SPECIAL IMMIGRATION APPEALS COMMISSION

Field House,
Breams Buildings
London

21st May 2013

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN

BETWEEN:

R1

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MS S HARRISON QC and MR N AHLUWALIA (instructed by Birnberg Peirce and Partners) appeared on behalf of the appellant.

MS L GIOVANNETTI QC and MR P GREATOREX (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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JUDGMENT

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Mr Justice Irwin:

Introduction

1. The Appellant is a Moroccan national born on 15 August 1977. He seeks to set aside the Order issued by the Special Immigration Appeals Commission ["SIAC"] of 25 February 2013, striking out his appeal against the decision of the Secretary of State for the Home Department ["SSHD"], refusing him leave to enter and rejecting his claim for asylum. His appeal was struck out for failure to comply with directions pursuant to paragraph 40(1) (c) (ii) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ["The SIAC Procedure Rules"].

Background and Chronology

2. On 11 February 2011, the Appellant was refused leave to enter in the United Kingdom. On 18 February 2011, he filed notice of appeal to SIAC. A number of interlocutory steps were taken and directions given, with the conclusion that a final hearing in his case was fixed for 4 June 2013. The Appellant was granted bail on 19 April 2011 after a contested hearing. The Secretary of State objected to bail, in large measure as a response to the Appellant's history of document fraud and immigration offending.

3. The arrangements for bail for this Appellant were in the usual highly structured form, centred upon an address provided for the specific purpose of his residence under strict conditions. As with other appellants, the residence provided had to be suitable for the security of individuals such as this. As from the latter part of 2011, the Appellant had as a condition of his bail to reside at an address chosen for the purpose in North London. Alongside that condition of bail were a number of other stringent conditions, including the wearing of an electronic monitoring tag, curfew hours when he was obliged to remain in the premises, frequent and regular reporting to a monitoring company by telephone, and physical self report to a specific address every second Monday.

4. On or around 27 January 2013 the Appellant absconded. On Tuesday 29 January the Treasury Solicitor alerted SIAC to the absconding. The relevant letter pointed out that the absconding was a breach of the condition of the Appellant's SIAC bail and went on to give details as follows:

> "Initial enquiries by the police suggest that he has been absent from his residence since leaving the property earlier [on Sunday] and that he has deliberately absconded, having taken with him clothes and other items……UKBA and the police do not currently know the Appellant's whereabouts and neither have his solicitors been able to provide any further information on this. Apart from concerns directly connected with absconding, it also follows that there is uncertainty regarding the ongoing appeal in respect of which HMG are continuing to deploy considerable resources. As an illegal entrant with a history of document fraud and immigration offences, we cannot

> rule out that the Appellant may have left the UK. SIAC will be aware that under Section 104 (4) of the Nationality Immigration and Asylum Act 2002 and Section 2 (4) of the Special Immigration Appeals Act 1997, the Appellant's immigration appeal must be treated as abandoned if he leaves the UK. With these points in mind we would invite SIAC to direct under Rule 39 that the Appellant should immediately surrender to a police officer or immigration officer for arrest……and confirm through his solicitors by 4.00pm on Friday 1 February 2013 that he is continuing to appeal. Should he fail to comply with this direction we would invite SIAC to strike out the SIAC appeal under Rule 40."

5. On 31 January 2013 SIAC wrote to the Appellant's solicitor to the Treasury Solicitor and to The Special Advocates Support Office ["SASO"] with the following directions given by me:

> "I direct forthwith the Appellant should immediately surrender to a police officer or immigration officer for arrest under paragraph 33 schedule 2 to the Immigration Act 1971.
>
> I direct that the Appellant should consider, by himself or through his solicitors, as soon as possible and in any event before 4.00pm on Friday 22 February 2013, indicating that he intends to continue with his appeal.
>
> I direct the Appellant's solicitors use their best endeavours to alert the Appellant to these directions.
>
> Matters are too uncertain at this stage to assume this appeal will not proceed. The balance of advantage lies with keeping the matter on track for a material period, so as to avoid prejudicing the timetable.
>
> Accordingly all parties must continue to adhere to the directions laid down. If at any stage any party has information which will affect the progress of the appeal, they should inform all concerned as soon as practicable and make suitable application to SIAC. Specifically, if any party has information as to the whereabouts of the Appellant then SIAC should be informed. In the absence of information, the SSHD may renew the application made in the letter of 29 January as from 10.00am on Monday 25 February 2013. Such application should be on notice to the Appellant's solicitors who should inform SIAC then as to their state of knowledge regarding the Appellant. I will consider how to proceed in the light of the information then available."

6. There was no indication from the Appellant's solicitors that they were reluctant to be used as the address for service of the Appellant, or as the point of contact for any relevant information. They were of course on record

as the Appellant's solicitors in this appeal. The Appellant's solicitors were also, within the knowledge of the parties, on record for the Appellant in continuing civil proceedings and Judicial Review proceedings, aside from the SIAC appeal.

7. Nothing more was heard from or of the Appellant during the bulk of the month of February. On 22 February the Appellant's solicitors emailed SIAC in the following terms:

> "Dear SIAC
>
> I write further to the Judge's directions of 31 January 2013.
>
> I have not had any contact with R1 and in the ongoing absence of his instructions it is with regret that I inform SIAC that I am withdrawing from representation of R1."

8. By 25 February nothing more had been heard from the Appellant. On that day the Secretary of State indicated by email that she wished to renew the application to strike out the appeal. On that day therefore I made an order striking out the Appellant's appeal, pursuant to paragraph 40 (1) (c) (ii) of the Procedure Rules. I also made an order releasing the parties from existing directions, including the obligations for disclosure of the defendant. By my direction, the order striking out the appeal was served on all the parties' solicitors including the appellant's solicitors. The Order was not served on the Appellant's former address in North London.

The Detention of the Appellant

9. On 27 March 2013, in the course of a routine search of a restaurant in Manchester, the Appellant was discovered working illegally and was detained. Birnberg Peirce and Partners were instructed once more in relation to this matter. They went back on the record on the same day.

10. The Appellant was then "brought before" SIAC in a telephone hearing on the following day, 28 March. He was represented by solicitors and counsel in that hearing, which also involved the Treasury Solicitor on behalf of the Respondent. His SIAC bail had of course been revoked, and no application for bail was made on that occasion, the Appellant thus being remanded in detention. It became clear during the course of the telephone hearing that the Appellant sought to restore his appeal and sought to raise a number of arguments as a means of so doing. I gave a number of directions including a direction that the Appellant should file and serve grounds for the restoration of the appeal, should file and serve any evidence to be relied upon by 19 April and by the same date submit a skeleton argument. Grounds of Appeal were lodged on 29 March. Written submissions were also filed and served but no evidence was submitted by 19 April. Indeed before the hearing of argument in this matter on 21 May 2013 no evidence at all was served, save for a copy of an attendance note between the Appellant's solicitor and the SIAC office, which confirmed that the order striking out the appeal had not been sent to the Appellant's former residence.

The Grounds of Appeal and Response

11. The Appellant submits overall that "his appeal *should not be* (emphasis added) struck out." His Counsel advance 5 grounds. Firstly, without prejudice to the submission that the proceedings "have not been finally determined", the Appellant submits that the order issued by the Commission has the effect of finally determining his appeal pursuant to paragraph 26 of the Procedure Rules. Further, that the Appellant may seek permission to appeal against the determination of his appeal pursuant to paragraph 26 of the Procedure Rules. Thirdly:

> "Whilst the Commission issued directions on 31 January 2013 setting out what was required of A and his solicitors …..the Commission did not thereafter serve on him a notice which stated (i) the respect in which he had failed to comply with the directions (i.e. the directions issued on 31 January 2013) and (ii) a time limit for complying with the direction; in other words the Procedure Rules require that the Commission ought first to give a party failing to comply with the directions an opportunity to comply, before taking the further decision to strike out an appeal. It is submitted that the affect of this omission is to vitiate the order."

12. Fourthly, the Appellant asserts that the Commission has an obligation to serve on the party any order striking out the appeal and fifthly, "since the order was not served upon [the appellant] it can have no legal effect, (*a fortiori*) it cannot have the very serious consequence of striking out his appeal".

13. The Respondent resists the appeal, initially making the fundamental point that the Commission is *functus officio,* having struck out the appeal and lacking any express power to vary such a previous order. The Respondent goes on to argue that there was no failure to comply with the Procedure Rules so as to justify a restoration of the appeal, even if there is jurisdiction to make such an order.

The Special Immigration Appeals Commission (Procedure) Rules 2013 ("The SIAC Procedure Rules")

14. The relevant passages from the rules read as follows:

> "**11B Striking out**
>
> The Commission may strike out –
>
> (a) A notice of appeal or the Secretary of State's reply, if it appears to the Commission that it discloses no reasonable grounds for bringing or defending the appeal, as the case may be; or

(b) a notice of appeal, if it appears to the Commission that it is an abuse of the Commission's process.

12. **Hearing of Appeal**

Every appeal must be determined at a hearing before the Commission, except where –

(a) the appeal –

(i) is treated as abandoned pursuant to Section 2(4) of the 1997 Act or Section 104 (4) (c) of the 2002 Act;

(ii) is treated as finally determined pursuant to Section 104 (5) of the 2002 Act or

(iii) is withdrawn by the Appellant;

(b) the Secretary of State consents to the appeal being allowed; or

(c) the appellant is outside the United Kingdom or it is impracticable to give him notice of the hearing and, and in either case, he is unrepresented.

……..

PART 5

Applications for Leave to Appeal from Commission

26. **Scope of This Part**

This part applies to applications to the Commission for leave to appeal on a question of law to the Court of Appeal ……from a final determination by the Commission of an appeal.

27. **Application for leave to Appeal**

(1) An application for leave to appeal must be made by filing with the Commission an application in writing.

(2) Subject to paragraph 2(B) the appellant must file any application for permission to appeal with the Commission –

(a) if he is in detention …..when he is served with the Commission's determination …..not later that 5 days after he is so served; and

(b) otherwise, not later than 10 days after he is so served.

PART 7 GENERAL PROVISIONS

……..

39. **Directions**

(1) The Commission may……give directions relating to the conduct of any proceedings.

(2) The power to give directions is to be exercised subject to –

(a) these Rules….

(3) Directions under this rule may be given orally or in writing.

(4) Subject to Rule 48, the Commission must serve notice of any directions on every party.

(5) Directions given under this rule may in particular –

(a) specify the length of time allowed for anything to be done;

(b) vary any time limits;

……..

6. The power to give directions may be exercised in the absence of the parties.

40. **Failure to Comply with Directions**

(1) Where a party ….fails to comply with a direction the Commission may serve on him a notice which states –

(a) the respect in which he has failed to comply with the direction;

(b) a time limit for complying with the direction;

(c) that the Commission may –

(i) proceed to determine the appeal on the material available to it if the party or special advocate fails to comply with the direction within the time specified; or

(ii) strike out the notice of appeal or the Secretary of State's reply as the case may be.

(2) Where a party …….who has been served with such a notice fails to comply with such a direction fails to comply with such a notice (sic) the Commission may proceed in accordance with paragraph (1) (c)

……

49. **Filing and Service of Documents**

1. Any document which is required or permitted by these rules or by an order of the Commission to be filed with the Commission or served on any person may be;

(a) delivered or sent by post….

(c) sent by email to an email address or

……..

specified for that purpose by the Commission or the person to which the document is directed.

……..

(3) Subject to paragraph (4) if any document is served on a person who has notified the Commission that he acting as the representative of the party, it shall be deemed to have been served on that party.

(4) Paragraph (3) does not apply if the Commission directs that a document is to be served on both the party and his representative.

…..

50. **Address for Service**

(1) Every party and any person representing a party or acting as special advocate must notify the Commission of a postal address at which documents can be served on him and any changes to that address.

(2) Until a party, representative or special advocate notifies the Commission of a change of address, any documents served on him at the most recent postal address he has given to the Commission shall have been deemed to have been served on him.

……..

53. **Errors of Procedure**

Where in any proceedings before they have been determined by the Commission there has been an error of procedure such as a failure to comply with a rule –

(a) subject to these rules, the error does not invalidate any step taken in the proceedings unless the Commission so order;

(b) the Commission may make an order or take any other step that it considers appropriate to remedy the error.

54. **Correction of Orders and Determination**

(1) The Commission may at any time amend an order or determination to correct a clerical error or other accidental slip or omission.

(2) Where an order or determination is amended under this rule –

(a) …….the Commission must serve the amended order or determination on every person whom the original order or determination was served; and

(b) the time within which a party may try for permission to appeal against an amended determination runs from the date on which the party is served the amended determination."

The Arguments

15. I will address the points taken in a slightly different order from the recital by the Appellant. I begin with the submissions that the Commission issued directions on 31 January setting out what was required of the Appellant and his solicitors, but failed thereafter to issue a Notice specifying the failures by the Appellant to comply with the directions issued and specifying a time limit for compliance. As the Grounds of Appeal put it:

> "In order words, the procedure rules require that the Commission ought first to give a party failing to comply with the directions an opportunity to comply, before taking the further decision to strike out an appeal. It is submitted that the effect of this omission is to vitiate the order [striking out the appeal] for its failure to comply with Procedure Rules."

16. The Respondent submits in reply that the order of 31 January gave sufficient notice of the respect in which the Applicant had already failed to comply with the Commission's directions regarding bail, stated the time for compliance ("immediately") and gave sufficient warning that in the event of non compliance, the Commission might strike out the appeal by making a reference to the Respondent's application to do so. The Respondent therefore submits that there was "substantial compliance" with Rule 40. The Respondent goes on to submit that a failure of compliance with Rule 40 would not invalidate a notice since Rule 53 expressly provides that:

> "an error of procedure such as a failure to comply with a rule…..does not invalidate any step taken in the proceedings unless the Commission so orders."

17. I have considered carefully the submissions of both parties in relation to the order of 31 January. The implication of the argument by the Appellant is that the directions lacked some formalities. The directions do not recite the fact that the Appellant was in breach of his SIAC bail. That fact was taken for granted and in my view is an obvious implication of the first sentence of the notice.

18. The order was clear as to when the Appellant should comply: he was directed that he "should immediately surrender".

19. The directions did not state in so many words that in the absence of surrender and/or an indication that the Appellant intended to continue with his appeal, it would be struck out. However, the directions made it clear that such an outcome was in question, since that was the burden of the Respondent's application. I accept it would have been possible to include a sentence stating in so many words that in the absence of compliance with the direction to surrender, the Appellant's appeal was at risk of being struck out. However, as I have already indicated, I am of the view that there was sufficient and effective notice of that risk.

20. I therefore conclude that the order of 31 January constituted a valid notice to the Appellant that he had failed to comply with directions under Rule 40(1). No question arises as to the valid service of the Directions of 31 January.

21. Given the conclusion I have reached in the preceding paragraph, there is no necessity to reach a conclusion on the Respondent's submissions as to the Commission's powers under Rule 53. I would incline to the view that these powers relate to a failure to comply with a Rule by a party. I am not attracted by an argument which suggests that Rule 53 (a) would save a defect in a Notice to a party from the Commission. However, a conclusion on that point is not necessary for my decision.

22. The Appellant next argues that the order striking out the appeal was invalid, because it was not properly served on the Appellant pursuant to the requirement under Rule 49. I reject this submission for two reasons.

23. The first reason is that a valid order striking out an appeal cannot be rendered retrospectively invalid by reference to a requirement for service which only arises after the order is made. The Appellant's reliance on the decision of the House of Lords in *Anufrijeva –v- Secretary of State for the Home Department* [2004] 1 AC 604 is in my judgment misconceived. *Anufrijeva* does not apply to orders of a court and obviously cannot apply to a striking out order. It would be absurd if an order striking out a claim for want of prosecution could only be rendered an effective order, once served on a Claimant (or in this instance Appellant) who had disappeared.

24. The second reason turns on the facts of this case, and the provisions of the SIAC Procedure Rules. In oral argument Ms Harrison QC for the Appellant submitted that service of the order on her instructing solicitors could not be valid when they had come off the record in this appeal. She submitted that she would have had no argument as to the service of the order striking out the appeal had the order been served on the Appellant's last known address pursuant to the provisions of Rule 50. Yet, on the facts of this case, service on the Appellant's known address would have been clearly ineffective to bring the matter to the Appellant's actual notice. Of all the addresses in England, the accommodation provided by the authorities for the Appellant, who had absconded in breach of his bail, would be the very last place where an appellant would make contact. If the procedure of SIAC is to be functional and effective as opposed to ritualistic, then the specification of the Appellant's solicitors as the address for service pursuant to Rule 49(1) was in my view a proper exercise of my discretion. That was the best point of contact for the Appellant, and indeed the only route by which he was likely to learn of the order if he ever surfaced again. Events proved the point. Ms Harrison cited no authority for the proposition that service of the order on the Appellant's solicitors, who remained on the record in other proceedings, was an unlawful exercise of the Commission's discretion under Rule 49 (1).

25. For both those reasons I reject the Appellant's submissions that the Order striking out the Appeal was invalid. It is worthy of note that Ms Harrison made no submission suggesting a strike-out was wrong on the merits of the case. The Appellant's arguments on this issue are exclusively technical.

26. The Appellant's fourth ground is that he has belatedly complied with the Commission's directions in the letter of 31 January. I reject this ground out of hand. It can in no sense be regarded as compliance with the direction to surrender, and to indicate whether there is an intention to proceed with the appeal, that two months later the Appellant was accidentally discovered and then arrested.

27. I now turn to consider the Appellant's first Ground of Appeal and the alternative ground recited under the fifth Ground of Appeal, namely that the Commission should, exercising its powers of case management, set aside the order striking out the appeal. The first question is whether the Commission has power to do so.

Does SIAC have Power to Set Aside a Decision to Strike Out an Appeal?

28. I begin by recording my view that it is on balance desirable that SIAC should have such power. Hypothetical examples often tend to the extreme, but it is not impossible that an Appellant might disappear because afflicted with significant and lasting mental illness or the consequences of a significant accident. In such cases, rare as they may be in practice, it would be desirable in the interests of justice that the Commission should be able to restore an appeal. However, the fact that such a power would be desirable does not conjure it into existence.

29. There is no explicit power in the SIAC Procedure Rules to restore an appeal, once struck out. As is clear from the wording set out above, Rule 54 (1) gives an express power to amend "an order" but only so as "to correct a clerical error or other accidental step or omission", not to set aside an order with fundamental effect made deliberately and not in error. One of the key arguments of the Respondent is that the explicit limit on the power under Rule 54 means that Parliament must be taken to have excluded a broader power to amend an order. In my view there is force in that argument.

30. Other procedural rules for other tribunals do provide such powers. An example cited to the Commission comes from the Asylum and Immigration Tribunal (Procedure) Rules 2005. Part of those rules reads as follows:

> "**17A Striking out an appeal for non-payment of fee**
>
> Where the Tribunal is notified by the Lord Chancellor that a certificate of fee satisfaction has been revoked the appeal will automatically be struck out without order of the Tribunal and the Tribunal must notify each party that the appeal has been struck out.
>
> **17B Reinstatement of an appeal struck out for non-payment of fee**
>
> Where an appeal has been struck out in accordance with rule 17A, the appeal may be reinstated if –
>
> (a) the appellant applies to have the appeal reinstated; and
>
> (b) the Lord Chancellor has issued a new certificate of fee satisfaction."

31. SIAC is a creature of statute. Neither side submits that the Commission has an inherent jurisdiction equivalent to that of the High Court to alter its own procedure, such as that analysed by Baroness Hale in *re L and B (Children)* [2013] UKSC8; 1 WLR 634. Even there, in the context of the High Court, the power of a judge to set aside a decision is limited in time. As Lady Hale said:

> "….there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (Rule 40.2 (2) (b)), an order is now perfected by being sealed by the Court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal."

32. Again within the context of the High Court powers, the Respondent relies upon the observations of the Court of Appeal in *Roult –v- NW Strategic Health Authority* [2010] 1 WLR 487. In that case the point at issue was whether a judge could be asked to reopen an order approving a partial

settlement of a serious personal injury action. The power under consideration was Civil Procedure Rules 3.1 (7) which provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

33. The facts of the case are not material, but Hughes LJ in giving the leading judgment, reviewed a range of authority bearing on the need for finality in proceedings. The court was clear that the power under Rule 3.1 (7) could not "constitute a power in a judge to hear an appeal from himself in respect of a final order": see paragraph 15. The court went on to observe that interlocutory or case planning orders may well require revision from time to time, and then Hughes LJ added:

> "There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continued – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent events) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the Judge's order is a final one disposing of the case, whether in whole or in part. ……the interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

The Secretary of State relies upon those dicta for the proposition that even in the context of the High Court, where an explicit power exists to vary an order, in the absence of an express power to set aside a strike out, the court has no power to achieve that outcome. Ms Giovannetti QC submits, in effect, if that is true for the High Court it is certainly true for SIAC.

34. It is instructive to consider the relevant powers of the Civil Procedure Rules. CPR 3.4 gives the court power to strike out a statement of case on a number of grounds, including under CPR 3.4 (2) (c) on the ground of a failure to comply with "a Rule, practice direction or court order". There is in addition an inherent jurisdiction to strike out proceedings which amount to an abuse of process: see CPR 3.4.5. The court has no power to set aside such a decision. There is a provision for automatic strike out and for judgment without trial after striking out, pursuant to CPR 3.5. CPR 3.6 makes provision for setting aside such a judgment. In other words the power to set aside a strike out would seem to be confined to "automatic" strike out. This is similar to the position in the Asylum and Immigration Tribunal (Procedure) Rules 2005.

35. Ms Harrison QC for the Appellant essentially advances two points on this aspect of the case. Firstly, she submits that it is unjust or unfair at common law for there to be no power to revoke a strike out; alternatively, as a separate proposition but with the same thrust, she says the promulgation of procedural rules which give the power to strike out but withhold a corresponding power to set aside a strike out are *ultra vires*. The submission

on the second point is that Section 5 of the Special Immigration Appeals Commission Act 1997 provides the Lord Chancellor with the power to make procedure rules, and that Section 5 (6) (a) requires the Lord Chancellor to have particular regard to securing that decisions are properly reviewed. In consequence, she says that regulations providing a power to strike out without a power to review such an order, were beyond the power delegated to the Lord Chancellor, since the regulations in that respect do not achieve the statutory objective. With great respect, to Ms Harrison I reject this argument roundly. It does not appear to me that the statutory language bears that construction. Such an approach would conflict with the Civil Procedure Rules. In the absence of express provision, at least in relation to a final order, the remedy for an error is appeal rather than an application to set aside the order. Nor can I discern any basis in common law for this submission.

36. Ms Harrison's makes a further point germane to this issue. She submits that a strike out of a SIAC appeal is not to be regarded as a final order.

37. Section 2 (1) of the SIAC Act 1997 removes into the Commission appeals in respect of immigration decisions, refusals of asylum claims and curtailment of, or refusal to extend, leave to remain as a refugee, which constitute appeals under sections 82 (1), 83 (2) and/or 83A of the Nationality Immigration and Asylum Act 2002 ["the 2002 Act"]. Accordingly the statutory language of the 2002 Act is imported into SIAC appeals. Sections 84, 85 and 85A of the Act set out the potential grounds of appeal, the matters to be considered and "matters to be considered: new evidence: exceptions" respectively. By Section 86 the relevant tribunal must "determine" any matter raised as a ground of appeal, and other matters are set out which the Tribunal is required to consider. The provisions of Section 86 of the 2002 Act do not include, explicitly or by reference, a strike out of the appeal for a procedural failure.

38. Section 104 of the 2002 Act reads in its relevant parts as follows:

> "**104 Pending Appeal**
>
> (1) An appeal under Section 82 (1) is pending during the period –
>
> (a) beginning when it is instituted, and
>
> (b) pending when it is finally determined, withdrawn or abandoned
>
> ……
>
> 5 An appeal under Section 82 (2) (a) (c) (d) (e) or (f) shall be treated as finally determined if a deportation order is made against the appellant."

39. The Appellant also relies on the provision of the Asylum and Immigration Tribunal (Procedure) Rules 2005, paragraph 2, which includes the definition:

"**Determination"**

> "In relation to an appeal, means a decision by the Tribunal in writing to allow or dismiss the appeal, and does not include a procedural, ancillary or preliminary decision."

40. I have set out earlier in this judgment Rule 12 of the SIAC Procedure Rules which imposes the obligation on the Commission to "determine" every appeal at a hearing save where it is abandoned, treated as finally determined pursuant to 104 (5) of the 2002 Act, or is withdrawn.

41. The result of placing all of this rather Byzantine statutory wording side by side, is that Ms Harrison submits a strike out of an appeal pursuant to Rule 40 (1) (c) (ii) of the SIAC Procedural Rules does not constitute a "determination", a withdrawal or abandonment of the appeal within the meaning of the 2002 Act. In consequence, Ms Harrison submits that if and when an appeal is struck out pursuant to Rule 41 (a) (ii) it nevertheless remains a "pending" appeal pursuant to Section 104 (1) of the 2002 Act, with a number of unexpected consequences. By that route, Ms Harrison argues in essence that the power to strike out an appeal under the SIAC Procedure Rules is in essence a dead letter.

42. I acknowledge the difficulty of the statutory language. On the face of it, the language of SIAC Rule 41 (c) distinguishes between a process by which the Commission may "proceed to determine the appeal" or alternatively "strike out the Notice of Appeal". It is a curious use of language, having set up such a distinction in the rules, to provide that an appeal which has been struck out is nevertheless "finally determined" within the meaning of Section 104 (1) (b) of the 2002 Act. Nevertheless, it does appear to me that must be the effect of the 2002 Act, the SIAC Act and the Procedure Rules taken together. It simply cannot have been the intention of Parliament that SIAC should have the power to strike out an appeal, but that the same appeal is to be regarded as "pending" because it has not been "finally determined" within Section 104 (1) (b). For those reasons, I take the view that an appeal must be regarded as having been "finally determined" if and when a Notice of Appeal has been struck out within the SIAC Procedure Rules.

Conclusions

43. In my judgment, the order of 31 January 2013 constituted sufficient notice to the Appellant that he was in breach of directions by SIAC; that notice was properly served upon him. The order striking out the appeal was properly and validly made. The Appellant's solicitors were properly specified for the purpose of service of the strike out order within the meaning of Rule 49 of the SIAC Procedure Rules. In any event, any failure of service of the order striking out the appeal would not affect the validity of the order, although it would mean that the period for appeal did not commence until service was effected. SIAC does not have any express power to set aside a decision to strike out an appeal. SIAC has no inherent jurisdiction, and therefore no inherent power to set aside such an order arises. I reject the argument that in such circumstances the Lord Chancellor was acting *ultra vires* when the

power to strike out the appeal was incorporated into the SIAC Procedure Rules or that there is any common law principle invalidating the Rules. Whilst it might well be desirable that SIAC should have the power to set aside such an order, I reject the submission that there is such injustice in the statutory provisions taken together so that they can be treated, in effect, as a nullity. Finally, I conclude that an appeal to SIAC which has been properly struck out pursuant to Rule 40, is an appeal which has been "finally determined" within the meaning of Section 104 (1) (b) of the 2002 Act.

44. It follows that I conclude the order of 25 February 2013 striking out this appeal was valid and stands. The appeal is no longer "pending". I cannot and do not set aside that order. If I had the power to do so, it does not appear to me that there would be a good case for doing so, on the facts of this case.