

ON APPEAL FROM THE HIGH COURT OF JUSTICE  
KING'S BENCH DIVISION, ADMINISTRATIVE COURT

B E T W E E N:

R (FAJR ELLIS)

Claimant/Appellant

v

THE SECRETARY OF STATE FOR EDUCATION

First Defendant/Respondent

v

THE SECRETARY OF STATE FOR JUSTICE

Second Defendant/Respondent

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**REPLACEMENT SKELETON ARGUMENT**  
**On behalf of the Secretary of State for Justice**

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*References are to the 29 April 2025 Core Bundle (228 pages) [CB/tab/page/§] and  
Supplementary Bundle (179 pages) [SB/tab/page/§]*

**Introduction**

1. The Appellant is a life service prisoner who served 28.5 years following a conviction of attempted murder.<sup>1</sup> His tariff was set at seven years, and his minimal custodial period expired in 2002 [CB/5/49/§1]. He was serving his sentence at HMP Hull when this claim was brought [CB/5/49/§1; CB/14/194/§6]. On 18 November 2022, he was transferred to HMP Isle of Wight [CB/5/56/§13]. Prior to the February 2023 hearing of his claim, the Appellant completed a research MSc in Sustainable Development provided by the University of London and the School of Oriental and African Studies ("SOAS") [CB/5/59/§26(iii); SB/3/21/§15; SB/4/39/§24].
2. This Skeleton Argument is submitted on behalf of the First Defendant, the Secretary of State for Education (the "SSE") and the Second Defendant, the Secretary of State for Justice ("SSJ"). The Grounds of Appeal engage only with acts of the SSJ. The Defendants are in the course of contacting the Appellant and the Court, to seek the removal of the SSE and the Student Loans Company as parties to this appeal.

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<sup>1</sup> The Appellant was released on 23 January 2025.

3. The Appellant's challenge should be dismissed:
- a. The Court did not apply an incorrect legal test or threshold for a violation of Article 2 Protocol 1 to the ECHR ("A2P1"). Rather, the Court correctly asked itself if the Appellant had been denied effective access to such educational facilities as the state provides for individuals in the position of that person. The Court recognised the difficulty the Appellant had faced, at times, in participating in his post-graduate course. Indeed, the Court found that one such obstacle – the removal of the Appellant's Chromebook computer – was unlawful as a matter of a domestic law obligation (but not A2P1). However, the Court also found that the SSJ had committed significant resources to enabling the Appellant to participate in distance learning, including – ultimately – 27 hours a week in the Education Department, with access to a computer and (some) internet access. Taking into account all of these factors, including the way in which his study was interrupted by the removal of the Appellant's Chromebook computer and related IT use, the Judge correctly found that there was no breach of A2P1 because the Appellant had not been denied effective access to educational facilities. Indeed, the Judge found that the "*strategies ... used were comfortably adequate to afford him lawful access to education whilst in prison*" [CB/5/68/§65].
  - b. The Court did not make an unlawful or incorrect case management decision to exclude evidence relevant to the Appellant's A2P1 challenge. While the Judge excluded the evidence of the Appellant submitted just prior to the hearing of the claim, the Appellant is wrong to suggest that the Judge excluded evidence regarding events at HMP Hull simply because they arose after the date of issue, which were within the original agreed bundle. The Judge took into account issues that arose after the date of the claim within the Appellant's and the SSJ's evidence, and was plainly aware that there were issues which were not resolved before the Appellant obtained his degree. Bearing in mind the discretionary nature of this case management decision, there is no basis on which this Court should intervene in the fully reasoned decision of the Judge.

### **Claim Before the High Court**

4. The Appellant’s claim before the High Court was wide-ranging; it was a “*broad-based challenge in terms that ‘the present regulation and/or system and/or actions or omissions of the Defendants unlawfully impeded the Claimant from pursuing his education’*” [CB/5/49/§4]. The Appellant complained of “[r]estricted access to specialist books, the university’s online library, restricted access to photocopying and difficulty in receiving materials (amongst other inconveniences). This represented an alleged unlawful lack of access to a library or to online resources or ownership of books within the prison or word processing facilities compared to non-detained students” [CB/5/50/§5(ii)]. The Appellant raised a number of complaints regarding:
  - a. access to books, including the private funding he had obtained to purchase the necessary books [CB/14/195/§11; SB/1/5/§5; 7/§13]
  - b. complaints about post and printing [CB/14/195/§12; SB/1/5-6/§§6; 8];
  - c. a lack of access to the SOAS’ physical library and online resources, on the basis that the prison library was inadequate for his use and not comparable to academic libraries such as that maintained by SOAS [CB/14/195/§12];
  - d. word processing and document storage facilities [CB/14/195/§12; SB/1/8/§§16-17];
  - e. access to funding for his course [CB/14/195/§§10; 12];
  - f. delays to the return of seized paper work and books [CB/14/207/§37]; and
  - g. access to his tutor via phone, email and videolink [CB/14/195/§12; 198/§17; SB/2/13].
5. The Appellant also challenged the decision to remove, from him, the use of the Chromebook and restrict his access to IT at the prison (the “**Chromebook Challenge**”).
6. The Appellant provided evidence of these complaints by way of a Statement of Facts and Grounds (3 May 2022) [CB/14/192]; Supplementary Submissions and Reply (6 July 2022) [CB/11/148]; and witness statements of the Appellant dated 12 May 2022

(typed) [SB/1/4] and (manuscript) [SB/2/13] and a third witness statement dated 17 February 2023 [SB/3/15].

7. The Defendants' evidence in response, detailed largely in the Witness Statement of Julia Anderson [SB/4/30] addressed:

- a. Educational Provision. The vast majority of prisoners across the prison estate who are undertaking undergraduate or postgraduate degrees undertake an Open University (or "OU") course; these courses are tailor-made for prisoners. However, it remains open to prisoners to undertake other distance learning courses. Ms Anderson explained that:

*"In light of the [special arrangements with the OU], prisoners are encouraged to study higher education courses through the OU whose courses are designed so that prisoners receive all the materials they need, and do not need to seek out additional resources. It is open to prisoners to study through other universities and course providers, as the Claimant has done. However, prisoners may naturally encounter some practical difficulties in pursuing these courses, as such courses are not designed to be studied by prisoners"* [SB/4/37/§17].

Ms Anderson also explained that the decision as to whether or not to allow a prisoner to study for a particular course is taken locally, by the prison governor: **SB/4/37/§§17-19**.

- b. Books. The Appellant detailed a number of historic complaints around posting books to prison. Ms Anderson's witness statement explained how this had been addressed (and could be avoided in the future) [CB/5/60/§29; SB/4/42-48/§§28; 32; 47; 51.4]. The Appellant was able to access eight books from the prison library at a time, twice the standard limit applied by the prison, and access books from community libraries [CB/5/60/§30; SB/4/44-45/§§36-40]. The Appellant received charitable donations to fund the cost of books he sought for his course [CB/14/197/§13; SB/4/40/§26].

- c. Printing. HMP Hull printed coursework for the Appellant, and the Appellant had been asked to make more regular requests to ease the burden on staff and avoid delays [CB/5/61/§31(ii); SB/4/46/§46].
- d. Local Prison Support. The Appellant benefited at HMP Hull from designated local long distance learning support. The Appellant had access to a “Distance Learning Coordinator” (or “**DLC**”) who acted as an intermediary between the Appellant and his course provider, printed out resources on request, arranged tutorials where needed and provided support with, for example, techniques of academic writing [CB/5/61/§31(ii); SB/42-43/§30-33]. The DLC would, for example, request books from the Appellant’s tutor on his behalf (see 14 July 2021 email):

*“Hi Annabel, I hope you are well. Mr Ellis has asked me to ask you if you could recommend any seminal books on the following – WAQF – solar powered furnace (small scale) – aero forestry-halophytic plants/crops – guide to building your own blockchain – latest i.s.o. standard for management.”* [CB/5/51/§7]

He also had support from the Learning Support Manager (“**LSM**”) and Learning and Education Manager (“**LEM**”) [SB/43/§33].

- e. IT Facilities. At HMP Hull the Appellant had access to the internet via the Virtual Campus (“**VC2**”) within the Education Department. There, at the time of Ms Anderson’s witness statement, he was being given access to sessions of up to 27 hours per week in the Education Department on the VC2 system, which was considerably more than what prisoners studying on an OU course or other forms of distance learning were afforded [CB/5/59/§28; SB/4/43/§34]. He could save his work on the VC2 system, and there was no limit to the amount of work he could save on this system [SB/4/43/§34]. The Appellant himself accepted that this was a solution, albeit not a perfect one [SB/3/21/§14]. The Appellant was also one of the first to be granted his own Chromebook [CB/5/62/§33].
- f. In terms of what he could access on the internet, the Education Department provided access to websites that were cleared as a “white site” and so were safe to be accessed. Prior to leaving HMP Hull, the prison was looking into how the

Appellant could be given independent access to the university website [CB/5/61/§31(iv); SB/4/46/§45].

- g. The Defendants' evidence also addressed the removal of access to the VC2 system in the Education Department between 28 January 2022 and 6 April 2022 while the security department carried out investigations, and the removal of the Appellant's chromebook on 28 January 2022: [SB/4/49-50/§§54-74].
- h. Tutor Access. At HMP Hull the Appellant could make as many telephone calls to approved numbers as he liked per day. He was therefore able to telephone his tutor from his cell. The only limitation was that a call could only last 15 minutes; after 5 minutes another call could be made. This limitation applies across the prison estate, and is not something that could be changed for one prisoner. The Appellant could also use one of his two video calls per month to speak to his tutor [CB/5/61/§31(vi); SB/4/47/§§48-49].
- i. A meeting was held on 14 September 2022 between the Appellant's tutor, a member of the Student Support Team from the university, and the LSM and LEM to discuss the way in which the prison could support the Appellant. The Appellant's tutor reported that they spoke weekly by telephone, and that was working well. The Appellant confirmed she now understood how to post materials to the Appellant, and this had been resolved. A system was set up for the Appellant to exchange drafts of his dissertation with his tutor for feedback [CB/6/61/§31(vii); SB/4/48-49/§§51-52].
- j. Operational Issues. Ms Anderson has explained that operational issues arose in facilitating the Appellant's participation on his course, but that the prison worked to address these as they arose:

*"It is clear from the above that there have been operational issues with respect to the Claimant's distance learning course. This is not at all surprising, or unusual, given that he has opted to enrol on a course which is not designed for the prison environment. HMP Hull has dedicated resources to ensure that these issues can be, and have been, ironed out, including extra support from the LSM, extra educational*

*sessions and liaison directly with the Claimant's university tutors."*

[SB/4/49/§52]

8. The access to education which was provided to the Appellant had to coexist with the security requirements of the prison. In particular, on 14 February 2022, following a cell search, the Appellant's books, documents and course papers were taken away, analysed and returned. A further cell search occurred on 15 March 2022, in which the Appellant's materials were reviewed and returned to the Appellant. These searches were not challenged [CB/5/51-53; 72/§82].
9. By way of an application dated 17 February 2023, the Appellant sought to expand the issues before the Court, and introduce evidence of a number of complaints about HMP IOW, to which he moved on 18 November 2022. The SSJ resisted the application for the Appellant to rely on this new evidence, and an additional Statement of Facts and Grounds, because of the limited time to take instructions on the material. The SSJ did provide a letter to the Appellant, and the Court, which established that the picture was not as described by the Appellant. In particular, he could access IT, could apply for a chromebook, spend time in the Education Department, have in person and telephone contact with his tutor, and had been approved to study for a degree in Islamic Law [CB/5/56/§13; 66/§55; CB/7/80-81/§§7-8].

## **Legal Framework**

### Article 2 Protocol 1

10. A2P1 provides, in relevant part, that “[n]o person shall be denied the right to education”.
11. The following principles are relevant to the application of A2P1:
  - a. The right is narrow and is concerned with access to the established system of education. In A v Head Teacher and Governors of Lord Grey School (“**Lord Grey School**”) [2006] 2 AC 363; [2006] 2 W.L.R. 690 Lord Bingham stated (at §24):

*“The Strasbourg jurisprudence ... makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing*

*member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds unless ... there is no alternative source of state education open to the pupil ....*  
*The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny a pupil effective access to such educational facilities as the state provides for such pupils?*” (emphasis added)<sup>2</sup>

- b. The correct approach is to ask if an individual is able access the basic standard of education available – not has the state failed to do all it could do to ensure a pupil is accessing education. Thus, in A v Essex County Council (“**A v Essex CC**”) [2011] 1 AC 280; [2010] 3 W.L.R. 509, where a claimant had ultimately been provided a high quality education at considerable public cost, the fact that it took the local authority 18 months to secure a placement did not amount to a breach of A2P1 (§§22; 55; 85; 108). A2P1 is not concerned with process but an overall result – was the applicant denied access to the “*basic minimum*” of education under the domestic system, looking at the domestic system as a whole: Lord Grey School at §57 (per Lord Hoffman).<sup>3</sup>
- c. This was the case even where a public authority is in breach of its duties under domestic law. A2P1 does not guarantee compliance with domestic law: Lord Grey School (at §§24; 60); A v Essex CC (§15).

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<sup>3</sup> There was no material difference between the approach described by Lord Bingham at §24 of Lord Grey School and Lord Hoffman at §57 (A v Essex CC §§12; 129).

- d. There remains relatively little A2P1 jurisprudence. The “*highly pragmatic*” test must be applied to the specific facts of each case: R (ZB and DB) v Croydon [2023] EWHC 489 (Admin) (at §28). The test is applied by reference to “*all the relevant circumstances of the case*”: A v Essex CC (§21). Thus, where the allegation is that a delay in accessing education led to a breach of A2P1, the correct approach is to look at the entire factual picture, and not just if the individual was able to access education over the period of the delay: A v Essex CC (§45).
- e. A2P1 does not provide a right to a particular type of education. In the Belgian Linguistics Case (No.2) (1968) 1 EHRR 252, 280 (at [3]) the Strasbourg Court said:

*“The negative formulation indicates ... that the Contracting Parties do not recognise such a right to education as would require them to establish at their expense, or to subsidise, education or any particular type or at any particular level.”*
- f. Thus, “[i]t is well established that the negative formulation of article 2 means that it does not import a right to public financial support”: R (Tigere) v Business, Innovation & Skills Secretary [2015] 1 W.L.R, 3820; [2016] 1 All E.R. 191 (at §73) (Lord Sumption and Lord Reed JJSC).
- g. A2P1 does not impose a duty on contracting states to set up institutions of higher education; once they are set up, a state will be under an obligation to afford an effective right of access to them: Sahin v Turkey (2007) 44 EHRR 5 (at §137); Lord Grey School (at §12).
- h. However, this does not extend to a failure to provide public funds to access tertiary education: R (Tigere) v Business, Innovation & Skills Secretary [2015] 1 WLR 3820; [2016] 1 All E.R. 191 (at §51) (per Lord Hughes JSC). Thus, challenges to decisions to the allocation of resources have generally been brought by way of an Article 14 discrimination challenge, rather than a allegation of a breach of A2P1 (see R (Kebede) v Secretary of State for BEIS [2013] EWHC 2396 (Admin) (Burnett J (at §§26; 35); R (Hurley and Moore) v

Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin).

- i. The right to education is not absolute, but may be subject to limitations. *“Provided that there is no injury to the substance of the right, these limitations are permitted by implication since the right of access ‘by its very nature calls for regulation by the State’. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to arts 8-11 of the Convention, it is not bound by an exhaustive list of “legitimate aims” under [A2P1]. Further, a limitation will only be compatible with [A2P1] if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”*: Catan v Moldova and Russia (2013) 57 EHRR 4 (at §140); Sahin v Turkey (2007) 44 EHRR 5 (at §154);
- j. The ECtHR has considered the application of A2P1 in the context of prisons. Those cases, on which the Appellant relies, apply, rather than expand, the principles set out above:
  - (1) A2P1 does not place an obligation to organise educational facilities for prisoners where such facilities are not already in place, or to subsidise particular educational establishments. Rather, the obligation is to afford effective access to established educational provision. Velov v Bulgaria (2014) 37 BHRC 406 (at §§31; 32; 34).
  - (2) The right is not absolute, and may be subject to limitations: Mehmet Arslan and Orhan Bingol v Turkey (App.Nos. 47121/06, 13988/07 and 34750/07) (18 June 2019) (at §56)].
  - (3) Where educational facilities are available for prisoner, they should not be subject to *“arbitrary and unreasonable restrictions”* which limit effective access to education: Mehmet Arslan and Orhan Bingol v Turkey (App.Nos. 47121/06, 13988/07 and 34750/07) (18 June 2019) (at §58)]; Velov v Bulgaria (2014) 37 BHRC 406 (at §32). Restrictions

which so limit access must be foreseeable, pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved: Mehmet Arslan and Orhan Bingol v Turkey (App.Nos. 47121/06, 13988/07 and 34750/07) (18 June 2019) (at §56]).

- (4) Contracting states enjoy a “*certain margin of appreciation in this sphere*”: Velov v Bulgaria (2014) 37 BHRC 406 (at §32).
- (5) A limitation on all access to a computer and Internet, where that access was *vital* for the continuation of their higher education studies, was a restriction which amounted to a breach of A2P1 because such access was *required for the purpose of any education*: Mehmet Arslan and Orhan Bingol v Turkey (App.Nos. 47121/06, 13988/07 and 34750/07) (18 June 2019) (emphasis added) (§58). In those circumstances, the Court held that a State could regulate access to such facilities, and how they would do that fell within the State’s margin of appreciation, but in that case it was “*undisputed*” that the prisons could have easily afforded to provide the prisoners with the facilities sought (§§64-65).

- 12. The Appellant also relies on cases concerning internet access in prison brought under Article 10 ECHR. In Kalda v Estonia (2016) 42 BHRC 145 (App No 17429/10) the prisoner sought access to three governmental sites containing legal information he required to defend his rights in court. The ECtHR recognised that while Article 10 could not be interpreted as imposing a general obligation to provide prisoners with access to the internet, here, the restriction of access to legal information constituted an interference with the right to receive information under Article 10, and if access 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. In Jankovskis v Lithuania (17 January 2017) (App. No. 21575/08), the complainant sought access to education-related information, also on a government website.<sup>4</sup> The right engaged here – to receive information under Article 10 – is different from, and does not speak to, the right of access to education under A2P1. However, the Court

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<sup>4</sup> The Appellant also relies on Demir v Turkey (App. No. 68550/17) (February 2021) to similar effect.

has recognised, relying on this caselaw, that where refusal of access to the internet gives rise to a denial of effective access to education, in order to assess if that limitation is proportionate, an assessment should be made of whether the domestic courts conducted an adequate evaluation of the particular safety risks and balanced the competing interests. Mehmet Arslan and Orhan Bingol v Turkey (App.Nos. 47121/06, 13988/07 and 34750/07) (18 June 2019) (§59).

### Providing Education to Prisoners

13. Section 86(1)(b) of the Apprenticeships, Skills, Children and Learning Act 2009 provides for a broad statutory duty to provide education to prisoners:

*“The Secretary of State must secure the provision of such facilities as the Secretary of State considers appropriate for ... (b) education suitable to the requirements of persons who are subject to adult detention.”*

14. The Prison Rules 1999 (the “**Prison Rules**”)<sup>5</sup> provide, in relevant part:

#### *“32 Education*

*(1) Every prisoner able to profit from the education facilities provided at a prison shall be encouraged to do so.*

*(2) Educational classes shall be arranged at every prison and, subject to any directions of the Secretary of State, 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.  
...”*

15. Paragraph 3.1 of the Prison Education & Library Services Policy Framework provides for the following high level service outcomes: 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 are regularly able to access

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<sup>5</sup> SI 1999/728.

appropriately stocked libraries that support them in their learning and personal development.

16. PSI 25/2014 IT Security Policy governs access to IT by prisoners. The relevant provisions are:

*“16.6 Access to the Internet by Prisoners*

*The basic principle that applies to all forms of communication – preventing the transfer of information that might aid crime, threaten prison security or aid escape from custody and the protection of victims must be applied with regards to Internet access for prisoners and supervised individuals in the community.*

*16.7 Access to Internet facilities may allow prisoners or supervised individuals in the community to abuse [or harass] victims either through direct, electronic communication or by indirect proxy contact outside the prison and these considerations must be weighed against any perceived advantages.*

*16.8 The risk exists that prisoners could use the Internet to commit, prepare for or encourage crime whilst in custody. Additionally they could access material that might endanger the security of the prison e.g. access to bomb-making techniques.*

*16.9 The accessibility of learning materials by prisoners in custody must be balanced against security considerations. Access to the Internet will only be granted following a thorough risk assessment on a case-by-case basis of the system, hardware, software and connectivity. Prisoners access to IT whilst in custody is subject to individual assessment as per the National Security Framework and advice on appropriate access controls can be obtained from security group, the IPA team.*

*16.10 Prisoners must not be allowed uncontrolled access to the Internet and/or to a computer or IT system whilst in custody that has software installed enabling Internet connectivity without seeking approval from security group, the IPA team and the completion of a thorough risk assessment.”*

**Judgment**

17. The Appellant, before the High Court, argued that the SSJ had breached his obligations under A2P1 through “*the absence of facilities made available, or imposition of restrictions upon educational attainment*”. [CB/8/121/§52]. The Judge described the crux of the Appellant’s case as that “*a prisoner was entitled to achieve the same as a notional student in the community, and that they both started from the same position – he did not accept there should be any difference in treatment, but differences as there were required justification*” [CB/5/65/§51]. The Appellant’s argued that this education was “*unreasonably hampered by the conduct of the Defendants*” [CB/5/63/§40].
18. As to the new evidence on which the Appellant had sought permission to rely, the Judge had indicated, at the hearing, that the Court “*would not be helped by material that referred to the Claimant’s time in incarceration at HMP IOW*”, but that she was “*prepared to note matters that took place after the grant of permission in the judicial review in order to understand the context or the consequences of earlier decisions that were properly under challenge*” [CB/5/63/§37; 65-66/§§53-56]. That decision is not challenged [Appellant’s Appeal Skeleton Argument (“ASA”) §56]. The Court took this approach on the basis that: (a) it would involve the Court in monitoring and regulating the performance of public authorities, rather than addressing challenges to discrete decisions; and (b) in any event the SSJ had had insufficient time to respond, in detail, to the Appellant’s new evidence regarding his time at HMP IOW.
19. The Judge rejected the Appellant’s challenge to the First Defendant’s regulations concerning the terms on which student loans are granted to prisoner’s as out of time: [CB/5/66/§58] as well as “*doomed to fail*” [CB/5/67/§59]. That decision is not challenged by the Appellant.
20. The Judge also held that the 6 April 2022 decision to remove, from the Appellant, the use of the Chromebook and restrict his access to IT at the prison between 28 January 2022 until 4 April 2022 was in breach of the SSJ’s obligations in domestic law, as it was not justified, or logically sustainable on the evidence [CB/5/69-71/§§68; 80; 81; SB/4/44/§35]. That decision is not challenged by the SSJ.
21. As to the ongoing challenge around a claim of a breach of A2P1, the Judge held:

*“The Claimant suggests that the [SSJ] violated A2P1 through the absence of facilities made available to the Claimant, or the imposition of restrictions upon*

*him. I reject this challenge. I accept ... that on the facts, the difficulties faced on HMP Hull were operational impediments – such as misaddressing materials, illness and the requirement to use sometimes indirect means of communication (through the DLC, for example) and not systemic under-provision nor denial of access to education in the sense understood by the authorities. To the extent that there were security checks on materials arriving at the prison, or set processes for receipt of study material, or the indirect nature of some communications with teachers and teaching institutions, it is impossible to say that they were not proportionate to the circumstances and the inevitable requirements of the prison security regime” [CB/5/68/§63].*

22. The Judge went on to find that a “*number of initiatives and workarounds*” had been put in place to facilitate to Appellant’s access to education [CB/5/68/§64]. The Judge held:

*“Even though on occasions evidencing a clunky system and some management hiccoughs (book 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.*

*The list of accommodating strategies that HMP Hull employed, set out in the evidence of Ms Anderson (above at paragraph [31]), make clear this was not in any event a picture of failure that produced a lack of access; the Defendants have sought to remedy the issues that affected the Claimant adversely personally within the necessary constraints of the regime at HMP Hull. The strategies they used were comfortably adequate to afford him lawful access to education whilst in prison. It is unreal to expect that there will be entirely hindrance-free learning given the fact of the security imperative (see for example the provisions of the IT Policy contained in PSI 25/2014 IT Security Policy).” [CB/5/68/§§64-65]*

23. The Judge went on to consider the two (unchallenged) cell searches, and the complaint made about the return of the Appellant’s materials following those searches. The searches were required to address and resolve security issues [CB/5/72/§§82-84].

Thus, the Appellant is wrong to suggest that the Judge found that the decision to search and remove the Appellant's books and documents from his cell was unjustified (ASA §12); the Judge specifically noted that these searches were unchallenged and the delay in returning the materials (which was challenged) was justified. The Judge found 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"* [CB/5/72/§84]. The Judge found that these delays, together with the withdrawal of the Chromebook, had interrupted the Appellant's studies, but they did not amount to an interference with his A2P1 rights. The cell searches were required as a security concerns, and the *"delays whilst these intelligence led searches were conducted and paperwork uplifted and considered cannot in my view be considered as constituting unjustifiable refusal of access to education...."* given that *"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"* [CB/5/73/§86]. Delays here were *"predominantly security-imposed"* and therefore were *"plainly reasonable, proportionate and not arbitrary"* [CB/5/73/§87]. The Judge found, on the facts here, that *"sufficient accommodation for the problems [were] afforded"* and that there was, therefore, no infringement with the Appellant's A2P1 rights [CB/5/73/§87].

**Ground 1: Did the Administrative Court apply the correct legal test, or threshold, for a violation of A2P1?**

24. The Appellant argues that the Judge adopted the incorrect threshold that *"for a breach of A2P1, his study must not be more difficult but made impossible"* [ASA §32]. The Appellant argues the Judge replaced the test of *"effective access"* with impossibility [ASA §35].
25. The Judge applied the correct threshold:
  - a. It is clear that the correct test to apply is as set out at paragraph 11.a above, namely that the Court must consider, on the facts of the case, has the individual been denied effective access to such educational facilities as the state provides for individuals in the position of that person.

- b. **First**, in considering the Appellant’s more generalised complaint regarding access to educational facilities, the Judge applied that test. Having regard to the issues raised by the Appellant, and the responses provided by the SSJ, there was no “*denial of access to education in the sense understood by the authorities*” [CB/5/68/§63] and “*the whole does not add up to a breach of the obligation to afford access to education to the Claimant*” [CB/5/68/§64]. Rather, the Judge found that there were “*operational impediments*”, which were addressed through “*a number of initiatives and workarounds*” [CB/5/68/§64]. The result was not “*a picture of failure that produced a lack of access*”; rather, “[t]he strategies ... were comfortably adequate” to meet the requisite threshold.
- c. **Second**, the Judge went on to consider if her findings as to the Chromebook Decision gave rise to a breach of A2P1. She found they did not. Rather, over that period steps were taken “*to afford the Claimant a degree of access to learning, and to the writing of his dissertation*”, including obtaining an extension [CB/5/68/§84]. There was an interruption to study, but it did not amount to a breach of the Appellant’s A2P1 rights because his study did not become impossible – i.e., applying the test above, that interruption did not result in a denial of effective access to education, judged in the round. There was no substitution of an impossibility test, but rather an explanation of why the Appellant had not been denied effective access to education. The Judge, in refusing permission to appeal, was right to characterise this challenge as an “*argument that on the facts of the case it was wrong not to hold there had been a breach*” [CB/6/75-76/§2].
- d. **Third**, having found there was not a breach of his A2P1 rights, there was no need for the Judge to consider if any limitations on those rights were reasonable, proportionate and not arbitrary, pursuant to Mehmet Arslan and Orhan Bingol v Turkey (App.Nos. 47121/06, 13988/07 and 34750/07) (18 June 2019) and Velov v Bulgaria (2014) 37 BHRC 406. However, the Judge found that the interruption caused by the “*predominantly security-imposed delays, are within the prison system, plainly reasonable, proportionate and are not arbitrary*” [CB/5/73/§87]. Thus, the Judge recognised that the SSJ was entitled to a period in which to investigate the concerns raised.

- e. **Fourth**, the context to the Appellant’s challenge was, and is, important. This is not a case about access to primary or secondary education. Rather the Appellant was enrolled on a “*non-OU ‘tailored’ post-graduate course of study*” [CB/5/68/§64]. Access to this course had been put in place specifically for the Appellant. It differed from the provision which was organised, through the OU, specifically for prisoners – that provision remained open to the Appellant. Further, the Appellant was ultimately successful in obtaining his degree. He complains about the mark he received, but his assertion that it would have been higher is un evidenced and unsupported. In any event, A2P1 is concerned with access, not quality, and the Appellant undoubtedly was able to access the post-graduate course he wished to study.
- f. **Fifth**, the Appellant’s criticism that the Judge’s finding fails to treat A2P1 rights at a level not equivalent to that set in Strasbourg is misplaced (ASA §§35; 49). The Appellant’s circumstances are entirely distinguishable from the ECtHR case law on which reliance is placed, as explained in the Judgment [CB/5/69; 73/§§64; 86]. In Arslan, the claimants were denied all access to a computer and the Internet, and as a result could not pursue their intended higher education course, where that was found to be vital for the prisoners to progress with their chosen studies (§§49-50; 59). Velov v Bulgaria 37 BHRC 406 concerned a denial of all access to pre-existing organised secondary education facilities for prisoners. Kalda, Jankovskis and Demir concern Article 10, and therefore do not speak to when a breach of A2P1 may arise.<sup>6</sup>
- g. **Sixth**, the Appellant is wrong to assert that each “*impediment placed upon the individual’s ability to learn must be justified as reasonable, proportionate and not arbitrary*” (ASA §41). It is only where those restrictions amount to a denial of effective access to education that the question of the justification of a limitation arises. To adopt the approach advanced by the Appellant impermissible widens the scope of the right afforded by A2P1, which is, at its core, concerned with access to a minimum standard of education.

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<sup>6</sup> In any event those cases all concern access to governmental, rather than third-party, websites.

26. The Appellant now focuses on a failure to justify access to the internet (**ASA §§45-46; 49**). At no point in the Appellant's evidence before the High Court was it said that internet access, or more specifically access to the SOAS website, was required for the Appellant to complete his course. When the Appellant sought access to the course, he did not seek internet access, or explain that that would be required for him to complete the course [**SB/4/36/§15**]. His tutor provided him with course materials and resources for his dissertation [**CB/14/200/§21; SB/1/7/§12**]. The Appellant's evidence was that he required books for his independent research, not internet access: **SB/1/11/§24**. In these circumstances, the lack of internet access to the SOAS website did not deny him access to education; he was able to continue with his degree without that access. No requirement to justify that limitation, then, arises.
27. The SSJ did, however, provide that justification. The SSJ's IT security policy outlined the risks that may arise where prisoners access the internet, and provided that access would only be granted in a controlled manner (see paragraph 7.f above). The SSJ's evidence was that the Appellant had access to the internet through the VC2 system, but not the SOAS website. In order for that access to be granted, the SOAS website would have to be cleared as safe to be accessed. The prison was exploring this, but had not been able to provide access at the time of Ms Anderson's witness statement [**SB/5/64/§45**]. This is unsurprising – reviewing a university website would undoubtedly be resource intensive. Further, the review would need to be ongoing (so monitoring) given that it was controlled by a third party. This is a significant undertaking. That is why the prison was working to provide the Appellant with other means of access to the materials he needed – such as through books and materials being posted. The Judge did not exclude the Appellant's complaint regarding access to an online library facility, but addressed it in the Judgment, by reference to the IT security policy and the access to the VC2 system [**CB/5/57/§24; 59/§28; 61/§31**].

**Ground 2: Did the Court unlawfully fail to have regard to evidence which was relevant to the Appellant's A2P1 challenge, namely events that post-dated the date of issue of the claim form?**

28. The Appellant does not challenge the case management decision to exclude his late evidence regarding education provision at HMP Isle of Wight [**ASA §56**].<sup>7</sup> Rather, he

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<sup>7</sup> The "new evidence" consisted of the Claimant's third witness statement dated 17 February 2023 [**SB/3/15**]; an Additional Statement of Facts in Support of the Grounds of Claim dated 16 February

says he challenges the Judge’s decision to allegedly refuse to “*take account of incidents complained of after this claim was issued*” [ASA §55]. The SSJ maintains that this is an inaccurate characterisation of the Judge’s approach.

29. The Judge did not, as the Appellant says, exclude evidence regarding events at HMP Hull simply because they arose after the date of issue, which were within the original bundle. The Judge was “*prepared to note matters that took place after the grant of permission in the judicial review in order to understand the context or consequences of earlier decisions that were properly under challenge*” [CB/5/63/§37]. To that end, the Judge did take into account the matters raised in the Appellant’s third witness statement, which provided an update on matters at HMP Hull [CB/5/63-64/§§38-39]. The Judge did not exclude the Appellant’s supplementary submissions or the SSJ’s evidence, submitted together with the Detailed Grounds, which spoke to matters as at the date of that evidence. Further, the Judge was aware that there were issues which were not resolved before the Appellant obtained his degree [CB/5/61/§31(iv)].
30. The case management decision to exclude evidence was concerned only with the “new evidence” – this is clear from the Judge’s first heading under “Consideration”, which read:

*“New materials: Should the Claimant be given permission to rely upon the additional statement of facts in support of the grounds of claim and adduce the Claimant’s witness statement and additional evidence?”* [CB/5/65]

31. The issue arose largely with respect to the complaints made around HMP Isle of Wight, which were, in the Judge’s assessment, “*a new judicial review for which permission had not been granted and the Defendants had had inadequate time to gather and produce evidence*” [CB/5/63/§37]. To a similar extent, the same applied to “*a running selection of incidents complained of after this claim was issued*” at HMP Hull as raised in the “new evidence” [CB/5/65/§53]. In each case, the core logic was the same – the SSJ had not been given an adequate opportunity to respond. However, the Judge was also mindful that the approach of the Appellant was straying into the approach deprecated in R (Dolan) v Secretary of State for Health and Social Care

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2023; and a statement of Mladen Kesar dated 17 February 2023. The Defendant responded by way of two letters dated 26 February 2023 and 6 March 2023 [CB/7/77].

[2020] EWCA Civ 1605, [2021] 1 WLR 2326 (at [118], of a “rolling” judicial review).<sup>8</sup>

32. This is a discretionary case management decision of the Judge with which this Court should be slow to interfere. It is trite law that the Court “*should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the judge*”: Royal & Sun Alliance Insurance plc v T & N Ltd (in administration) [2002] EWCA Civ 1964 (Chadwick LJ) (at §38).
33. The Judge’s decision was clearly reasoned. She pointed to the fact-sensitive nature of the issues she was required to resolve, noting that “[t]his case is one of those where the state of the evidence is central to the assertions made” [CB/5/66/§55]. Given this, she considered it would not be appropriate to proceed to consider the breadth of the complaints raised by the Appellant which would have the effect of expanding the claim for judicial review. She took into account the information which was relevant to the issues argued before her, but refused to expand the claim at this late date to include the new issues and complaints raised by the Appellant (which included phone contact with his wife and a request for an in-cell computer and printer at HMP Hull, which was outstanding) [SB/3/17/§5; 20/§13].
34. Importantly, nowhere does the Appellant identify what evidence which post-dated the claim the Judge should have addressed, but did not because it had been specifically excluded, save for the reference to the University’s online library (ASA §§57; 64) which is addressed at paragraph 26 above.

**Ground 3: Did the Court error in law in rejecting the Appellant’s challenge under A2P1 based on the restrictions imposed on his post-graduate study?**

35. The Appellant’s access to education has not been denied, or restricted in such a way as to amount to a breach of the SSJ’s obligations under A2P1:

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<sup>8</sup> A summary of the complaints made in the “new evidence”, including the Claimant’s Third Witness Statement, was annexed to the Defendant’s Skeleton Argument below, at [CB/7/101].

- a. The Appellant has completed a course of his own choosing, i.e. one which has not been specifically structured to meet the needs of the prison population. The Appellant choose to undertake a Masters degree at SOAS. He completed that degree and obtained a merit. It is entirely speculative, and self-serving, for the Appellant to assert that had he had access to different resources he would have obtained a different mark.
  - b. The Appellant received a significant amount of support to obtain that decree, including prison support to access his tutor; access to word processing and electronic storage; access to the internet and online resources for study; access to learning materials, including books and library services. Indeed, it appears the Appellant ultimately received all the support that he says was “*necessary to be able to effectively undertake and complete higher education courses*” (**ASA §9**).
  - c. The SSJ maintains that the support received goes well beyond that which is required by A2P1, as the prison clearly up in bespoke mechanisms to ensure that the Appellant had the access to the University, his tutor and other educational resources to access his degree. The Judge agreed.
36. The Appellant identifies three ways in which he says his A2P1 rights were breached.
  37. First, he says any limitation which interferes with his ability to complete his course within a desired time period or to the “*best of his ability*” results in a breach of A2P1 (**ASA §66(i)**). In so doing, the Appellant sets the threshold for a breach of A2P1 far too low. A2P1 is not concerned with the quality of education; it is about access in a narrower sense. The test, as explained above, is whether or not the Appellant was denied effective access to educational facilities. The Judge rightly found that he was not, taking into account her findings with respect to the Chromebook Challenge: [**CB/5/73/§87**].
  38. The Appellant’s approach turns the established caselaw around A2P1 on its head, and in particular the fact that A2P1 does not require the State to provide, or fund, education of a particular type or level. Effectively, the Appellant says the State should have been required to devote more resources to his education, in order to limit the obstacles he faced in undertaking the distance learning course he chose and to provide him the

support he felt would allow him to perform to the best of his ability. That request falls far outside of the scope of A2P1.

39. Second, the Appellant says that the denial of access to the University online e-learning and library resources was an interference with his A2P1 rights which was not proportionate and lawful (**CSA §66(ii)**). As explained at paragraph 26 above, there was no evidence before the High Court that the denial of access to the SOAS website meant the Appellant was denied effective access to education. Indeed, the evidence demonstrated that the Appellant was able to obtain the course materials he required to successfully complete his degree. In these circumstances, there was no need to show that the restriction on internet access was “proportionate” – but the SSJ has met that test, in any event.
40. Third, the Appellant says that cumulatively his education provision was arbitrarily and unreasonably restricted (**ASA §66(iii)**). The Appellant, here, points in particular to the status of the Appellant’s videolink and telephone access (**ASA §68**) and the requirement to email his tutor via his LSA (**ASA §68**). As to this:
  - a. These complaints amount to disagreements with the factual findings of the Judge, and not an error of law.
  - b. The Judge took into account the issues raised regarding videolink and telephone access: [**CB/5: 51; 61/§31(iv); 64/§§48-49; 68/§64**].
  - c. In any event, the SSJ’s evidence reported that the Appellant’s tutor considered the system of weekly calls (Thursdays at 10:00 am) had “*been working well for some time now*” [**SB/4/48/§51.2**].
  - d. The Judge correctly, considering the evidence as a whole, that while the issues to which the Appellant points evidenced a “*clunky system*” [**CB/5/62/§64**], they did not, collectively, give rise to a breach of the obligation to afford effective access to education. This was a finding which it was open to her to make. The SSJ’s evidence, properly construed, is a narrative of the prison addressing the Appellant’s complaints as they arose – from posting books to making available more sessions on the VC2 in the education department. Those issues arose because the Appellant was undertaking a novel path. It was not straightforward

to address all of the issues raised; it is clear, however, that the prison devoted significant resources to the Appellant's education.

## **Conclusion**

41. The Appeal should be dismissed. The case management decision of the Judge, as well as the decision regarding A2P1, were lawful decisions, which it was open to her to take.

**Jennifer Thelen**

**39 Essex Chambers**

**28 May 2025**