Appeal No: SC/09/2014
Hearing Dates: 9 and 10 June, 2014
Date of Judgment: 1 July 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE PETER LANE
MR HAYDON WARREN-GASH

"B"

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

For the Appellant:	Ms Stephanie Harrison QC and Mr Anthony Vaughan
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr Robin Tam QC and Mr Steven Gray
Instructed by:	The Treasury Solicitor for the Secretary of State

Mr Justice Irwin :

Introduction

1. This judgment addresses two further issues in this case. Firstly, the Secretary of State has applied to the Commission to strike out this appeal on the basis of the abuse of process by the Appellant in continuing to withhold his identity. Secondly, the Appellant submits that following the ruling of the Commission in this case on 13 February of this year, to the effect that the Appellant has not been the subject of a deprivation of liberty but that a revision of bail conditions should be mounted, SIAC no longer has jurisdiction to impose bail conditions on B. We address both of those below.

2. In parallel with the hearing of these two issues in SIAC, the Appellant has issued judicial review proceedings addressing essentially the same bail issue. By an order of Ouseley J of 30 May 2014, a rolled-up permission and substantive hearing in that claim was listed before Irwin J, sitting at Field House on the first day of the SIAC hearing. By agreement, no ruling will be made in the judicial review proceedings until the parties have had the opportunity to consider this judgment and make any consequential submissions in the judicial review.

The Facts

3. The facts of this case were fully analysed in the Commission's judgment of February this year. We do not intend to repeat that detailed analysis. It is sufficient to say, in order to make this judgment independently comprehensible, that the Appellant arrived illegally in the United Kingdom in 1993 and initially lied about his identity. He was arrested in 1998 in connection with the Algerian terrorist organisation known as the GIA and, as the Commission subsequently found, was actively involved during the year 2000 in the procurement of equipment for the purpose of terrorist activity. He was detained under the Anti-Terrorism, Crime and Security Act 2001 from 2002-2005, latterly in Broadmoor hospital. In 2005 he was subject to a control order. In August 2005 he was notified of the intention to deport him and appealed against the decision to deport. Initially he supplied false identity details, including a false name to SIAC. Subsequently he accepted that the name he had given was false but he has continually refused to identify himself or to give cooperation which would enable his identification.

4. In January 2007 the Commission made a specific direction that the Appellant should provide information as to his true identity. He failed to respond. On 30 July 2008 SIAC ruled that B was a risk to national security and also concluded that his conduct in refusing to identify himself amounted to an abuse of due process of law. In August 2009 the SSHD applied to SIAC for a committal order for contempt by B in disobeying the order of July 2007. Following adjourned hearings with a view to persuading B to cooperate, on 26 November 2010 SIAC concluded that B was liable for contempt and ordered that B should be committed to prison for four months although that committal order was suspended pending appeal. The committal order was upheld by the Court of Appeal on 21 July 2011 and by the Supreme Court on 30 January

2013. On 6 February 2013 the SIAC committal order was executed and B was taken to prison. He was discharged from prison on 4 April 2013 and on the same day admitted to the Highgate Centre for Mental Health in London. Tailored bail arrangements were made, different in their content depending on whether the Appellant was living at home or living, as he did for some considerable time, as an in-patient in hospital. He was finally admitted to hospital under Section 3 of the Mental Health Act as a compulsory patient on 21 January 2014. He was discharged from hospital on 19 May 2014 and has subsequently been living at home subject to conditions of bail.

5. The steps to attempt B's removal to Algeria are set out between paragraphs 29 and 51 of our February judgment. In that judgment the Commission concluded that:

> "In our view, in the absence of a change of mind by B, there is a very low prospect that he will be able to be removed to Algeria."

The Commission also concluded that there was some valid criticism to be made of delay by the Secretary of State between 2009 and 2013 but we went on to say:

> "…it is highly doubtful if this made any difference to the outcome. In any event, the principal author of the problems is the Appellant."

6. Following that judgment, and directions as to time, the Secretary of State moved to strike out the appeal.

Strike Out

7. In making his application on behalf of the Secretary of State, Mr Robin Tam QC began by emphasising the duty on the Commission set out in Rule 4(3) of the SIAC Procedure Rules 2003 that "the Commission must satisfy itself that the material available to it enables it properly to determine proceedings". In the context of this case, part of the "material" which is required to so enable the Commission is the identification of the Appellant. He knows who he is but has not made that information available. This represents a deliberate distortion of the evidence and is an attempt to prevent the Commission from reaching a proper determination.

8. The context here is not really in issue. The Secretary of State established her case on national security many years ago. The Respondent's case is that the Appellant is an Algerian. The Appellant has never contested the suggestion that he is Algerian. The Secretary of State has throughout conceded that, in respect of someone where historic terrorist involvement has been established, return to Algeria could not be effected in a manner consistent with her obligations under the Refugee Convention or the European Convention without the existence of reliable assurances from the Algerian Government as to the proper treatment of the Appellant. Negotiation of such assurances is very unlikely to be achieved unless and until the Appellant's identity is

established, as the Commission set out in February. It is important to note, for reasons which will become clear subsequently, that the Commission did not and does not conclude that establishing the Appellant's identity is impossible of achievement, either because (under the pressure of events) he unexpectedly changes his mind or because identification becomes possible through other means. It is not impossible, in addition, that the Algerian approach might change.

9. Having emphasised the importance of this critical information, Mr Tam submits there are two alternative routes to an order striking out the appeal. Firstly, Rule 11B empowers the Commission to strike out "a notice of appeal … if it appears to the Commission that it is an abuse of the Commission's process". Further, Rule 40 provides that where a party fails to comply with a direction, the Commission "may serve on him a notice which states – (a) the respect with which he has failed to comply with the direction; (b) a time limit for complying with the direction; and (c) [the fact] that the Commission may … (ii) strike out the notice of appeal." Rule 40(2) provides that "where a party … who has been served with such a notice fails to comply with the direction, the Commission may proceed" to strike out the notice of appeal.

10. On 12 January 2007 the Commission made a direction pursuant to Rule 39(1) of the SIAC Rules that the Appellant should provide the relevant information. On 19 July 2007 SIAC made an order that B should provide the necessary information, that order containing a penal notice.

11. The Secretary of State relies on the conclusions of the Commission in its national security judgment, as long ago as 30 July 2008. Following consideration of the medical evidence then available, which included a "tendency to exaggerate symptoms of psychological distress and his suspiciousness of psychiatric services" (paragraph 28), the Commission concluded:

> "…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 evidence is 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." (see paragraph 9 of the closed judgment adopted and repeated in paragraph 33 of the open judgment of that date)

12. It is on that factual basis that the Appellant was committed for contempt. There is no issue, says Mr Tam (uncontradicted by Ms Harrison QC), that the Appellant remains in contempt.

13. In emphasising the significance of the contempt, and its character as an abuse of process, Mr Tam relies on the judgment of Longmore LJ in *B v SSHD* [2011] EWCA Civ 828 at paragraph 20,where the judge rejected as unarguable the proposition that the sentence for contempt was too long:

> "20. … many people might think that a sentence of four months for a deliberate and contumelious contempt, frustrating the Secretary of State's intention to deport B and causing SIAC great difficulty in its final disposition of the appeal before it, is a sentence which is comparatively merciful."

14. Mr Tam relies on the approach taken by Popplewell J in *JSC BTA Bank v Mukhtar Ablyazov* [2013] EWHC 1979 (Comm). Popplewell J concluded that it was, in appropriate circumstances, open to a court to refuse to hear a contemnor "where the contempt itself impedes the course of justice" because "it is contrary to the interests of justice to allow him to ask the court to take into account his interests when he is not prepared to abide by the court's decisions should the court decide the issue against his interests" (see paragraph 20).

15. The Supreme Court has recently considered abuse of process in *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004. In that case the Claimant made an exaggerated claim at the trial on quantum. The judge accepted there was exaggeration and that much of the claim as presented was "substantially fraudulent", but by virtue of authority, he was unable to strike the claim out in its entirety, and was bound to award compensation for the injury and loss which he found to be genuine. The Court of Appeal sustained the judge. The Supreme Court held that, both within the court's inherent jurisdiction and pursuant to CPR r3.4(2), the court had power to strike out a statement of case, on the grounds of abuse of process, at any stage of proceedings including after trial, but that the power would be "exercised at the end of a trial only in very exceptional circumstances where the court was satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined" (see the headnote).

16. In paragraph 35 the Supreme Court reviewed pre-CPR authority. The court quoted the well known dictum from Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536 as follows:

> "The circumstances in which abuse of process can arise are very varied… it would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the Court has a duty (I disavow the word discretion) to exercise this salutary power."

17. The Supreme Court emphasised the conclusion in *Birkett v James* [1978] AC 297 to the effect that the court can strike out a claim as an abuse of process even where such an order might "extinguish substantive rights". In approving the approach of the Court of Appeal in *Masood v Zahoor* (Practice Note)

[2010] 1 WLR 746 the court emphasised the care necessary in striking a balance where excessive claims have been made:

> "However, there is a balance to be struck. To date the balance has been struck by assessing both liability and quantum and provided that those assessments can be carried out fairly to give judgment in the ordinary way." (See the judgment of Lord Clarke at paragraph 50)

18. Mr Tam relies on the remarks in the judgment of the court at paragraph 62, where the court observed that:

> "… one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the Claimant has forfeited the right to have determined. Secondly, nothing in this judgment affects the case where the fraud or dishonesty taints the whole claim. In that event, if the court is aware of it before the end of the trial, judgment will be given for the defendant, and, if it comes to light afterwards, it will be open to a defendant to raise the issue in an appeal."

In the instant appeal, the Secretary of State is not addressing fraud or dishonesty, but does submit that the abuse of process by the Appellant taints the whole appeal, since it radically affects the capacity of the Commission to reach a fair and proper outcome. Mr Tam submits that in the context of such a case as this, defiance of SIAC is a matter of considerable public importance, given the gravity of the matters concerned and the weight of responsibility placed by Parliament upon SIAC.

19. The application is principally made under SIAC Procedure Rule 11B, since the contempt and abuse of process by the Appellant breach that Rule.

20. The Secretary of State submits that a proper alternative basis for strike out would be Rule 40. The continuing failure to comply with the direction is clear. Although no formal notice expressed to be pursuant to Rule 39 has been served, it is perhaps implicit in Mr Tam's submissions that the original order of July 2007, followed by the penal notice (in respect of which special arrangements were made for explanation to B of the Order and its implications), followed by the protracted committal proceedings culminating in the prison sentence served by the Appellant, together satisfy the notice requirements under Rule 39.

21. The Appellant accepts that the Commission has the power to strike out under Rule 11B or Rule 40, but advances a number of reasons why it would be wrong to do so. They can be summarised as follows. First and foremost, to do so would deny the Appellant an effective remedy in determination of a claim for protection under the Refugee Convention and/or the European Convention of Human Rights. That would be contrary to the purpose of the statutory scheme, and/or common law guidelines, and would breach Article 3 and Article 13 of the European Convention of Human Rights. This is not a

civil claim between private parties, where it strikes at no fundamental rights and obligations if an abuser of the Court's process is deprived of his remedy. The Commission must be very slow, says Ms Harrison, to stop an appeal where the end of the case does not resolve the underlying dispute, which will necessarily subsist. The consequence would be to leave the Appellant in a legal limbo.

22. Further, the Appellant argues that, on the facts, the conduct of the Appellant does not prevent the Commission from a proper determination of his appeal. On the facts, it would be disproportionate to strike out the appeal, particularly where the Secretary of State has:

> "…acted unlawfully and/or abused the process of the court in making a decision to deport the Appellant and in maintaining that decision, in all circumstances where there was no power to do so since, at all material times since 2005, the Defendant did not have in place the substantive conditions necessary to lawfully deport the Appellant."

23. The appeal, it is said, therefore rests on a number of bases which, for present purposes, converge on two requirements. First, the State should not act in a manner incompatible with his rights and the international obligations of the State (ECHR Article 3, S6(1) of the Human Rights Act 1998, the Refugee Convention, the EU Council Directive 2004/83/EC, the "Qualification Directive", in particular Article 20). Secondly, the State has an obligation to ensure an effective remedy, where such rights and obligations are in question: ECHR Article 13, Council Directive 2005/85/EC, December 2005, the "Procedures Directive". The heart of the Appellant's argument is that any strike out will necessarily mean an abrogation of the substantive rights and/or procedural rights of the Appellant.

24. We reject those arguments, for a number of reasons. Firstly, there will still be legal remedies available to the Appellant. No-one in England becomes an outlaw. The Appellant will, if so advised, be able to apply to the Court for judicial review of any actions of the Secretary of State, most particularly perhaps of any decision to deport him, but in fact of any fresh decision arising. Since the commencement of Section 6 of the Justice and Security Act 2013, the High Court can in an appropriate case permit a closed material procedure, enabling the Court to admit sensitive material into evidence. As the Respondent submits, the case of *Chahal v UK* (1996) 23 ECHR 413, and subsequent authority, establish that judicial review can be and often is an "effective remedy" for the purposes of the ECHR (and no doubt the Procedures Directive). That remedy must have been rendered more effective in this context by the new capacity of the Court to receive evidence in closed material procedures.

25. It is in the nature of the caseload of this Commission that fundamental rights and state obligations are in question in almost every case. The strike out of almost any case will mean that the competing claims concerning such rights and obligations will not be determined within that appeal. Parliament must be taken to have had that consequence in contemplation, when granting the

Commission the power to strike out under either Rule, both of which were introduced by amendment to the Rules in 2007 (S1 2007/1285 r11, r26a).

26. We should not be understood to mean that the strike out of such an appeal is a step to be taken lightly, or that the legal remedies available to a former appellant after a strike out are as apt to a case of this kind as are the tailored procedures of SIAC. The higher courts have repeatedly stressed that SIAC is the appropriate jurisdiction for the litigation of such questions: see, for example, *Ignaoua v SSHD* [2014] 1 WLR 651, [2013] EWCA Civ 1498. We accept that is so. For that reason, any such decision must be reached proportionately and with care. It must nevertheless be open to the Commission to make such an order where appropriate, both in pursuance of the power granted under the Rules, and as a necessary protection of the integrity of SIAC's processes from manipulation.

27. We further consider that there is a confusion inherent in the position of the Appellant. It is not unfair on the part of his counsel to suggest that a position of "deadlock" has been reached: the Appellant refuses to identify himself; unless and until he does so, his removal to Algeria is rendered very problematic. However, that difficulty will likely subsist beyond any strike out of the appeal. It is a substantive problem created by the Appellant, not a function of the proceedings no longer continuing in SIAC.

28. We reject the proposition that a strike out in this case would represent an unlawful delegation of the Commission's functions to the Secretary of State, as was the case in *J1 v SSHD* [2013] EWCA Civ 279 or indeed an abdication of the Commission's function.

29. We therefore conclude that it is fully open to the Commission to strike out the appeal, if it is appropriate and proportionate to do so on the facts.

30. There is no doubt that there is a distinction to be made between striking out a civil claim, thereby bringing to an end the underlying legal dispute, and striking out an appeal where subsisting rights and obligations continue, and the underlying dispute between the Appellant and the State will remain to be answered. That distinction means that authority from different legal contexts, particularly from conventional civil disputes, must be applied with care. We also bear fully in mind the practical consequences: any strike out will leave the Appellant's position without a final resolution, and it is likely that another Court will have to grapple with the aftermath. These are powerful considerations for caution when exercising this power.

31. 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.

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.

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".

34. There is of course no certainty about the outcome of this issue if the Appellant did identify himself. The SSHD might nevertheless not succeed in establishing his safety on return, but that opportunity for a just outcome based on the proper material is precluded by the Appellant's stance.

35. Ms Harrison argues against a strike out by reference to the decision showing that the conduct, even the deliberate conduct, of a claimant of asylum, after arrival in the country of claim, may nevertheless found refugee status. She cites *Danian v SSHD* [2000] Imm AR 96, CA. She relies on *Chahal v UK* (1996) 2 EHRR 413 to show that individual conduct is irrelevant to the issue of protection under Article 3 of the European Convention. She also relies on *Al Hassan-Daniel v Her Majesty's Revenue and Customs* [2010] EWCA Civ 1443, [2011] QB 866 as showing that deliberate criminality does not abolish subsisting convention rights, or of itself prevent enforcement of those rights.

36. For present purposes we are prepared to accept those arguments, as we are prepared to accept that the equitable maxim *ex turpi causa non oritur actio* is at least arguably inappropriate and inapplicable where fundamental rights and State obligations are in question. As we have already recognised, these rights and obligations, and the underlying dispute, will survive any strike out of the appeal. One distinction between any of these cases and the instant case is that in this case, if the matter proceeded to the most likely outcome, the Appellant would have achieved his aim not merely despite his criminality or by means of his own manipulation of his general situation, but by a deliberate abuse of the process of SIAC; a tribunal which gives effect to the UK's international obligations towards those in need of international protection.

37. In *Summers v Fairclough Homes Ltd*, the Supreme Court emphasised that, even in the context of a civil claim for compensation where the claim would be finally extinguished by a strike out, and even at the conclusion of a trial, it is open to a Court, to strike the matter out if exceptional circumstances warrant such a step. In paragraphs 46 to 62 the Court addressed the need for a power to strike out, and the requirement that the power should be exercised only where it is "a proportionate means of achieving the aim of controlling the process of the Court and deciding cases fully" (paragraphs 48 and 61), and re-

stated that nothing in that case mitigates against striking a case out at an early stage (paragraph 62).

Our Conclusions

38. 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.

Bail

39. The Appellant submits, following the finding in February that there is no longer a reasonable prospect of deportation and removal to Algeria, that SIAC has no longer any jurisdiction to grant or withhold bail to the Appellant. The problem acquires an extra dimension given the decision we have reached to strike out the appeal. It is therefore appropriate to address the powers of SIAC firstly in relation to the period between February 2014 and now, and secondly for the future.

40. In the submission of the Secretary of State there are various powers by which SIAC may grant or withhold bail. The first basis arises from the combination of Schedules 2 and 3 of the Immigration Act 1971 and Section 3 of the SIAC Act 1997.

41. Section 3 of, and Schedule 3 to, the Special Immigration Appeals Commission Act 1997 confer on the Commission the function of releasing on bail a person detained under the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002, if (a) that person's detention has been certified by the Secretary of State as necessary in the interests of national security; (b) the person has been detained following refusal of leave to enter on the ground that exclusion is in those interests; or (c) the person is detained following a decision to make a deportation order on the ground that the person's deportation is in the interests of national security (section 3(2)).

42. Schedule 2 to the Immigration Act 1971 confers powers on the First Tier Tribunal to grant bail to persons who are in immigration detention. Where section 3(2) of the SIAC Act applies to a person, section 3(2) provides that "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".

The provisions of Schedule 2 to the 1971 Act specified in Schedule 3 to the SIAC Act are paragraphs 22, 23, 24, 29, 30, 31, 32 and 33. Schedule 3 to the SIAC Act amends those provisions, largely by substituting references to the Commission for references to the First Tier Tribunal.

43. The Commission's principal bail functions under the amended Schedule 2 may be summarised as follows:

Paragraph 22

Paragraph 22(1) confers power to release on bail those detained under paragraph 16(1) pending examination by an immigration officer under paragraph 2; those detained under paragraph 16(1A) pending completion of examination/decision whether to cancel leave; and those detained under paragraph 16(2) pending the giving of removal directions.

Paragraph 24

Paragraph 24 enables an immigration officer etc to re-arrest a person who has been released on bail pursuant to paragraph 22, where the officer has reasonable grounds for believing the person on bail is likely to break a condition of his recognizance or any other condition of bail; or is breaking/has broken such a condition. Re-arrest may also occur if the officer is notified in writing by a surety of the surety's belief that breach of a condition of recognizance is likely.

Paragraph 29

Paragraph 29 provides for the Commission to release on bail a person in immigration detention who has an appeal pending under Part 5 of the Nationality, Immigration and Asylum Act 2002. Paragraph 29(2) to (6) contains provisions regarding recognizances and conditions.

Paragraph 30

Paragraph 30(1) prevents the release under paragraph 29 of a person on bail without the consent of the Secretary of State, if directions for the removal of the person are for the time being in force or the power to give such directions is for the time being exercisable. Paragraph 30(2) (concerning further circumstances where the First-tier Tribunal is not obliged to release an appellant) does not apply to the Commission.

Paragraph 33

Paragraph 33 makes provision for the re-arrest of appellants, in terms corresponding to those of paragraph 24. As in paragraph 24, a person so arrested shall be brought before the Commission within twenty-four hours.

44. By that labyrinthine route, SIAC is given the power to set bail for those appellants in SIAC cases in respect of whom the powers of detention of the Secretary of State have been exercised. It is argued that, at least until release from detention during the currency of a SIAC appeal, and from that point until

the end of an appeal, those are the relevant powers exercised by the Commission. We consider below the position arising following the strike out of an appeal.

45. There are essentially simple competing propositions as to the continuance of SIAC's power in the case, as here, where detention has been ruled unlawful by reference to the principles formulated in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 and adopted and affirmed in *R(Lumba) v SSHD* [2012] 1 AC 245. The Appellant argues that if actual detention is unlawful, the power of SIAC to grant bail must fall away. How can bail be set when the Appellant cannot be detained? What sanction for breach of bail can there be if detention is unlawful?

46. The Appellant relies on the proposition that there is no longer in existence a lawful power to detain within the meaning of paragraph 2(3), Schedule 3 to the 1971 Act, if the "*Hardial Singh* principles preclude detention". Such detention would be unlawful. The effect of the decision of the Supreme Court in *Lumba* is that there is no distinction to be made between the situation where no power to detain exists at all, and the situation where a power exists, but exercise of the power to detain would be unlawful: see paragraph 66 of *Lumba*, where Lord Dyson said:

> "A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 established that both species of error render an executive act *ultra vires*, unlawful and a nullity... The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision *ultra vires*…"

47. The Appellants also rely on the disapproval by the Court of a "causation" test. Here the context of *Lumba* is important. The case concerned actions for false imprisonment based on the detention of the Claimants, derived from an unpublished policy of blanket detention for all foreign national prisoners on completion of their sentences of imprisonment. The Secretary of State argued that such detention should be excluded from the tort of false imprisonment because the Claimants would have been detained in any event, even if there had been no secret policy and published government policy had been followed. The Court rejected that. Indeed the passage from the judgment of Lord Dyson, in paragraph 66 set out above, was formulated as a rejection of that argument.

48. The Secretary of State accepts that such distinctions are invalid and ineffective in the context of a case like *Lumba* where the question is not "could the claimants have been lawfully detained?" but "were the claimants lawfully detained?" The Secretary of State relies on *R(Khadir) v SSHD* [2006] 1 AC 207, a case discussed but not doubted in *Lumba*.

49. The leading speech in *Khadir* was given by Lord Brown of Eaton-under-Heywood, with whom the other members of the House agreed. The context is also important here. The claimants were a group of Iraqi Kurds who could not, for the time being, be removed to Northern Iraq. It was said that their removal to Iraq was therefore not "pending" within the terms of Schedule 2 to the 1971 Act, and for that reason they were not persons "liable to detention" under paragraph 16 of the Schedule. This argument succeeded at first instance and in the Court of Appeal.

50. In response to that outcome, and pending appeal to the House of Lords, the government of the day introduced to Parliament the provisions which became Section 67 of the Nationality, Immigration and Asylum Act 2002, the material points of which read:

> "**Construction of reference to person liable to detention**
>
> (1) This section applies to the construction of a provision which—
>
> (a) does not confer power to detain a person, but
>
> (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.
>
> (2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that— (a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement, (b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or (c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.
>
> (3)This section shall be treated as always having had effect."

We return to Section 67 below.

51. The House of Lords reached the view that Section 67 was a redundant provision. In the leading speech, Lord Brown considered the *Hardial Singh* line of authority, including the decision in *R(I) v SSHD* [2003] INLR 196, which was expressly approved by Lord Dyson in *Lumba*. Lord Brown quoted and adopted the distinction made by Mance LJ (as he then was) in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, between a person who is "potentially liable to detention" and "the circumstances in which the power to detain can in any particular case properly be exercised": paragraph 31. Even where it has:

> "…become unreasonable actually to detain the person pending a long delayed removal … that does not mean that the power has lapsed." (paragraph 32)

52. In paragraph 33, Lord Brown made the distinction ever clearer:

> "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 properly it cannot); nothing about its *existence*."

53. Lord Brown went on to accept that, where there is "simply no possibility" of removal, as in *Tan Te Lam*, then the power to detain has ceased to exist. Short of that point, the power subsists: see paragraph 33.

54. Agreeing with Lord Brown in *Khadir*, Baroness Hale said:

> "A person is "liable to be detained" within the meaning of Schedule 2 to the Immigration Act 1971 where there is a power to detain him even if it would not be a proper exercise of that power actually to do so." (see paragraph 4)

55. In the course of the argument in *Lumba*, the distinction raised by Lord Brown in *Khadir* was mentioned, but not doubted, save in the dissenting judgment of Lord Walker of Gestingthorpe, and even then in terms which may well not undermine the point for our purposes: see paragraphs 184 to 193. In the course of expressing his concerns, Lord Walker also doubted the full implications claimed for *Anisminic* in the judgment of Lord Dyson.

56. In *Lumba*, Lord Brown maintained the distinction he had adopted in *Khadir*: see paragraphs 347 and 348. None of the other judges dissented on the point and the Supreme Court reached their conclusion in *Lumba* without disapproving the outcome in *Khadir*.

57. For these reasons we reject the Appellant's arguments based on the decision in *Lumba*. We regard *Khadir* as correct and binding on us on this point. Moreover, even if that were wrong, Section 67 of the 2002 Act remains in force and would operate to grant jurisdiction to the Commission to set terms for bail.

58. It may be helpful to emphasise that our conclusion as to the prospects of return to Algeria, as summarised above, are not so extreme as to mean there are no prospects of return, as in *Tan Te Lam*, so as to deprive the Secretary of State of the power to detain and thus remove the jurisdiction of SIAC to grant bail.

59. We have considered the further arguments from the Appellant on this point, specifically the lack of sanction for breach of bail, and the alleged breach of Article 5(1) of ECHR. In our view the fact that renewed detention in the face of breach of bail conditions might be said to breach the *Hardial Singh* principles is a difficulty, but cannot itself subvert the power to detain. In addition, the claim that actual detention would breach the Convention adds

nothing to the debate. Exercise of the power at the moment would be unlawful. The fact that it would breach the Convention adds nothing to the fact that it would breach domestic law.

60. It is worth adding that, at least in the theory and probably in practice, the fact that detention today would be unlawful does not necessarily prevent lawful detention tomorrow. If, for whatever reason, removal suddenly became a viable short-term prospect, the outcome of the application of *Hardial Singh* principles (or for that matter, ECHR Article 5) might well be different. In our view this consideration lends weight to the analysis of the powers to detain set out in *Khadir*.

Bail Following Strike Out

61. The Secretary of State submits that SIAC can properly continue to exercise the power to grant bail pursuant to Section 3 of the 1997 Act, because the powers are wider than the "bail pending appeal" power in Schedule 2 paragraph 29. Once a deportation order is made the relevant detention power is that set out in Schedule 3 paragraph 2(3) to the 1971 Act. SIAC can also exercise the Schedule 2 paragraph 22 general bail power. As a matter of history, such powers were exercised in relation to a number of Egyptian nationals detained on national security grounds, and from time to time in respect of the Appellant Othman.

62. For these reasons, we propose to continue the bail of the Appellant until further application.