THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondent who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or any member of his family in connection with these proceedings.

Hilary Term
[2018] UKSC 5
On appeal from: [2015] EWCA Civ 445

JUDGMENT

B (Algeria) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lady Hale, President
Lord Mance, Deputy President
Lord Hughes
Lord Hodge
Lord Lloyd-Jones

JUDGMENT GIVEN ON

8 February 2018

Heard on 14 and 15 November 2017

Appellant
Robin Tam QC
Belinda McRae
(Instructed by The Government Legal Department)

Respondent
Stephanie Harrison QC
Anthony Vaughan
(Instructed by Birnberg Peirce)

Intervener (Bail for Immigration Detainees (BID))
Michael Fordham QC
Laura Dubinsky
(Instructed by Allen & Overy LLP)

LORD LLOYD-JONES: (with whom Lady Hale, Lord Mance, Lord Hughes and Lord Hodge agree)

1. The question raised by this appeal is whether there exists a power under the Immigration Act 1971 ("the 1971 Act") to grant immigration bail to a person who can no longer be lawfully detained.

Factual Background

2. B has a long and complex immigration history which it is necessary to refer to in some detail. He has been in the United Kingdom since 1993. Between 5 February 2002 and 11 March 2005, he was detained under section 21 of the Anti-terrorism, Crime and Security Act 2001. He appealed to the Special Immigration Appeals Commission ("SIAC") against that decision using a false identity. The relevant provisions of the 2001 Act were repealed by the Prevention of Terrorism Act 2005 ("the 2005 Act") following the decision of the House of Lords in *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68. B was then released from detention on 11 March 2005, and made subject to a control order under the 2005 Act. He was admitted to the Royal Free Hospital on the 12 March 2005 as a voluntary psychiatric patient where he remained, save for one night, until 11 August 2005.

3. On 11 August 2005 B was notified, in accordance with regulations under section 105 of the Nationality Immigration and Asylum Act 2002, of the Secretary of State's decision to make a deportation order against him on national security grounds, under sections 3(5) and 5(1) of the 1971 Act. B was arrested and detained under immigration powers contained in paragraph 2(2) of Schedule 3 to the 1971 Act "pending the making of the deportation order". He was detained at HMP Woodhill and, the following day, transferred to HMP Long Lartin. On 17 August 2005, B appealed to SIAC against that decision, once again using the same false identity. B's grounds of appeal contended, *inter alia*, that his removal to Algeria would be in breach of the United Kingdom's obligations under the UN Refugee Convention and unlawful as incompatible with his rights under article 3 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR").

4. The Secretary of State has never disputed that, if deported to Algeria, B would be at real risk of treatment incompatible with article 3 ECHR and that only with specific individual assurances from the Algerian government could he be lawfully and safely removed to Algeria. On 11 May 2006, Her Majesty's Government informed the Algerian Government that it proposed to deport B and

requested certain information about him. On 16 May 2006, specific assurances as to the treatment of B were sought from Algeria. On 10 July 2006, the Algerian authorities confirmed that the details of his identity given by B were those of an individual present in Algeria.

5. On 17 July 2006, SIAC heard the national security case in B's appeal against the Secretary of State's decision to make a deportation order.

6. On 12 January 2007, pursuant to rule 39(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003, SIAC directed B to provide specified particulars of his true identity and to consent to provide a non-invasive sample for the purposes of DNA testing. B consented to provide a DNA sample but refused to provide the particulars of his true identity. On 19 July 2007, SIAC ordered B to provide details of his true identity. A penal notice was attached to the order.

7. On 30 July 2008, SIAC gave judgment in the national security case against B, holding that the Secretary of State's case on the risk to national security had been made out. SIAC concluded that, notwithstanding his mental health difficulties, B 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 hearing of the case on safety on return did not take place at that time because of the unresolved question of B's true identity.

8. On 18 August 2009, the Secretary of State applied to SIAC for an order that B be committed to prison for contempt for disobeying the order of 19 July 2007. Following an adjournment in the hope of resolving the issue of B's identity, the committal application was eventually heard on 11 October 2010. In its judgment delivered on 26 November 2010 SIAC held that B had deliberately and contumeliously disobeyed its order and, taking into account all the circumstances including that B's mental illness may have reinforced his decision not to comply with SIAC's order, imposed a prison sentence of four months. The operation of the order was suspended until the final determination of any appeal. On 21 July 2011, the Court of Appeal by a majority dismissed his appeal (*B (Algeria) v Secretary of State for the Home Department* [2011] EWCA Civ 828). B appealed to the Supreme Court which on 30 January 2013 dismissed the appeal (*B (Algeria) v Secretary of State for the Home Department* [2013] UKSC 4; [2013] 1 WLR 435). B then served his sentence of 4 months' imprisonment in HMP Belmarsh and was released on 5 April 2013.

9. On 11 April 2006, SIAC had decided in principle that B could be granted bail. However, save for one night, throughout the period from 11 March 2005 B remained in either prison or hospital until his discharge from hospital to bail

accommodation on 18 January 2011. B was voluntarily readmitted to hospital in February 2011 and on further occasions thereafter. Following his release from prison after serving his sentence for contempt, two sets of bail conditions were set by SIAC to run in parallel depending on whether B was an in-patient at a psychiatric hospital or residing at his bail accommodation.

10. On 23 January 2014, B applied to vary his bail conditions which, he maintained, constituted an unlawful deprivation of liberty. At a hearing on 28 and 29 January 2014 SIAC considered the application of the *Hardial Singh* principles (*R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704) to the circumstances of B's case, including the prospect of B's removal to Algeria. In its judgment of 13 February 2014, SIAC found that in the absence of a change of mind by B "there is no reasonable prospect of removing [B] to Algeria and thus the ordinary legal basis for justified detention of B under the Immigration Acts has fallen away". Following this ruling, the Secretary of State did not authorise the further detention of B, although B's advisers only became aware of this on or about 6 June 2014. In its judgment of 13 February 2014 SIAC also held that the conditions of bail did not constitute a deprivation of liberty. However, it subsequently directed a review of B's bail conditions, which were relaxed by an order dated 16 May 2014.

11. On 14 May 2014 the Secretary of State applied under rules 11B and 40 of the Special Immigration Appeals Commission (Procedure) Rules 2003 to strike out B's appeal against the notice of decision to deport him, on the grounds of his continuing refusal to comply with the order of 19 July 2007. On 1 July 2014, in the light of B's continuing contempt of court, SIAC struck out B's appeal.

12. B maintained that, following SIAC's findings on 13 February 2014, his detention could no longer lawfully be authorised as it would be incompatible with *Hardial Singh* principles. He contended that if that were so, and he could not lawfully be detained, SIAC no longer had jurisdiction to grant bail to B or to impose bail conditions. In its judgment of 1 July 2014, SIAC rejected these submissions, concluding that it continued to have jurisdiction to impose bail conditions on B.

13. B then applied for permission to apply for judicial review of SIAC's decision of 1 July 2014 on its bail jurisdiction, there being no right of appeal against that decision. Irwin J, sitting as a High Court Judge, heard that application by agreement between B and the Secretary of State, and on 14 August 2014 he granted B permission to apply for judicial review of that decision, dismissed the application for judicial review, and granted permission to appeal to the Court of Appeal.

14. B appealed to the Court of Appeal which on 6 May 2015 gave judgment allowing both appeals (*B (Algeria) v Secretary of State for the Home Department (No 2)* [2015] EWCA Civ 445; [2016] QB 789).

> (1) The Court of Appeal allowed B's appeal in relation to SIAC's bail jurisdiction on the ground that SIAC had no jurisdiction to impose bail conditions on B if his detention would be unlawful.
>
> (2) The Court of Appeal also allowed B's appeal against the strike out of B's SIAC appeal and remitted the matter to SIAC.

15. On 15 September 2016 SIAC refused the application to strike out B's appeal against the decision to make a deportation order against him. The Secretary of State then indicated that she no longer opposed B's appeal. Accordingly, in a judgment dated 12 December 2016 SIAC confirmed its decision to allow B's appeal against the notice of intention to deport him. The Secretary of State did not seek permission to appeal. As a result of this ruling allowing the substantive deportation appeal, B's bail fell away and it is common ground that the immigration bail power is now unavailable.

16. On 9 November 2015, the Supreme Court granted the Secretary of State permission to appeal against the decision of the Court of Appeal on the issue of SIAC's bail jurisdiction.

Statutory provisions

17. The Secretary of State's power to detain or control a person pending deportation is set out in paragraph 2 of Schedule 3 to the 1971 Act which provides in material part, as amended:

> "(2) Where notice has been given to a person in accordance with Regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State

pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).

…

(4A) Paragraphs 22 to 25 of Schedule 2 to this Act apply in relation to a person detained under sub-paragraph (1), (2) or (3) as they apply in relation to a person detained under paragraph 16 of that Schedule.

(5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.

(6) The persons to whom sub-paragraph (5) above applies are -

…

(b) a person liable to be detained under sub-paragraph (2) or (3) above, while he is not so detained."

18. The power to grant immigration bail and impose bail conditions derives from paragraphs 22 and 29 of Schedule 2 to the 1971 Act so far as relevant, as amended. Paragraph 22 governs bail in general and paragraph 29 governs bail pending appeal.

19. Section 3 of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") extends to SIAC the power to grant bail and impose bail conditions that is conferred on an immigration officer not below the rank of chief immigration officer or the First-tier Tribunal ("the FTT") by paragraphs 22 and 29 of Schedule 2 to the 1971 Act. Section 3 of the 1997 Act provides in material part:

"(1) In the case of a person to whom section (2) below applies, the provisions of Schedule 2 to the Immigration Act

1971 specified in Schedule 3 to this Act shall have effect with the modifications set out there.

(2) This subsection applies to a person who is detained under the Immigration Act 1971 … if -

(a) the Secretary of State certifies that his detention is necessary in the interests of national security,

(b) … or

(c) he is detained following a decision to make a deportation order against him on the ground that his deportation is in the interests of national security."

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

"22. (1) The following, namely -

(a) a person detained under paragraph 16(1) above pending examination;

(aa) a person detained under paragraph 16 (1A) above pending completion of his examination or a decision on whether to cancel his leave to enter; and

(b) a person detained under paragraph 16(2) above pending the giving of directions,

may be released on bail in accordance with this paragraph.

(1A) The Special Immigration Appeals Commission may release a person so detained on his entering into a recognizance or, in Scotland, bail bond conditioned for

his appearance before an immigration officer at a time and place named in the recognizance or bail bond or at such other time and place as may in the meantime be notified to him in writing by an immigration officer.

…

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

(3) In any case in which the Special Immigration Appeals Commission has power under this paragraph to release a person on bail, the Commission may, instead of taking the bail, fix the amount and conditions of the bail (including the amount in which any sureties are to be bound) with a view to its being taken subsequently by any such person as may be specified by the Commission; and on the recognizance or bail bond being so taken the person to be bailed shall be released.

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

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

…

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

21. The power of arrest and re-detention of persons on bail under paragraphs 22 and 29 of Schedule 2 is provided for under paragraph 24 of Schedule 2 to the 1971 Act which provides:

"24. -

(1) An immigration officer or constable may arrest without warrant a person who has been released by virtue of paragraph 22 above -

(a) if he has reasonable grounds for believing that that person is likely to break the condition of his recognizance or bail bond that he will appear at the time and place required or to break any other condition of it, or has reasonable ground to suspect that that person is breaking or has broken any such other condition; or

(b) if, a recognizance with sureties having been taken, he is notified in writing by any surety of the surety's belief that that person is likely to break the first-mentioned condition, and of the surety's wish for that reason to be relieved of his obligations as a surety;

and paragraph 17(2) above shall apply for the arrest of a person under this paragraph as it applies for the arrest of a person under paragraph 17.

(2) A person arrested under this paragraph -

(a) if not required by a condition on which he was released to appear before an immigration

officer within twenty-four hours after the time of his arrest, shall as soon as practicable be brought before the First-tier Tribunal or, if that is not practicable within those 24 hours, before in England and Wales, a justice of the peace, in Northern Ireland, a justice of the peace acting for the petty sessions area in which he is arrested or, in Scotland, the sheriff; and

(b) if required by such a condition to appear within those 24 hours before an immigration officer, shall be brought before that officer.

(3) Where a person is brought before the First-tier Tribunal, a justice of the peace or the sheriff by virtue of sub-paragraph (2)(a), the Tribunal, justice of the peace or sheriff -

(a) if of the opinion that that person has broken or is likely to break any condition on which he was released, may either -

(i) direct that he be detained under the authority of the person by whom he was arrested; or

(ii) release him, on his original recognizance or on a new recognizance, with or without sureties, or, in Scotland, on his original bail or on new bail; and

(b) if not of that opinion, shall release him on his original recognizance or bail."

22. On 12 May 2016 the Immigration Bill 2016 received royal assent. Section 61 of the Immigration Act 2016 provides in material part:

"(3) A person may be released and remain on bail under paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971 even if the person can no longer be detained under a provision

> of the Immigration Acts to which that paragraph applies, if the person is liable to detention under such a provision.
>
> (4) The reference in subsection (3) to paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971 includes that paragraph as applied by any other provision of the Immigration Acts.
>
> (5) Subsections (3) and (4) are to be treated as always having had effect."

23. On 9 November 2015, the Supreme Court granted the Secretary of State permission to appeal on the issue of SIAC's bail jurisdiction. The Secretary of State indicated that she did not propose to rely on section 61 of the Immigration Act 2016 on this appeal. The appeal has been heard on the basis of the statutory provisions as they were at the time of the Court of Appeal's decision.

Hardial Singh principles

24. The *Hardial Singh* principles form an important part of the background to these proceedings. In *Hardial Singh* itself Woolf J. laid down the following propositions (at p 706D-G):

> "Since 20 July 1983, the applicant has been detained under the power contained in paragraph 2(3) of Schedule 3 to the Immigration Act 1971. Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems

> to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

25. Over time these principles have been elaborated and refined. In *R (WL (Congo)) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, Lord Dyson JSC summarised them as follows (at para 22):

> "It is common ground that my statement in *R (I) v Secretary of State for the Home Department* [2003] INLR 196, para 46 correctly encapsulates the principles as follows: (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal."

With regard to determining what is a reasonable period Lord Dyson (at para 104) repeated his earlier conclusion in *I*'s case (at para 48):

> "It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

Discussion

26. I take as my starting point that adopted by the Court of Appeal at paragraph 23 of the judgment of Lord Dyson MR. It is uncontroversial. On 13 February 2014 SIAC ruled that there was "no reasonable prospect of removing [B] to Algeria and thus the ordinary legal basis for justified detention of B under the Immigration Acts has fallen away". The Secretary of State accepts that there was thereafter no further authority for the detention of B under paragraph 2(2) of Schedule 3 to the 1971 Act. It is, therefore, common ground that B could not lawfully be detained following the ruling of 13 February 2014 because to do so would exceed the implied limits on the exercise of administrative power to detain for immigration purposes as determined in *Hardial Singh*.

27. At the heart of this case lies a dispute between the parties as to the correct approach in principle to the availability of immigration bail when the *Hardial Singh* limit on actual detention is reached. The Secretary of State submits that at that point the individual can be moved onto or kept on bail as an alternative to detention, as a means of getting or keeping him out of detention that is, or is about to become, or would be unlawful. Moreover, at that point the ability to exercise control over him in the form of bail conditions is retained. B's position, by contrast, is that bail is predicated on lawful detention with the result that when the *Hardial Singh* limit on actual detention is reached the ability to grant or maintain bail also simultaneously falls away.

28. On behalf of the Secretary of State, Mr Tam urges the court to adopt a purposive interpretation of the relevant legislation. He submits that it is consistent with the purpose of the bail power for it to be construed so that bail is available regardless of whether the individual is lawfully detained or would hypothetically be lawfully detained. The bail power has been provided in order to remove an individual from detention. That purpose would be served whether the detention is lawful or unlawful at the time that bail is granted and the detention is terminated. The bail power, he submits, constitutes a practical solution which permits the termination of unwanted or unwarranted detention, regardless of the separate question of whether that detention is lawful or unlawful. He then draws attention to the fact that at one end of the spectrum of cases dealt with by the immigration system are those of dangerous criminals and those who pose a risk to national security. It is, he submits, particularly important that bail should be available in such cases. Here he refers to the fact that bail conditions can be of greater stringency than conditions which can be attached to temporary admission or temporary release. The availability of bail, he argues, therefore helps to protect the public from such risks if detention is no longer appropriate.

29. While accepting that practical difficulties may arise in the categories of case referred to by Mr Tam in circumstances where continuing detention becomes unlawful on *Hardial Singh* grounds, I can see no basis for adopting the purposive approach for which the Secretary of State contends, resting as it does on a disregard of the issue of the lawfulness of any continuing detention. It is a fundamental principle of the common law that in enacting legislation Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear (*Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111E; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 122E-F per Lord Bridge). Thus, in *In re Wasfi Suleman Mahmod* [1995] Imm AR 311, 314 Laws J, observed:

> "While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards."

In the present case our particular focus is not on a power of executive detention, but on a power to grant bail. Nevertheless, and despite the fact that the purpose may be to effect a release from detention, I consider that this similarly attracts the presumption of statutory interpretation because the conditions which may be attached to a grant of bail are capable of severely curtailing the liberty of the person concerned. It was common ground before us that bail under the 1971 Act may be subject to conditions which constitute a deprivation of liberty within article 5(1)(f) ECHR. As Mr Tam frankly accepts, the ability to exercise control through the use of what may be stringent conditions of bail in part underlies the purposive interpretation for which he contends. Moreover, this is, to my mind, a situation where the principle of legality is in play. As Lord Hoffmann observed in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131D-G:

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

In these circumstances, we are required to interpret the statutory provisions strictly and restrictively.

30. It is common ground that being "detained" is a condition precedent to the exercise of the power to grant bail conferred by paragraphs 22 and 29 of Schedule 2 to the 1971 Act. The power of SIAC to grant bail under section 3, Special Immigration Appeals Commission Act 1997 is similarly based on the person being detained. The Court of Appeal (at para 30) described the bail power as "predicated on the individual being detained".

31. Paragraph 22 of Schedule 2 confers a power to release on bail in the case of three categories of person, namely a person detained under paragraph 16(1) pending examination, a person detained under paragraph 16(1A) pending completion of his examination or a decision on whether to cancel his leave to enter, and a person detained under paragraph 16(2) pending the giving of directions. Each category is defined by reference to the person being detained under paragraph 16 of Schedule 2. Similarly, paragraph 29 applies to a person who "is for the time being detained under Part I of this Schedule". Applying the strict approach to interpretation which I consider is required here, these provisions must be taken to refer to detention which is lawful. This conclusion is reinforced by the fact that in respect of each category to which it applies paragraph 16 refers to detention "under the authority of an immigration officer". This makes clear that the provision is not addressing the mere fact of detention; this must refer to a lawful authorisation for detention. As the Court of Appeal concluded in the present case, it would be extraordinary if Parliament had intended to confer the power to grant bail where a person had been unlawfully detained or could not lawfully be detained. The words employed are certainly not appropriate to refer to a state of purported detention or to embrace both lawful and unlawful detention. I consider that "detained" in paragraphs 22 and 29 refers to lawfully authorised detention.

32. On behalf of the Secretary of State, Mr Tam submits that "detained" is used only to define the state of affairs which must exist at the time when the power is first exercised. Clearly the power to grant bail can continue to be exercised after the person has ceased to be detained. However, this fails to address whether there needs to be a continuing power to detain as a pre-condition to the grant of bail. Here it seems to me that unless there is a continuing power to detain, the system of bail within Part 1 of Schedule 2 would encounter substantial difficulties in its operation. In this regard, Ms Harrison on behalf of B, draws attention to certain features attending the grant of bail. First, paragraph 22(1A) and paragraph 29(2) require the detained person to enter into a recognizance to appear before an immigration officer at a named time and place. When he does so it is then for the immigration officer to re-fix bail if he or she considers it appropriate to do so and to determine any appropriate conditions. (*R (AR (Pakistan)) v Secretary of State for the Home Department* [2016] EWCA Civ 807, para 26). It is difficult to see how this would operate if there were no continuing power of detention. As Ms Harrison points out, bail could be re-fixed but until it is the individual cannot simply be at liberty, neither detained nor granted temporary admission. Secondly, and more fundamentally, Ms

Harrison points to a situation in which it becomes necessary to re-detain the person on bail, for example because he or she is in breach of the conditions of bail. This would not be possible in the absence of a subsisting lawful power to detain. In the absence of such a power, conditions of bail and recognizances entered into would be unenforceable.

33. In response Mr Tam first places reliance on the breach of bail conditions. However, in such circumstances the legal authority for detention cannot be found in the grant of bail or in the breach of conditions of bail but must be found in an ongoing lawful power to detain, as appears from *Stellato v Ministry of Justice* [2010] EWCA Civ 1435; [2011] QB 856 and *R (Konan) v Secretary of State for the Home Department* [2004] EWHC 22 (Admin), authorities to which I shall return later in this judgment. Secondly, he makes the point that under the *Hardial Singh* principles a power of detention may sometimes revive, for example because of a change of circumstances in the foreign state concerned or because of a change in the risk which the individual presents. While that may well occur from time to time in individual cases, it is no answer to Ms Harrison's objection which is directed at the operation of the system of immigration bail. I note, moreover, that there is no possibility of that occurring in the present case where not only did SIAC conclude on 1 July 2014 that B's detention could no longer be authorised as it would be incompatible with *Hardial Singh* principles, but the Secretary of State has not authorised B's continuing detention since that finding of SIAC. The present case, it appears, falls within the category contemplated by Lord Dyson JSC in *WL (Congo)* at para 144 where, however grave the risk of absconding or the risk of serious offending, it ceases to be lawful to detain a person pending deportation. Once that position is reached there is, in my view, no longer a power of detention under paragraph 16 and there is therefore no longer a power to grant bail under paragraphs 22 or 29.

34. The Secretary of State next draws attention to paragraph 21 of Schedule 2 which concerns temporary admission or release of persons liable to detention or detained in non-deportation cases (ie the equivalent provisions to paragraphs 2(5) and (6) of Schedule 3 of the 1971 Act). Paragraph 21 as amended provides for the release or temporary admission of persons "liable to detention or detained":

> "21.- Temporary admission or release of persons liable to detention
>
> > (1) A person liable to detention or detained under paragraph 16(1), (1A) or (2) above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this

> shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

35. Mr Tam submits that the respective structures of the powers to grant temporary admission or release under paragraph 21 and the power to grant bail under paragraph 22 are similar; paragraph 21 refers to "a person liable to detention or detained" whereas paragraph 22 refers to "a person detained". He submits that this difference of wording serves only to identify that bail is available only if the individual is actually detained, while temporary admission is also available if the individual has not been actually detained. Thereafter, he submits, the approach adopted by the House of Lords in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207 ought to apply equally to both of these "ameliorating possibilities". The power to admit temporarily and the power to grant bail should be held to continue so long as the power to detain exists, even if it cannot be lawfully exercised.

36. The approach to which he refers is to be found in the speech of Lord Brown in *Khadir* at paras 31-33.

> "31. For my part I have no doubt that Mance LJ was right to recognise a distinction between the circumstances in which a person is potentially liable to detention (and can properly be temporarily admitted) and the circumstances in which the power to detain can in any particular case properly be exercised. It surely goes without saying that the longer the delay in effecting someone's removal the more difficult will it be to justify his continued detention meanwhile. But that is by no means to say that he does not remain 'liable to detention'. What I cannot see is how the fact that someone has been temporarily admitted rather than detained can be said to lengthen the period properly to be regarded as 'pending ... his removal'.
>
> 32. The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being

> used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be '*im*pending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (ie throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under paragraph 21.
>
> 33. To my mind the *Hardial Singh* line of cases says everything about the *exercise* of the power to detain (when properly it can be exercised and when it cannot); nothing about its *existence*. ..."

37. In its judgment in the present proceedings SIAC drew attention to the distinction drawn by Lord Brown between the existence of a power to detain, which can subsist even where actual detention would be unlawful, and the unlawful exercise of that power. The power to detain continues to exist even if actual detention would be unlawful provided that there is some prospect of removal being effected. It noted that *Khadir* had not been disapproved by the Supreme Court in *WL (Congo)*. In the present case SIAC considered that there remained "some prospect" of removal so that the power to detain persisted under paragraph 2 of Schedule 3. The fact that detention today would be unlawful did not necessarily prevent lawful detention in the future. As a result it concluded that the power to grant bail also subsisted and could be exercised. That reasoning was decisively rejected by the Court of Appeal.

38. On this further appeal Mr Tam submits that the value of the decision in *Khadir* is that its acceptance of the continuing existence of the power to detain and thus the continuing availability of temporary admission or temporary release allows a purposive construction of the three-layered mechanism provided by Schedule 2 ie detention, bail, temporary admission or temporary release. In particular, he submits that as both bail and temporary admission or temporary release are "ameliorating possibilities" of alternatives to detention, it is sensible for both powers to persist for some duration beyond the point at which actual detention can no longer continue.

39. In my view, *Khadir* provides no assistance to the Secretary of State in the present case, for the reasons given by Lord Dyson MR (at paras 29-31). They may be summarised as follows:

(1) *Khadir* is a decision not on detention or on the power to grant bail under paragraphs 22 or 29, but on the power to grant temporary admission under paragraph 21.

(2) There is a material difference between the wording of paragraph 21, on the one hand, and paragraphs 22 and 29 on the other. The distinction between a person "detained" and a person "liable to be detained" is clear and must have been deliberate.

(3) The House of Lords in *Khadir* held that the distinction between the existence and the exercise of the power to detain was material to the power to grant temporary admission to a person "liable to detention". There is no warrant for applying that distinction to the different question of whether there is a power to grant bail to a person who may not lawfully be detained at the time when it is proposed to grant bail.

40. On behalf of the Secretary of State it is then submitted that the interpretation of paragraphs 22 and 29 favoured by the Court of Appeal would lead to impracticability in their application and that this casts doubt on its reading.

41. First, it is submitted that, if there is no power to grant bail unless there is a power to detain, on an application for bail the FTT or an immigration officer would have to determine *Hardial Singh* issues as a jurisdictional matter. It is submitted that Parliament could not have intended the FTT or immigration officers to engage in such an exercise which is difficult enough in a case of actual detention but which would be much more difficult or even logically impossible in the hypothetical context required by this reading of paragraphs 22 and 29. As a result bail applications could require "two or three days of *Hardial Singh* enquiry simply to decide whether there is jurisdiction to grant bail". Here Mr Tam further submits that the FTT does not have jurisdiction to decide whether detention is lawful. (See *Konan* at para 30 and *WL (Congo)* at para 118.) I consider that there is little or no substance in these contentions for the following reasons:

(1) It is unlikely that an applicant for bail will seek to challenge the jurisdiction of the FTT to grant bail. Similarly, the Secretary of State is unlikely to maintain that an applicant's detention is unlawful. I accept, however, that, as it is a matter of jurisdiction, there may be cases in which the FTT should properly take the point of its own motion.

(2) The power to grant bail is expressly conferred on the FTT or a Chief Immigration Officer by paragraphs 22 and 29 of Schedule 2. If an issue as to

the legality of detention were to arise on a bail application, it would fall to be addressed in that context. If the judge concluded that detention was unlawful, the Secretary of State could be expected to direct release of the applicant on temporary admission. If she maintained the view that detention was lawful, the matter could be raised urgently in the Administrative Court. I note that, in the context of SIAC, where an applicant puts the legality of his detention in issue, concurrent judicial review proceedings can be lodged and the Chair of SIAC is able to exercise the jurisdiction of the Administrative Court. That is, in fact, what occurred in the present case.

(3) The FTT is clearly entitled to address the *Hardial Singh* principles. Consideration on a bail application of whether detention was lawful would not, in any event, require the FTT to depart significantly from what is currently required of it. The current guidance (Bail Guidance for Immigration Judges Presiding over Immigration and Asylum Hearing, Presidential Note 1 of 2012, Judge Michael Clements, 11 June 2012 at paras 5,17 and 18) recognises that the lawfulness of detention may be a relevant factor in bail proceedings, as has the High Court in the SIAC jurisdiction (*R (Othman) v SIAC* [2012] EWHC 2349 (Admin)).

42. Secondly, the Secretary of State submits that it appears from the statutory scheme that the grant of bail was intended to be an exercise conducted by relatively junior immigration officers or even by police officers with less specialist immigration experience and that, accordingly, it is very unlikely that Parliament intended that the lawfulness of detention should be investigated before the grant of bail. This is equally unconvincing. So far as the capabilities of immigration officers are concerned, I agree with the observations of Lord Dyson MR (at para 35). Immigration officers are charged by Parliament with taking many difficult decisions, which require care, individual consideration and the exercise of judgement and which may involve fact finding. These decisions are of enormous consequence to the lives of the persons concerned. In particular, in considering whether to grant temporary admission an immigration officer may have to consider whether a person is "liable to detention" under paragraph 21. Contrary to the submission of Mr Tam, I cannot see that application of the *Khadir* test of "some prospect" of the individual's removal is a significantly less complex exercise than the application of the *Hardial Singh* principles.

43. Thirdly, the Secretary of State submits that an arrest by a police officer for an actual or apprehended breach of bail would require the officer to consider the *Hardial Singh* principles and assess whether the prescribed limit of a power to detain had been reached. However, the power of arrest conferred by paragraph 24(1)(a) is exercisable by a police officer "if he has reasonable grounds for believing that that person is likely to break the condition of his recognizance or bail bond". Unlike the

power to order re-detention in paragraph 24(3), it does not depend on a continuing power to exercise immigration detention.

44. Fourthly, the Secretary of State points to the consequences which might follow if detention were unlawful on other grounds. Here, particular reliance is placed on *WL (Congo)*, where detention was unlawful because it was based on an unpublished policy which conflicted with a published policy, and on *R (SK (Zimbabwe)) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 1 WLR 1299, where detention was unlawful because of missed detention reviews required by a published policy. It is said that it would be absurd if there were no power to grant bail in such circumstances. In my view, there is no absurdity here. Once detention had been authorised on a lawful basis there would be power to grant bail.

45. Accordingly, I consider that the spectre of impracticability conjured up by Mr Tam is illusory and does not cast any doubt on my reading of paragraphs 22 and 29. There is no reason to conclude that Parliament must have intended to confer a power to grant bail where a person is detained unlawfully. On the contrary, I have no doubt that the statutory provisions with which we are concerned require a lawful power to detain as a pre-condition to a grant of bail. In any event, if administrative inconvenience is a consequence the remedy lies with Parliament.

46. For these reasons I agree with the conclusion of Lord Dyson MR that bail may not be granted under paragraphs 22 and 29 of Schedule 2 where a person is unlawfully detained purportedly under paragraph 2(2) of Schedule 3 to the 1971 Act or where a person not currently in detention could not lawfully be detained under that provision.

47. In his judgment in the Court of Appeal in the present case, Lord Dyson MR, having arrived at the conclusion that the word "detained" in paragraphs 22 and 29 of Schedule 2 should be construed as meaning "lawfully detained", advanced a further, independent basis for his conclusion, namely that the power to grant bail presupposes the existence of and the ability to exercise the power to detain lawfully. In support of this conclusion he drew attention to *Mitchell v Mitchinham* (1823) 2 D & R 722 and *In re Amand* [1941] 2 KB 239 which, he observed, demonstrate that the writ of habeas corpus can still issue where a person is on bail.

48. As a matter of legal instinct, the proposition that the ability to exercise a lawful power to detain is a precondition to a power to grant bail seems entirely sound. Not only does it seem correct as a matter of principle, but also the lack of a lawful power to detain is likely, without more, to give rise to practical difficulties. As I have explained earlier in this judgment, that would, in my view, be the position

in relation to immigration bail if the Secretary of State's submissions were accepted in the present case. Although we have been referred on this appeal to a number of authorities relating to the scope and availability of habeas corpus, including those referred to by Lord Dyson MR, I have not found these decisions of any great assistance. Nevertheless, there is a considerable body of modern authority which supports Lord Dyson's statement of principle.

49. The decision of the Court of Appeal in *Stellato v Ministry of Justice* [2011] QB 856 is strongly supportive of this approach. The claimant having been released on licence from a prison sentence refused to comply with the conditions of his licence on the ground that he was entitled to be released unconditionally. He was returned to prison. A Divisional Court of the Queen's Bench Division dismissed his claim for judicial review. His appeal was allowed by the Court of Appeal which granted a declaration that he was entitled to immediate release but stayed the declaration to permit a petition to the House of Lords and granted him conditional bail. He refused to comply with the bail conditions and, as a result, was arrested and returned to prison pursuant to an order of a Lord Justice who, the next day, ordered that his bail be revoked and that he remain in custody until the end of the stay granted by the Court of Appeal. Following the dismissal by the House of Lords of the Home Office's appeal, he was released unconditionally and he then brought an action for false imprisonment and breach of his rights under article 5 ECHR against the Ministry of Justice as successor to the Home Office. In those proceedings the question arose whether the stay or the breach of bail conditions provided legal authority for his detention. The Court of Appeal (Maurice Kay, Stanley Burnton and Patten LJJ) held that they did not. Stanley Burnton LJ explained (at para 21) that the only authority for the continued detention was the original sentence of imprisonment and the legislation which was the subject of the court's judgment. He continued:

> "23. Turning to the effect of the orders of Hughes LJ, I consider that the answer is to be found in the nature of a grant of bail. In principle, a grant of bail is not an order for the detention of the person to whom it is granted. To the contrary, it is a grant of liberty to someone who would otherwise be detained. The legal justification for his detention is to be found elsewhere: in the case of a person suspected of crime, in the powers of arrest of a constable under a warrant issued by a magistrates' court (see section 1 of the Magistrates' Courts Act 1980), or without a warrant (see section 24 of the Police and Criminal Evidence Act 1984), and powers to remand pending trial or further hearing. Similarly, there is statutory authority for detention in immigration cases: see, for example, paragraph 16 of Schedule 2 to, and paragraph 2 of Schedule 3 to, the Immigration Act 1971.

> 24. A grant of bail may be conditional or unconditional. A condition of bail does not impose an obligation on the person granted bail. It is a true condition. It qualifies the grant of liberty made by the grant of bail. If the person granted bail does not comply with the conditions of his bail, he is liable to be returned to custody. If so, the legal authority for his detention is not the grant of bail, or his breach of the conditions of his bail, but the authority for his detention apart from the order for bail. All that his breach of the conditions of his bail does is to disentitle him to bail."

50. Similarly, in *R (Konan) v Secretary of State for the Home Department* [2004] EWHC 22 Admin, where the claimants alleged that their immigration detention had been unlawful, Collins J, in rejecting a submission on behalf of the Secretary of State that bail was an alternative remedy, stated (at para 30):

> "An adjudicator in considering a bail application is not determining (indeed, he has no power to determine) the lawfulness of the detention. The grant of bail presupposes the power to detain since a breach of a bail condition can lead to a reintroduction of the detention."

51. That the grant of bail is not a determination of the legality of detention was emphasised by Lord Dyson JSC in *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245, para 118, and Hughes LJ in *R (Omar Othman) v Special Immigration Appeals Commission* [2012] EWHC 2349 (Admin), para 18. I also note that in *Ismail v United Kingdom* (2014) 58 EHRR SE6, para 16, the United Kingdom expressly submitted, on the authority of *Konan* and *Lumba*, that article 5(4) ECHR was not applicable since a bail application was not a procedure under domestic law to challenge the lawfulness of immigration detention and emphasised that, under domestic law as interpreted by the courts, a decision to release a person on bail, subject to conditions designed to ensure his future attendance, presupposed the legality of the power to detain.

52. On behalf of the Secretary of State Mr Tam relies before us on a line of cases concerning foreign national offenders in which bail had been granted to an individual, whose detention had become or was about to become unlawful, as a means of ending the detention and continuing the individual's management whilst he was on bail. These decisions include *R (Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin); *R (A, MA, B and E) v Secretary of State for the Home Department* [2008] EWHC 142 (Admin); *R (O) v Secretary of State for the Home Department* [2008] EWHC 2596 (Admin); *R (Adewale) v Secretary of State for the Home Department* [2009] EWHC 1289 (Admin); *R (Wang) v Secretary*

of State for the Home Department [2009] EWHC 1578 (Admin); *R (D) v Secretary of State for the Home Department* [2009] EWHC 1655 (Admin); *R (Ahmed) v Secretary of State for the Home Department* [2010] EWHC 625 (Admin); *R (Hussein) v Secretary of State for the Home Department* [2010] EWHC 2651 (Admin) and *R (HY) v Secretary of State for the Home Department* [2010] EWHC 1678 (Admin). On this basis, he submits that the Secretary of State's contention in the present proceedings is the conventionally accepted approach to the question of bail and that this includes the imposition of bail conditions as an alternative to detention after actual detention has become unlawful for *Hardial Singh* reasons. The difficulty with this submission, however, is that in these first instance decisions, which include one of my own, the power to grant bail appears to have been assumed without the present issue having been directly addressed.

53. Nevertheless, the notion that the power to grant bail presupposes the existence and the ability to exercise a power to detain lawfully is not necessarily a principle of universal application. While the clearest possible words would be required to achieve a contrary result, Parliament could do so. It would be a question of construction in each case whether that result had been achieved. Thus in *Stellato* Stanley Burnton LJ observed (at para 25) that the general principles which he had set out in paragraphs 23 and 24 (quoted above) are subject to any statutory provision. Moreover, following a suggestion by Lord Hughes during the course of argument on this appeal, it became apparent that the provisions governing police bail in sections 34, 37 and 41, Police and Criminal Evidence Act 1984 may be exceptions to the general principle stated by the Court of Appeal. In this regard, I also draw attention to section 61, Immigration Act 2016.

54. In view of such possible statutory inroads into the principle stated by the Court of Appeal, I prefer to found my conclusions in the present case on the interpretation of the provisions of Schedule 2.

55. In the present case it is common ground that B could not lawfully be detained following the ruling of SIAC on 13 February 2014 that there was "no reasonable prospect of removing [B] to Algeria and thus the ordinary legal basis for justified detention of B under the Immigration Acts has fallen away". Furthermore, it has not been suggested that this is a case in which, on the application of *Hardial Singh* principles, a lawful power of detention subsequently revived as a result of a change of circumstances. In these circumstances I conclude, for the reasons set out above, that in the absence of a power of lawful detention there was no power to grant bail to B pursuant to paragraph 22 of Schedule 2 to the 1971 Act.

56. In these circumstances I do not consider it necessary to address the arguments which we have heard on article 5 ECHR which, in my view, adds nothing to the resolution of the issues before the court on this appeal.