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RSCSL-03-01-ES
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RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Before: Justice Teresa Doherty, Designated Duty Judge

Registrar: Ms. Binta Mansaray

Date: 4 September 2020

In the matter of

THE APPLICATION OF CHARLES GHANKAY TAYLOR

Case No. RSCSL-03-01-ES-1442

DECISION

PUBLIC

**THE APPLICATION OF CHARLES G. TAYLOR TO BE TEMPORARILY
TRANSFERRED TO A SAFE THIRD COUNTRY TO CONTINUE HIS
IMPRISONMENT DUE TO THE MASSIVE OUTBREAK OF COVID 19 IN THE
UK**

Office of the Prosecutor:

Mr. James C Johnson

Counsel for Charles Ghankay Taylor:

Mr. Essa M. Faal

Defence Office

Mr. Ibrahim Yillah

RESIDUAL SPECIAL COURT FOR SIERRA LEONE	
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SEIZED of “Taylor’s Request for Temporary Transfer to a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”¹ filed on 15 June 2020 (“Motion”), wherein Mr. Taylor (‘Plaintiff’) asks to be transferred to a “third and safe country outside the United Kingdom as soon as is practicably possible” on the grounds that he is “extremely concerned about his physical safety and his health in general in the light of the current widespread nature of the coronavirus situation in the UK;”²

NOTING the Order of the President of 29 June 2020 appointing Justice Teresa Doherty as Designated Duty Judge;³

RECALLING that on 30 June 2020, this Court issued Directions:⁴ i) instructing, inter alia, Defence Counsel to inform the Court of Mr. Taylor’s nationality or nationalities and to specify which “third and safe country outside the United Kingdom” he seeks temporary transfer to within eight (8) days of service of those Directions to Mr. Taylor and ii) granting the Defence Counsel’s request⁵ for an extension of time to file a Reply to the Response of the Prosecutor and the Registrar’s Submission within eight (8) days of service of those Directions to Mr. Taylor;

NOTING that the Plaintiff has failed to conform to the aforesaid Directions issued on 30 June 2020

NOTING the “Prosecutor's Response to Taylor's Request for Temporary Transfer to a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”, dated 24 June 2020⁶ and refiled on 1 July 2020,⁷ with its Corrigendum;⁸

CONSIDERING the “Submission of the Registrar Pursuant to Rule 33(B) the Application of Charles Ghankay Taylor for Temporary Transfer to a Safe Third Country to Continue His

¹ RSCSL-03-01-ES 1442.

² RSCSL-03-01-ES 1442, para. 6.

³ RSCSL-03-01-ES 1446.

⁴ RSCSL-03-01-ES 1448.

⁵ RSCSL-03-01-ES 1447.

⁶ RSCSL-03-01-ES 1444.

⁷ RSCSL-03-01-ES 1450.

⁸ RSCSL-03-01-ES 1452.

Imprisonment Due to Massive Outbreak of Covid-19 in the UK,” refiled as Public with Confidential Annexes on 1 July 2020;⁹

RECALLING that on 1 July 2020 the Principal Defender sought the withdrawal and/or recusal¹⁰ of the Designated Duty Judge from deciding Mr. Taylor’s Motion and that on 23 July 2020 the Duty Judge issued a Statement and a Decision declining to recuse herself;¹¹

FURTHER RECALLING that on 4 August 2020 the President of the Court issued an “Order Convening Chamber Pursuant to Article 13(1) of the Statute”¹² to hear and determine the Recusal Application and that on 24 August 2020 said Chamber declined to disqualify the Designated Duty Judge;¹³

NOTING that on 1 September 2020 the Registrar filed her “Submission Of The Registrar Pursuant To Rule 33 Arising From Direction Of The Court For The Application Of Charles G. Taylor To Be Temporarily Transferred To A Safe Third Country To Continue His Imprisonment Due To Covid-19 Outbreak In The UK;”¹⁴

COGNISANT of the Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom and Northern Ireland (“U.K”) on the Enforcement of Sentences of the Special Court for Sierra Leone, of 10 July 2007 (“United Kingdom Agreement);”

HEREBY DECIDES AS FOLLOWS:

SUBMISSIONS

PLAINTIFF’S SUBMISSIONS

1. The Plaintiff “submits this request for an order to transfer him temporarily to a third and safe country outside of the United Kingdom as soon as is practicably possible.”¹⁵ He sets out the chronology of his trial and appeal before the Special Court for Sierra Leone (SCSL)

⁹ RSCSL-03-01-ES 1451.

¹⁰ RSCSL-03-01-ES 1449.

¹¹ RSCSL-03-01-ES 1457.

¹² RSCSL-03-01-ES 1458.

¹³ RSCSL-03-01-ES 1459.

¹⁴ RSCSL-03-01-ES 1461.

¹⁵ RSCSL-03-01-ES 1442, para. 6

and notes that he is currently serving a 50 year term of imprisonment in HMP Franklands(*sic*) Prison in the United Kingdom pursuant to the Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone (“Enforcement Agreement”).¹⁶ He submits that while he is serving his sentence “his basic and fundamental human rights remain unaffected including his right to life and personal dignity” and that the United Nations Standard Minimum Rules for the Treatment of Prisoners (“the Mandela Rules”) provide “that no one in prison should fear for his or her physical safety.”¹⁷

2. He submits, however, that since the World Health Organization (“WHO”) declared the COVID-19 pandemic on 11 March 2020, “a substantial number of inmates in prisons and detention centers across the United Kingdom are reported to have contracted the disease” and that people in overcrowded areas and older persons are “among the highly and most vulnerable categories to the disease.”¹⁸ He claims to be “extremely concerned about his physical safety and his health in general in light of the current widespread nature of the coronavirus situation in the UK”¹⁹ and informs that his fears of contracting the virus have been “aggravated after it was confirmed that two of the prison inmates in HM Franklands(*sic*) Prison have been infected”²⁰ and there have been “reports of deaths of prison inmates in prison/detention centers across the [UK].”²¹ He submits that “given (his) age (72 years) there is an urgent need to take appropriate measures to save him from any possible contact with the virus.”²²

3. The Plaintiff asserts that the RSCSL “has not specifically developed a covid-19 policy for application at HM Franklands(*sic*) Prisons” but has “transmit[ted] the guidelines for the United States Center for Disease Control (CDC) and advis[ed him] to follow these guidelines.”²³ While he “appreciates the steps taken by the Court,” he submits that those “measures do not go far enough” since HM Franklands(*sic*) Prison “is overcrowded with over 900 inmates” and “[n]o amount of social distancing would save [him] from contracting the

¹⁶ RSCSL-03-01-ES 1442, paras. 1-4.

¹⁷ RSCSL-03-01-ES 1442, para. 11 *bis*. The Plaintiff’s Motion contains two paragraphs numbered “11”.

¹⁸ RSCSL-03-01-ES 1442, para. 5.

¹⁹ RSCSL-03-01-ES 1442, para. 6.

²⁰ RSCSL-03-01-ES 1442, para. 6.

²¹ RSCSL-03-01-ES 1442, para. 6.

²² RSCSL-03-01-ES 1442, para. 6.

²³ RSCSL-03-01-ES 1442, para. 7.

virus given that most facilities [...] are shared by a number of inmates, which exposes [him] at his advanced age.”²⁴ He also submits that he “has not been provided with adequate personal protective equipment (PPE) and masks and has no statistics on whether that prison facility has sufficient hand washing areas and isolation rooms for all its 900 inmates.”²⁵

4. “Overall it is the defence assessment” that the “authorities of HM Franklands(*sic*) Prison” are not “sufficiently trained in the field of medicine to handle an outbreak of the magnitude of covid-19”²⁶ and that “Mr. Taylor’s classification as a category A prisoner presents further complication” since his “medical and health needs would likely [be] subordinated to other circumstances.”²⁷ In this regard, he submits that according to the rules of the prison, his transfer to “a hospital outside the prison facilities where intensive care equipment and respirators are available” would require such “heavy security that [it] may be next to impossible to be provided during the situation of the pandemic.”²⁸

5. The Plaintiff asserts that “the existing state of affairs at HM Franklands(*sic*) Prison portrays a grimmer picture of the dangers that underlie [his] continued incarceration in the United Kingdom and may not be conducive to the proper application and observance of the guidelines set by the CDC”²⁹ and that his “continued detention in a country that is being ravaged by a dangerous and life threatening disease poses a substantial risk to his right to life.”³⁰ Thus, he requests the RSCSL to order his transfer to “a safe country outside of the United Kingdom as soon as is practicably possible.”³¹

6. Counsel submits that, “although Mr. Taylor is currently serving a prison term” under international human rights law, there is an “obligation to protect the life of arrested and detained persons from a foreseeable danger” and the “COVID-19 virus is clearly a foreseeable danger.”³² He also asserts that international human rights law establishes that “where fundamental human rights are at stake, the competent authorities must act appropriately to

²⁴ RSCSL-03-01-ES 1442, para. 7.

²⁵ RSCSL-03-01-ES 1442, para. 18.

²⁶ RSCSL-03-01-ES 1442, para. 17.

²⁷ RSCSL-03-01-ES 1442, para. 19.

²⁸ RSCSL-03-01-ES 1442, para. 19.

²⁹ RSCSL-03-01-ES 1442, para. 7.

³⁰ RSCSL-03-01-ES 1442, para. 11 *bis*. The Plaintiff’s Motion contains two paragraphs numbered “11”.

³¹ RSCSL-03-01-ES 1442, para. 6. *See also* RSCSL-03-01-ES 1442, paras. 8, 9, 20-21.

³² RSCSL-03-01-ES 1442, para. 12 *citing* Keller v. Russia, European Court of Human Rights (“ECHR”), 17 October 2013, Application No. 26824/04 (“Keller v. Russia”). *See also* RSCSL-03-01-ES 1442, para.12

avert a violation which might occasion irreparable injustice” and “to protect the physical and mental health of detainees/inmates/convicts in times of crisis such as covid-19.”³³ This “obligation also extends to the duty to move prisoners from harms-way where it is clear that without such movement, the prisoner will be exposed to undue risk.”³⁴

7. The Plaintiff submits that even though his “detention in the UK is governed by UK law,”³⁵ under the terms of its Statute and the Enforcement Agreement, the Residual Special Court for Sierra Leone (RSCSL) is vested with sufficient authority to supervise the enforcement of his sentence and to order his transfer.³⁶ He also submits that jurisprudence from other international criminal tribunals support this Court’s authority to order a transfer.³⁷

8. Moreover, he asserts that the “argument that [his] detention is subject to the rules of detention of the United Kingdom cannot trump this court’s inherent powers and must not be used as a reason not to exercise its powers of supervision over the enforcement of [his] sentence.”³⁸ He submits that instead, “[his] right to life trumps procedural consideration as to whether or not this court has jurisdiction to entertain [his request for a transfer].”³⁹ He further submits that while “the supervisory jurisdiction will as a matter of practicality and necessity be exercised through collaboration with national authorities [this] in no way means that the national authorities can usurp the functions of the RSCSL especially as the RSCSL has a functioning registry and has judges in its roster of judges to address matters relating to the enforcement of sentences of RSCSL convicts.”⁴⁰

³³ RSCSL-03-01-ES 1442, paras. 13-15 *referring to* Keller v. Russia; Turluyeva v. Russia, ECHR, 20 June 2013, Application No. 63638/09 (“Turluyeva v. Russia”); Torean v. Romania, ECHR, 28 October 2014, Application No. 47603/10 (“Torean v. Romania”); the European Convention on Human Rights; Inter-American Court of Human Rights, Matter of the Penitentiary Complex of Curado; African Commission on Human and People’s Rights, Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa; the International Covenant on Civil and Political Rights; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the African Charter on Human and People’s Rights; the African Charter on the Rights and Welfare of the Child; and the Protocol on the Rights of Women.

³⁴ RSCSL-03-01-ES 1442, para. 11.

³⁵ RSCSL-03-01-ES 1442, para. 9.

³⁶ RSCSL-03-01-ES 1442, para. 9 *citing* Articles 1 and 23(2) of the RSCSL Statute and Articles 3(2) and 9(2) of the Enforcement Agreement.

³⁷ RSCSL-03-01-ES 1442, para. 10 *referring to* the International Criminal Court’s decision to transfer Thomas Lubanga and Germain Katanga to the Democratic Republic of Congo to serve their remaining prison terms.

³⁸ RSCSL-03-01-ES 1442, para. 16.

³⁹ RSCSL-03-01-ES 1442, para. 16.

⁴⁰ RSCSL-03-01-ES 1442, para. 16.

9. He submits that his request for a transfer “is not in any way intended to circumvent this court’s Decision on [his] Motion for Termination of Enforcement of Sentence” and that it “is purely borne out of the need to avert a looming disaster on [his] life if he were to contract the coronavirus due to his continued presence at HM Franklands(*sic*) Prison in the United Kingdom.”⁴¹ He also submits that “he could be returned back to the UK to continue serving his imprisonment when the UK and its prisons are free from the virus.”⁴²

PROSECUTOR’S RESPONSE

10. On 24 June 2020, the Prosecutor sought leave to respond to Mr. Taylor’s Motion⁴³ and his request was granted on 30 June 2020.⁴⁴ On 1 July 2020, the Prosecutor filed his Response in which he submits that the Plaintiff’s request for a transfer lacks factual and legal basis,⁴⁵ is an attempt to circumvent this Court’s decision on his last application for a transfer,⁴⁶ is ill-timed and at odds with reality⁴⁷ and should be dismissed for a lack of merit.⁴⁸

11. The Prosecutor submits that Mr. Taylor’s “request for a transfer to an unnamed ‘safe third country’ demonstrates a woeful lack of grasp of the reality the world community faces from the threat of the COVID-19 Pandemic.”⁴⁹ He submits that since being declared a pandemic, “COVID-19 has [...] been progressively hitting every country on the globe” and “to seek to be transferred as a prisoner from the UK at this time [...] to an unnamed, and so-called, ‘safe third country’ is downright unthinkable” and “would place Prisoner Taylor at significantly greater danger than he currently enjoys in the relative safe confines of HMP Frankland.”⁵⁰

12. He submits that while “infection rates in the UK have admittedly been very high, Prisoner Taylor’s ill-timed motion fails to take into consideration the steadily improving climate of the COVID-19 in the country” that has seen “declining rates of infection,

⁴¹ RSCSL-03-01-ES 1442, para. 21 *citing* RSCSL-03-01-ES 1437.

⁴² RSCSL-03-01-ES 1442, para.8.

⁴³ RSCSL-03-01-ES 1443.

⁴⁴ RSCSL-03-01-ES 1448.

⁴⁵ RSCSL-03-01-ES 1450, para. 2. *See also* RSCSL-03-01-ES 1450, paras. 11-18.

⁴⁶ RSCSL-03-01-ES 1450, para. 2.

⁴⁷ RSCSL-03-01-ES 1450, paras. 4-10.

⁴⁸ RSCSL-03-01-ES 1450, para. 2.

⁴⁹ RSCSL-03-01-ES 1450, para. 3.

⁵⁰ RSCSL-03-01-ES 1450, para. 6.

hospitalization and deaths.”⁵¹ Furthermore, he avers that the Plaintiff fails to consider “the relatively robust measures currently in place within the UK prison system, including in his own particular circumstances as a Category A prisoner [... and] the low risk of his exposure to COVID-19 due to his relative insulation from much of the wider prison population.”⁵²

13. In this regard, the Prosecutor first submits that the UK has “addressed prison overcrowding by transferring some lower category prisoners from highly populated prisoners and processed the release of up to 4,000 prisoners.”⁵³ Moreover, prison authorities imposed “a temporary suspension on prison visits by the public” and enforced “standard COVID-19 preventive measures – social distancing and washing hands.”⁵⁴ He submits that “by 28 April, 2020 – more than six weeks before Prisoner Taylor filed his motion, the cumulative effect of these measures had resulted in extremely great success in containing the spread.”⁵⁵

14. Second, he submits that as a Category A prisoner, the Plaintiff “enjoys something of a privileged prison life that puts him in extremely lower risk [...] than the average prisoner”⁵⁶ and “[f]ar from being genuinely concerned about his health and well-being [...], [Mr.] Taylor is rather trying to capitalize on the moment basing his strategy on highly speculative non-fact scenarios and an over-stretched notion of right to protection of life obligations on authorities, to explore possibilities for a selfish gain.”⁵⁷

15. Furthermore, he submits that the Plaintiff’s age, 72, “in itself is not an automatic license for early release of prisoners from jail or ‘out of harm’s way’ through a transfer.”⁵⁸ He asserts that in countries where prisoners have been released, including the UK, these “[d]ecisions [...] have not been made blanket to benefit all vulnerable inmates, but rather are guided by set principles,” among which the number of years of imprisonment and the serious nature of the crime committed.⁵⁹ He submits that the “revulsion of the community over the nature of the crimes committed is undoubtedly a key consideration” and quotes examples of

⁵¹ RSCSL-03-01-ES 1450, para. 4. *See also* RSCSL-03-01-ES 1450, para. 8.

⁵² RSCSL-03-01-ES 1450, para. 4.

⁵³ RSCSL-03-01-ES 1450, para. 7.

⁵⁴ RSCSL-03-01-ES 1450, para. 7.

⁵⁵ RSCSL-03-01-ES 1450, para. 7.

⁵⁶ RSCSL-03-01-ES 1450, para. 9.

⁵⁷ RSCSL-03-01-ES 1450, para. 3. *See also* RSCSL-03-01-ES 1450, para. 9.

⁵⁸ RSCSL-03-01-ES 1450, para. 10.

⁵⁹ RSCSL-03-01-ES 1450, para. 10.

“well-known” persons who were convicted of serious offences “in the US” who were “denied Covid-19 release.”⁶⁰ The Prosecutor urges the RSCSL to apply this reasoning to Mr. Taylor’s Motion.⁶¹

16. The Prosecutor refers to the Plaintiff’s argument that “the Court’s expressed and inherent powers cannot be trumped by the UK’s authority or responsibility to manage the conditions of imprisonment” and submits that “[w]hile in theory, it is from the power to supervise enforcement of sentences that all other rights, duties and authority to manage the conditions of imprisonment derive, there is nothing prohibiting the RSCSL from allowing the state of enforcement more authority on matters that it lacks capacity or technical ability to manage, especially relating to the day-to-day conditions of imprisonment during a pandemic.”⁶² He asserts that “the Court can leave it to the state of enforcement to apply what measures it deems appropriate for the entire prison population as long as those measures do not contravene the court’s own policy or rules of detention.”⁶³

17. He also avers that “Prisoner Taylor’s motion makes unfair and unwarranted criticism of the RSCSL’s effort to provide information and guidance about COVID-19 to its prisoners, complaining that the Court has not specifically developed a COVID-19 policy,” “ignor[ing] the fact that the steps taken by the RSCSL were only complementary to measures actually applied by the prison authorities in the state of enforcement.”⁶⁴

18. In addition, the Prosecutor submits that “Prisoner Taylor makes wild assertions that the threat to his health and wellbeing from COVID-19 amount to a violation of his right to life and personal dignity,” a claim unsupported by the authorities he cites.⁶⁵ He submits that while it is “correct that a positive legal duty under Article 2 of the European Convention – (the right to life) is imposed upon any authority [...] that takes a person into custody to ensure that they protect that person’s life, and this includes ensuring that the person under their charge does not come to any harm, actual or foreseeable(*sic*), that may result in their death,” the cases cited by the Plaintiff also establish that “such an obligation must be interpreted in a way which does not

⁶⁰ RSCSL-03-01-ES 1450, para. 10.

⁶¹ RSCSL-03-01-ES 1450, para. 10.

⁶² RSCSL-03-01-ES 1450, para. 11.

⁶³ RSCSL-03-01-ES 1450, para. 12.

⁶⁴ RSCSL-03-01-ES 1450, paras. 19-20.

⁶⁵ RSCSL-03-01-ES 1450, para. 13.

impose an impossible or disproportionate burden on the authorities bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.”⁶⁶

19. Furthermore, he submits that “[a] positive obligation will arise [...] where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual by a third party or himself and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁶⁷ In addition, “it would be inaccurate and unfair, given the highlighted conditions of his incarceration and the efforts so far taken by the authorities within the scope of the state’s resources to prevent the spread of the virus, for Prisoner Taylor to say that the HMP Frankland authorities, being aware of the risk of COVID-19 infection to its prisoners, failed to take reasonable measures within the scope of their powers.”⁶⁸

20. He submits that while “prisoners are entitled to the enjoyment of certain fundamental rights and freedoms while in jail,” the enjoyment of such rights and freedoms can be curtailed “and where applicable, should be subject to a fair balance that ensures society’s interests in seeing prison sentences served, is not trumped.”⁶⁹

21. The Prosecutor also asserts that the Court should not rely on the precedents set by the International Criminal Court concerning the transfer of Thomas Lubanga Dyilo and Germaine Katanga from the Hague Detention Centre to their home country the Democratic Republic of Congo because Mr. Taylor himself acknowledges that those transfers were not for reasons similar those presented in his Motion.⁷⁰ Moreover, “what Prisoner Taylor refers to as a transfer, is in essence the designation of a state of enforcement of sentence for these two convicted prisoners” and “not a transfer of a convicted prisoner from [the] designated state of enforcement to another state, as in the present case.”⁷¹

⁶⁶ RSCSL-03-01-ES 1450, para. 13 *citing* Keller v. Russia, para. 81 and Turluyeva v. Russia, para. 91.

⁶⁷ RSCSL-03-01-ES 1450, para. 14 *citing* Keller v. Russia, para. 82 and Turluyeva v. Russia, para. 91..

⁶⁸ RSCSL-03-01-ES 1450, para. 15.

⁶⁹ RSCSL-03-01-ES 1450, para. 16.

⁷⁰ RSCSL-03-01-ES 1450, para. 17.

⁷¹ RSCSL-03-01-ES 1450, para. 17.

22. He also avers that “[i]n dismissing the application of Laurent Semanza, 76, for provisional release due to the current COVID-19 situation, the President of the International Residual Mechanism for Criminal Tribunals (IRMCT), took into valid consideration and was assured from information received, that the prison authorities in the state of enforcement (Benin) were taking appropriate measures in relation to the management of the coronavirus pandemic.”⁷²

23. Finally, he submits that “[a]ssuming *arguendo*, that the request for transfer had some merit to it and was worthy of consideration, Prisoner Taylor makes it impossible to still grant [the] same by his failure to name the particular ‘safe third country’ he wishes to be transferred to. In a situation as this, where he remains a prisoner and his health, safety and wellbeing are all issues at play, the specific location he intends to be transferred to should be among the key facts before the President for his consideration. The request is thus vague and should merit no consideration.”⁷³

REGISTRAR’S SUBMISSION

24. On 1 July 2020 the Registrar refiled her submissions⁷⁴ as public with confidential annexes pursuant to the Directions issued by this Court on 30 June 2020.⁷⁵ The Registrar also exhibited the guidance issued by the Government of the UK named ‘COVID-19: Prisons and other prescribed places of detention guidance’⁷⁶ and the decision in *Prosecutor v. Laurent Semanza* issued by the President of the International Residual Mechanism for Criminal Tribunals⁷⁷.

25. The Registrar outlines the chronology of the Plaintiff’s conviction and transfer to HMP Frankland, UK, and states that following that transfer “the RSCSL, the UK Government

⁷² RSCSL-03-01-ES 1450, para. 18 *citing* *Prosecutor v. Laurent Semanza*, MICT-13-36-ES.2-880, Decision on Motion for Provisional Release, 21 April 2020, p. 6.

⁷³ RSCSL-03-01-ES 1450, para. 23.

⁷⁴ RSCSL-03-01-ES 1451.

⁷⁵ RSCSL-03-01-ES 1448.

⁷⁶ RSCSL-03-01-ES 1451, Annex 3.

⁷⁷ *See supra* fn. 72.

and prison authorities have worked closely together to ensure Mr. Taylor serves his sentence as provided under the applicable international detention standards.”⁷⁸

26. The Registrar submits that COVID-19 is a global pandemic, and as such it affects the whole world and all institutions and that “[f]ollowing the World Health Organization’s (“WHO”) declaration of COVID-19 a worldwide pandemic, the Registrar’s office consulted with the prison authorities in Rwanda and the UK where the Court’s convicts are serving sentences, in order to seek feedback on the wellbeing of detainees during the pandemic and to ensure that prisoners are provided with all relevant guidelines issued by public health officials on recommended safety measures.”⁷⁹ Accordingly, “[a]ll RSCSL prisoners were advised to follow the guidelines because in a public health crisis, individual adults, including prisoners must also take personal responsibility to comply with public health guidelines to ensure their physical safety and right to life.”⁸⁰

27. She submits that the Plaintiff is subject to the conditions of imprisonment in the UK and the “public health policies and guidelines issued by the UK public health institutions are applicable to [him]” and since these “policies are very sound,” they “negat[e] the need for the Residual Special Court to propose additional policies that would be applicable to Mr. Taylor alone.”⁸¹ The Registrar states that she continues to monitor the COVID-19 situation in all the places where SCSL convicted persons are serving sentence.⁸²

28. The Registrar also submits that “Mr. Taylor has access to a range of complaints procedures within official prison channels” and “[b]etween March and June 2020, Mr. Taylor did not raise any concerns through those channels in relation to his fears about contracting COVID-19 in HMP Frankland [where] there are supplies of soap, sanitizers, disinfectants for his own use and additional supplies which he can request from staff, if required.”⁸³

29. She further submits that “[u]pon receipt of Mr Taylor’s Request for Transfer, [she] consulted with the Acting Governor of HMP Frankland, who on 16 June 2020, provided

⁷⁸ RSCSL-03-01-ES 1451, para. 8

⁷⁹ RSCSL-03-01-ES 1451, para. 11.

⁸⁰ RSCSL-03-01-ES 1451, para. 11.

⁸¹ RSCSL-03-01-ES 1451, para. 12.

⁸² RSCSL-03-01-ES 1451, para. 13

⁸³ RSCSL-03-01-ES 1451, para. 14.

feedback on pertinent issues” and “made no concurring findings on the potential breach of Mr. Taylor's rights.”⁸⁴ The Acting Governor stated that Mr. Taylor: i) has been instructed on the benefits of social hygiene and handwashing; ii) has access to in-cell running water and the provision of soap; iii) has only ever been located in a single cell; and iv) has received disinfectant and cleaning materials for his cell.⁸⁵ The Registrar records that the Acting Governor also informed that: i) HMP Frankland has an operational capacity of 854 cells designed for single occupancy and is currently at a capacity of 840 with no plans or necessity to make prisoners share a single cell; ii) showers and telephones are shared communally, but are cleaned regularly; and iii) the situation in the UK is one which is improving with reported reductions in the numbers of deaths, identified positive case and hospitalisations.⁸⁶

30. Accordingly, she submits that “there is no imminent danger to Mr. Taylor’s detention at HMP Frankland arising from the COVID-19 pandemic”⁸⁷ and “UK prison authorities and the RSCSL have upheld their obligations in the UK Enforcement of Sentence Agreement to ensure that Mr. Taylor's detention complies with relevant health and human rights standards during the COVID-19 pandemic.”⁸⁸ Further, “[t]he Registry will continue to monitor the implementation of the UK Enforcement of Sentence Agreement and the implementation of the COVID-19 health and safety guidance to ensure that obligations continue to be met.”⁸⁹

31. In relation to the Plaintiff’s specific request for transfer, the Registrar submits that since COVID-19 is a worldwide pandemic with rapid contagious global impact, “there is no ‘third and safe country’ for a temporary transfer of Mr. Taylor.”⁹⁰ She avers that the Plaintiff failed to specify such a country “because he fully understands that with the alarming rate at which COVID-19 spreads, there is no such country”⁹¹ and “also failed to state clearly what a safe third country means,” which she presumes to be “a country that is free from COVID-19 or that has not had COVID-19.”⁹² She informs that according to news reports only Kiribati, Marshall Islands, Micronesia, Nauru, North Korea, Palau, Samoa, Solomon Islands, Tonga,

⁸⁴ RSCSL-03-01-ES 1451, paras. 16-17. The details in a Confidential annexure have been made available to the parties.

⁸⁵ RSCSL-03-01-ES 1451, para. 18.

⁸⁶ RSCSL-03-01-ES 1451, para. 18.

⁸⁷ RSCSL-03-01-ES 1451, para. 31.

⁸⁸ RSCSL-03-01-ES 1451, para. 32.

⁸⁹ RSCSL-03-01-ES 1451, para. 33.

⁹⁰ RSCSL-03-01-ES 1451, para. 20.

⁹¹ RSCSL-03-01-ES 1451, para. 20.

⁹² RSCSL-03-01-ES 1451, para. 21.

Turkmenistan, Tuvalu and Vanuatu have not reported COVID-19 cases.⁹³ However “if not reporting COVID-19 means [... these] are considered safe third countries” none of them have an enforcement of sentence agreement with the Court.⁹⁴ Additionally, she submits that “[a]s of 19 June 2020, the WHO has not declared any place in the world safe from COVID-19.”⁹⁵

32. The Registrar further submits that “many countries of the world still observe travel restrictions; some have continued to place total lockdown on flights while others have placed quarantine orders for a period ranging from fourteen days to two months, thus, the logistics for transferring Mr. Taylor plus other connected security concerns would pose many difficulties to the RSCSL.”⁹⁶

33. The Registrar also avers “that based on the assessment of the prison authorities, Mr. Taylor does not meet the relevant criteria for early release” due to Covid-19 that has been granted to some prisoners in the UK and “worldwide”. Such decisions are made on a case by case basis based on the evaluations of various professionals.⁹⁷

34. The Registrar submits that the facts of the present situation are distinguishable from the Lubanga case relied on in Mr. Taylor’s Motion and that although the Keller v. Russia, Turluyeva v. Russia and Torean v. Romania cases, referenced in Mr. Taylor’s Motion, “may have highlighted the obligation to protect the health and well-being of persons in detention, the facts are distinguishable with the present Request for Transfer and they are not *locus classicus* nor authoritative precedents to be relied on for granting a Request for Mr Taylor’s Transfer to a third country during the COVID-19 global pandemic.”⁹⁸

35. The Registrar further submits that “pursuant to Article 23(2) of the Statute of the RSCSL and Article 3(2) of the enforcement of sentence agreement Mr. Taylor’s detention in the UK is governed by UK law and only subject to supervision of the RSCSL, a similar provision applies in the Semanza case.”⁹⁹

⁹³ RSCSL-03-01-ES 1451, paras. 21-22.

⁹⁴ RSCSL-03-01-ES 1451, para. 21.

⁹⁵ RSCSL-03-01-ES 1451, para. 22.

⁹⁶ RSCSL-03-01-ES 1451, para. 22.

⁹⁷ RSCSL-03-01-ES 1451, para. 23. *See also* RSCSL-03-01-ES 1451, para. 29.

⁹⁸ RSCSL-03-01-ES 1451, paras. 27-28.

⁹⁹ RSCSL-03-01-ES 1451, para. 26

APPLICABLE LAW

36. Article 23(3) of the RSCSL Statute establishes that:

The Residual Special Court shall have the power to supervise the enforcement of sentences, including the implementation of the sentence enforcement agreements...

37. Rule 103 of the Rules of Procedure and Evidence (“Rules”) provides that:

(A) Pursuant to Article 23 of the RSCSL Statute, imprisonment may be served in Sierra Leone or another State that has concluded an agreement to that effect with the Special Court or the Residual Special Court. The Residual Special Court may conclude agreements with other countries willing to accept and imprison convicted persons.

(B) The place of imprisonment for each convicted person shall be designated by the President.

38. Paragraph 5 of the SCSL Practice Direction for Designation of State of Enforcement¹⁰⁰ provides as follows:

After the sentencing of a convicted person has become final, the President of the Special Court will on the basis of the submitted information and on any other inquiries he/she chooses to make, designate the State in which imprisonment shall be served. In his/her designation, the President will take into account the desirability of serving sentences in States that are within close proximity or accessibility of the relatives of the convicted person. Before making the designation, the President may consult with the Sentencing Chamber or its Presiding Judge and/or the Registrar and shall notify the Government of Sierra Leone. The President may also request the submissions of the convicted person and/or the Office of the Prosecutor.

39. Article 2(1) of the Enforcement Agreement provides:

A request to the United Kingdom to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "Registrar"), with the approval of the President of the Special Court.

40. Article 3 of the Enforcement Agreement provides:

¹⁰⁰ SCSL Practice Direction for Designation of State Enforcement, 10 July 2009.

(2) The conditions of imprisonment shall be governed by the law of the United Kingdom, subject to the supervision of the Special Court, as provided for in Articles 6 to 9 of this Agreement.

(3) The conditions of imprisonment shall be equivalent to those applicable to prisoners serving sentences under the law of the United Kingdom and shall be in accordance with relevant human rights standards.

41. Article 9(2) of the Enforcement Agreement provides:

The Special Court may at any time decide to request the termination of the enforcement of the sentence in the United Kingdom and transfer the sentenced person to another State or to the Special Court.

42. Rule 73(A) provides:

Subject to Rule 72, either party may move before the President, Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The President, Designated Judge or the Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open Court.

DECISION

43. The Plaintiff has not filed an affidavit or other statement in support of his application. As a result the Court has no direct information on the impact of the Covid-19 prevention regime upon him or direct evidence of his physical and mental health. Likewise the Plaintiff did not adduce any affidavit or other evidence in support of his submissions on the conditions within HMP Frankland and it is noted that some of these are at variance with the facts adduced in the Registrar's Submission.

44. Further the Plaintiff has not complied with Court Directions which were served on him on 2 July 2020 and as a result, the Court is not informed by him of which country he applies to have the RSCSL send him to and what country or countries he can enter by virtue of his nationality. The Plaintiff has not filed a Reply to the Response of the Prosecutor or to the Registrar's Submission. The Court therefore relies on the information contained in the Motion, the Prosecutor's Response and the Registrar's submissions and, in accordance with evidentiary procedure, matters of public knowledge.

45. The relief sought in the Motion is not provided for in the SCSL or RSCSL Statute or Rules. The Plaintiff appears to rely solely on the provisions of the international conventions he has cited and this Court has considered these thoroughly. The Plaintiff does not specify which provisions of any of these conventions he relies on. He cites Art. 2 of the European Convention on Human Rights¹⁰¹ which opens stating “Everyone’s right to life shall be protected by law” and submits that the instruments he cites generally “act to protect the physical and mental health of detainees/inmates/convicts in times of crisis such as covid-19.”¹⁰² He also refers to the African Charter On The Rights And Welfare Of The Child¹⁰³ and “the Protocol on Rights on the Rights Of Women”¹⁰⁴ (this appears to be a reference to the Protocol To The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa)¹⁰⁵ Having read these and considered fully the definitions in each Protocol this court concludes that neither instrument can apply to the Plaintiff. The Plaintiff also refers¹⁰⁶ at length to the African Commission on Human and People’s Rights “works” “on African prison conditions” but makes no statement how these apply to his case or are in any other way relevant.

46. This Court also has regard to the jurisprudential principles that a Plaintiff must present a Court with a clear, concise and defined statement of the relief or orders he is seeking and that a Court can only grant relief that is clear, enforceable and legal.

47. I consider and apply these Conventions and principles to the application before me.

48. As recited in the submissions above the Plaintiff seeks temporary transfer to a third and safe country outside of the United Kingdom. He does not define the country which he considers a ‘third’ or a ‘safe’ country nor clarify which countries are ‘first’ or ‘second’ countries for the purposes of his application.

¹⁰¹ RSCSL-03-01-ES 1442, para. 12

¹⁰² RSCSL-03-01-ES 1442, para. 15

¹⁰³ The Charter is stated to promote the rights and welfare of children and Article 2 of the Charter provides “For the purposes of this Charter, a child means every human being below the age of 18 years” The Motion states that the Plaintiff is 72.

¹⁰⁴ RSCSL-03-01-ES 1442, para. 15.

¹⁰⁵ RSCSL-03-01-ES 1442, para. 15. Article 2 of that Protocol provides that “States Parties shall combat all forms of discrimination against women...” The Plaintiff is not a woman.

¹⁰⁶ RSCSL-03-01-ES 1442, para. 14.

49. The term ‘a third country’ is used in Art. 22(2) of the Statute of the SCSL and in Art. 23(2) of the Statute of the RSCSL but it is not defined in either the Statutes or the Rules. Both Statutes provide that imprisonment shall (SCSL Statute) or may (RSCSL Statute) be served in Sierra Leone. Both Statutes then provide an alternative place of imprisonment in countries which have concluded an agreement for enforcement of sentences. From the wording of both these Statutes I conclude that Sierra Leone is the ‘first country’ and those countries with which the Court has concluded enforcement agreements are ‘third countries’.

50. Whether the Plaintiff has considered these provisions and intends his application to follow the Statute is not stated and failure to respond to this court’s directions does not assist in deciding what precise relief he seeks. As noted by the Prosecutor “the specific location he intends to be transferred to should be among the key facts”¹⁰⁷ put before the court and his application is vague and, as such, offends against the principle that a party seeking relief must give a clear defined statement of the relief sought.

51. Likewise the Plaintiff has not defined or specified where he means by a ‘safe’ country. The term ‘safe’ is not used in the Statutes or Rules of SCSL and RSCSL in relation to places in which imprisonment may be served. Therefore in the context of this application I agree with the Registrar when she presumes it to be “a country that is free from COVID-19 or that has not had COVID-19.”¹⁰⁸ Further I accept the Registrar’s research which is in the public arena when she informs this court that “according to some news reports, as of 18 June 2020” only “Kiribati, Marshall Islands, Micronesia, Nauru, North Korea, Palau, Samoa, Solomon Islands and Tonga, Turkmenistan, Tuvalu and Vanuatu” have not reported COVID-19 cases.¹⁰⁹ This court also notes “WHO has not declared any place in the world safe from COVID-19.”¹¹⁰ In relation to North Korea this court notes that its public statement that it is free from Covid-19 has been challenged.¹¹¹

¹⁰⁷ RSCSL-03-01-ES 1450, para. 23.

¹⁰⁸ RSCSL-03-01-ES 1451, para. 21.

¹⁰⁹ RSCSL-03-01-ES 1451, para. 21-22

¹¹⁰ RSCSL-03-01-ES 1451, para. 22.

¹¹¹ See British Broadcasting Corporation (BBC) Radio broadcast Sunday 26 July 2020. See also BBC, *Coronavirus: North Korea claims to be 'totally free' of virus*, 3 April 2020 (<https://www.bbc.com/news/world-asia-52146989>).

52. Notwithstanding that the relief sought by the Plaintiff is not clearly defined and is vague I will consider whether a court can issue an order in this matter that is both enforceable and legal.

53. As noted above the Statutes of both the SCSL, which applied when the Plaintiff was convicted and sentenced, and the RSCSL which applies now (Art. 22(1) and Art.23(1) respectively), provide that if a convicted person is not imprisoned in Sierra Leone then imprisonment may be served “in any of the States which have concluded [...] an agreement for the enforcement of sentences” with either SCSL or RSCSL. The countries with which RSCSL has enforcement agreements are specified on the RSCSL website¹¹². Each of these countries has been impacted by the Covid-19 virus.¹¹³

54. None of the “safe countries” named in the Registrar’s submissions have an enforcement agreement with SCSL or RSCSL and therefore have no treaty or other legal obligation to accept the Plaintiff as a convicted person to be accommodated at a penitentiary facility in their country. This legal situation precludes this court from issuing a clear and enforceable legal order to direct the transfer of the Plaintiff to a third country.

55. If given the emphasis in the Motion that the Plaintiff’s transfer will be temporary and, *arguendo*, one of the named “safe countries” is willing to accept the Plaintiff, the provisions of the Convention on the Transfer of Sentenced Persons may apply as Tonga is a signatory to that Convention and therefore an “administering State.”¹¹⁴ Article 3 of the Convention provides that “a sentenced person may be transferred under this Convention only on the following conditions: a. if that person is a national of the administering State.”

56. The Plaintiff has not responded to the direction to inform this Court of his nationality or nationalities. This Court, therefore, sought information from the Registrar, pursuant to Rule 33(B), asking what nationality or nationalities are held by the Plaintiff according to Court records. Having consulted with both the Principal Defender and the Prosecutor and researched the records of the SCSL the Registrar has informed this Court that the Plaintiff is a Liberian

¹¹² <http://www.rscsl.org/documents.html>

¹¹³ See <https://covid19.who.int/>.

¹¹⁴ Article 1 of the Convention on the Transfer of Sentenced Persons defines "administering State" as the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.

national.¹¹⁵ He is not a national of Tonga nor of the Commonwealth countries of Nauru, Samoa, Tuvalu and Vanuatu.

57. Further Rule 26 (E) of the Rules of Detention of RSCSL,¹¹⁶ which conform with the Mandela Rules, prohibits the use of corporal punishment. Tonga retains corporal punishment in its legislation although this has not been applied for many decades.¹¹⁷

58. Hence for these further legal reasons this court cannot issue an enforceable legal order to direct the transfer of the Plaintiff to the third country of Tonga.

59. The Plaintiff also submits that jurisprudence from other international criminal tribunals support this Court's authority to order a transfer and cites the cases of Thomas Lubanga and Germain Katanga who were sent to the Democratic Republic of Congo by the International Criminal Court (ICC).¹¹⁸ The records of the ICC show that both Lubanga and Katanga are nationals of the Democratic Republic of Congo.¹¹⁹ Hence the restrictions of such conventions as the Convention on the Transfer of Sentenced Persons do not apply in their cases. As the Prosecutor has pointed out the Plaintiff has acknowledged those cases are not applicable to this situation and do not create a precedent on which he can rely as Lubanga and Katanga were sent to serve sentence and not to shelter from a pandemic.¹²⁰

60. The Plaintiff has put forward an emphatic case that “while he is serving his sentence “his basic and fundamental human rights remain unaffected including his right to life and personal dignity.”¹²¹ Notwithstanding my finding that I cannot issue an enforceable legal order in the terms the Plaintiff seeks I will consider whether the human rights convention which the Plaintiff cites and relies on “trump” (to adopt the term used by the Plaintiff and the Prosecutor) the legal provisions I have relied on.

¹¹⁵ RSCSL-03-01-ES 1461, paras. 6-8.

¹¹⁶ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone (“Rules of Detention”) As amended on 13 May 2019.

¹¹⁷ See <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Tonga.pdf>

¹¹⁸ RSCSL-03-01-ES 1442, para. 10.

¹¹⁹ See <https://www.icc-cpi.int/CaseInformationSheets/katangaEng.pdf> and <https://www.icc-cpi.int/CaseInformationSheets/lubangaEng.pdf>

¹²⁰ See RSCSL-03-01-ES 1450, para. 17 *citing* RSCSL-03-01-ES 1442, para. 10.

¹²¹ RSCSL-03-01-ES 1442, para. 11 *bis*. The Plaintiff's Motion contains two paragraphs numbered “11”.

61. The Plaintiff submits that the Mandela Rules provide “that no one in prison should fear for his or her physical safety [and that] “prevailing conditions relating to COVID 19 infections and deaths in the United Kingdom do not guarantee sufficient safeguards for Mr. Taylor’s right to a safe environment.”¹²²

62. As already noted the Plaintiff did not file any affidavit or statement concerning his conditions and present health. I will, therefore, refer to the statements in the Motion and the facts adduced by the Registrar and/or the Prosecutor which come directly from the prison authorities or other reliable public sources.

63. As recited above the Plaintiff states that: the prison is “overcrowded with over 900 inmates;”¹²³ “[n]o amount of social distancing would save [him] from contracting the virus given that most facilities [...] are shared by a number of inmates...;”¹²⁴ “it was confirmed that two of the prison inmates in HM Franklands (*sic*) Prison have been infected;”¹²⁵ there have been “reports of deaths of prison inmates in prison/detention centers across the UK;”¹²⁶ he “has not been provided with adequate personal protective equipment (PPE) and masks and has no statistics on whether that prison facility has sufficient hand washing areas and isolation rooms for all its 900 inmates.”¹²⁷

64. The Plaintiff refers to international human rights law reciting “where fundamental human rights are at stake, the competent authorities must act appropriately to avert a violation which might occasion irreparable injustice”¹²⁸ and “to protect the physical and mental health of detainees/inmates/convicts in times of crisis such as covid-19.”¹²⁹

65. The Plaintiff does not produce direct evidence to support his statement that HMP Frankland has in excess of 900 inmates and I accept the direct response given in the Registrar’s Submission that “HMP Frankland has an operational capacity of 854 cells designed for single occupancy and is currently at a capacity of 840 with no plans or necessity to make

¹²² RSCSL-03-01-ES 1442, para. 11 *bis*. The Plaintiff’s Motion contains two paragraphs numbered “11”.

¹²³ RSCSL-03-01-ES 1442, para. 7.

¹²⁴ RSCSL-03-01-ES 1442, para. 7.

¹²⁵ RSCSL-03-01-ES 1442, para. 6.

¹²⁶ RSCSL-03-01-ES 1442, para. 6.

¹²⁷ RSCSL-03-01-ES 1442, para. 18.

¹²⁸ RSCSL-03-01-ES 1442, para. 13.

¹²⁹ RSCSL-03-01-ES 1442, para. 15.

prisoners share a single cell.”¹³⁰ Also both the Registrar’s submission and the Prosecutor show that the Plaintiff occupies a single cell and has always done so since his arrival in HMP Frankland.¹³¹ As the Plaintiff has not rebutted either of these submissions I find that his allegation that there is overcrowding is not correct and that he has and always had a single cell.

66. In support of his submissions that overcrowding is a breach of human rights, he cites the Inter-American Court of Human Rights (“I/A Court H.R.”), Matter of the Penitentiary Complex of Curado. Having read all of the ‘Order The Inter-American Court Of Human Rights Of May 22, 2014 Provisional Measures Regarding Brazil Matter Of The Penitentiary Complex Of Curado,¹³² I note among the findings that “the alleged overcrowding, with 6,456 inmates present on September 14, 2013, and 6,444 on February 28, 2014, for a prison with capacity for 1,514 persons” AND “the prison conditions are also deplorable: electricity is intermittent and there are exposed electrical wires that have generated some sparks and small fires in certain cell blocks; access to water comes and goes in intervals and in one unit, the water supply is cut every night; there is no distribution for hygienic materials and food is extremely scarce and is prepared without any health standards.”¹³³ The I/A Court H.R. has since then issued further resolutions on the Matter of the Penitentiary Complex of Curado that continue to illustrate the overcrowding at the prison and the deplorable safety and hygienic conditions.¹³⁴

67. Whilst the Provisional Measures of the I/A Court H.R. indeed set fundamental human rights of detainees I ask if the Plaintiff seriously intends to convince this court that it is a valid comparator to his present conditions which can support his application for transfer given the conditions I have quoted.

68. The Plaintiff also seeks to support his submissions that the prison conditions breach his human rights and in particular the Mandela Rules and Art. 2 of the European Convention

¹³⁰ RSCSL-03-01-ES 1451, para. 18.

¹³¹ See RSCSL-03-01-ES 1450, paras. 4, 9 and RSCSL-03-01-ES 1451, para. 18.

¹³² Inter-American Court of Human Rights, Order The Inter-American Court Of Human Rights Of May 22, 2014 Provisional Measures Regarding Brazil Matter Of The Penitentiary Complex Of Curado (“Matter of the Penitentiary Complex of Curado”). Available at https://www.corteidh.or.cr/docs/medidas/curado_se_01_ing.pdf.

¹³³ Matter of the Penitentiary Complex of Curado, paras. 7(c)(11) and 7(c)(12).

¹³⁴ Matter of the Penitentiary Complex of Curado, Resolutions of [7 October](#) and [18 November 2015](#); [23 November 2016](#), [15 November 2017](#), and [28 November 2018](#).

on Human Rights by citing part of the ratio in the cases of *Keller v. Russia*,¹³⁵ *Turluyeva v. Russia*,¹³⁶ *Tirean v. Romania*,¹³⁷ and the European Convention on Human Rights.

69. Having read each of the decisions in these cases in full I note that in *Keller v. Russia* the European Court found that “[a]lthough there is insufficient evidence to show that the authorities knew or ought to have known that there was a risk that V.K. might attempt to escape by jumping out of a third floor window, there were certain basic precautions which police officers should be expected to take in respect of the persons held in detention in order to minimise any potential risk of attempts to escape.”¹³⁸ “A positive obligation will arise, the Court has held, where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual by a third party or himself and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”¹³⁹ The Court “emphasises that persons in custody are in a particularly vulnerable position and the authorities are under an obligation to account for their treatment” and “[s]uch an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail a Convention requirement for the authorities to take operational measures to prevent that risk from materialising.”¹⁴⁰

70. In the matter of *Tirean v. Romania*, which the Plaintiff also relies on, *Tirean* complained of overcrowding and failure to protect him from other detainees smoking.¹⁴¹ It is notable in that case the applicant did not complain about lack of space in all of the places he was detained. The ECHR noted that the Government provided information on the living space afforded to the applicant in all of the detention facilities but some were less than 4 sq. m and were sometimes as little as 1.45 sq. m so fell short of the standards imposed by the Court’s

¹³⁵ *See supra*, fn. 32.

¹³⁶ *See supra*, fn. 33.

¹³⁷ *See supra*, fn. 33.

¹³⁸ *Keller v. Russia*, para. 88.

¹³⁹ *Keller v. Russia*, para. 82.

¹⁴⁰ *Keller v. Russia*, para. 81.

¹⁴¹ *Tirean v. Romania*, paras. 3, 28.

case-law.¹⁴² That court also considered that some cells must also have contained detainees' beds and other items of furniture.¹⁴³ The Court held that a lack of personal space afforded to detainees amounts to a violation of Article 3 of the Convention.

71. The Plaintiff does not rebut the information to this court that he is the sole occupant of a single cell and is not otherwise obliged to endure a restricted living space that has “caused him suffering that exceeded the unavoidable level of suffering inherent in detention.”¹⁴⁴

72. The Plaintiff also relies on *Turluyeva v. Russia*, a case dealing with the disappearance of the applicant's son. The ECtHR details the history of the disappearance and actions taken by the authorities.¹⁴⁵ But as noted by the Prosecutor herein, that court again:

reiterate[d] that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the Court to find a violation of the positive obligation to protect life, it must be established that the authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.¹⁴⁶

73. The case law cited by the Plaintiff shows that the ECHR expects: (i) basic precautions which ...officers should be expected to take in respect of the persons held in detention in order to minimise any potential risk to be taken; (ii) the positive obligation arises when the authorities knew of the risk and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk; and (iii) the obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

¹⁴² *Tirean v. Romania*, para. 39.

¹⁴³ *Tirean v. Romania*, para. 39.

¹⁴⁴ RSCSL-03-01-ES 1442, para. 13 *citing* *Tirean v. Romania*.

¹⁴⁵ *Turluyeva v. Russia*, paras. 7-55.

¹⁴⁶ *Turluyeva v. Russia*, para. 91.

74. I apply these criteria to the Plaintiff's case and note that the authorities at HMP Frankland took precautions to minimise potential risk, once aware of the potential risk of Covid-19 they have taken measures within the scope of their powers. These measures included stopping prison visits, informing inmates of hygiene regimes and other precautions detailed in the Registrar's Submission. As these measures are in accordance with the advice and directions given by the government authorities and their medical experts I consider that they have complied as far as they may be expected to avoid any potential risk.

75. I note, as did the Prosecutor, that the ECHR repeated in cases that "scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities"¹⁴⁷ and this applies in the instant case.

76. In asking the RSCSL to identify another country where he will be safe from Covid-19 pandemic and then oblige the RSCSL to negotiate an enforcement agreement with that country, which may have no international obligation to accept him as a national, will involve considerable and lengthy negotiations. Given that the Plaintiff expects this to be a temporary arrangement I consider such extensive work will "impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources."¹⁴⁸

77. The Plaintiff has stated that if he needed to be taken from the prison to a local health facility it would require "such heavy security that [it] may be next to impossible to be provided during the situation of the pandemic."¹⁴⁹ Despite this observation and worry on his part he seeks to go to another country. The locations identified by the Registrar as possible 'safe' countries (which were not rebutted by the Plaintiff) will involve even greater travel and security. This is coupled with the health dangers when such travel is not recommended. In particular travel to the countries without coronavirus in the Asia Pacific region are difficult and involve extended travel and flight transfers in countries which may restrict entry to non-nationals. This may increase the exposure and risk of infection. In this regard too I find that the

¹⁴⁷ Turluyeva v. Russia, para. 91. *See also* Keller v. Russia, para. 81.

¹⁴⁸ Turluyeva v. Russia, para. 91. *See also* Keller v. Russia, para. 81.

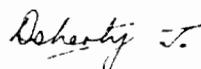
¹⁴⁹ RSCSL-03-01-ES 1442, para. 19.

Plaintiff is seeking to impose an impossible or disproportionate burden on the authorities when the conditions of his detention already conform to all which are “judged reasonably,..... expected to avoid that risk.”¹⁵⁰

78. For these several reasons I do not consider that there has been any breach of the Plaintiff’s human rights, that he has not made a case which, for the several reasons detailed above, warrants this court directing his transfer and, accordingly, his application is dismissed.

Done Remotely and File in The Hague

this 4 day September 2020



Justice Teresa Doherty



¹⁵⁰ Keller v. Russia, para. 82.