



**SUPREME COURT**

**BRITISH INDIAN OCEAN TERRITORY**

**BIOT SC 15, 16 of 2023 and 28,29 &30 of 2024**

**Before:**

**Margaret Obi**

**ACTING JUDGE OF THE SUPREME COURT**

**B E T W E E N:**

**(1) VT and others**

**Claimants**

**-and-**

**THE COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY**

**Defendant/Respondent**

**Representation**

Helen Law (Claimant VT and Claimants 30-36) instructed by Wilson Solicitors; Chris Buttler KC and Jack Boswell (Bailed Claimants 2-6 and New Claimants 1-7) instructed by Duncan Lewis Solicitors, Ben Jaffey KC, and Natasha Simonsen (Bailed Claimants 7-12 and New Claimants 8-29) instructed by Leigh Day

John McKendrick KC and William Irwin instructed by the Defendant/Respondent

**Dates of hearing:** (in person and via video-link from Diego Garcia): Tuesday 23 July 2024

**Date of Judgment:** (via video-link) Friday 26 July 2024

## Margaret Obi:

### Introduction

1. This is an application for a variation of bail in respect of the 11 claimants ('the Bailed Claimants') who were granted bail on 22 April 2024. These claimants were made subject to a Revised Bail Order on 4 May 2024. I will continue to describe these claimants as the Bailed Claimants for the purposes of distinguishing them from the 29 new claimants ('the New Claimants') who have not previously sought bail but do so now. In the context of this application for bail, unless I differentiate between these two sets of claimants, any reference I make to 'the Claimants' is a reference to both the Bailed Claimants and the New Claimants.
2. The Bailed Claimants were granted bail on terms which provided that they must be permitted to access a specific route along DG1 (the Highway) and attend any of the beaches along that route that are safe to access. The Bailed Claimants now seek bail on more permissive terms. The New Claimants are entitled to apply for bail having submitted *habeas corpus* claims which were filed on 16 July 2024. The New Claimants seek bail on exactly the same terms as the Bailed Claimants.
3. I heard oral submissions from the parties on 23 July 2024. Mr McKendrick KC, on behalf of the Commissioner, invited me to postpone the application until Thursday (25 July 2024) to enable discussions to take place with the US authorities in the hope that a way forward may be identified. He made it clear that he could not give any assurances to the Court that such discussions would result in a positive outcome. However, he submitted that there was a real risk of the Court imposing conditions that would not be workable due to US security concerns. He further submitted that, in the absence of meaningful discussions with the US authorities, the Claimants would be in the "*unpalatable situation*" of being given false hope. The Claimants objected to the postponement application.
4. I accepted the Claimant's submissions that the application should proceed without delay. I did so for the following interrelated reasons:
  - First, there have been recent developments in this case. These developments have been set out in the Commissioner's third witness statement dated 22 July 2024. The Commissioner made a submission to the former Foreign Secretary on 26 June 2024, recommending that the most vulnerable migrants which includes those with children, should be transferred to the UK on the basis of "*exceptional humanitarian considerations*." This was in recognition that the conditions in the Camp are untenable. In particular, the children are at immediate risk of harm; that risk of harm is growing and includes allegations of child sexual abuse. The situation has become urgent. In short, the needs of the children cannot be met on British Indian Ocean Territory (BIOT). A further submission, along similar lines, was sent to the current Foreign Secretary on 8 July 2024. On 16 July 2024, following a meeting with the Commissioner, the Foreign Secretary wrote to the Home Secretary requesting that 39 migrants be transferred to the UK. The events on the ground are continuing to evolve and yesterday (25 July 2024) I received further updates. I will address these new developments in due course.
  - Secondly, the Commissioner was made aware of the proposed bail conditions on 12 July 2024 and on 16 July 2024 the bail application was filed. The views of the

US authorities were sought on 17 July 2024 resulting in a written response which was received by BIOT Administration on the morning of 23 July 2024 only a few hours before the hearing was due to commence. The US authorities were asked three questions ('the Questions') which can be summarised as follows: (i) What would be the impact if the proposed bail conditions were granted in full; (ii) Would the US accept some greater access? (five options were posited); and (iii) Does the US have any other comments or concerns about the bail applications? In response to the Questions, the US authorities made it clear that their security concerns, as previously expressed, remain unchanged. I will come back to those security concerns shortly. There was no indication from the US authorities in their written response to the Questions, or during Mr McKendrick's oral submissions, that another 36-48 hours would make any difference. In my view, leaving to one side the position of the US authorities, the Commissioner has had ample opportunity to express a view on the proposed bail conditions.

- Thirdly, it is of fundamental importance that this Court is not distracted from its core function. There can be no doubt that this case is very unusual; it raises highly sensitive political and diplomatic relationship issues with regard to the US authorities. But this is a court of law and the guiding principle in all cases is to give effect to the overriding objective. A key component of that objective is to deal with cases justly. In the context of this case, amongst other things, that means making a decision about liberty promptly.
5. Having heard submissions on bail, I informed the parties on Tuesday (23 July 2024) that I would announce my decision and deliver a reasoned judgment on Thursday morning; that being the earliest date and time that the Court could reconvene. However, for reasons outside my control, delivery of this judgement had to be adjourned until today (26 July 2024).

## **Background**

6. For those that have been following this case the background circumstances are well known. However, for present purposes, I will summarise that background briefly.
7. The Claimants are Sri Lankan nationals of Tamil ethnic origin. The Defendant is the Commissioner for BIOT. The Commissioner exercises both executive and legislative functions.
8. The BIOT comprises more than 50 islands. Diego Garcia is the largest of those islands and is maintained as a joint UK/US military facility. There are no civilians on the island save for those posted to Diego Garcia to support military objectives. Family members and dependants of those working on Diego Garcia cannot reside on the island. Therefore, the population of approximately 4,000 is made up of service personnel, public officers of the BIOT Administration, support staff, and independent contractors. Permission to enter BIOT is strictly controlled.
9. The Claimants arrived on Diego Garcia having left Sri Lanka by boat with the intention of travelling to Canada where they intended to claim international protection. They ran into difficulties and were rescued at sea by the Royal Navy. Some arrived in October 2021;

others arrived in April 2022. Since arrival, the Claimants have been accommodated in a tented compound known as “Thunder Cove” which I shall refer to as “the Camp.” However, VT and KP are currently being held in a Short-Term Holding Facility, and AAA is currently in Rwanda (with her daughter ZZZ), for medical treatment.

10. The Claimants allege that they are being detained and that their detention is unlawful. There will be a trial in respect of the Unlawful Detention claim in September 2024.
11. The UNHCR conducted a monitoring visit in November 2023. The Executive Summary of the final report, dated 16 February 2024, states as follows:

*“The combination of long-term uncertainty about the future, significant delays in finalising decisions on the international protection needs of camp residents and lack of effective counselling on the process, and the use of and conditions of detention are contributing to high levels of emotional distress and mental health conditions among asylum seekers and refugees. UNHCR is concerned that there is a significant risk of suicide and attempted suicide and further incidents of self-harm.”*

#### *Recent Developments*

12. The situation on the ground has not improved since the UNHCR report was published. On the contrary, as I have already indicated, the events are evolving, and the situation appears to be deteriorating rapidly. During the hearing, I was informed that following my decision to vacate the Unlawful Detention trial (which should have taken place in July 2024), some of the migrants are using self-harm as a form of protest. At least one migrant is believed to be in a critical condition. Yesterday I received a witness statement from Ms Sulaiha Ali dated 25 July 2024. Ms Ali is a solicitor at Duncan Lewis Solicitors. She states that on 24 July 2024, the Camp Manager held a meeting with the 22 unaccompanied men (i.e. the men with no wives, partners, or children on Diego Garcia). The Camp Manager informed them that the other 39 residents of the Camp (namely the families, those with positive non-refoulement decisions and one particularly vulnerable individual) would be transferred to the UK in approximately six to eight weeks’ time. At least 20 of the unaccompanied men are understood to have self-harmed following that meeting, and some have been transferred to the US medical facility. It is Ms Ali’s understanding that as of yesterday (25 July 2024) the adults in the Camp are on hunger strike in solidarity with the unaccompanied men. The information Ms Ali provides is based on a call with a child who speaks some English, not via an interpreter. However, even if the account given by that child is not completely accurate, it nonetheless paints a very disturbing picture. At least some of this information has been corroborated by a Safeguarding Incident Report Form from Lisa Lund who is a member of staff from ResponseMed (a remote medical support organisation). Ms Lund describes the events as “*prolific self harming behaviour*” and states that that the Camp is in “*complete crisis*.”
13. Yesterday I was also provided with a copy of a letter from the Director General for Africa and the Americas – Harriet Mathews to the Deputy Commissioner for BIOT dated 24 July 2024. It sets out the UK’s views with regard to the potential effects of an extension of bail. In essence, it reiterates the submissions made by Mr McKendrick KC. The letter focusses on the detrimental impact to UK/US relations in the event that the Revised Bail

Order is extended. In the final paragraph of the letter the Director General states as follows:

*“...the UK would consider that any order for bail that fails properly to consider and reflect either the United States’ responsibility for security of the NSF, its assessment of security concerns, which should be afford[ed] a high degree of deference, or its discretion in making available the use of any of its facilities, to be contrary to the UK’s agreements with the United States concerning the BIOT. For present purposes, that is likely to be the case in respect of any order for enlargement of bail that is contrary to the position taken in the US response as regards either the security of the NSF or the provision of logistical support by the United States. I can only reiterate the serious consequences to the UK’s interests were the Court to take such a course.”*

14. I turn to the key legal principles.

### **Key Legal Principles**

15. Section 6 of the BIOT Courts Ordinance 1983 provides that the Supreme Court of BIOT has the powers of the High Court of England and Wales, and it is well established that the High Court has an inherent jurisdiction to grant bail in civil proceedings including judicial review and *habeas corpus*.

16. As I stated in my original bail judgment, dated 22 April 2024, there are four well-established principles when considering bail:

- First, there is a presumption in favour of bail and cogent reasons are required to justify any refusal to grant bail.
- Secondly, it is for the relevant authority (in this case the Commissioner) to demonstrate why concerns cannot be addressed through conditions.
- Thirdly, bail applications have to be determined on a case-by-case basis and not on the basis of general hypothetical risks.
- Fourthly, a breach of any bail conditions is liable to lead to a withdrawal of bail.

### **Discussion**

17. I have approached the issue of bail by posing the following questions:

- What is the legal position relating to this Court’s jurisdiction?
- Should the New Claimant’s be granted bail, at the very least, on the same terms as the Bailed Claimants? If not, why not?
- Should bail be extended to include the Nature Trail, Turtle Cove, and the Brit Club? Each of these locations will be considered separately.

## Legal Position

18. The US authorities are not a party to these proceedings. The 1966 Exchange of Notes between the UK and US governments established that BIOT shall remain under UK sovereignty but its islands ‘*shall be available to meet the needs of both Governments for defence*’. Therefore, the UK has overall responsibility for the security of BIOT as a function of its sovereignty. As stated in the Supreme Court case of *R (SC) v Work and Pensions Secretary* [2021] UKSC 26 it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the UK. It is a necessary consequence of the UK’s sovereignty.
19. As I have already stated, the Commissioner has both executive and legislative powers. In response to the Claimant’s application for bail it is for the Commissioner to determine how to respond. Although the UK authorities suggested a number of options as part of the Questions to the US authorities, the Commissioner has not engaged with the substance of the Claimants’ application by identifying specific reasons why bail should be refused, save for the concerns expressed by the US authorities. Nor has he sought to demonstrate why concerns cannot be addressed through conditions. Again, save for the concerns expressed by the US authorities. The US concerns can be summarised as follows:
- Bail, as proposed by the Claimants, poses operational security, health, and safety risks to the US Naval Support Facility and its personnel. These risks cannot be mitigated or would be unduly burdensome to mitigate. These risks have been partially mitigated by the limited number of migrants permitted to access the bail route and the requirement of one-to-one escorts, but these mitigations are inadequate.
  - Access to the Nature Trail, Turtle Cove and the Brit Club poses a risk to the migrant’s own safety in ways that cannot be mitigated. Furthermore, the route to the Nature Trail and the Nature Trail itself is not suitable for children.
  - Access to a scooter or bicycle creates a risk of injury and there are only limited medical resources available on the Naval Support Facility.
  - There are no options or variables in terms of route, frequency, numbers, or group types that would mitigate the risk or would not be unduly burdensome to mitigate.
20. It is in this context that I will examine whether the New Claimants should be granted bail at least on the same terms as the Bailed Claimants.

## Bail on the same terms?

21. I recognise, of course, that Diego Garcia is a military facility and that none of the Claimants have been subject to the usual vetting procedures and security checks. Such checks cannot be carried out because the personal details of the Claimants cannot currently be shared with their country of origin. Any US/UK sensitivity in respect of this issue is to be respected not least because the Commissioner is in the best position to assess and determine whether wider access to a sensitive military facility should be granted. However, the Commissioner has not put forward any specific reasons for denying bail to the New Claimants or reasons why they should be made subject to particular bail conditions. He solely relies on the security concerns as expressed by the US authorities. In my judgment these concerns are generic and unduly rigid. I fully

understand that from a diplomatic relations perspective this places the UK authorities in an extremely difficult position and has knock-on consequences for the Commissioner. However, this is a court of law, and I am required to exercise my powers independently and judicially, in order to safeguard the rule of law.

22. In considering the applications for bail I draw, by analogy, on the factors relevant to bail under s61 of the Immigration Act 2016 and paragraph 3(2) of Schedule 10 to that Act. These factors (with some adaptation for present purposes) are as follows:

- The likelihood of the Claimants failing to comply with a bail condition;
- Whether the Claimants have been convicted of an offence;
- The likelihood of the Claimants committing an offence whilst on bail;
- The likelihood of the Claimant's presence causing a danger to public health or being a threat to the maintenance of public order;
- Whether detention is necessary in the Claimant's interests or for the protection of others;
- Whether the Claimants have failed without reasonable excuse to cooperate with any process;
- Such other matters as the court considers relevant.

23. I accept the submission, made on behalf of the New Claimants, that they are in materially the same situation as the Bailed Claimants.

24. There is no suggestion that any of the Claimants would fail to comply with bail conditions and there is no evidence before me of previous non-compliance of a reasonable instruction. Nor was there any evidence before me that any of the New Claimants have failed to cooperate with the Commissioner with regard to any process or procedure. Mr Dholakia, in his first witness statement, refers to an incident where one of the migrant's absconded from the Camp and was located in the airport area and to seven instances where four migrants absconded. However, the Commissioner does not rely on any of these incidents for the purposes of this bail application. In my judgment, the New Claimants will have a very strong incentive to comply with any conditions of bail given that their movements have been restricted for such a long time. For the same reason I have also concluded that the likelihood of the New Claimants failing to comply with a bail condition is low and the risk of absconding is equally low, particularly given the size, location, and presence of military personnel on the island. There is no evidence to suggest that the New Claimants in the Camp have been convicted of criminal offences on Diego Garcia or elsewhere and therefore no evidence to indicate that they would commit offences whilst on bail.

25. In the context of recent events in the Camp involving self-harm, I have given careful consideration to the issues of public health, the maintenance of public order and the New Claimants' interest. I have concluded that it is not in the New Claimant's interests to be confined to the Camp. On contrary, it is highly likely to be in their interests, for physical and mental health reasons, to have the opportunity to leave the Camp at least once a day. The self-harming incidents by the unaccompanied males appear to have been part of an orchestrated protest. This protest was based on the communication of specific information about the possibility of some of the migrants being transferred to the UK and I am acutely aware that order in the Camp is at risk of deteriorating further. However, I am satisfied that in the unique circumstances of this case and given the important context surrounding

recent events, the New Claimants do not pose a significant risk to others or public health. It seems to me that bail in principle can be granted subject to suitable arrangements which I will address at the end.

26. In summary, I am satisfied that for the reasons I granted bail to the Bailed Claimants, the New Claimant's should, at the very least, be granted bail on the same terms. In reaching this decision I have taken into account the nature and purpose of Diego Garcia. I note that the Claimants have been under close surveillance in the Camp for more than 2.5 years. If any of the New Claimants pose an unacceptable risk due to their behaviour in the Camp or any other specific information which raises substantial grounds for believing that they pose a risk to security this should have been brought to my attention. No such reasons have been advanced by the Commissioner. Furthermore, I also note that the needs of the New Claimants are just as great as those of the Bailed Claimants and I accept the submission made by Mr Buttler that no proper basis has been provided for treating one group more favourably than the other.
27. As a consequence of this decision up to 40 Claimants have the right to leave the Camp subject to stringent conditions. This will present a logistical challenge, but I am satisfied that it would not make conditional bail unworkable. I will return to this issue once I have addressed the issue of whether bail should be extended to permit access to the Nature Trail, the Brit Club and Turtle Cove.

#### Extended Bail Areas

##### *Nature Trail*

28. The Nature Trail is a 1.5km track. It can be accessed through woodlands very close to the Camp. In an email, dated 25 April 2024, the Nature Trail was identified as an area that would be safe for the Claimants to access and the response from an Environmental Officer the next day (26 April 2024) confirmed that the trail had already been marked with orange tape. I note that the UK authorities, in the Questions posed to the US, suggested that the Nature Trail could be made available to families and/or children escorted by their teachers.
29. In these circumstances, I accept the submission made on behalf of the Claimants that accessing the Nature Trail is not a significant security risk. Furthermore, in terms of health and safety, I am not persuaded that accessing the Nature Trail is any more hazardous than the beach adjacent to the Camp or any of the other beaches along DG1. The Bailed Claimants have been permitted to access these beaches since the grant of conditional bail in April 2024 and revised bail conditions in May 2024.
30. I am satisfied that bail should be extended to include access to the Nature Trail.

##### *Brit Club*

31. The Brit Club is described as a social space, owned, and operated by the UK Royal Navy. It is located in the Splendidville area and according to the Commissioner's evidence is only open from 22:00 – 03:00 on Friday and Saturday nights. This evidence has been disputed by the Claimants as an advertisement was posted by the official Brit Club



Instagram account on 2 April 2024. The advertisement stated that an event would be taking place at the Brit Club at 5pm. Irrespective of the opening times, the Claimants may not be able to access the Brit Club for a reasonable length of time and return to the Camp without some form of transport. They would also need to be granted access during the daytime.

32. A similar application for access to the Brit Club was made back in April 2024 and refused. I remain of the view that it would not be appropriate to grant bail conditions which, in effect, would require the Commissioner to provide transport for the Claimants and make arrangements for the Brit Club to be opened during the day. Refusal is not for reasons of resource allocation because I take the point that the Commissioner has chosen to allocate significant staffing resources to supervise the Bailed Claimants on a 1:1 basis which suggests that he would be able to assign appropriate numbers of staff to supervise the Claimants in the Brit Club. This aspect of the application for extended bail is refused because, in general, I am not persuaded that it is appropriate to include a condition which places a positive obligation on the Commissioner. In my view, the Court's interference with the operational decisions on the ground should be the minimum necessary to give effect to the temporary 'release' of the Claimants on conditional bail. There may be occasions when it is appropriate to do more. However, I am not satisfied that it is appropriate in these circumstances. It is within the gift of the Commissioner to source appropriate transport and permit access to the Brit Club on a voluntary basis, but I will not require him to do so, in circumstances where reasonable and proportionate bail can be granted without imposing such a condition.

#### Turtle Cove

33. Turtle Cove is accessible from the Camp by travelling south along DG1. However, it is too far to walk without transport. Unlike the Brit Club it is *only* accessible if transport is provided. It is submitted, on behalf of the Claimants, that they have the opportunity to access funds that have been collected by a Tamil charity. These funds could pay for bicycles or scooters which could be bought from the bike shop on Diego Garcia or shipped from elsewhere. Such an arrangement would have to be made with the cooperation of the BIOT Administration. I also note that the Questions from the UK invited the US authorities to consider the possibility of sign-ups for day trips to Turtle Cove and the Conservation Area as part of a conditional bail package.
34. A similar application, for access to Turtle Cove, was made by the Bailed Claimants in April 2024 which I refused. Once again, for the reasons I have already outlined, it is within the gift of the Commissioner to obtain suitable transport and permit access to Turtle Cove on a voluntary basis but I will not require him to do so, in circumstances where reasonable and proportionate bail can be granted without imposing such a condition.

#### Toilets and Drinking Water

35. I understand that the Bailed Claimants are permitted to use the toilet and drinking tap at Building 1533, which is adjacent to the Brit Club. No other facilities are available to them while they are exercising their right to bail. As a consequence, I have been informed that some of the Bailed Claimants have not been able to exercise their right to bail because the heat requires them to drink plenty of water and the absence of readily available toilet

facilities presents difficulties for those with incontinence issues and very young children. If this has occurred it is wrong. No-one should be prevented from exercising their right to bail for want of drinking water and/or toilet facilities.

36. I make no finding. However, based on the evidence before me the Commissioner is directed to use his best endeavours to facilitate access to adequate toilet facilities and drinking water while the Claimants are exercising bail. For the avoidance of doubt, 'adequate' in this context means sufficient to meet the needs of all those who have been granted bail.
37. For the reasons I have outlined the applications for bail and extended bail are granted.

#### Miscellaneous Bail Issues

38. The Claimants are granted bail between the hours of 0900 and 1700, each day. Time periods during that window may be imposed to ensure that access to DG1, the beaches and the Nature Trail are safe and manageable. Every Claimant is entitled to exercise their right to bail at least once a day. Given the number of Claimants there will have to be a morning and afternoon session. Claimants may exercise their right to bail during both sessions but only if they will not be taking the place of someone who wants to exercise their right to bail and has not done so that day. It is a matter for the Commissioner to determine whether to (i) reduce the ratio of G4S officers or (ii) increase the number of G4S officers.
39. In accordance with §4.8 of the Revised Bail Order, the Commissioner must give notice to the Bailed Claimants by 6pm if he intends to restrict their bail to 4 hours the following day. However, there is no corresponding requirement for restrictions pursuant to §4.9 to be communicated in advance. The §4.9 restrictions enable the Commissioner to impose "*reasonable limits where such limits are necessary by reason of the operational requirements of the military facility*". The Claimants seek a condition requiring the Commissioner to communicate any restrictions on bail for operational reasons to the Claimants and their solicitors in advance, insofar as reasonably practicable. I grant this variation. It is fair, reasonable, and appropriate that the Claimants' legal representatives are informed of such restrictions as soon as possible so that, amongst other things, they can take instructions in a timely manner.

#### Terms of the Bail Order

40. I grant bail in the terms that I have outlined but will leave it to the parties to work out the mechanism based on their knowledge of what would be workable on the ground.
41. As far as possible, the Revised Bail Order should remain in place as it appears to have worked well. Adjustments should be made to it only to the extent that it is necessary to give effect to the decision I have made today. The expectation is that the parties will reach an agreement that gives effect to my decision without further recourse to the Court save for approval of a draft Order. In the event, of a disagreement, the parties should provide me with a shortlist of viable options, and I will make a decision.
42. That concludes this judgment.