Neutral Citation Number: [2015] EWCA Civ 445

Case No: T2/2014/2930
T3/2014/2932

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**ADMINISTRATIVE COURT**
**IRWIN J (CO/2512/2014)**
**AND**
**THE SPECIAL IMMIGRATION APPEALS COMMISSION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2015

**Before :**

**THE MASTER OF THE ROLLS**
**LORD JUSTICE RICHARDS**
and
**LADY JUSTICE BLACK**

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**Between :**

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|---|---|---|
| T2/2014/2930 | **B** | **Appellant** |
| | **- and -** | |
| | **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |
| T3/2014/2932 | **B** | **Appellant/ Claimant** |
| | **- and -** | |
| | **SPECIAL IMMIGRATION APPEALS COMMISSION** | **Respondent/ Defendant** |
| | **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Interested Party** |

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**Stephanie Harrison QC** and **Anthony Vaughan** (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
**Robin Tam QC** and **Steven Gray** (instructed by **Government Legal Department**) for the Secretary of State

Hearing date: 20 April 2015

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# Approved Judgment

## Master of the Rolls:

*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 Singh* [1984] 1 WLR 704 as approved by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

2. The appellant 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 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 process. In separate proceedings, the appellant 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, UT 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 appellant 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 appellant 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 section 3(5) and 5(1) of the Immigration Act 1971 ("the 1971 Act"). 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 European Convention on Human Rights ("the Convention") 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 appellant 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 ("the Rules") that the appellant 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 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 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."

11. SIAC adjourned the issue of the risk upon return to Algeria. In August 2009, the Secretary of State applied for a committal order on the grounds of the appellant'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:

> "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 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 question, accordingly, is what steps, if any, the Commission should take in the face of this contempt."

His appeals to the Court of Appeal and the Supreme Court against sentence were dismissed.

12. The appellant was released from prison on 4 April 2013 and was 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.

13. By a judgment dated 13 February 2014, SIAC held, on an application of *Hardial Singh* principles, that the appellant could no longer be lawfully be 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 appellant'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 am 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 appellant 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 UK 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 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 appellant 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.

*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 para 2 of Schedule 3 to the Immigration Act 1971 ("the 1971 Act") which (as amended) provides so far as material:

> "(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.
>
> (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).
>
> …
>
> (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.
>
> (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.
>
> (6) The persons to whom sub-paragraph (5) above applies are—
>
> (a) ….
>
> (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 paras 2(2) and (3) and, if the discretion is not exercised, restrictions may be imposed under para 2(5).

19. The power to grant bail and impose bail conditions derives from paras 22 and 29 of Schedule 2 of the 1971 Act. Section 3 of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") 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 ("the FTT") by paras 22 and 29 of Schedule 2 to the 1971 Act.

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,
>
> (b) …., 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. Paras 1 and 4 of Schedule 3 to the 1997 Act modify paras 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 recognizance or, in Scotland, bail bond conditioned for his appearance before an immigration officer at a time and place named in the recognizance 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 recognizance 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 recognizance 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 recognizance or, in Scotland, bail bond conditioned for his appearance before the Commission at a time and place named in the recognizance or bail bond.

(5) The conditions of a recognizance 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 paras 2(5) and (6) of Schedule 3) is contained in para 21 of Schedule 2 to the 1971 Act which provides for the release on temporary admission of persons "liable to detention":

"21.

> (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 appellant under para 2(2) of Schedule 3 to the 1971 Act. It is, therefore, common ground that the appellant 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 *Hardial Singh* and *Lumba.*

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 appellant 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* [2005] UKHL 39, [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 *Lumba*; (iv) there remains "some prospect" of removal in this case so that the power to detain persists under para 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 *Khadir.* In short,

since it cannot be said that there are *no* prospects of return to Algeria, the decision in *Khadir* 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. *Khadir* is not a case about detention at all. The claimant had been granted temporary admission under para 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 para 16(2) meant "until removal". Lord Brown (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 (ie 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 para 21. "

28. It is important to emphasise that *Khadir* is a decision on the power to grant temporary admission under para 21 of Schedule 2 of the 1971 Act. It is not a decision on the power to grant bail under paras 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* the Privy Council concluded that the power itself had 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 paragraph 24 above, Lord Browne-Wilkinson, having correctly posed the question whether detention was "pending removal," then used the 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 apt to apply the reasoning of *Khadir* to a case about bail. Para 21(1) states that the power to grant temporary admission applies where a person is "liable to detention". In *Khadir,* it was held that a person may continue to be "liable to detention" even when, on an application of *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 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 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 *Khadir*.

30. There is a material difference between the wording of para 21 and that of paras 22 and 29. Critically, para 21 provides that a person "liable to be detained or detained" may be temporarily admitted. Paras 22 and 29 provide that a person "detained" may be released on bail. The distinction between a person "detained" and a person "liable to be detained" is clear and must have been deliberate. The distinction is made in para 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 detention or being detained.

31. In my judgment, bail may not be granted under paras 22 and 29 of Schedule 2 where a person is *unlawfully* detained purportedly under para 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 purports to allow the deprivation of individual liberty by administrative detention: see *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97 at p 111D-E. Paras 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, paras 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 paras 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: "when common bail is filed, still the party in the eye of the law is in custody and in such a 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, since 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 *Khadir*). I have already explained that *Khadir* was concerned only with para 21 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 para 22 of 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 appellant's appeal against the refusal to grant judicial review of the decision to grant bail.

*THE STRIKE OUT APPEAL*

38. SIAC held that 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 appellant'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 appellant's contention that revealing his identity might put his family at risk in Algeria; and (ii) failed to make a clear finding that the appellant'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 appellant'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 EU Charter of Fundamental Rights ("the Charter"). 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* [2012] UKSC 26, [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 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 appellant the right to pursue his appeal against the notice of intention to deport. In short, had the appellant 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 appellant'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 appellant was abusing the process. It said that, if the safety on return issue were decided without disclosure of the appellant'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 appellant'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 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, under the heading "Disproportionate to strike out" Ms Harrison included the statement that, even if the principles summarised in *Summers v Fairclough Homes* were applied, it would clearly not be proportionate to strike out the appellant's notice of 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 – 4 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 1-4 of the order might in his 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 appellant's case before SIAC. In the skeleton argument, it was but one of a number of factors that were relied on by the appellant 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 appellant 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 appellant placed little weight on 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 appellant's skeleton argument clearly asserted that it would not be proportionate to strike out the appeal because (i) the appellant was concerned that to reveal his identity would place his family at risk and (ii) it was not unreasonable for the appellant "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 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 himself is not the product of those difficulties. That issue cannot now be re-opened. In fairness, Ms Harrison has not suggested it should. "

49. I shall assume in the appellant'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 appellant'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 appellant'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 appellant'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] UKSC 8, [2012] 2 AC 115 at paras 4 to 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 appellant'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 appellant 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 appellant 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 appellant'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 appellant 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 appellant 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 appellant 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 appellant 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.

**Lord Justice Richards:**

59. I agree.

**Lady Justice Black:**

60. I also agree.