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Court of Appeal

B (Algeria) *v* Secretary of State for the Home Department (No 2)

Regina (B (Algeria)) *v* Special Immigration Appeals Commission

B

[2015] EWCA Civ 445

2015 April 20; May 6

Lord Dyson MR, Richards, Black LJJ

C

Immigration — Deportation order — Detention pending deportation — Foreign national served with Secretary of State's intention to deport and detained pending deportation — Foreign national appealing to Special Immigration Appeals Commission — Commission granting conditional bail — Commission finding no reasonable prospect of foreign national's removal and no basis for lawful detention but continuing bail — Whether power to grant bail and thus to impose bail conditions when detention unlawful — Immigration Act 1971 (c 77) (as amended and modified by Asylum and Immigration Act 1996 (c 49), s 12(1), Sch 2, para 11(1), Special Immigration Appeals Commission Act 1997 (c 68), s 3, Sch 3, paras 1, 4, Nationality, Immigration and Asylum Act 2002 (c 41), s 114, Sch 7, paras 6(a), 7 and Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c 19), s 34(1)(2)), Sch 2, paras 22, 29, Sch 3, para 2(2)

D

The claimant was served with notice of the Secretary of State's intention to deport him on the ground that he was suspected of being an Algerian terrorist and E was detained under paragraph 2(2) of Schedule 3 to the Immigration Act 1971, as amended[1], pending the making of the deportation order. He appealed against the notice to the Special Immigration Appeals Commission which granted him conditional bail, pursuant to its power under paragraph 22 of Schedule 2 to the 1971 Act. The claimant was later committed to prison for four months for failing to comply with the commission's directions to provide details of his identity, following which he was granted conditional bail again. Subsequently the commission found F that there was no reasonable prospect of the claimant's removal to Algeria and that therefore he could not lawfully be detained pursuant to paragraph 2(2), but continued his bail on slightly relaxed conditions. The claimant sought judicial review of the commission's decision to impose conditions on his bail, contending that since there was no longer a power to detain him it had no power to grant him bail. The Upper Tribunal struck out the claimant's appeal on the grounds that his continued refusal to comply with directions to provide details of his identity amounted to an G abuse of process, and the judge dismissed his claim for judicial review.

On the claimant's appeal against the decision of the judge and his application for permission to appeal against the decision of the Upper Tribunal—

Held, (1) allowing the appeal against the decision of the judge, that, since any statutory provision which purported to permit the deprivation of individual liberty by administrative detention should be construed strictly and since the power to grant bail presupposed the existence of, and the ability to exercise, the power to detain H lawfully, the word "detained" in paragraphs 22 and 29 of Schedule 2 to the Immigration Act 1971, as amended, should be construed as meaning "lawfully detained"; that, therefore, bail could not be granted under paragraphs 22 and 29 of

[1] Immigration Act 1971, Sch 2, paras 22, 29, as amended and modified: see post, para 21. Sch 3, para 2, as amended: see post, para 17.

Schedule 2 where a person was unlawfully detained, purportedly pursuant to paragraph 2(2) of Schedule 3 to the 1971 Act, or where a person not currently in detention could not lawfully be detained under that provision; and that, accordingly, since the Secretary of State had accepted that the claimant could no longer lawfully be detained the Special Immigration Appeals Commission had no jurisdiction to grant or impose conditions on bail (post, paras 31–37, 59, 60).

(2) Granting the application for permission to appeal against the decision of the Upper Tribunal and allowing the appeal, that in deciding whether it was just and proportionate to strike out the claimant's appeal the commission should have determined whether the claimant's explanation for his refusal to disclose his identity, namely the fear of reprisals against his family, was genuine and sufficiently compelling to justify conduct which prima facie was a serious abuse of process; that, although there still might have been a strong case for striking out the appeal even if the commission had been satisfied that the claimant's explanation was genuine, the court could not be certain that, if the commission had properly taken the fear of reprisals into account, it would have struck out the appeal; and that, accordingly, the case would be remitted to the commission for further consideration (post, paras 49–50, 52–55, 58, 59, 60).

Decision of Irwin J reversed.

Decision of the Special Immigration Appeals Commission reversed.

The following cases are referred to in the judgment of Lord Dyson MR:

Amand, In re [1941] 2 KB 239, DC

B (Algeria) v Secretary of State for the Home Department [2011] EWCA Civ 828, CA; [2013] UKSC 4; [2013] 1 WLR 435; [2013] 2 All ER 167, SC(E)

Mitchell v Mitchinham (1823) 2 D & R 722

R v Governor of Durham Prison, Ex p Hardial Singh [1984] 1 WLR 704; [1984] 1 All ER 983

R (Khadir) v Secretary of State for the Home Department [2005] UKHL 39; [2006] 1 AC 207; [2005] 3 WLR 1; [2005] 4 All ER 114, HL(E)

R (WL (Congo)) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245; [2011] 2 WLR 671; [2011] 4 All ER 1, SC(E)

Summers v Fairclough Homes Ltd [2012] UKSC 26; [2012] 1 WLR 2004; [2012] 4 All ER 317, SC(E)

Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97; [1996] 2 WLR 863; [1996] 4 All ER 256, PC

W (Algeria) v Secretary of State for the Home Department [2012] UKSC 8; [2012] 2 AC 115; [2012] 2 WLR 610; [2012] 2 All ER 699, SC(E)

The following additional cases were cited in argument:

Al-Hassan Daniel v Revenue and Customs Comrs (JUSTICE intervening) [2010] EWCA Civ 1443; [2011] QB 866; [2011] 2 WLR 488; [2011] 2 All ER 31, CA

Danian v Secretary of State for the Home Department [1999] INLR 533, CA

Foxall v Barnett (1853) 2 E & B 928

J1 v Secretary of State for the Home Department [2013] EWCA Civ 279, CA

Labsi v Slovakia (Application No 33809/08) (unreported) given 15 May 2012, ECtHR

MS (Palestinian Territories) v Secretary of State for the Home Department [2010] UKSC 25; [2010] 1 WLR 1639; [2010] 4 All ER 866, SC(E)

R v Secretary of State for the Home Department, Ex p Saleem [2001] 1 WLR 443; [2000] 4 All ER 814, CA

R (Konan) v Secretary of State for the Home Department [2004] EWHC 22 (Admin)

R (TN (Afghanistan)) v Secretary of State for the Home Department [2013] EWCA Civ 1609; [2014] 1 WLR 2095, CA

A *B (Algeria) v Secretary of State for the Home Department (No 2)*

APPLICATION for permission to appeal

On 11 August 2005 the claimant, B, was served with notice of the Secretary of State for the Home Department's intention to deport him under sections 3(5) and 5(1) of the Immigration Act 1971 and was detained under paragraph 2(2) of Schedule 3 to the Immigration Act 1971, as amended, B pending the making of the deportation order. On 17 August 2005 the claimant appealed against the deportation notice to the Special Immigration Appeals Commission. On 12 January 2007 the commission made a direction pursuant to rule 39(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034) that the claimant should provide information as to his true identity, including his full name. On 19 July 2007 C the commission made another order requiring the claimant to provide the same information, with a penal notice attached. On 26 November 2010 the commission ordered that the claimant be committed to prison for four months for contempt of court in that he had disobeyed the order of 19 July 2007. On 1 July 2014, on the application of the Secretary of State under rules 11B and 40 of the 2003 Rules, the commission (Irwin J, Upper Tribunal Judge Peter Lane and Mr Haydon Warren-Gash) struck out the claimant's appeal D on the basis that his continued withholding of his identity amounted to an abuse of process. By an order of 13 August 2014 the commission (Irwin J) refused the claimant's application for permission to appeal that decision on the basis that there were no reasonable prospects of success in the appeal.

By an appellant's notice filed on 5 September 2014 the claimant sought permission to appeal the decision of the commission on 1 July 2014 striking E out his appeal before the commission as an abuse of process on the following grounds. (1) The commission had (i) failed to make a clear finding on the issue of abuse of process, and (ii) failed to take into account relevant factors. Although the claimant accepted that he continued to be in contempt for refusing to disclose his identity, he did not accept that that amounted to an abuse of process, and, although indicating that the conduct was an abuse, the commission did not in fact analyse whether the premise was properly made F out and thus failed to determine the issue adequately. (2) The commission had unlawfully deprived itself of the ability formally to decide the claimant's status under the Convention for the Protection of Human Rights and Fundamental Freedoms and under EU law, denied the claimant and cut down the legal protection to which he was entitled and thus abdicated its responsibility to discharge its statutory function. (3) The commission had G placed unlawful reliance on public policy factors, in that striking out the appeal encroached on fundamental rights notably the right to an effective remedy under EU law and the Convention as well as the substantive claim under article 3 of the Convention. (4) The commission had made an erroneous assessment as to proportionality in that (a) it failed to take into account that the claimant had already been punished for his ongoing contempt, failed to make a finding on the effect of the four-month sentence of H imprisonment on the policy aim of deterrence and how far imprisonment constituted an effective sanction; (b) it failed to examine the correlation between the seriousness of the claimant's conduct and the importance of the substantive right denied to him; (c) it failed to take adequate account of its earlier ruling that there was no reasonable prospect of the claimant's

removal to Algeria and the consequent state of limbo in which he was now left; (d) it failed to take account of other relevant matters, including the fact that it was contrary to the overriding objectives of justice and good administration to strike out the appeal without a substantive decision of the lawfulness of the determination to remove where the appeal was effectively part heard. The Court of Appeal (Richards LJ) directed the hearing of the application be listed as an application for permission to appeal with the appeal to follow if permission should be granted and together with the appeal against the dismissal of the claimant's judicial review claim.

The facts are stated in the judgment of Lord Dyson MR.

Regina (B (Algeria)) v Secretary of State for the Home Department

APPEAL from Irwin J

On 11 April 2006, following the detention of the claimant, B, under paragraph 2(2) of Schedule 3 to the Immigration Act 1971, as amended, pending the making of a deportation order against him and his appeal against the deportation notice to the Special Immigration Appeals Commission, the commission granted the claimant bail, pursuant to its powers under paragraph 22 of Schedule 2 to the 1971 Act. Bail was thereafter continued. On 13 February 2014 the commission (Irwin J, Upper Tribunal Judge Peter Lane and Sir Stephen Lander) held that there was no reasonable prospect of the claimant's removal to his presumed country of origin, Algeria, and that therefore he could not lawfully be detained pursuant to paragraph 2(2). On 30 April 2014 the commission continued the claimant's bail on slightly relaxed conditions. By an application for judicial review dated 29 May 2014 and amended grounds the claimant sought declarations against the commission that it did not have jurisdiction to impose bail conditions on the claimant while he had a pending appeal. On 1 July 2014 the commission (Irwin J, Upper Tribunal Judge Peter Lane and Mr Haydon Warren-Gash) gave judgment holding, inter alia, that the claimant's bail conditions would be continued. The application for judicial review was amended to include that decision. By order dated 14 August 2014 Irwin J dismissed the application for judicial review and granted the claimant permission to appeal.

By an appellant's notice filed on 5 September 2014 the claimant appealed on the grounds that in its decision on 1 July 2014 the commission had erred in the following respects. (1) In making a material misdirection in law in declining to follow the authority of *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245 and holding that the claimant could be treated as being "detained" for the purposes of paragraphs 22 and 29 of Schedule 2 to the Immigration Act 1971 as amended, notwithstanding that it was presently impossible to detain him lawfully. The commission's reliance on a dissenting judgment in *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207 was misplaced since (a) the idea that a power to detain could exist even though its exercise would be unlawful was incompatible with the *WL (Congo)* case which was authority that an unlawfully exercised power was no power at all, was a nullity and was ultra vires, (b) the decision of the majority in the *Khadir* case on the correct approach to the power to detain was incompatible with the existence/exercise distinction in the dissenting judgment, (c) in any event

A that case concerned construction of the term "liable to detention" under paragraph 21 of Schedule 2 to the 1971 Act for the purposes of whether the power to grant temporary admission existed, and the concept of being "liable to detention" was not a condition precedent to the grant of bail. (2) In reasoning that section 67 of the Nationality, Immigration and Asylum Act 2002 would operate to grant jurisdiction to the commission to set terms for bail. However, the power to grant bail stemmed from paragraphs 22 and B 29 of Schedule 2 which were premised on actual detention. If there was no lawful detention in the context of paragraph 2 of Schedule 3, the commission had no bail jurisdiction, and section 67 could not change that position and was therefore irrelevant.

The facts are stated in the judgment of Lord Dyson MR.

C *Stephanie Harrison QC* and *Anthony Vaughan* (instructed by *Birnberg Peirce & Partners*) for the claimant.

Robin Tam QC and *Steven Gray* (instructed by *Treasury Solicitor*) for the Secretary of State for the Home Department.

The Special Immigration Appeals Commission did not appear and was not represented.

D The court took time for consideration.

6 May 2015. The following judgments were handed down.

LORD DYSON MR

E *Introduction*

1 It is now well established that the statutory power vested in the Secretary of State for the Home Department to detain persons pending deportation can only be exercised for a period which is reasonable; and that, if before the expiry of a reasonable period, it becomes apparent that deportation cannot be effected within a reasonable period, the power may not lawfully be exercised: see *R v Governor of Durham Prison, Ex p Hardial* F *Singh* [1984] 1 WLR 704 as approved by the Supreme Court in *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245.

2 The claimant is very likely to be an Algerian national, but no definitive finding that he *is* an Algerian national has been possible because he refuses to provide details of his identity. He was detained in the United Kingdom pending deportation and then released on bail. He appealed against the G notice of intention to deport him. On 13 February 2014 the Special Immigration Appeals Commission ("SIAC") decided that there was no reasonable prospect of removing him to Algeria and that, on an application of *Hardial Singh* principles, he could not lawfully be detained pending deportation.

3 The Secretary of State applied to strike out the appeal on the grounds that his refusal to provide details of his identity amounted to an abuse of H process. In separate proceedings, the claimant sought permission to apply for judicial review of SIAC's decision to impose conditions on him after its decision of 13 February 2014 on the ground that, since there was no longer a power to detain him, by the same token there could no longer be a power to grant him bail.

4 On 1 July 2014 SIAC (Irwin J, Upper Tribunal Judge Peter Lane and Mr Haydon Warren-Gash) struck out the appeal and dismissed arguments that SIAC no longer had jurisdiction to grant bail. The application for judicial review was subsequently amended to cover that bail decision. On 14 August 2014 Irwin J (sitting in the Administrative Court) dismissed the application for judicial review without giving a further substantive judgment.

5 The claimant appeals against the refusal of the application for judicial review with the permission of Irwin J. His application for permission to appeal against SIAC's decision to strike out the appeal was referred to the full court by Richards LJ.

The facts

6 The claimant arrived in the United Kingdom illegally in 1993 and was arrested in 1998 in connection with his alleged involvement in the Algerian terrorist organisation known as the GIA. SIAC subsequently found that he was involved in 2000 in the procurement of equipment sent to Islamist fighters in Chechnya. He was detained under the Anti-Terrorism, Crime and Security Act 2001 between 2002 and 2005, latterly in Broadmoor Hospital.

7 On 11 August 2005 he was served with a notice of intention to deport him under sections 3(5) and 5(1) of the Immigration Act 1971. On 17 August 2005, he appealed to SIAC against the notice on grounds which included that there would be a real risk of a violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms if he were returned to Algeria. On 11 April 2006 he was granted conditional bail by SIAC subject to suitable accommodation being found. No suitable accommodation was found so that the claimant remained in Broadmoor.

8 On 17 July 2006 SIAC commenced hearing the appeal, but adjourned it part heard when it became clear that he had provided a false name in his notice of appeal.

9 On 12 January 2007 SIAC made a direction pursuant to rule 39(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034) that the claimant should provide information as to his true identity, including his full name. He consented to provide a DNA sample, but otherwise refused to comply with the direction. On 19 July 2007 SIAC made a fresh order requiring him to provide the information. The order contained a penal notice.

10 On 30 July 2008 SIAC ruled that he was a risk to national security and that he would have the ability to continue to undertake terrorist-related activities. It said at para 9 of its closed judgment (which was incorporated into its open judgment):

> "As the correspondence presently before the commission discloses, a deadlock has prevailed in connection with the further hearing of this appeal. The deadlock has resulted from the failure and refusal of the appellant to comply with orders of the commission that he discloses his identity. There being an issue as to his identity, there has been a question as to whether he can be returned to Algeria or anywhere else. That being so, the hearing of the issue on safety on return has not proceeded. In considering whether orders requiring the appellant to disclose his identity were appropriate the commission has taken account of the psychiatric

A evidence which was placed before it. Having considered the evidence, it nevertheless has concluded that it was appropriate that an order should be made. The commission at present can only conclude that the appellant is deliberately refusing to disclose his identity in order to thwart the future progress of this appeal. As such, the commission must state that it regards his conduct in this regard to be material to the risk he presently continues to present to national security. A deliberate refusal to respond to a lawful B order is a material failure capable of supporting the conclusion that he has not relinquished his commitment to terrorist causes and evidences a material refusal to accept the force of law within the United Kingdom. Further, the commission is satisfied that his conduct is capable of amounting to an abuse of the due processes of law which he has invoked by pursuing this appeal."

C

11 SIAC adjourned the issue of the risk on return to Algeria. In August 2009 the Secretary of State applied for a committal order on the grounds of the claimant's contempt in disobeying the order of 19 July 2007. On 26 November 2010 SIAC ordered that he be committed to prison for four months. At para 60 of its judgment, the commission said:

D "It is now common ground between the parties that the appellant is in contempt of the order of 19 July 2007. Having regard to all the evidence, in particular that of Drs Deeley and Payne, we find it proved beyond a reasonable doubt that the appellant has made a conscious and rational decision to refuse to comply with that order notwithstanding his mental health difficulties (putting them, for this purpose, at their highest, as described by Dr Deeley). Even if the appellant is telling the truth that he is E concerned that revealing his identity and the other matters in directions 1 to 4 of the order might (in his view) put his family at risk in Algeria—notwithstanding that he is aware of and understands the respondent's undertaking to the commission regarding restrictions on the use of that information—it is manifest that the appellant has deliberately and contumeliously refused to comply with the commission's order. The F question, accordingly, is what steps, if any, the commission should take in the face of this contempt."

His appeals to the Court of Appeal (*B (Algeria) v Secretary of State for the Home Department* [2011] EWCA Civ 828) and the Supreme Court [2013] 1 WLR 435 against sentence were dismissed.

12 The claimant was released from prison on 4 April 2013 and was G immediately admitted to Highgate Centre for Mental Health in London as his mental health had deteriorated while he was in prison. After a brief period on release at home, and a relaxation of his bail conditions, he was again admitted to hospital on 21 April 2013 as a compulsory patient under section 3 of the Mental Health Act 1983. He was discharged from hospital on 19 May 2014 and since then has been living at home subject to bail conditions.

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13 By a judgment dated 13 February 2014, SIAC held, on an application of *Hardial Singh* principles, that the claimant could no longer be lawfully detained. It concluded at para 51 that: "there is no reasonable prospect of removing the appellant to Algeria and thus the ordinary legal basis for justified detention of B under the Immigration Acts has fallen away."

14 The claimant's bail conditions were further relaxed at a hearing before SIAC on 30 April 2014. In summary, the amended conditions included that: (a) he must remain inside his residence, save between 9 a m and midnight, when he must remain within an agreed boundary area; (b) he was permitted to leave the agreed boundary area for the purpose of an authorised trip of which the Secretary of State was notified at least 24 hours in advance and to which he did not object, or of which the commission approved despite the Secretary of State's objections; (c) he was not permitted to attend any mosque save for the London Central Mosque, 146 Park Road, London; (d) he must call the monitoring company between 08.50 and 09.30 hours and must not leave the residence before making such a telephone call; (e) he must also call the monitoring company between 21.00 hours and midnight, and not leave the residence after making such telephone call; (f) he must permit police officers to verify his presence at his residence, search his residence, remove any item to ensure compliance with the bail conditions, inspect/modify or remove any article, permit monitoring equipment to ensure compliance and take his photograph; (g) he was prohibited from directly or indirectly associating with certain named individuals; (h) he was prohibited from using the Internet and any communications equipment; (i) visitors to his residence must be approved by the Secretary of State in advance and the claimant must ensure that such visitors keep their mobile telephone switched off while in his presence; (j) he was permitted to use a non-Internet enabled computer agreed by the Secretary of State, and may only use such software as was approved by the Secretary of State; (k) he was permitted to hold one bank account details of which, and the monthly statements for which, must be provided to the Home Office; (l) he was prohibited from transferring or sending anything to a destination outside the United Kingdom without the Home Office's consent, and was not permitted to procure or provide to others any form of communications or computer equipment; (m) he was prohibited from possessing any credit, debit or Switch card not issued to him in the name in which he was bailed; (n) he was prohibited from applying for or possessing any passport; and (o) he was prohibited from applying for or possessing any travel ticket other than a bus pass permitting him to travel outside his bail boundary unless it was for the purpose of an authorised visit.

15 The Secretary of State applied under rules 11B and 40 of the SIAC Procedure Rules 2003 to strike out the appeal against the notice of decision to deport him on the grounds of his continuing refusal to comply with the order of 19 July 2007. Rule 11B(b) provides that SIAC may strike out a notice of appeal if it appears to it that "it is an abuse of the commission's process". Rule 40(1)(c) provides that SIAC may strike out a notice of appeal where a party fails to comply with a direction.

16 As I have said, the claimant applied in separate proceedings for permission to apply for judicial review of the decision to impose bail conditions after the decision of 13 February 2014 on the grounds that there was no legal basis for granting bail once the "legal basis for detention had fallen away". SIAC struck out the appeal and Irwin J dismissed the application for judicial review of the decision to impose bail conditions.

A *The bail appeal*

The legal framework

17 The Secretary of State's power to detain or control a person pending deportation is set out in paragraph 2 of Schedule 3 to the Immigration Act 1971 which provides so far as material (as amended by section 64 of and paragraph 1(c) of Schedule 10 to the Criminal Justice Act 1982, section 10 of and paragraph 10(2)(4) of the Schedule to the Immigration Act 1988, section 12(1) of and paragraph 13 of Schedule 2 to the Asylum and Immigration Act 1996, section 54(3)(4) of the Immigration and Asylum Act 1999, section 114 of and paragraph 7 of Schedule 7 to the Nationality, Immigration and Asylum Act 2002 and section 34(2) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004):

B

C

> "(2) Where notice has been given to a person in accordance with Regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
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> D "(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."
>
> E "(4A) Paragraphs 22 to 25 of Schedule 2 to this Act apply in relation to a person detained under sub-paragraph (1), (2) or (3) as they apply in relation to a person detained under paragraph 16 of that Schedule.
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> "(5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.
>
> F "(6) The persons to whom sub-paragraph (5) above applies are— . . . (b) a person liable to be detained under sub-paragraph (2) or (3) above, while he is not so detained."

18 The Secretary of State, therefore, has a discretion to detain under paragraphs 2(2) and (3) and, if the discretion is not exercised, restrictions may be imposed under paragraph 2(5).

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19 The power to grant bail and impose bail conditions derives from paragraphs 22 and 29 of Schedule 2 to the 1971 Act so far as relevant (as amended by section 12(1) of and paragraph 11(1)(2)(a)(b) of Schedule 2 to the Asylum and Immigration Act 1996, paragraph 2 of Schedule 1 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21) and section 114 of and paragraph 6(a) of Schedule 7 to the Nationality, Immigration and Asylum Act 2002). Section 3 of the Special Immigration Appeals Commission Act 1997 extends to SIAC the power to grant bail and impose bail conditions that is conferred on an immigration officer not below the rank of chief immigration officer or the First-tier Tribunal by paragraphs 22 and 29 of Schedule 2 to the 1971 Act.

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20 Section 3 of the 1997 Act provides:

"(1) In the case of a person to whom subsection (2) below applies, the provisions of Schedule 2 to the Immigration Act 1971 specified in Schedule 3 to this Act shall have effect with the modifications set out there.

"(2) This subsection applies to a person who is detained under the Immigration Act 1971 . . . if— (a) the Secretary of State certifies that his detention is necessary in the interests of national security . . . or (c) he is detained following a decision to make a deportation order against him on the ground that his deportation is in the interests of national security."

21 Paragraphs 1 and 4 of Schedule 3 to the 1997 Act modify paragraphs 22 and 29 of Schedule 2 to the 1971 Act respectively so that, in SIAC cases, they are taken to provide as follows:

"22(1) The following, namely— . . . (b) a person detained under paragraph 16(2) above pending the giving of directions, may be released on bail in accordance with this paragraph.

"(1A) The Special Immigration Appeals Commission may release a person so detained on his entering into a recognisance or, in Scotland, bail bond conditioned for his appearance before an immigration officer at a time and place named in the recognisance or bail bond or at such other time and place as may in the meantime be notified to him in writing by an immigration officer."

"(2) The conditions of a recognisance or bail bond taken under this paragraph may include conditions appearing to the Special Immigration Appeals Commission to be likely to result in the appearance of the person bailed at the required time and place; and any recognisance shall be with or without sureties as the commission may determine."

"29(1) Where a person (in the following provisions of this Schedule referred to as 'an appellant') has an appeal pending under Part 5 of the Nationality, Immigration and Asylum Act 2002 or section 2 of the Special Immigration Appeals Commission Act 1997 or a review pending under section 2E of that Act and is for the time being detained under Part I of this Schedule, he may be released on bail in accordance with this paragraph and paragraph 22 does not apply.

"(2) The Special Immigration Appeals Commission may release an appellant on his entering into a recognisance or, in Scotland, bail bond conditioned for his appearance before the Commission at a time and place named in the recognisance or bail bond."

"(5) The conditions of a recognisance or bail bond taken under this paragraph may include conditions appearing to the person fixing the bail to be likely to result in the appearance of the appellant at the time and place named; and any recognizance shall be with or without sureties as that person may determine."

22 The power of release in non-deportation cases (i e the equivalent provisions to paragraphs 2(5) and (6) of Schedule 3) is contained in paragraph 21 of Schedule 2 to the 1971 Act (as amended by section 10 of and paragraph 10(1)(4) of the Schedule to the Immigration Act 1988 and section 42(4) of the Immigration, Asylum and Nationality Act 2006) which

provides for the release on temporary admission of persons "liable to detention":

> "(1) A person liable to detention or detained under paragraph 16(1), (1A) or (2) above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> "(2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

The issue

23 The starting point is SIAC's ruling on 13 February 2014 that there was "no reasonable prospect of removing the appellant to Algeria and thus the ordinary legal basis for justified detention of B under the Immigration Acts has fallen away". The Secretary of State accepts that there was thereafter no further authority for the detention of the claimant under paragraph 2(2) of Schedule 3 to the 1971 Act. It is, therefore, common ground that the claimant could not lawfully be detained following the ruling of 13 February 2014 because to do so would exceed the implied limits on the exercise of administrative power to detain for immigration purposes as determined in the *Hardial Singh* case [1984] 1 WLR 704 and the *WL (Congo)* case [2012] 1 AC 245.

24 Ms Harrison QC submits quite simply that (i) it is a condition precedent to SIAC's jurisdiction to grant bail and impose bail conditions (whether pending appeal or otherwise) that the applicant is "detained" within the meaning of the applicable statutory provisions; (ii) "detained" can only mean *lawfully* detained; (iii) therefore the Secretary of State must be able lawfully to authorise the detention of an applicant before SIAC can exercise a bail jurisdiction in relation to him; (iv) in the light of its ruling on 13 February 2014, it was no longer possible lawfully to detain the claimant and SIAC had no power to grant bail or impose bail conditions; and (v) a person who is not and cannot be lawfully detained must be released and his release cannot be subject to restrictions and conditions imposed by a court in the exercise of its bail jurisdiction.

25 In rejecting these submissions, SIAC reasoned as follows: (i) there is a distinction between the existence of the power to detain (which can subsist even where actual detention would be unlawful) and the unlawful exercise of that power: see *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207; (ii) the existence/exercise distinction means that the power to detain continues to exist even if actual detention would be unlawful, provided that there is "some prospect" of removal being effected; (iii) the existence/exercise distinction was not disapproved in the *WL (Congo)* case; (iv) there remains "some prospect" of removal in this case so that the power to detain persists under paragraph 2 of Schedule 3 to the 1971 Act; and (v) the fact that detention today would be unlawful does not necessarily prevent lawful detention tomorrow: if removal were suddenly to become a "viable short term prospect", the outcome of the application of the *Hardial*

Singh principles might well be different. This lends weight to the analysis of the powers to detain set out in the *Khadir* case. In short, since it cannot be said that there are *no* prospects of return to Algeria, the decision in the *Khadir* case compels the conclusion that the power to detain continues to exist. It follows that the power to grant bail also continues to exist and can be exercised.

26 Mr Tam QC supports the commission's reasoning. He also submits that the power to grant bail is one of a number of powers (the power to grant temporary admission is another) which are alternatives to detention. They are intended to be exercised quickly and easily by immigration officers and tribunals. If the power to grant bail and impose bail conditions were to depend on whether a person is lawfully detained, this would require immigration officers and tribunals to decide questions of considerable difficulty. The application of the *Hardial Singh* principles has proved to be complex, troublesome and time-consuming. Although Mr Tam did not go so far as to say so expressly, it is implicit in his submissions that Parliament cannot have intended to require immigration officers and tribunals to conduct an exercise of this kind.

27 I cannot accept Mr Tam's submissions. The *Khadir* case is not a case about detention at all. The claimant had been granted temporary admission under paragraph 21 of Schedule 2 to the 1971 Act which I have set out at para 22 above. He sought judicial review of the Secretary of State's refusal to grant him exceptional leave to enter. The judge held that the temporary admission was no longer lawful because the claimant could not be regarded as a person "liable to detention" in respect of whom directions could be given "pending . . . removal". The House of Lords held that the phrase "pending . . . removal" in paragraph 16(2) meant "until removal". Lord Brown of Eaton-under-Heywood (who gave the leading speech) said, at para 32:

> "The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be '*im*pending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (i e throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under paragraph 21."

28 It is important to emphasise that the *Khadir* case is a decision on the power to grant temporary admission under paragraph 21 of Schedule 2 to the 1971 Act. It is not a decision on the power to grant bail under paragraphs 22 and 29 of the same Schedule. It is true that, at para 33, Lord Brown said:

> "To my mind the *Hardial Singh* line of cases says everything about the *exercise* of the power to detain (when properly it can be exercised and when it cannot); nothing about its *existence*. True it is that in *Tan Te Lam* [1997] AC 97 the Privy Council concluded that the power itself had

A ceased to exist. But that was because there was simply no possibility of the Vietnamese Government accepting the applicants' repatriation; it was effectively conceded that removal in that case was no longer achievable. Once that prospect had gone, detention could no longer be said to be 'pending removal'. I acknowledge that in the first passage of his judgment set out in para 24 above, Lord Browne-Wilkinson, having correctly posed the question whether detention was 'pending removal', then used the B expression 'if removal is not pending'. That, however, can only have been a slip. He was clearly following *Hardial Singh* and no such error appears in Woolf J's approach."

29 These observations were made in the context of a case about temporary admission. I accept the submission of Ms Harrison that it is not C apt to apply the reasoning of the *Khadir* case [2006] 1 AC 207 to a case about bail. Paragraph 21(1) of Schedule 2 states that the power to grant temporary admission applies where a person is "liable to detention". In the *Khadir* case, it was held that a person may continue to be "liable to detention" even when, on an application of the *Hardial Singh* principles, it may no longer be lawful to detain him. All that is required for a person to remain "liable to detention" is that there is "some prospect" of his removal D even if detention at that time would be unlawful because removal could not be effected within a reasonable period. The House of Lords held that the distinction between the existence and the exercise of the power to detain was material to the power to grant temporary admission to a person "liable to detention". There is no warrant for applying that distinction to the different question of whether there is a power to grant bail in respect of a person who E may not lawfully be detained at the time when it is proposed to grant bail. In my view, the answer to this question is not to be found in the *Khadir* case.

30 There is a material difference between the wording of paragraph 21 and that of paragraphs 22 and 29 of Schedule 2. Critically, paragraph 21 provides that a person "liable to be detained or detained" may be temporarily admitted. Paragraphs 22 and 29 provide that a person "detained" may be released on bail. The distinction between a person "detained" and a person F "liable to be detained" is clear and must have been deliberate. The distinction is made in paragraph 21 itself. As the House of Lords explained, a person may be liable to detention (and therefore susceptible to temporary admission) when he may no longer be detained pending deportation. In the scheme under the 1971 Act, bail is predicated on the individual being detained, whereas temporary admission is predicated on a person being either liable to G detention or being detained.

31 In my judgment, bail may not be granted under paragraphs 22 and 29 of Schedule 2 where a person is *unlawfully* detained purportedly under paragraph 2(2) of Schedule 3 to the 1971 Act or where a person not currently in detention could not lawfully be detained under that provision. I set out my reasons in the following paragraphs.

32 The court should construe strictly any statutory provision which H purports to allow the deprivation of individual liberty by administrative detention: see *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111D–E. Paragraphs 22 and 29 of Schedule 2 to the 1971 Act permit the release of detained persons on bail subject to conditions which may severely curtail their liberty. The conditions imposed in the present case

illustrate this very clearly: see para 14 above. In my view, paragraphs 22 and 29 should be given a restrictive interpretation. If Parliament intended to permit immigration officers to grant bail to a person who is being unlawfully detained or who could not lawfully be detained, I consider that it would have made this clear. It did not do so. The word "detained" in paragraphs 22 and 29 should be construed as meaning "lawfully detained".

33 The power to grant bail presupposes the existence of (and the ability to exercise) the power to detain lawfully. For this reason, the writ of habeas corpus can still issue where a person is on bail: see *Mitchell v Mitchinham* (1823) 2 D & R 722, 723: "When common bail is filed, still the party in the eye of the law is in custody, and in such case the habeas corpus may issue." The case of *In re Amand* [1941] 2 KB 239 concerned an application for a writ of habeas corpus on behalf of a person who was detained in custody for the purpose of being handed over to the Netherlands military authorities as a deserter from the Netherlands army. At p 249, Viscount Caldecote CJ said: "He is now on bail, but this makes no difference and we have to deal with the application as if he were still detained in custody." He said that to justify detention on British soil, authority must be found in the law of this country. He then proceeded to examine this question and concluded that detention would have been authorised. The application for a writ of habeas corpus was therefore dismissed. The corollary must be that, if detention would not have been authorised, a writ of habeas corpus would have issued.

34 It would be extraordinary if Parliament had intended to confer the power to grant bail where a person has been unlawfully detained or could not lawfully be detained. In this context, I do not believe that it can have intended to authorise the grant of bail where the power to detain cannot be exercised, even if the power can be said to exist (the distinction made by Lord Brown at para 33 of the *Khadir* case [2006] 1 AC 207). I have already explained that the *Khadir* case was concerned only with paragraph 21 of Schedule 2 to the 1971 Act and the power to grant temporary admission (which is a power less potentially intrusive of individual liberty than the power to grant bail). If Lord Brown is to be understood as having said that the power to grant bail exists and/or is exercisable when the power to detain is no longer exercisable, this was not a necessary part of his reasoning and I would respectfully disagree with it.

35 I do not consider that Mr Tam's arguments based on impracticability come anywhere near to casting doubt on these conclusions. On any view, the immigration legislation and rules require a great deal of immigration officers. That is why detailed guidance is given to them. Even on Mr Tam's approach, they are required to decide difficult questions. For example, if they are considering whether to grant temporary admission, they are required to decide whether the person is "liable to detention" (i e whether there is "some prospect" of his or her removal); and, if so, what restrictions as to residence, employment and reporting to impose. These are not pro forma decisions. They require careful individual consideration which may involve fact-finding and an exercise of judgment. Furthermore, to the extent that the *Hardial Singh* principles are difficult to apply, this is a problem with which immigration officers have to grapple in any event. In short, the practical problems to which Mr Tam refers are inherent in what is inevitably a complex process. Presumably, that is why paragraph 22 of Schedule 2 to the 1971 Act provides that bail may be granted by an immigration officer not

below the rank of chief immigration officer and why immigration officers are given detailed guidance as to how to perform their functions.

36 I see no basis for holding that the difficulty of the decisions that are involved is such that Parliament must have intended to give immigration officers the power to grant bail where a person is being detained unlawfully.

37 For all these reasons, I would allow the claimant's appeal against the refusal to grant judicial review of the decision to grant bail.

The strike-out appeal

38 SIAC held that it was open to it to strike out the appeal if it was "appropriate and proportionate to do so on the facts": para 29. It recognised that a strike-out would leave the claimant's position without final resolution and it was likely that another court would have to grapple with the aftermath. It explained the issue in the following terms, at para 33:

> "There is no real issue that he would be at risk of article 3 breaches if returned to Algeria, and any removal there would be safe only on the basis of governmental assurances. The national security case has been decided and there is no current prospect of that issue being reopened in this appeal. The important remaining issue is safety on return to Algeria. The essential problem arising from the appellant's contempt and abuse of process has two aspects: firstly, it cannot be established so as in practice to satisfy the Algerian authorities that he is Algerian; secondly, as a consequence, no relevant assurances can be obtained from Algeria. If the safety on return issue were decided now in the appeal, on the evidence as currently restricted by the appellant's actions, the conclusion would almost certainly be that he could not safely be 'returned' to Algeria. The commission would be bound to add the rider 'as a result of his continuing contempt of the commission and abuse of process'."

39 At para 38 it concluded:

> "In this case we conclude that the proportionate and fair step is to strike out the appeal. Although the appeal is far from 'at an early stage', it is also far from complete. There is still time and cost to be saved by such an order, although the significance of such matters is reduced by the likelihood that trouble and cost are likely to arise elsewhere. This is a case where the outcome of such a final determination of the appeal, turning as it would on the issue of safety on return, will go one way or the other. If the matter proceeded, it would be likely to favour the appellant. That would be as a consequence of his manipulation of information, his contempt and abuse of process. It would be an encouragement to others to behave in a similar way. It would be an unjust outcome. Striking out the appeal will not remove his subsisting Convention rights nor prevent access to an appropriate, although perhaps less convenient or apt, effective legal remedy. A striking out will protect the integrity of SIAC. For those reasons we consider such an order to be proportionate and just."

The grounds of appeal

40 There are four grounds of appeal. The first is that SIAC (i) failed to address the claimant's contention that revealing his identity might put his

family at risk in Algeria; and (ii) failed to make a clear finding that the claimant's refusal to disclose his identity amounted to an abuse of process. The second is that the striking out of the appeal amounted to a denial of an effective remedy in respect of the claimant's claim that the notice of decision to deport was contrary to his rights under article 3 of the Convention: this was in breach of article 47 of the Charter of Fundamental Rights of the European Union. The third ground of appeal is that SIAC unlawfully relied on public policy factors as justifying the strike-out. The fourth is that it erred in law in deciding that it would be proportionate to strike out the appeal.

Discussion

41 In considering this issue, it is important to have in mind the relevant principles which were recently stated by the Supreme Court in *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004. It held that the court has power to strike out a statement of claim on the ground that the claim is an abuse of the process of the court at any time. But the power to do so at the end of a trial should be exercised only in very exceptional circumstances, where the court is satisfied that the party's abuse is such that he has forfeited the right to have his claim determined. The court reviewed the principles which govern the exercise of the power to strike out generally. For present purposes, it is sufficient to refer to para 61 where Lord Clarke of Stone-cum-Ebony JSC said: "The test in every case must be what is just and proportionate."

42 In the present case, justice and proportionality involved weighing the seriousness of the abuse of process against the gravity of denying to the claimant the right to pursue his appeal against the notice of intention to deport. In short, had the claimant forfeited the right to have his appeal determined by his refusal to disclose his identity?

The first ground of appeal

43 It is clear that SIAC was of the view that the claimant's conduct amounted to an abuse of process. I have set out para 33 of the judgment at para 38 above. Ms Harrison is critical of the reasoning of this paragraph. But in my view SIAC made a clear finding in this paragraph that, in refusing to provide details of his identity in accordance with its order, the claimant was abusing the process. It said that, if the safety on return issue were decided without disclosure of the claimant's identity, the result would "almost certainly" be that he could not safely be removed to Algeria, i e his appeal would succeed as a result of his deliberately defying a court order; and it would be bound to add the rider "as a result of his continuing contempt of the commission and abuse of process". In these circumstances, I am of the opinion that SIAC did deal with the abuse issue.

44 The principal argument advanced by Ms Harrison in relation to the first ground of appeal concerns the way in which SIAC dealt with the claimant's explanation that he refused to reveal his identity because he had a well founded fear that, if he did so, he would put his family at risk of reprisals from the Algerian authorities. She submits that SIAC failed to take account of his explanation at all; alternatively, that if it did take it into account in deciding whether it was just and proportionate to strike out the

A appeal, it failed to give it sufficient weight. If it had given it proper weight, it would have been bound to dismiss the application to strike out.

45 At para 18 of her skeleton argument for the appeal before the commission, under the heading "Disproportionate to strike out" Ms Harrison included the statement that, even if the principles summarised in *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004 were applied, it would clearly not be proportionate to strike out the claimant's notice of B appeal. The skeleton argument continued:

> "(a) It is accepted that the appellant's contempt is a serious matter. The degree of seriousness is reflected by the term of imprisonment—four months. In fixing that term, it is relevant to note that the commission did not reject the appellant's assertion that 'he is concerned that revealing his identity and the other matters in directions 1 to 4 of the order might in his C view put his family at risk in Algeria'. Notwithstanding the respondent's assurances as to the use of the information, it is not unreasonable for the appellant to harbour such fears, given the experiences of other Algerian appellants to SIAC, and the general evidence about the climate of fear operating in Algeria . . ."

46 Mr Tam submits that this point did not form a prominent part of the D claimant's case before SIAC. In the skeleton argument, it was but one of a number of factors that were relied on by the claimant in support of his case that it would not be just and proportionate to strike out the appeal. He says that, in view of the low importance attached by the claimant to the point, it does not lie in his mouth to criticise SIAC for failing to deal with it in detail. In further support of the submission that the claimant placed little weight on E it, Mr Tam relies on the fact that it was not advanced as a reason why SIAC should not make the disclosure order in the first place or why it should not make the committal order. He raised no objection to the making of the disclosure order and did not dispute the contempt.

47 The difficulty with this submission is that the claimant's skeleton argument clearly asserted that it would not be proportionate to strike out the appeal because (i) the claimant was concerned that to reveal his identity F would place his family at risk and (ii) it was not unreasonable for the claimant "to harbour such fears". It is not suggested that this part of the skeleton argument was withdrawn during the appeal. In my view, it was incumbent on SIAC to address this issue. Mr Tam submits that it was sufficiently addressed. At para 31 of the judgment, SIAC said: "The appellant argues that his contempt does not represent a frustration of SIAC's G processes, and in an ancillary point, that his refusal to identify himself is at least understandable. We address the latter point first."

48 Mr Tam submits that this latter point was the fear of reprisals. SIAC went on to say, at para 32:

> "SIAC has all along borne in mind that the appellant has genuine psychiatric problems, but all along concluded that his refusal to identify H himself is not the product of those difficulties. That issue cannot now be reopened. In fairness, Ms Harrison has not suggested it should."

49 I shall assume in the claimant's favour that para 31 contains a reference to the fear of reprisals in the latter part of the first sentence, although it is by no means clear that this is the case. SIAC referred to the

claimant's argument that his refusal to identify himself was "at least understandable". In saying that this point would be addressed first, SIAC rightly recognised that it needed to be addressed. Unfortunately, however, it seems to have lost sight of it. The point was not mentioned again. In my judgment, this was a material omission.

50 The claimant's refusal to disclose his identity lay at the heart of the strike-out application. In deciding whether it was just and proportionate to strike out the appeal, SIAC should have determined whether the claimant's explanation for his refusal to disclose his identity was genuine and sufficiently compelling to justify conduct which prima facie was a serious abuse of process. It did not do so. It did not make an assessment of the gravity of the risk of reprisals. Ms Harrison has drawn our attention to certain case law which indicates that Algeria is a country where torture is systematically practised by the state and family members of those at risk are themselves at risk of treatment contrary to article 3 of the Convention: see, for example, *W (Algeria) v Secretary of State for the Home Department* [2012] 2 AC 115, paras 4–6. But that is no substitute for an assessment by SIAC.

51 Mr Tam submits that the omission was not material because no reasonable commission could have come to any conclusion other than that it was just and proportionate to strike out the appeal. In other words, SIAC would have been bound to reach the conclusion expressed in para 38 of its judgment even if it had taken into account the fact that the reason for the claimant's refusal to provide the information was his fear of reprisals against his family. This was a case of a deliberate and contumelious refusal to comply with SIAC's order. The reasoning at para 60 (see para 11 above) would inevitably have led SIAC to strike out the appeal as an abuse of process even if it had taken the fear of reprisals into account.

52 I accept that there still could have been a strong case for striking out the appeal even if SIAC had been satisfied that the reason why the claimant refused to comply with the order was his fear of reprisals against his family. The public interest in protecting the integrity of the court and its processes is a powerful factor which strongly militated in favour of the order that SIAC made. The question whether the claimant had a sustainable claim that the notice of intention to deport was in breach of his rights under article 3 of the Convention was the very issue that SIAC had to decide. That could only be properly decided with evidence about the claimant's personal circumstances. This in turn required that SIAC should know who he is.

53 I accept the submission of Mr Tam that, prima facie, to have permitted the claimant to proceed with the appeal, and to profit from the deliberate use of a false identity and his grave contempt of court, would seriously undermine the public interest in orders of the courts being obeyed, and would seriously damage public confidence in the administration of justice.

54 But I cannot be certain that, if SIAC had taken the fear of reprisals into account in the balancing exercise that it had to perform, it would have struck out the appeal.

55 I would, therefore, grant permission to appeal in relation to the first (and principal) ground of appeal, allow the appeal on this ground and remit the case to SIAC for further consideration in the light of this judgment.

The other grounds of appeal

56 I am not persuaded that the remaining grounds of appeal would have a real prospect of success or that there are any other sufficient reasons for granting permission to appeal in relation to them. I do not consider that the claimant can successfully invoke article 47 of the Charter if the appeal is an abuse of process. There is real force in the submission of Mr Tam that the avoidance of abuse of a court's process, particularly abuse by which a litigant seeks to distort the court's findings in his favour, is a good reason in the public interest that can justify the imposition of limitations on the litigant's judicial remedies. Furthermore, as pointed out by SIAC, although the claimant has forfeited his right to a full merits appeal (which might be regarded as better and more "effective" than judicial review), he has not forfeited his right to judicial review of some kind before his actual deportation. That judicial review would be able to consider the substantive dispute between the claimant and the United Kingdom, namely whether his deportation to Algeria would violate his rights under article 3 of the Convention.

57 Leaving aside the material omission to which I have referred, I am satisfied that there is no basis on which SIAC's decision can be impugned.

Overall conclusion

58 For these reasons, I would allow the bail appeal and allow the strike-out appeal, but only on the basis of the first ground of appeal.

RICHARDS LJ

59 I agree.

BLACK LJ

60 I also agree.

Application granted.
Appeals allowed.
Case remitted to commission for further consideration.

ROBERT RAJARATNAM, Barrister