Appeal No: SC/09/2005
Hearing Date: 19 July 2016
Date of Judgment: 15 September 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX

BETWEEN:

B

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Ms Stephanie Harrison QC and Mr Anthony Vaughan
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr Robin Tam QC
Instructed by:	Government Legal Department

JUDGMENT

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The Honourable Mr Justice Flaux:

Introduction

1. The Secretary of State applies to strike out this appeal on the grounds that the appellant is in continuing and contumelious contempt of court in failing to comply with the Order of the Commission that the appellant should disclose his true name and identity to the Secretary of State and to the Commission, alternatively for abuse of process. The appeal has already been struck out on these grounds by the judgment of the Commission (presided over by Irwin J) dated 1 July 2014. However, that decision was overturned by the Court of Appeal on 6 May 2015 ([2015] EWCA Civ 445; [2015] 3 WLR 1031), so far as the issue of strike out is concerned on the narrow ground that, in that judgment, the Commission had failed to address the appellant's reasons for refusing to comply with the Order which were, as Lord Dyson MR put it at [44] of his judgment, that the appellant: *"had a well-founded fear that if he [revealed his identity] he would put his family at risk of reprisals from the Algerian authorities"*.

2. In holding that the failure to address this issue was a material error, Lord Dyson MR said this at [50]-[55]:

> "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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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."

3. As recorded in that last paragraph, the case was remitted by the Court of Appeal to the Commission for further consideration of the issue of the risk of reprisals if the appellant disclosed his identity. This is the judgment of the Commission following a further hearing on 19 July 2016 at which that issue was considered. By agreement between the parties, the matter was dealt with by me alone.

The factual background

4. The factual background is tortuous and complicated, although not really in dispute. Much of it was set out in detail in the judgment of the Commission (again presided over by Irwin J) dated 13 February 2014 addressing issues as to the prospects of the appellant's removal to Algeria and whether the bail conditions imposed upon him constituted a deprivation of his liberty. So far as relevant, that background can be summarised as follows.

5. The important starting point is that, as the Commission said at [2] of that judgment: *"The appellant is very likely to be an Algerian national".* Indeed, when, on 14 June 2016, I lifted the appellant's bail conditions save for a residence condition, I found that, on a balance of probabilities, he is Algerian.

6. He arrived illegally in the United Kingdom in 1993. At the time of his arrest on immigration and criminal charges in 1994, he gave his name as "Nolidoni". In November 1994 he applied for asylum under the name "Pierre Dumond". He absconded from arrest, but was re-arrested and spent a year in prison. In May 1998 he was arrested in a series of arrests associated with the GIA, an Algerian terrorist organisation, but was released without charge. As the Commission subsequently found, he was actively involved during 2000 in the procurement of telecommunications equipment and in the provision of air time for satellite telephones for the purpose of terrorist activity.

7. On 5 February 2002, the appellant was detained under section 21 of the Anti-Terrorism, Crime and Security Act 2001 for three years until 11 March 2005, the last four months of that detention being in Broadmoor Hospital. He was then released from detention, but made the subject of a Control Order under the Prevention of Terrorism Act 2005. On 11 August 2005, he was notified of the intention of the Secretary of State to make a Deportation Order against him under sections 3(5) and 5(1) of the Immigration Act 1971. He was arrested and detained. On 17 August 2005, he appealed to the Commission against the decision to deport him.

8. The Commission commenced hearing the appeal on 17 July 2006, when it was agreed that the case fell into two parts: (i) the national security case and (ii) the safety on return case. For a number of reasons, including that the appellant refused to disclose his true identity, it was agreed that the safety on return case could not be dealt with. Accordingly, after the national security case had been heard, the appeal was adjourned part heard. On 11 December 2006 the Secretary of State made a formal request for information regarding his true identity through his solicitors. There was no response. On 12 January 2007, the Commission made a direction pursuant to rule 39(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ["the SIAC Rules"] that the appellant should provide information as to his true identity, including his full name, his place of birth and birth certificate or any other supporting documentation, the full names of both of his parents and their current addresses and all the addresses at which he had lived in

Algeria. He was also directed to give written consent to the taking of a non-invasive sample for DNA testing. The appellant consented to provide a DNA sample but otherwise refused to comply with this direction. His solicitors wrote on 19 January 2007, stating they were unable to provide further information.

9. On 3 May 2007, the Secretary of State made an application for an Order containing a penal notice that the appellant should provide the necessary information concerning his identity. The Commission made such an Order on 19 July 2007 in these terms:

> "By order dated 19 July 2007 you were directed to provide the following information:-
>
> 1. Your full name.
>
> 2. Your place of birth certificate, or any other documentation supporting this.
>
> 3. The full names of both parents and their current addresses.
>
> 4. All addresses at which you lived in Algeria.
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> You must within 14 days of the service of this order upon you comply with 1-4. If you, [the Appellant] disobey this order you may be held in contempt of court and may be imprisoned, fined or have your assets seized. Any other person who knows of this order and does anything which helps or permits the Appellant to breach the terms of this order may also be held in contempt of court and may be imprisoned, fined or have their assets seized."

10. That Order was served on the appellant personally in early September 2007. In February 2008, following the transmission of his fingerprints to Algeria, Interpol Algeria confirmed that the prints matched those held for an individual with the name "MB" born on 2 March 1971. The British Embassy in Algiers then sought assurances from the Algerian Ministry of Foreign Affairs regarding the appellant's treatment if he were returned to Algeria and asked for confirmation that it was accepted that he was an Algerian national. On 17 June 2008, the British Government received a *note verbale* from the Algerian Ministry of Justice stating that the appellant was not the person MB identified by Interpol Algeria.

11. On 30 July 2008, the Commission handed down Open and Closed judgments on the issue of the risk posed by the appellant to national security, which upheld the case of the Secretary of State. The Commission concluded that, notwithstanding his mental health difficulties, the appellant had played a leading role in facilitating communications for Algerian terrorists, as well as being responsible for the procurement of false documentation and high technology equipment. The Commission also

concluded that the appellant was deliberately refusing to disclose his true identity, in order to thwart the future progress of the appeal, and that this conduct was capable of amounting to an abuse of the due processes of law which he had invoked by pursuing the appeal.

12. On 18 August 2009, the Secretary of State applied to the Commission for an order for committal of the appellant for contempt in disobeying the Order of 19 July 2007. That application was heard on 22 December 2009, but was adjourned, following undertakings by the Secretary of State as to the use to which the information would be put, designed to procure compliance by the appellant, but he still refused to comply with the Order. After a period of many months, his solicitors wrote to the Commission on 6 July 2010 saying that after "extended deliberations" he was not prepared to provide further information about his identity. The letter read in part:

> "[B's] concluded view... is that he cannot, safely, provide more information without endangering family members in Algeria and that his priority must therefore be, as he considers it, the safety of his family."

13. The committal hearing continued on 11 October 2010 and, on 26 November 2010, the Commission gave judgment on the application, concluding that the appellant was in deliberate contempt. As the Commission found at [60] of its judgment:

> "[It is] proved beyond reasonable doubt that the appellant has made a conscious and rational decision to refuse to comply with that order, notwithstanding his mental health difficulties … 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."

14. The Commission ordered that the appellant be committed to prison for four months, but that the committal Order should be suspended pending his appeal to the Court of Appeal. He remained on bail. The appeal was heard on 6 July 2011 and, in its judgment of 21 July 2011, a majority of the Court of Appeal dismissed the appeal: *B (Algeria) v SSHD* [2011] EWCA Civ 828. In his judgment, Longmore LJ summarised the difficulty caused by the appellant's refusal to disclose his true identity, in particular the fact that, in the absence of any evidence of his identity, Algeria refused to recognise him as Algerian. As Longmore LJ put it at [5]:

> "B, by refusing to disclose his identity, appears to have successfully frustrated any attempt by the Secretary of State to deport him to Algeria or for that matter anywhere else."

15. The majority of the Court of Appeal rejected any suggestion that the sentence of four months imprisonment for contempt was excessive. Longmore LJ said:

> "Many people might think that a sentence of 4 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."

16. The Court of Appeal refused the appellant permission to appeal but certified two questions under sections 1(3) and 13(4) of the Administration of Justice Act 1960, in relation to the correct approach of the Court of Appeal (Civil Division) to appeals against sentence in contempt cases. The Supreme Court granted the appellant permission to appeal on 14 December 2011. The appeal was heard on 5 December 2012 and, by its judgment given on 30 January 2013, the Supreme Court dismissed the appeal.

17. At that point, the appellant was required to serve the sentence of four months imprisonment for contempt. Whilst serving the sentence, he was visited by an immigration officer who asked if he was now prepared to provide details of his identity. He refused to speak to the officer. He was released from prison on 5 April 2013.

18. At a hearing on 28 and 29 January 2014, the Commission considered issues as to the prospects of the appellant's removal to Algeria and whether the bail conditions imposed upon him constituted a deprivation of his liberty. In its judgment handed down on 13 February 2014, the Commission determined at [48]-[51] that, in relation to the first issue, the principal cause of the difficulties faced in removing the appellant to Algeria was his resolute defiance of the Order of the Commission that he disclose his true identity. As the Commission concluded at [51]:

> "…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".

19. The application of the Secretary of State to strike out the appeal was heard on 9 and 10 June 2014. By its judgment of 1 July 2014, the Commission struck out the appeal. The Commission concluded at [38] of that judgment that the appeal should be struck out because of his deliberate contempt and abuse of the process:

> "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 appropriate and just."

The judgment in *W and others*

20. As already noted, the basis upon which the Commission struck out the appeal in July 2014 was that the appellant's deliberate refusal to identify himself, in contempt of court, meant that he would have been able to manipulate the result of his appeal in his own favour. This was because, in the absence of evidence as to his identity, the Algerian government would not recognise him as Algerian and thus would not give the assurances in relation to this appellant which they had given in relation to others concerning safety on return. At the time of the first strike out hearing and, indeed, the subsequent hearing in the Court of Appeal, assurances had been sought and obtained from the Algerian government in other cases. In such cases, the Commission had determined that removal was compatible with Article 3 of the ECHR because those assurances were effective to obviate any risk of torture or ill-treatment.

21. However, the position as regards the effectiveness of such assurances has now changed, as a consequence of the judgment of the Commission (presided over by Irwin J) in *W and others v SSHD* [2016] UKSIAC SC/39/2015 on 18 April 2016. That decision concerned six of the Algerian nationals who were found by the Commission to constitute a threat to national security. The Court of Appeal in *BB and others v SSHD* [2015] EWCA Civ 9 had allowed their appeals against the previous decision of the Commission that the treatment to which they might be subjected on return to Algeria if deported would not violate Article 3 of the ECHR and had remitted their appeals to the Commission for rehearing and reconsideration. Following that rehearing, by its judgment dated 18 April 2016, the Commission decided that there was a real risk of a breach of Article 3 by virtue of ill-treatment, if the appellants were returned to Algeria, and that the means of verification advanced by the Secretary of State that the Algerian authorities would adhere to assurances given, did not amount to a robust system of verification. The appeals were accordingly allowed.

22. It will be necessary to consider that judgment in more detail hereafter, in the context of reliance upon it by the appellant in support of his position that disclosure of his identity would put his family at risk of ill-treatment in Algeria. For the present, it is simply to be noted that the judgment was in relation to issues common to all those Algerian appellants, a generic decision, not one specific to the particular circumstances of the individual appellants. The Commission expressed its conclusion at [116] in these terms:

> "Our conclusions can be simply stated. Viewing the evidence as a whole we are not convinced that the improvements in conditions in Algeria are so marked or so entrenched as to obviate the need for effective verification that the authorities will adhere to the assurances given. It is not inconceivable that these Appellants, if returned to Algeria, would be subjected to ill-treatment infringing Article 3. There is a real risk of such a breach. The different means of verification of adherence advanced by the Respondent do not, taken together, amount to a robust system of verification."

23. At [118] the Commission recorded that it had canvassed with the parties whether, in the event that the appellants succeeded on these common issues, the Commission should go on to consider the issues in the individual cases and the parties had agreed that the Commission should not do so.

24. On behalf of this appellant, Ms Stephanie Harrison QC submits that the same generic conclusion would and should be reached in the case of the appellant, on the basis that, despite his failure to reveal his true identity, the Commission has concluded that on a balance of probabilities he is Algerian. Accordingly, the thrust of her submissions is that the decision in *W and others* means that the Commission should adopt a completely different approach to the issue whether, given the appellant's admitted and deliberate contempt, his appeal should be struck out, to that adopted by the Commission in its judgment of 1 July 2014. This is because, she submits, if the appeal is allowed to proceed, it will succeed for the same generic reasons common to all Algerian appellants as in *W and others* (indeed Ms Harrison QC invited the Commission to allow the appeal now), not because of any previous manipulation of the system or abuse of process by the appellant in failing to disclose his identity. I will return below to these arguments and to the answers to them advanced by Mr Robin Tam QC on behalf of the Secretary of State. First, having set out the legal framework against which the application to strike out the appeal is to be considered, I will consider the issue on which the Court of Appeal allowed the appeal, the risk of ill-treatment of the appellant's family if he were to disclose his identity and this became known to the Algerian authorities.

The applicable legal principles

25. The Secretary of State seeks to strike out the appeal on two related grounds: (i) the appellant's continuing and deliberate contempt of court and (ii) the appellant's abuse of the legal process which he has invoked by his appeal to the Commission. So far as the contempt of court is concerned, the Commission, like any other court has a free-standing discretion as to whether to hear the contemnor. The applicable principles are set out in [9]-[28] of the judgment of Moore-Bick LJ in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 639 as further considered and applied by Popplewell J in the later judgment in the same case of contempt: *JSC BTA Bank v Ablyazov* [2013] EWHC 1979 (Comm). Popplewell J summarised those principles at [13] of his judgment:

> "Ultimately, the question is whether, taking into account all the circumstances of the case, it is in the interests of justice not to hear the contemnor. Refusing to hear a contemnor is a step that the court will only take where the contempt itself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Justice Denning in *Hadkinson v Hadkinson* [1952] P 285 and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make: see page 298."

26. At [20] of his judgment, he continued:

> "One of the justifications for the principle is that a contemnor is to be deprived of the opportunity to seek to influence the court's decision-making process if he does not recognise the authority of the court and is not willing to abide by its decisions. In this particular case, Mr Ablyazov wishes to have his submissions addressed to the court in order … to safeguard his interests in relation to the order which the Bank seeks. That is an attempt on Mr Ablyazov's part to influence the court's decision so as to take account of his interests. The reason, or one of the reasons, why a contemnor may not be permitted to do that, is that 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."

27. Mr Tam QC relied upon those principles in support of his overriding submission that, through his defiant refusal to comply with the Commission's Order to disclose his identity, the appellant has shown that he does not recognise the authority of the Commission and is not prepared to abide by its decisions. In those circumstances, Mr Tam QC submits that the Commission should not permit the appeal to proceed.

28. In relation to abuse of process, Rule 11B of the SIAC Rules provides expressly that the Commission may strike out a notice of appeal if it appears to the Commission that it is an abuse of the Commission's processes. That is a power which would be available to the Commission in any event as a matter of inherent jurisdiction.

29. The circumstances which might amount to abuse of process are not circumscribed, as is clear from the classic statement of principle by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536:

> "This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the

> administration of justice into disrepute among right-thinking people. 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."

30. That statement of principle was cited and approved by Lord Clarke in the judgment of the Supreme Court in *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004. That was a case concerning fraudulent exaggeration of injury by a claimant and the question which arose was whether the court could strike out the claim as an abuse of process even after trial. The Supreme Court held that the court could strike out a statement of case at any stage of proceedings, including after trial, although the power would only be exercised after trial in exceptional circumstances, where the court was satisfied that the abuse of process was such that the abusive claimant had forfeited the right to have the claim determined. The factual circumstances of that case are thus far removed from the present case, but the relevant principles as stated by Lord Clarke are applicable in any case of abuse of process.

31. At [34] of the judgment, Lord Clarke stated that, in this exceptional class of case, it was appropriate to have regard to the way in which the inherent jurisdiction of the court had been exercised before the Civil Procedure Rules came into force. At [35] he stated, inter alia, as follows:

> "The pre-CPR authorities established a number of propositions as follows.
>
> (i) The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the defendant, but also where the court was satisfied that the default was "intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court": *Birkett v James* [1978] AC 297, 318, per Lord Diplock. In the latter case it was not necessary to show that a fair trial was not possible or that there was prejudice to the defendant. See also, for example, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, 1436H, per Lord Woolf MR (with whom Waller and Robert Walker LJJ agreed).
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> [Lord Clarke then cites at (ii) the passage from *Hunter* set out above.]
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> (iii) The court had power to strike out a claim on the ground of abuse of process, even though the effect of doing so would be to extinguish substantive rights. It follows from the conclusion in *Birkett v James* [1978] AC 297, that the court could strike out a claim as an abuse of process for intentional and

> contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice, that the fact that a strike out might extinguish substantive rights is not a bar to such an order.
>
> (iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case."

32. Mr Tam QC relied (as he had at the previous strike out hearing before the Commission in 2014) upon what Lord Clarke stated at [62]:

> "…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."

Risk of ill-treatment

33. With those principles in mind, I turn to consider the appellant's case that, whilst it is accepted on his behalf that he is in contempt of court, the reason for his refusal to comply with the Order is a well-founded fear that, if he does disclose his identity, there is a risk of reprisals against his family in Algeria, particularly from the Algerian Security Service, the DRS. Ms Harrison QC, whilst recognising that the appellant is nonetheless in contempt, submits that his refusal to provide his identity is explicable in those circumstances, so that it would be disproportionate to strike out his appeal.

34. One of the striking aspects of this case, is that, although Lord Dyson MR referred to the appellant having: *"a well-founded fear that…he would put his family at risk of reprisals…"* there is simply no evidence from the appellant to that effect. Nor has he adduced any evidence from himself or anyone else that his family in Algeria would be or might be at risk of reprisals. Indeed, he has not in fact adduced any evidence that he has any family in Algeria at all. The highest it can be put on his behalf is that, in an interview with a psychiatrist who produced a report on him in March 2004 (a report which was put before the Commission at the present hearing), he asserted that he had family in Algeria. What is essentially relied upon on his behalf is material concerning the risks of reprisals by the DRS against family members of returned Algerians, gleaned from other Algerian cases before the English courts.

35. Mr Tam QC's response is that none of that material even begins to support a case that merely revealing his identity would lead to a risk of reprisals against the appellant's family. Those other cases concern the effectiveness of the verification system to ensure that the Algerian authorities are complying with their assurances that returned suspected terrorists will not be ill-treated. Part of that verification system has been information from

family members, but they have become reluctant to speak out about ill-treatment of their relatives for fear of reprisals from the DRS. That is the context in which the risk of reprisals has arisen, namely the risk of reprisals for speaking out. Mr Tam QC submits that there is no evidence of any risk of reprisals simply for being a family member. In the circumstances, it is necessary to look at the evidence in those other cases, specifically *W and others*, more closely.

36. The case of *W and others* is one of a number of appeals before the Commission commenced in 2005 by Algerians involved in terrorist activities who were resisting return to Algeria. The issue of safety on return for various of these appellants was considered by the Commission in *U v SSHD* [2007] UKSIAC 32/2005. One of these, Q, was detained on his return to Algeria by the DRS. Amnesty International expressed concern that he would be subject to torture and an official in the British Embassy spoke to Maitre Mohammed Amara, a judge and senior official at the Algerian Ministry of Justice who gave assurances that Q had spoken to his family. His family subsequently visited him in prison. Another returned Algerian national, H, was detained on his return. The evidence before the Commission was that he had had contact with his brother and his mother whilst in detention. Mr Tam QC submitted that this picture of contact with family members on return was wholly inconsistent with the suggestion that there was a risk of reprisals by the DRS against family members simply for being family members. If that were so, they would have made themselves scarce and not had any contact.

37. The decision of the Supreme Court in *W(Algeria) v SSHD* [2012] UKSC 8; [2012] 2 AC 115 recognised that in appropriate cases, the Commission could make, on an *ex parte* basis, irrevocable non-disclosure orders giving confidentiality to potential witnesses who wished to give evidence of ill-treatment of returned persons but feared ill-treatment themselves if they gave such evidence. Lord Dyson JSC identified the circumstances in which such an order would be appropriate at [34] of his judgment:

> "SIAC should be astute to guard against the danger of abuse and should scrutinise with great care and test rigorously the claimed need for an order. But if SIAC (i) is satisfied that a witness can give evidence which appears to be capable of belief and which could be decisive or at least highly material on the issue of safety of return and (ii) has no reason to doubt that the witness genuinely and reasonably fears that he and/or others close to him would face reprisals in Algeria if his identity and the evidence that he is willing to give were disclosed to the AAs, then in my view an irrevocable non-disclosure order should be made."

38. Following that determination that the Commission could make such orders, the Commission did make protective orders in *W and others* because it was satisfied that potential witnesses had reasonable concerns about reprisals if the evidence they would give were known to the Algerian authorities. At the subsequent hearing before the Commission, evidence

emerged about the conditions in which returned Algerians were held at Antar barracks for up to twelve days upon arrival in Algeria, so called *Garde a vue* detention. This evidence emerged because of the detention of AB, a British citizen who was deaf. Because he was British, details of what had happened to him were passed to the British Embassy. It was accepted by Mr Anthony Layden, a witness called by the Home Office who was the Special Representative for Deportation with Assurances ("DWA") at the time, that his treatment had been degrading (see [6]-[9] of the judgment of Sir Maurice Kay in *BB and others* [2015] EWCA Civ 9). Ms Harrison QC pointed out that appellants who had been returned to Algeria, including Q and H in 2007, had been subjected to *Garde a vue* detention for up to twelve days on return.

39. Given such detention, the Commission considered whether the means of verification was adequate and, at [40] of its judgment in *BB and others v SSHD* [2013] UKSIAC 39/2005, the Commission (presided over by Mitting J) concluded that they were adequate. In relation to verification through contact with family members, the Commission said:

> "British embassy contact with the detainee and family members, before, during and after release, if facilitated by them, is effective, as the case of Benmerzouga demonstrated (T § 17). We do not accept Miss Rose's submission that family members will be deterred from contact with the British embassy or may not tell the truth out of fear of the Algerian authorities. Two striking open examples demonstrate why that proposition is erroneous. Q, from within Serkadji Prison, wrote an open letter in his own name to Ouseley J protesting about the treatment which he said he had received in garde a vue detention and then in prison. Benmerzouga confirmed the date of his release and that he was well and at home by telephone to a female British embassy official. Miss Rose did not suggest that he had not told the truth. She did, however, advance a further proposition that no Algerian will dare speak on the telephone about malpractice by the DRS, for fear of the consequences, because telephone calls are intercepted. We regard this proposition as far-fetched. Not even the DRS has unlimited manpower and resources. It would be unproductive to devote both to monitoring the telephone calls of detainees who have been released, because there was no ground upon which to detain or prosecute them. The proposition that it will is untenable."

40. In the Court of Appeal, Sir Maurice Kay dealt with this aspect of verification at [37]-[41] of his judgment. At [39], he said:

> "It seems to me that we can only begin to question the reliance by SIAC upon family members as an effective source of verification if Ms Rose can persuade us that the "far-fetched" comment cannot be justified because the evidence established that family members are significantly deterred from

complaining about the ill-treatment of detainees and the conditions in which they are held because they fear that their telephone conversations with British officials will be intercepted by the DRS and they will thereafter be at risk of reprisals. In this connection, Ms Rose relies principally on the evidence of Mr Anthony Layden. I have read again the transcript of his cross-examination by Ms Rose. Although it took place in protected conditions, I consider that the following edited extracts can be included in this open judgment:

> 'Q: Do you accept that it is correct that telephone calls in Algeria are routinely monitored or are believed to be monitored by the DRS?
>
> A: Yes. I do not think that the monitoring is universal but the DRS probably ….that will be one of the main ways they access information.
>
> Q: So if people are afraid that information that they are giving would lead to adverse attention from the DRS, they will not be prepared to give that information by telephone, will they?
>
> A: I agree.
>
> ……
>
> Q: You have accepted … that telephone calls are often monitored in Algeria.
>
> A: Yes.
>
> Q: The assurances that you have with the Algerian state do not protect family members, do they?
>
> A: They do not. They only protect the detained deportee
>
> …..
>
> Q: Will you accept that the fear of members of the family may be particularly great when other members of the family, not just the person in detention, have themselves been harassed or abused by the DRS?
>
> A: That is a reasonable point to make, yes.
>
> …..
>
> A: It is a fair point to make that they might be afraid to talk to the British Embassy. On the other hand, and I have to say this, again and again I come to the and yet question ….documented allegations of ill-treatment of people in

> Algeria have consistently come out, even in times when the situation was much more terrifying than it is today, so the Algerian authorities must calculate, if they did that to one of our people, we would get to know about it.'"

41. At [40] Sir Maurice Kay comments on this evidence:

> "At the very least, this evidence established both that the DRS do monitor telephone calls (which were the means of communication encouraged by the British Embassy) and that people, including family members, may consequently feel inhibited about saying anything in the course of such conversations which might lead to reprisals. It would be a subjective fear with an objective justification."

42. The Court of Appeal allowed the appeal and remitted the cases to the Commission for rehearing and redetermination. At the rehearing, presided over by Irwin J, evidence was given by Dame Anne Pringle, the successor of Mr Layden as Special Representative for DWA. The Commission dealt with verification through family members at [80]-[87] of the judgment (*W and others* [2016] UKSIAC 39/2005). At [80] and [81], the Commission said:

> "80. The first point to consider in this context is the question whether a detainee who is being mistreated will raise a complaint with his family during telephone contact. There is no evidence upon which we could conclude that the telephone conversation will be confidential. Common sense suggests that many detainees might choose not to raise a complaint in such circumstances for fear of stimulating reprisal. Equally, if a complaint were raised, many families might take a similar view. There is the further consideration that, if a detainee and his family felt it was too risky to complain of mistreatment at the time, then subsequent complaint may be dismissed because the complaint was not made at the time.
>
> 81. At several points in her evidence, Dame Anne expressed a very firm view that families who were informed by a detainee of mistreatment would always complain, such would be their concern for their relative. We consider her view here to be definitely too sanguine."

43. Having considered the other evidence about fear of reprisals against family members, the Commission concluded that family members were not only justified in being afraid if they made a complaint but that they would actually be afraid, in these terms at [87] of the judgment:

> "In considering publicity or public complaint by families as a means of verification, the question must not be confined to asking whether family members are justified in being afraid:

> the question must be, at least in part, whether they will actually be afraid. Taking a "holistic" view of this issue, we cannot conclude with any confidence that families would report misconduct unless they are confident they will get a positive response from the authorities or the press, the legal system, or the British embassy. Moreover, complaint by families can only be effective if it can evoke a protective, or helpful, response from others in a position of power or influence. In practical terms, the calculation for a detainee and his family as to whether to raise a complaint must relate to the response by the press, the Algerian authorities, NGOs and/or potentially the British embassy."

44. Ms Harrison QC submitted that this passage demonstrated that neither the press nor the Algerian authorities, nor the NGOs nor the lawyers and courts were sufficient to protect individuals from reprisals. She submitted that, overall, the judgment of the Commission in *W and others* does demonstrate that there is a climate of fear of reprisals by the DRS, infecting the whole system in Algeria, including courts and lawyers as well as doctors.

45. She relied in addition upon a number of other pieces of evidence, including the DWA Checklist of Actions for the British Embassy in Algiers. This stated, inter alia: *"All DWA contact with Algerian officials, returnees and their families must be recorded meticulously and reported to London as soon as possible (usually within 24 hours). Any concern about the welfare of a returnee, his family or lawyer should be reported immediately to Special Cases Team in CTD."* Ms Harrison QC submitted that this recognised the need for concern about reprisals against family members and lawyers, not just against the returnees themselves. Ms Harrison QC relied upon evidence in chief about that Checklist from Dame Anne Pringle in *W and others*. Asked why the welfare of the family and lawyer had been specifically included, she said: *"I assume that would have been included because of what we were discussing earlier about potential threats to people involved in cases where the DRS were involved."*

46. Asked whether in her estimation it was necessary to ask the Algerian Government to provide assurances in respect of families and lawyers she said: *"I would think that would be advisable".* A little later she expanded on that point: *"No, I was saying it came back to my earlier point, assurances for the returnees but making clear to the Government of Algeria that we are in touch, if we are, with the family and lawyers and that that contact is there".*

47. Ms Harrison QC submitted that making this clear to the Algerian authorities was necessary because of the recognition that family members and lawyers of terrorist suspects may be at risk of reprisals from the DRS. Ms Harrison QC also relied upon an anonymised statement dated 23 November 2012 of a witness who had travelled to Algeria in 2008 to determine the risks faced inter alia by returnees. This referred to the fact

that lawyers for terrorist suspects were regarded by the President as traitors and were the targets of prosecution themselves.

48. Ms Harrison QC submitted that this risk of reprisals including against the family was recognised generally by the Home Office in the Immigration Rules, paragraph 339 IA of which provide:

> "339IA. For the purposes of examining individual applications for asylum
>
> (i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant, and
>
> (ii) information shall not be obtained from the alleged actor(s) of persecution that would result in their being directly informed that an application for asylum has been made by the applicant in question and would jeopardise the physical integrity of the applicant and his dependants, or the liberty and security of his family members still living in the country of origin."

49. Mr Tam QC submitted that none of this material formed any evidential basis for Ms Harrison QC's assertion on behalf of the appellant that he had a well-founded fear of the risk of reprisals against his family if he revealed his identity. Mr Tam QC pointed out that the usual position would be that an appellant's identity would be established and then verified by the Algerian authorities, and there was simply no evidence of family members then being subject to reprisals from the DRS merely because they were the family of the appellant. The context of all the evidence in the various Algerian appeals about risk of reprisals against family members, including the evidence of Mr Layden on which Ms Harrison QC placed considerable reliance, was that there was only such a risk of reprisals against family members if they spoke out against the DRS.

50. Despite Ms Harrison QC's valiant efforts to conjure up from a general climate of fear some evidence that there is a risk of reprisals by the DRS against family members merely by virtue of being family members, I agree with Mr Tam QC that there is no such evidence before the Commission. Upon a proper analysis, all the evidence relied upon by Ms Harrison QC is only of the fear of reprisals against family members if they speak out. This emerges very clearly from the passage in the judgment in *W and others* at [80] to [87] dealing with the efficacy of verification by family members. Nothing in that passage supports the wider case asserted by Ms Harrison QC.

51. Equally, that was also the context of the DWA Checklist, namely the family being relied upon for verification, not some generalised concern that family members might be persecuted. If this was not clear from the Checklist itself, it was clear from Dame Anne Pringle's evidence about it. The piece of her evidence I quoted at [46] above is clearly dealing with contact with family as part of the verification process. Furthermore, I agree

with Mr Tam QC that the relevant parts of the anonymised witness statement being relied on are concerned with fear of reprisals against people, particularly lawyers, who speak out and make complaints against the DRS.

52. None of this provides a sound basis for concluding that, even if, subjectively, the appellant has the fear asserted by Ms Harrison QC (and as I said at the outset of this section of the judgment, there is no evidence from the appellant that he does have such a fear), there is any objective justification for it. It does not seem to me that the general provision in the Immigration Rules takes matters further or improves the appellant's position.

53. In her submissions, Ms Harrison QC also asserted that there was relevant evidential material in *W and others*, which was subject to a protective non-disclosure order, which supported the appellant's case on the risk of reprisals against family members. Mr Tam QC rightly submitted that the starting point must be that, in the absence of an Order of the Commission admitting that protected evidence, it is inadmissible. He had not been part of the protective "ring" in *W and others* and so did not know what protected evidence there was. On the face of it, the protective order would only have been made by the Commission if satisfied that the relevant witness had a genuine fear of reprisals if his or her identity were revealed and the order made would be absolute and irrevocable unless that witness agreed to its variation. There was no evidence that any witness who had given evidence subject to the protective order in *W and others* had given permission for that evidence to be used in the present case.

54. I agree with Mr Tam QC that it would be wrong for the Commission to give any credence to this point, particularly in circumstances where I have not seen the evidence being referred to. I do not need to make any findings about it, but there does seem to be considerable force in Mr Tam QC's point that, if that evidence had really been of any significance to the present appeal, the appellant would surely have taken steps to obtain the consent of the witnesses to it being referred to and Ms Harrison QC would almost certainly have argued her case differently.

55. In all the circumstances, I conclude that there is no basis for the appellant's case that his refusal to disclose his identity can be justified or at least explained by his fear of reprisals against his family if he does so. His refusal to disclose his identity remains unjustified and can only be explained as part of his deliberate decision not to cooperate with the Commission, notwithstanding that it is he who has invoked the appeal process. He remains in contumelious and deliberate contempt of court. I return to the issue identified at [24] above which is whether, notwithstanding that contempt and his previous manipulation of the process, the generic decision as regards Algerian appellants in *W and others* has effected a sea change as regards this appeal so that it could and should succeed on the same generic grounds, or whether, as the Secretary of State contends, the contempt and abuse of process remain so serious that the appeal should still be struck out, notwithstanding *W and others*.

Should contempt and/or abuse of process still lead to striking out?

56. As I have already indicated at [24] above, Ms Harrison QC, whilst admitting that the appellant remains in contempt, submits that it would be disproportionate to strike out his appeal in circumstances where, notwithstanding his refusal to disclose his identity, the Commission has decided that he is an Algerian, so that, she submits, his appeal would be bound to succeed on the same generic grounds as in *W and others*, not because of any manipulation of the process before the Commission in which he has engaged in the past. She submits that the clear rationale for the decision of the Commission at the previous hearing that the appeal should be struck out (and for that matter of the Court of Appeal in dismissing the appeal in relation to the contempt) was that he was using his refusal to reveal his identity to manipulate the proceedings before the Commission, so that the appeal would have to be concluded in his favour if it proceeded. That was why it was objectionable and contrary to justice to permit the appeal to proceed in those circumstances.

57. However, she submits the position is now completely different. As a consequence of the generic decision in *W and others*, the appellant's appeal if allowed to proceed, should succeed for the same generic reason, to which his deliberate refusal to disclose his identity is of no relevance, because the Commission has already found that, on a balance of probabilities, he is Algerian, so that his return to Algeria would be in breach of Article 3. In those circumstances, striking out his appeal would be disproportionate and unjust. In addition, whilst he has not purged his contempt, he has served the sentence of imprisonment which was his punishment for it, so that it would be disproportionate to punish him again by striking out the appeal.

58. Mr Tam QC urged the Commission to maintain the position which commended itself to the Commission on the last occasion and strike out the appeal. He accepted that it was arguable that, in the light of *W and others*, the outcome of the appeal would now be the same whether or not the appellant purged his contempt and disclosed his identity, but submitted that this case was not about outcome, but about the propriety of the process and about justice. He submitted that despite the fact that *W and others* would have an effect on the outcome of the appeal, it remained the case that, for a long time, this appellant has manipulated the process of the Commission and that should be weighed in the balance against the point that the appeal should be allowed to succeed on the basis of *W and others*. The interests of maintaining the integrity of the court and of the system of justice should outweigh that point and lead to the appeal being struck out.

59. Mr Tam QC submitted that the appellant was still preventing the Commission from having all the evidence about him available in order to achieve a just result. He submitted that the appellant was, in effect, forcing the Commission to treat him as one of the main cohort of Algerians to whom the principles in *W and others* would apply and the process was accordingly unfair. Any Order in his favour would still mean that he was profiting from his contempt and manipulation of the process. Mr Tam QC

submitted that this was not a case where the Commission need have any concern that the effect of striking out the appeal would be to extinguish the appellant's Article 3 rights. The relevant right is not to be deported to a country where he would or might suffer ill-treatment. Striking out the appeal would not extinguish that right: if any question arose hereafter of seeking to deport him to Algeria, he would be able to exercise that right again.

60. Of course, I recognise that it is important that the Commission, like any other court, should be assiduous to protect the authority of the court and the integrity of its process and to demonstrate to litigants that they cannot defy the court with impunity or manipulate the process to achieve their own ends. That is precisely why the courts are under the duty in relation to abuse of process which Lord Diplock recognised in *Hunter*. The deterrent effect of striking out claims by those who defy the authority of the courts and abuse the process is an important aspect of the power to strike out. Equally, I agree with Mr Tam QC that, where there is a contempt of court which involves continuing manipulation of the process, it is no answer for the contemnor to say that he has served his sentence of imprisonment.

61. All the authorities, both in the context of contempt of court and abuse of process, recognise that striking out is not inevitable where a party is in contempt or abusing the process. There is a balancing exercise between what justice requires in terms of protection of the process and discouragement of abuse and what justice requires in terms of a just and fair result of the litigation. Where the court comes down in conducting that balancing exercise will depend upon the seriousness of the contempt or abuse, particularly the extent to which it would lead to the party in contempt or abuse manipulating the result of the litigation.

62. In the circumstances, if I considered that the appellant's continuing and deliberate refusal to disclose his identity was still operating to any extent in determining the outcome of this appeal, I would have no hesitation in striking out the appeal, particularly in circumstances where, as I have found, there is no evidence of a fear of reprisals against his family, which might have gone some way towards justifying the appellant's position. However, it seems to me that his refusal to disclose his identity will no longer have any effect on the outcome of the appeal. Irrespective of that refusal, he is clearly an Algerian and, as such, cannot be returned to Algeria for exactly the same generic reasons as the appellants in *W and others* (and the other Algerian appellants in relation to whom the secretary of state has accepted that those reasons would apply).

63. Although Mr Tam QC maintained that the appellant was still preventing the Commission from having all the evidence before it and achieving a fair result, when I asked him what difference he contended disclosure of the identity of the appellant could make to the outcome of the appeal in the light of *W and others*, he was unable to provide a convincing response. His suggestion that it might, for example, emerge that the appellant was actually a close relative of someone in the Algerian authorities, so that he and his family would not in fact be at risk was, with respect, entirely

fanciful. If that were the position, it is inconceivable that the appellant would have refused to disclose his identity in the first place. It does not seem to me that the Secretary of State can realistically identify any evidence of which the Commission has been deprived which would lead to a different result in this appeal from that in *W and others*.

64. Accordingly, although I do not underestimate the seriousness of the appellant's contempt and his previous manipulation of the process, I consider that the refusal to disclose his identity is no longer operating to achieve a particular result in this appeal. In the circumstances, it would be disproportionate to strike out the appeal and I decline to do so.

65. In the light of that conclusion, it is not necessary to deal with the point as to whether striking out would extinguish the appellant's Article 3 rights, although I incline to the view that Mr Tam QC is correct that his rights would not be extinguished by striking out. Indeed, Mr Tam QC has accepted at previous hearings that, even if the appeal were struck out, as matters stand the Secretary of State could not procure the removal of the appellant who would have leave to remain, albeit possibly on conditions.

The outcome of the appeal

66. Ms Harrison QC urged the Commission, if it did not strike out the appeal, to proceed to determine it in the appellant's favour on the basis that his case was indistinguishable from that of the other Algerians to whom the principles established in *W and others* would apply. I see considerable force in that submission. However, in fairness, it seems to me that the Secretary of State should be afforded an opportunity to put forward any further submissions as to why the Commission should not apply *W and others* and allow the appeal. I will allow the Secretary of State 14 days from the date of hand down of the judgment in which to put forward any submissions in writing or to indicate that, in the light of this judgment, it is accepted that the appeal succeeds. If submissions are put forward, the appellant's representatives are to have 14 days thereafter to put in any submissions in response. In that event, I will either convene a further hearing to determine the appeal or, if the parties agree, determine the appeal on paper.