned Judge was wrong not to uphold the challenge that A2P1 has been breached. The Appellant’s contentions concern both (i) the Chromebook and IT (and papers) deprivation for a period of time during which his dissertation was expected and time (if that schedule had been achieved) existed to provide drafts for feedback and additional research to be conducted – and which interference was unlawful (in domestic terms, established to be so); and (or) (ii) the absence of any justification ever provided for the denial of

access (at all times) to the University’s e-learning website and resource. (This latter point is not addressed within the judgment, though it was raised).

30. The judgment notes that “complaint is made about delay until April before access was given to IT and full access to his papers was resumed, at a time when the Claimant was under pressure with regard to completion of his dissertation” {82} [C5/72]; and that “once the security issues were resolved and whilst they were being resolved, steps were taken to afford the Claimant a degree of access to learning, and to the writing of his dissertation. There were mitigation measures to ensure the Claimant’s degree could be taken, and his tutor assisted him by obtaining an extension for submission of his dissertation - as stated, he was successful in obtaining the qualification” {84} [C5/72-73]. This was at the mark of merit, and the Appellant maintained that without the impediments he had to work under he would likely have obtained a distinction {39} [C5/63]; explained in the witness statement at [19]¹⁹).

31. There was interruption to study, but not amounting to an interference with A2P1. The Court found that whilst the Claimant was subject to delays, and interruptions, to his study for the period from January to April 2022, that “was regrettable, but sufficient accommodation for the problems afforded that it cannot in my judgement be said that the Claimant’s rights, were infringed” {87} [C5/73]. Whilst “Accepting that in certain circumstances **delay** may inform a breach of the A2P1 obligation, and that delay or lack of personal IT access is frustrating and inconvenient, it is clear in my view the interruptions to full access to education, such as were caused by the predominantly security-imposed delays, are within the prison system, plainly reasonable, proportionate and are not arbitrary” {87} [C5/73] (emphasis added).

32. The Court adopts the threshold that for a breach of A2P1 his study must be not more difficult but made **impossible** {86} [C5/73] (“the evidence does not show that the absence of the Chromebook (a new facility), or IT access made study impossible during that time, accepted that it was more difficult”).

¹⁹ [S3/22-23]

33. The Court accepted the Respondent's argument below that there is "not systemic under-provision nor denial of access to education in the sense understood by the authorities" {63} [C5/68].

Submissions on the Grounds of Appeal

Ground (1):

34. The Judge below was wrong to set the threshold for an unlawful interference with A2P1 rights at a level not equivalent to that set in Strasbourg.

35. The Court adopts the threshold that for a breach the person's study must be not more difficult but made impossible {86} [C5/73]. It is respectfully submitted however that the threshold for the breach of A2P1 is not such as to require an impossibility to educate, or a full denial of access to education. Rather the threshold for an infringement is met by a restriction that interferes with and renders absent the effective access to the available provision of education *without* a positive justification established for that restriction.

36. The Appellant relies upon Mehmet Arslan and Orhan Bingöl v Turkey (App. nos. 47121/06, 13988/07 and 34750/07) (18 June 2019), Kalda v Estonia (2016) 42 BHRC 145, and Jankovskis v Lithuania (App. No. 21575/08) (17 January 2017) which demonstrate the proposition for which he contends.

37. The limitations experienced by the Appellant did not meet the requirements to be each (a) foreseeable, (b) in pursuit of a legitimate aim, and (c) proportionate to that aim. These are the principles applicable to considering compliance with A2P1.

38. At {86} [C5/73] the Court cites part of paragraph 59 of the decision in Mehmet Arslan and Orhan Bingöl v Turkey (App. nos. 47121/06, 13988/07 and 34750/07 (18 June 2019). In that case the inability of two life-sentence prisoners to use computers and to access the Internet for their higher education studies constituted a violation of A2P1. The authorities had not been able to put

forward any concrete justification for the lack of resources of the prisons in question nor did the authorities provide an appropriate assessment of all the interests at stake or provide any justification for restricting the applicants' access to the use of the electronic material.

39. Paragraph 59 of Arslan additionally explains the principle and test for an A2P1 breach. The specific reference to websites is relevant below, but the principle of justifiable assessment of risks to warrant any interference is of wider purchase:

in assessing the applicants' complaint under Article 2 of Protocol No. 1 the Court will take due account of its case-law, hitherto developed under Article 10 of the Convention, on the right of prisoners to Internet access (see *Kalda* and *Jankovskis*, [...]). That case-law shows that in order to determine whether a refusal to provide prisoners with Internet access is justified in a given case, an assessment should be made of whether the domestic courts conducted an adequate evaluation of the actual risks to security inherent in the particular case, thus properly balancing the competing interests.

40. The Judge below sought to distinguish Arslan, and says (at [C5/68]):

64. As the Defendants point out in their skeleton argument, in *Arslan* (*supra*), the Claimants were denied all access to a computer and Internet, where that access was vital for the continuation of their higher education studies. In the present case a number of initiatives and workarounds, including access to a non-OU “*tailored*” post-graduate course of study, have been put in place for the Claimant and the fact that the provision of and access to higher education may differ from what may be available outside prison is not evidence that it is unlawful and infringes the Claimant's rights. Even though on occasions evidencing a clunky system and some management hiccoughs (books sent back when arriving without warning, the need to use a social video slot for an academic encounter for example), even taking the picture as including long out of time examples, the whole does not add up to a breach of the obligation to afford access to education to the Claimant.

41. However the principles to apply properly require consideration of justification established for a restriction. It is not necessary to establish an impossibility to conduct the education in question, but to identify that there is lack of a considered justification for the impediment placed upon the individual's ability to learn.

42. As well as Arslan, the Appellant would seek to rely upon two other Strasbourg decisions that support an A2P1 breach on this basis, and which Arslan makes plain have relevance to the proper approach to this Convention article also:

- a. In Kalda v Estonia (2016) 42 BHRC 145 the applicant, a prisoner, wished to be granted access via the Internet to information published on three particular websites. A violation of Art. 10 ECHR was found. The Court laid emphasis on the fact that by its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in facilitating the dissemination of information in general [44], [52]. Although imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information, and there is no general obligation to provide access to the Internet, or to specific Internet sites, for prisoners, *nonetheless*, the court found that if access to certain sites was to be denied then it would expect "detailed analysis as to the security risks allegedly emerging from the access to the three additional websites in question" [53].

[This case was followed also in a case finding a breach of A2P1 where sufficient explanation was not provided for justification of a terrorist prisoner's denial of access to certain sites for training and rehabilitation to a profession: Ramazan Demir v. Turkey (Case Note in English) (App. 68550/17) (9.2.2021)].

- b. Jankovskis v Lithuania (App. No. 21575/08) [2017] ECHR 21575/08 concerned an applicant prisoner (who wished to acquire a second university degree) complaining of restricted access to the website of the Ministry of Education and Science preventing him from receiving education-related information. The court found a violation of Article 10. The court referred to the principles elaborated in Kalda and placed emphasis, in particular, on the nature of the information which the applicant sought to obtain. It said it was "not persuaded that sufficient reasons have been put forward in the present case [by the state] to justify the interference with the applicant's right" (to receive information) [63]. Plainly the onus to justify the restriction preventing

access to a specific website rests on the state authorities to provide proper proof – with reasons that follow detailed consideration and proper analysis.

43. It is submitted that the principles to be applied as established by the above Strasbourg jurisprudence constitutes a clear and constant line of authority, and must be followed domestically. As Lord Bingham explained in Ullah (*ante*): the Court “is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right...” [20].

44. This approach is also consistent with the seminal explanation of Lord Bingham in R (Greenfield) v SSHD [2005] 1 WLR 673, where he identified that “the purpose of incorporating the convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg” [19]. That is why damages awards also seek to match the approach of the Strasbourg court. That principle was explained (in the Article 5 context) in R (Faulkner) v Secretary of State for Justice and the Parole Board; R (Sturnham) v Parole Board and Secretary of State for Justice (*No.1*) [2013] 2 AC 254; UKSC 23 at [24]-[40] per Lord Reed. An award of just satisfaction at a level below that awarded in Strasbourg leaves the individual remaining a victim of the violation; so that a failure to award compensation at a level comparable to that awarded by the ECtHR undermines an objective of the

HRA 1998 by leaving individuals able and required to apply to the European Court for a higher level of compensation (per Ciorap v Moldova (No 2), app 7481/06, at [24]-[26] (Article 3); Betteridge v United Kingdom (2013) 57 EHRR 195 (7) at [41] (Article 5); Scordino v Italy (2007) 45 EHRR 7 at [269]-[271], Grand Chamber (A1P1 and Article 6). In Velev v Bulgaria (2014) 37 BHRC 406 the Court awarded 2,000 Euros in non-pecuniary damages [53]. In Kalda v Estonia (*ante.*) the finding of the violation was sufficient just satisfaction [58]. No damages were required in Mehmet Arslan and Orhan Bingöl v Turkey (*ante.*) (at [76]-[78]); nor Jankovskis v Lithuania (*ante.*) (at [70]). In Ramazan Demir v. Turkey (*ante.*) the Court awarded 1,500 Euros in respect of non-pecuniary damage.

45. In relation to the absence of any facility for the Appellant to access the University's e-learning resources and virtual campus there was simply no justification provided by the Respondent. The officers failed to properly address the requests made, assess and consider the website and any security issue, and provide access (or identify why it should not be, if, surprisingly, there was some legitimate reason to prevent elearning access). As in the successful Strasbourg cases above, in the Appellant's case there has not been any proper or adequate attempt to evaluate and explain with an adequately reasoned assessment why it should be properly justifiable, why it posed any unacceptable security risk; or why it would be a proportionate response, to deny him from access to the university online site. It is insufficient for the Respondent to suggest that there may be reasons against unrestricted access to all of the internet: the issue is whether there is a positive justification to restrict access to *this* particular educational material and site hosted on the internet.
46. The Appellant respectfully submits that in light of the jurisprudence, and the threshold test for a breach, this constituted a violation of A2P1. In relation to the absence of any facility for the Appellant to access his University's e-learning resources or virtual campus there was *no justification* provided.
47. Likewise (and in the further or alternative) as to the unlawful deliberate deprivation of access to a Chromebook or similar computer, and I.T. facility, by

a decision-making approach that is unlawful as a matter of public law. The justification is absent for that interference. As the Court accepts, A2P1 requires that where an educational opportunity is a possibility available to a prisoner it should not be subject to arbitrary and unreasonable restrictions: Velev v Bulgaria (2014) 37 BHRC 406 at [30]-[34].

48. The educational provision was here arbitrarily or unreasonably restricted by the unlawful Chromebook decision and/or further restrictions that cumulatively caused a violation of A2P1.

49. It is recognised that the Judge is trenchant in her refusal of permission to appeal against her own judgment. However it is respectfully submitted that the Judge's defence of her judgment wrongly seeks to minimise or explain her rejection of the A2P1 claim as a 'finding on the facts' (which of course every case is), without regard to the fact that she had to apply a particular legal test or threshold to those facts in order to arrive at the conclusion. It is respectfully submitted that it is apparent from her judgment that she applied a test for a violation in relation to this Convention right that does not match that applied by the Strasbourg Court itself. This is particularly evident in the treatment of (a) the absence of access permitted to the internet to the University website for library and course material access; and (b) the absence of any reasons to justify that, or to demonstrate a proper balancing exercise was undertaken, on the part of the defendant authority. Indeed it is precisely the strong factual similarity between the proposed Appellant's case and the cases decided by the Strasbourg Court which provide the clear statements of the test to be applied that demonstrates so clearly that the wrong legal test has been applied in this novel domestic decision. It thus risks setting a bad precedent and it is important that it not stand.

Ground (2):

50. The Court was wrong in principle to refuse to consider the events that occurred following the issue of the claim form challenging an ongoing violation of A2P1. This error also appears to have influenced the Judge's decision on A2P1.

51. This point concerns the correct legal approach to the consideration by a court hearing a judicial review of an alleged violation of a fundamental human right protected by the Convention, and Human Rights Act 1998, that did not cease at the date of issue.
52. The Appellant was properly required to proceed with the claim at that point to seek relief and if the public authorities continue to breach his right on an ongoing basis by a course of conduct (R (Delve) v Work and Pensions Secretary [2021] ICR 236, CA, at [124]) thereafter such further acts within that course of conduct should have been considered (provided proper and fair notice is given). This claim of an ongoing violation of A2P1 was brought procedurally by way of judicial review in order to seek quashing or mandatory relief for an ongoing situation, and in such a case it is necessary and fair that a court should have regard to events that post-date the date of issue of the claim form and constitute part of the ongoing violation and pattern of treatment.
53. This ground is perhaps also supported by the thrust of the decision of the Supreme Court in In Re McAleenon [2024] 3 WLR 803 (albeit in a very different context, and where different defendants would be identified by prospective civil or judicial review claims), which reaffirmed an individual's right to choose whether to use a judicial review (for speedier resolution of an ongoing breach of the law [59]) or a civil claim, even if the judicial review relief included a damages claim (there under Article 8 ECHR against the regulator [60]-[61]). If the use of judicial review in principle were to preclude any relief being granted for the continuation of the unlawfulness after date of issue this would suggest two sets of proceedings being required to resolve essentially the same complaint of a singular and continuing breach of duty. That would not accord with the overriding objective. Provided there is fairness in the pleading and understanding of the particular individual case there is no principled reason why a judicial review court must ignore the continuation of a state of affairs.
54. The correct approach, had it been taken below, would have prevented what

must otherwise cause an artificial division of the Appellant's educational experience and elements of the violation. The erroneous approach would mean that where public law relief were needed the conduct that as a whole might cumulatively amount to an A2P1 breach would be split and compartmentalised, so that the continuing actions could not be considered at all, and any compounding effect must be disregarded. That would not do justice or further the overriding objective – assuming always that there can be fairness done to a defendant in procedural terms to ensure fairness.

55. The Court decided that to take account of incidents complained of after this claim was issued would be to impermissibly expand this judicial review {53} [C5/65-66]. The Judge said that the Appellant could not “expand” the judicial review “to challenge a running” series of events occurring since the claim was issued.

56. The Court also said that it would be unfair, due to the lateness of the application, to admit evidence and complaints concerning the new establishment the Claimant had moved to (HMP Isle of Wight): *no challenge* is made to that case management decision (i.e. to the decision to exclude the additional facts stated in February 2023, and additional evidence in support thereof). The refusal of a late amendment application to include matters occurring at a new prison, HMP Isle of Wight, is not challenged on this appeal. That was a matter of case management as to timing and opportunity to the defendant to respond, and excluding that material was a matter within the Judge's ambit of discretion. *Aliter* however, the exclusion of events in the existing evidence and papers of the agreed bundle, events that occurred at HMP Hull, simply because they occurred after date of claim issue. The Respondent was fairly on notice to respond to what had always formed part of the grounds, and the agreed bundle for the hearing.

57. The complaint that the Appellant had no access to the University's online library was not new (as already noted). It is submitted that that complaint was required to be considered, and that it (either alone indeed on the authorities, or *a fortiori* in a cumulative consideration) amounts to a violation of A2P1.

58. The Court applied guidance directed towards “rolling” judicial review, where replacement extant decisions are substituted for the original target decision of a claim when issued. That is, with respect, not apposite to this scenario.
59. Ground (1) of the judicial review claim alleged an unlawful violation of the right to an education protected by A2P1. In order to seek remedial orders the Appellant brought a judicial review. But the ongoing experience of restrictions remained and continued post-issue. The public authority defendant was failing to discharge its legal duty on a continuing basis over a period of time, and had not ceased in that failing. This was a continuing series of acts and accordingly the Court below erred, with respect, in declining to consider those events post-issue of which the Respondent had had fair and proper notice and time to respond to in the proceedings.
60. Having regard to all matters temporally (which the defendant had had proper chance to respond to) would allow the Court to be fully informed of the gravity and continuous nature of any failure to afford the protections of the law, to which a claimant is entitled, over a prolonged period. It avoids the prejudice to an individual who must seek the assistance of the Administrative Court to put an end to violations, or to remedy any operational or policy failing, as well as having entitlement to redress against any continuation of breach over this period. The “undesirability of confining attention to only part of the overall picture” in a human rights claim was emphasised by Lord Mance in Somerville v Scottish Ministers [2007] 1 WLR 2734. It is submitted that this does apply equally here.
61. Permitting reliance upon breaches that occurred within a year of the issue of proceedings (i.e. within the usual time limit under the HRA 1998) would be consistent with the approach of the court in R (Bruton) v Secretary of State for Justice [2017] EWHC 704 (Admin) (where indeed the court went much farther back in time also to consider violations of Article 8 protecting confidential and privileged correspondence).
62. The Court of Appeal in R (Delve) v Work and Pensions Secretary [2021] ICR 236 (considering the decision of the Supreme Court in O’Connor v Bar

Standards Board [2017] 1 WLR 4833), at paragraph [124], explained the important distinction between “a series of acts comprising a course of conduct occurring over an extended period of time” and on the other hand a continuing effect of a single act (the latter being a situation where time limits commenced at the point of the decision/act under challenge, the former being in-time for challenge). There is plainly a continuing series of acts at the same prison in this case (prior to the Appellant’s relocation).

63. Further authority indicating that the entirety of events at HMP Hull that constituted part of the violation of A2P1 were properly liable to be considered is the judgment of the Supreme Court in R (Johnson) v SSHD [2017] AC 365. There (for an Article 8 and 14 claim) the denial of citizenship at birth had a continuing direct effect on the individual. Baroness Hale explained at [28] that the Convention] recognises the concept of a ‘continuing situation’ that “refers to a state of affairs which operates by continuous activities by or on the part of the state to render the applicants victims”²⁰.

64. One particular matter consequently, it seems, excluded from consideration by the Judge below was the failure to permit the requested access to the university website with its ‘elearn’ and online library facility. The evidence in support of this complaint was not however supplied late, but is contained within the agreed part of the hearing bundle, and whilst post-dating issue was contained in complaints submitted at the time to the prison authorities in the summer of 2022. As seen above, the repeated requests for access were made, during a time he was due to be working on his dissertation, on 23 May 2022 ([S9/169]), 9 June 2022 ([S10/171]), 15 June 2022 ([S11/174]), 29 August 2022 ([S14/178]). In the Respondent’s formal witness evidence dated 20 October 2022 this had still not been facilitated and was merely “being looked into” ([S4/46]; Ms Anderson’s witness statement para. 45). There was never any substantive response to the requests, and access was never facilitated. At the same time no reason or explanation was ever provided to seek to justify any decision to not allow access. It was important, and only fair, that this be considered.

²⁰ The factual distinction between Johnson and Delve was explained by the Court of Appeal in R (CN) v SSHSC [2022] 4 WLR 73 at [50] per Sir Geoffrey Vos MR.

Ground (3):

65. Applying the correct approach, the Court was wrong not to allow the claim on the grounds of breach of section 6 of the Human Rights Act 1998 for violation of A2P1 by the respondent state authorities. The identified impediments to the Appellant's education were not warranted.

66. A breach of A2P1 was evident either as a result of:

- i. The unlawful, and so unjustified, deprivation of the Chromebook and IT access for a period of time that interfered with the ability to complete the Master's course he was undertaking at the required time and to the best ability of the student; and/or
- ii. The unjustified denial of access to the University online e-learning and library resources, which amounts to an interference that is not shown to be proportionate and lawful; and/or
- iii. Cumulatively, the educational provision was arbitrarily or unreasonably restricted and interfered with by the Respondent.

67. To elaborate as to the second of these, there is in truth no defence to the failure to allow the Appellant to access his University's particular portal of website provision for his studies – nor was any defence ever suggested by the Respondent.

68. The third manner above would recognise that the violation of A2P1 is established by the combination of the two preceding matters, or indeed by any combination of all the impediments experienced and suffered by the Appellant in seeking to complete his educational study. In aggregate the proper and adequate provision was not made for external educational access. *Inter alia*, the Respondent made (1) no proper and adequate provision for educational videolink and telephone access and/or (2) no proper and adequate provision for educational PINs contacts (private identification numbers approved for calling by an inmate). As paragraph 8 of the supplemental submissions (filed prior to

permission²¹) noted, the videolink facility or telephone teaching and direct contact impediments to the Appellant's learning precluded proper teaching receipt and academic discussion. There was significant restriction placed upon videolink facility and telephone access to the Professor (or other tutors). Whilst not being wholly prevented from any contact there were technical limitations being imposed that significantly hindered any remote teaching and direct contact with his Professor. The restrictions meant that:

Videolink

- i. The Appellant was not able to have any educational provision for video visits but was required to use social visits ([S2/13]; and [2]²²); {48} [C5/64];
- ii. on one occasion the social visit was refused on the day because she was not a social visitor: [S2/13];
- iii. there are a very limited number of social slots permitted to him, which cannot then be used to maintain personal relationships: [S2/13]; {48} [C5/64];
- iv. such visits are of restricted length {48} [C5/64]. Each last only up to 30 minutes [2]²³;
- v. HMP Hull only permitted two (effective) 30 minute videolinks during his entire Master's programme [2]²⁴.

Telephone

- vi. telephone calls with his tutor are limited to 15 minutes before automatic disconnection: [S2/13-14]. That precludes the viability of academic discussions which are continually interrupted and trains of thought lost. They ought not to be subject to such cut-outs. A wait of 5 minutes was required before a call could be made to the same number for another 15 minutes {49} [C5/64]; {31(vi)} [C5/61].

²¹ [C11/150-151]. [This not to be confused with a later additional statement of facts concerning matters that were not admitted into evidence but occurred at HMP Isle of Wight]

²² [S3/16] (C's second w/s).

²³ *Loc. cit.* [S3/16]

²⁴ *Loc. cit.* [S3/16]

- vii. No proper and adequate provision is made for Educational PINs contacts (i.e. an approved Personal Identification Number telephone number list that could relate to education as opposed to social or legal numbers) so enabling an adequate number of contacts to be in place for educational research purposes and without those numbers displacing social and family contacts from the list: [S2/14]; {49} [C5/64].

Email

- viii. He had to conduct his studies without the ability to directly email his course tutors, and communicating only via the prison staff (most often an officer Danny Birch at HMP Hull): [17]²⁵. That causes delays and impedes ready consultation or advice. At times there was not an education officer available because Mr Birch would be on leave (including a period of sick leave²⁶). There was also error in the passing on of information: {50} [C5/65].

Giving consideration to all matters of fact, it was wrong of the Judge below to reject the breach of A2P1 on the facts of the Appellant's case.

Conclusion

69. This is an important judgment concerning A2P1. There is need to prevent domestic law setting the wrong bar to enforcement of A2P1 rights in the domestic courts. The High Court is persuasive at its own level, but its judgments form a binding precedent for county court consideration of issues of educational access, which means for the many cases at that level, including self-representing individuals, or cases seeking to enforce human rights post-events through vindication that must follow in arrears after-the-event, would be affected adversely by the first instance judgment in this case.

²⁵ Grounds of claim at [C14/198-199]

²⁶ [12] at [S3/20] (C's second w/s)

70. This is an important decision in this context, where domestically little consideration has hitherto been given to the principles developed in the Strasbourg jurisprudence. It is respectfully submitted that too high a threshold is set by the Court before a breach is established.

71. This Court is respectfully invited to allow the appeal and declare the violation of the Appellant's A2P1 rights. It is submitted that the learned Judge erred in her approach to the important issues of law raised. The Court shall also be invited to consider what appropriate just satisfaction requires in light of the Strasbourg jurisprudence and awards made there, in the particular circumstances.

7 February 2025

(Pagination updated to hearing bundles 20 February 2025)

Philip Rule KC

No.5 Chambers