Appeal No: SC/09/2005
Hearing Dates: 28th and 29th January 2014
Date of Judgment: 13th February 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE PETER LANE
SIR STEPHEN LANDER

"B"

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Mr H Southey QC
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr S Gray
Instructed by:	The Treasury Solicitor

Mr Justice Irwin :

Introduction

1. This judgment addresses two issues. Firstly what is the prospect of removal of B to Algeria: is the prospect of removal sufficiently good to justify detention of B under the Immigration Acts? Secondly, have the conditions of bail imposed by SIAC on B, since his release from imprisonment for contempt and until his very recent detention under the Mental Health Act 1983, constituted a deprivation of liberty?

The Facts

2. The Appellant is very likely to be an Algerian national. He arrived illegally in the United Kingdom in 1993. In October 1994 he was arrested on immigration and criminal charges, the latter an alleged social security fraud. At this stage he gave his name as "Nolidoni". On 25 November 1994 he applied for asylum, in this case using the name "Pierre Dumond". Having absconded from the arrest on criminal charges, he was re-arrested in June 1995, denied using the name Nolidoni and denied having previously been arrested. Following this re-arrest, he spent a year in HMP Rochester.

3. On 12 May 1998, B was arrested in connection with a series of arrests associated with the Algerian terrorist organisation known as the GIA. He was released without charge. On 5 June 1998 he was arrested a second time but was released without charge. As the Commission was subsequently to find, he was actively involved during 2000 in the procurement of telecommunications equipment and in the provision of air time for satellite telephones for the purpose of terrorist activity.

4. Between August 2000 and early 2002 B spent two short periods in prison for driving offences.

5. On 5 February 2002, B was detained under s21 of the Anti-Terrorism, Crime and Security Act 2001 ["ATCSA"]. He was detained under that provision from 5 February 2002 until 11 March 2005. For the latter part of this detention, from 17 November 2004, B was transferred to and detained in Broadmoor hospital.

6. On 11 March 2005, B was released from detention, but was made subject to a Control Order under the Prevention of Terrorism Act 2005 ["PTA"]. From 12 March 2005, B was an in-patient at the Royal Free Hospital, London save for one night, until 11 August 2005. On that date, B was notified of the intention of the SSHD to make a Deportation Order against him pursuant to Section 3(5) and 5(1) of the Immigration Act 1971. He was arrested on that day and detained firstly at HMP Woodhill and from the following day in HMP Long Lartin. On 17 August 2005, B appealed to SIAC against the decision to deport.

7. An emergency bail application having been refused, on 8 September 2005, B was transferred once more to Broadmoor. He returned to Long Lartin on 2 February 2006, but engaged in food refusal and was returned to Broadmoor on 3 April 2006.

8. On 11 April 2006, B was granted conditional bail in principle by SIAC, subject to suitable accommodation being found. However, no suitable accommodation was identified and B remained in Broadmoor. On 17 January 2007, SIAC directed that

when B was discharged from Broadmoor to prison, a further bail application would need to be made.

9. In the meantime, on 17 July 2006, SIAC commenced the hearing of B's appeal. However, it was adjourned part heard after it transpired that B had provided false identity details to SIAC, including a false name. The hearing was adjourned for the matter to be investigated.

10. On 29 October 2003, the Commission had given judgment in the certification appeal, concluding in substance that the Appellant, using a false name, had procured communications equipment for use by extremists in Chechnya and by a terrorist organisation in Algeria, known as the GSPC. The Commission concluded from open evidence that B had been a member of the GIA and later of the GSPC. On the first review of the Appellant's certification on 2 July 2004, the Commission concluded that B was a "trusted and senior member of the GSPC….not deterred by previous periods of detention from carrying on his terrorist support activities". The Commission reached similar conclusions in the judgment on the second review, of 9 December 2004. The terrorist support activities concerned were all conducted under a false name.

11. Following the adjournment of B's appeal, on 11 December 2006 the SSHD made a formal request for information regarding B's true identity through his solicitors. There was no response. On 12 January 2007, SIAC made a direction pursuant to rule 39(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ["the SIAC Rules"] that B should provide information as to his true identity, including his full name, his place of birth and birth certificate or any other supporting documentation, the full names of both of his parents and their current addresses, all the addresses at which B had lived in Algeria. He was also directed to give written consent to the taking of a non-invasive sample for DNA testing. B consented to provide a DNA sample but otherwise refused to comply with this direction. His solicitors wrote on 19 January 2007 stating they were unable to provide further information.

12. On 27 March 2007, B was discharged from Broadmoor and returned to Long Lartin. However, on 13 April 2007 he was admitted to the Laffan ward at St Pancras Hospital.

13. On 3 May 2007, the SSHD applied to SIAC for an order that B should provide the necessary information containing a penal notice, and such an order was issued by the Commission on 19 July 2007.

14. The order was served on B in early September, following an indication through his solicitors that he would not provide more information. On 3 December 2007, B's fingerprints were transmitted to Algeria via Interpol channels. On 28 February 2008, Interpol Algeria responded to the fingerprint transmission confirming that the fingerprints matched those they held on record for an individual of the name "MB" born on 2 March 1971. On 10 April 2008, the British Embassy in Algiers sent a *note verbale* to the Algerian Ministry of Foreign Affairs asking, *inter alia* for assurances regarding B's treatment if he were to be returned to Algeria, and for confirmation that it was accepted B was an Algerian national. Further questions were submitted from the Treasury Solicitor to B's solicitors, asking 12 discrete questions designed to elicit

B's true identity. On 14 May B's solicitors responded indicating that they had no idea of B's real identity and that they have never had any further information which might establish it.

15. On 17 June 2008 HMG received a *note verbale* from the Algerian Ministry of Justice confirming that the Appellant is not the person identified by Interpol Algeria in February 2008. That individual had been interviewed and stated that he had lost his passport in 1995.

16. On 30 July 2008, SIAC handed down Open and Closed judgments on B's risk to national security. The case of the SSHD was upheld. SIAC also concluded that it was satisfied that B's conduct amounted to an abuse of the due process of law.

17. On 18 August 2009, the SSHD applied to SIAC for a committal order for contempt by B in disobeying the order of 19 July 2007. That application was heard on 22 December 2009. It was adjourned following undertakings by the SSHD as to the use to which the information would be put, designed to gain compliance by B. This too was met by a refusal. After a period of many months, B's solicitors wrote to the Commission on 6 July 2010 saying that after "extended deliberations" B was not prepared to provide further information about his identity. The letter read in part

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

18. The committal hearing before SIAC continued on 11 October 2010 and on 26 November 2010 SIAC gave judgment on the application, concluding that B was liable for contempt and ordering firstly that B be committed to prison for four months and secondly that the committal order should be suspended pending appeal. B remained on bail.

19. Throughout this extended period, B had remained an in-patient in the Laffan ward at St Pancras Hospital. On 18 January 2011, B was discharged from the Laffan ward to bail accommodation. A little over a month later, on 23 February 2011, B was found by police officers on a bridge over the Thames. He was taken to the Royal London Hospital and subsequently transferred to the Royal Free Hospital. A month later, on 23 March 2011, B was discharged from hospital back to his bail address.

20. On 6 July 2011, B's appeal against the committal order was heard by the Court of Appeal and, in a judgment of 21 July 2011, the Court of Appeal upheld the committal order: see *B(Algeria) v SSHD* [2011] EWCA Civ 828. The Court of Appeal concluded that SIAC had made an error in expressing confidence that B would not relapse into paranoid psychosis if he was sent to prison. In particular SIAC had erred in rejecting the evidence of two consultant psychiatrists who were of the view that B would, in prison, refuse to take his medication and would in consequence relapse. Notwithstanding those errors, by a majority the Court of Appeal concluded that the appeal against the committal order should be dismissed. They rejected arguments based on Articles 3 and 8 of ECHR, holding that a relapse into a psychotic condition would not amount to a breach of Article 3 (*per* Longmore LJ at paragraph [14] to [17]) because if such an event took place, arrangements would be in place for B's

transfer to hospital. The majority found that even in those circumstances, the four months' sentence was not excessive and indeed in the view of Longmore LJ it was a sentence which was "comparatively merciful". The Court of Appeal refused B permission to appeal but certified two questions under s.1(3) and 13(4) of the Administration of Justice Act 1960.

21. On 14 December 2011, the Supreme Court granted B permission to appeal. That appeal was heard on 5 December 2012, and on 30 January 2013 the Supreme Court handed down judgment dismissing B's appeal: see *B(Algeria) v SSHD* [2013] UKSC 4. The Supreme Court remarked that the purpose of such a committal was two-fold, firstly to induce the contemnor to purge his contempt and secondly to punish the contempt. The Court observed:

> "Where there is reason to believe that committal will secure compliance with the Court's order, the fact that the person subject to it has already substantial restrictions on his liberty is immaterial. Where it is required in order to properly punish the contemnor, the loss of residual liberty is unlikely to weigh heavily against the making of the order."

22. The Supreme Court concluded, in effect, that the intention of SIAC in passing this sentence was primarily to punish the Appellant, although there was also some expressed hope that the sentence would cause him to purge his contempt by revealing his identity. Analysing the approach of the Court of Appeal, the Supreme Court concluded that the constitution of the Court of Appeal who upheld the sentence were not motivated by a hope that B would reveal his identity, but were motivated by the need for punishment, even if that carried the risk of bringing about deterioration of the mental health of B leading to his transfer to hospital. That approach was upheld in the Supreme Court.

23. On 6 February 2013 the SIAC committal order was executed and B was taken to prison. On 4 April 2013 he was discharged from prison and on the same date was admitted to the Highgate Centre for Mental Health in London. For the period following B's release from HMP Pentonville, SIAC made two alternative orders setting conditions for bail, one to apply while B was an in-patient in hospital and the other to apply if and when he was released into the community.

24. The objective of the two orders, which underwent a number of detailed changes, was to ensure that bail conditions were consistent with the requirements of treatment whilst ensuring reasonable security. The pattern of the "home" bail order in place from April 2013 is that B has been required to live at the designated residence, and to be present within "curfew" hours. The arrangements provide attendance at medical appointments at short notice and, for example, facilitate his use of the local swimming pool. He is required to remain within a defined area during his "non-curfew" times. He is also required to report by telephone regularly to a telephone monitoring company.

25. From May 2013 the Appellant was permitted to leave his residence at the following times:

> "(1) Subject to the rules of the hospital which take precedence, the Appellant shall be permitted to leave the hospital for up to 3 hours each day between 17.45 and 20.45.
>
> (2) The Appellant is permitted to attend medical appointments on the basis that he provides the SSHD with a minimum of 24 hours notice of the date, time and location of the appointment.
>
> (3) **Mondays, Tuesdays and Wednesdays:**
>
> 09:00 – 17:00, for the purpose, between 09:30 and 16:00, of attending the … Centre;
>
> (4) **Thursdays:**
>
> 12:30 – 17:00 for the purpose, between 13:00 and 16:00, of attending the … Centre;
>
> (5) **Fridays:**
>
> 12 noon – 17:00, for the purpose, between 13:00 and 16:00, of attending the … Mosque"

26. On 7 November 2013 SIAC relaxed some of the bail conditions and in particular expanded the "non-curfew" hours. The conditions since then have been as follows:

> "The bail conditions to which B is subject have been modified since the directions hearing on 15 October 2013. A Bail Variation Request, dated 25 October 2013, was considered by SIAC and dealt with in writing on 7 November 2013. SIAC agreed to some relaxation of the conditions. In summary, the position so far as curfew hours is concerned is now as follows:
>
> - Monday to Wednesday: Non-curfew hours are 09:00 to 22:00 [i.e. 11 hour curfew] subject to the requirement to call in to the monitoring company between 16:30 and 17:30.
>
> - Thursdays and Fridays: Non-curfew hours are 12:00 to 22:00 [i.e. 14 hour curfew] subject to the requirement to call in to the monitoring company between 16:30 and 17:30.
>
> - Saturdays and Sundays: Non-curfew hours are 15:00 to 20:00 [i.e. 19 hour curfew]."

27. The order of 7 November also acceded to an extension of the boundary within which B can move freely during his "non-curfew" times and approved the suggestion that he should be able to engage in any activity compatible with his bail conditions in "non-curfew" hours and expand his boundary. These variations were made in response to a

> "Those are the most important [matters] to him, and he does not yet feel well enough to see new visitors or concentrate on a computer."

28. The Appellant has been living under those conditions until committed to hospital under s.3 of the Mental Health Act on or about 21 January 2014.

Efforts to Prepare for B's Return to Algeria

29. As the chronology set out above makes clear, the SSHD knew from July 2006 that B had provided a false identity. The Commission received written evidence from Philip Douglas, Deputy Director in the Home Office's Office for Security and Counter-Terrorism. Attached to his first witness statement is a chronology of efforts made to establish B's identity. The first positive step was a *note verbale* from the UK to Algeria, dated 11 May 2006, giving biographical details of B as he had given them. Further notes were sent over the ensuing two months, but on 10 July 2006 Algeria informed the Secretary of State that the individual whose identity B had claimed was alive and living in Algeria. It was this information which led to the adjournment of the first appeal on 17 July that year. On 5 October 2006, the UK informed Algeria that they had concluded B could not be the man he claimed.

30. On 28 November 2006 the UK representative, Anthony Layden, met the Director General for Legal and Judicial Affairs at the Algerian Ministry of Justice, Maitre Amara. Maitre Amara confirmed that the passport provided to Algeria had been doctored by the insertion of a new photograph.

31. Further information was provided by the UK Government on 3 July but this information related to the man B claimed to be. By 23 June 2008 the Algerians confirmed it was now clear that B was not the man, MB, who he claimed to be.

32. In July 2009, exchanges between the UK and Algeria consisting of a repeat sending of a photograph of B, a copy of the passport and a copy of his fingerprints were again transmitted to Algeria, with a response from Algeria confirming the biographical details they held for MB but with no progress towards identifying B.

33. It was following this that the Secretary of State applied to commit B for contempt. It does not appear that any other steps were taken to identify B or prepare the ground for his removal to Algeria, between July 2009 and March 2013.

34. Following his committal to HMP Belmarsh, B was visited in prison by an immigration officer asking if he was now prepared to provide his true biographical details and, in effect, purge his contempt. B refused to speak to the officer.

35. Between March and May 2013 Mr Douglas informs the Commission that there was a review of the file held by the Secretary of State and legal advice was sought. On 15 August 2013 the UK sent a further *note verbale* to Algeria informing them of B's sentence for contempt and asking whether a visit by UK officials would assist further

investigations. It is not clear from Mr Douglas's evidence what investigations were proposed. Maitre Amara indicated that any findings would be shared with the UK.

36. On 20 August 2013 the Home Office wrote to B's solicitors asking him to attend a language analysis interview, at which he would be further fingerprinted and would be asked to complete an Algerian travel document form giving his true biographical details. After some delay, the language analysis interview took place on 19 September and fresh fingerprints were taken.

37. The language analysis has been placed in evidence before us. It is dated 25 September. The findings are said to be at a "high" degree of certainty but falling short of "very high". Through a combination of questions establishing local knowledge, and linguistic analysis, the report concludes that B is a Berber (Qbaili) from Algiers. However, this evidence can go no further.

38. In late September 2013, Dame Anne Pringle, the UK Government's Special Representative for Deportation With Assurances, had a further discussion with Maitre Amara. According to Mr Douglas, Maitre Amara -

> "confirmed that the Algerian authorities would assist the UK Government in the efforts positively to identify B and indicated work was in hand in this regard."

It is not clear from Mr Douglas's evidence what that work was said to be.

39. On 23 October 2013 there was a further meeting between Dame Anne and Maitre Amara in London. The latter was informed that the UK Government "would soon pass on the new fingerprints obtained on 19 September". On 6 November the UK Government summarised the findings of the language analysis in a further "note" and passed a copy of the language analysis report and the new fingerprints.

40. In early December the UK embassy in Algiers spoke again to Maitre Amara asking for an intensification of Algerian efforts. Embassy officials spoke once more to Maitre Amara on 8 January 2014. He explained the results of the Algerian investigations and they were summarised in a further *note verbale* dated 12 January. This note explains how B stole the identity of MB. It appears that NB gave his passport to "an individual" in 1995. This individual left Algeria for Italy where he sold the passport on to another man, unnamed in the witness statement of Mr Douglas but named to the UK authorities. It is thought that the latter individual is now in Canada. Maitre Amara informed the UK verbally that the Algerian authorities had been unable to match the fresh fingerprints of B with any fingerprints on their system. In the face of that rebuff, Mr Douglas stated that the intention of the UK Government was:

> "The option of trying to contact the individuals known to have possession of the passport, in order to determine whether they could assist our efforts to establish B's true identity."

41. The Commission was told that the formal arrangements between the UK and Algeria are that Algeria should accept the return of any individual shown to be an Algerian

national. However, in the December meeting with Maitre Amara, the British embassy was informed by him that –

> "returning someone without confirmed identity would be problematic…. Anyone returned under the agreement between Algeria and the United Kingdom must be confirmed as Algerian and identified. "

In the face of this, as Mr Douglas sets out in his witness statement of 24 January 2014, the first step in attempting to persuade Algeria to accept B without identification would be to invite Algerian consular staff to interview B in London. This is a response to a suggestion made by Maitre Amara, although Mr Douglas states Maitre Amara "has been clear that any decision to arrange such an interview would be beyond his remit". Mr Douglas expresses the hope that this can be arranged when B is released from hospital.

42. In a clarification from Mr Douglas, set out in a third statement dated 29 January, he makes it clear that the reaction of Maitre Amara to the linguistic analysis report was "sceptical", producing the comment that –

> "Berbers come from Morocco, Tunisia and Libya as well as Algeria. The contents of the report alone could not therefore confirm Algerian nationality."

43. The Appellant advanced a body of evidence suggesting that it was generally extremely difficult to achieve removal of undocumented Algerian nationals. Jane Ryan, an experienced solicitor, gives that as her experience and exhibits to her witness statement a "Travel Document Information Guide" originating from the UKBA and dated 19 March 2007. The guidance in relation to Algeria emphasises that even where an expired passport is available, that cannot be used to effect removal of an Algerian citizen to Algeria, save on a voluntary basis. The minimum requirements for removal are said to be "Form IS33", eight passport photographs, an application form, bio data and fingerprints.

44. Also exhibited to Ms Ryan's statement is a paper from the London Detainees Support Group of March 2008, wherein the group concluded that –

> "many undocumented Algerian nationals cannot be removed without extreme delays. Significant numbers of undocumented Algerians are being detained for long periods of time without apparent progress in effecting removal."

45. Ms Ryan also produces guidance from UKBA which appears to be dated from December 2009. The guidance suggests that an Emergency Travel Document is required for removal as well as any relevant expired passport. The guidance also records that –

> "the Algerian Consulate rejects applications that fail to produce a complete place of birth. The town/city, municipality and province must be provided."

46. The Appellant also relies on the witness statement of Deborah Zanotti, a Higher Executive Officer in the Criminal Casework Directorate of UKBA. The statement was made by Ms Zanotti in a different case, and dates from May 2011, but it does emphasise the high requirements of Algeria before removal can be achieved. The same point emerges from the statements of Richard Coy and Sian Jones, also made in the other case by witnesses who are officials of UKBA. There is little purpose in analysing the detail of all this evidence, which simply serves to emphasise the technical requirements set up by Algeria. If Algeria stands by this kind of approach in relation to this Appellant, then in the absence of the Appellant revealing his true identity, it seems very unlikely that Algerian requirements will be fulfilled.

47. The Secretary of State seeks to distinguish the position of the Algerian approach to "ordinary" removals and what the Algerian Government might be brought to accept in this case. Mr Gray submits that it is clear the UK Government are negotiating about this Appellant at a very senior level, as evidenced by the position held by Maitre Amara. Mr Gray submits that the position is not without hope and that the Secretary of State does intend, for example, to seek contact with those involved in the purchase and onward transmission of B's passport to see what information can be gleaned. However, Mr Gray was scrupulous to acknowledge that the prospect of return was not high.

Our Conclusions on the Prospect of Return

48. In our view, in the absence of a change of mind by B, there is a very low prospect that he will be able to be removed to Algeria. Whilst the Algerian authorities will no doubt wish to seem cooperative in such a case as this, none of the evidence demonstrates anything more than gesture from the Algerian side. There is no convincing evidence that any different line will be taken in respect of B than would be taken in the "ordinary" removal case. A good indicator of the true underlying attitude is the response to the Sprakab language analysis report. The report indicated to a high degree of probability that B is a Berber from Algiers. The response of Maitre Amara was that there are Berbers in many different countries. Common sense suggests that efforts at achieving cooperation from the individuals who dealt in B's trafficked passport are unlikely to produce results, even if they could be located.

49. The Appellant's lawyers have been critical of delay on the part of the Secretary of State in attempting to establish his identity. We consider there is some validity in the criticism. It certainly appears that for a period of four years or so between 2009 and 2013 nothing was done to pursue the matter. Once committal to prison was in question, no-one considered or took any other active steps. However, it is highly doubtful if this made any difference to the outcome. In any event, the principal author of the problems is the Appellant.

50. Nor is there any indication that B will change his attitude. He has been resolutely defiant of the order of the Commission to identify himself and was apparently unmoved by his imprisonment. Although the extent and severity of his mental health difficulties may be in issue, it is common ground that he does have genuine mental health problems to some degree.

51. For all these reasons, our conclusion is that there is no reasonable prospect of removing the Appellant to Algeria and thus the ordinary legal basis for justified detention of B under the Immigration Acts has fallen away.

Has the Appellant Undergone Deprivation of Liberty?

52. In *SSHD v AP* [2011] 2 AC 1, the Supreme Court considered what was meant by deprivation of liberty for the purpose of Article 5 of the European Convention of Human Rights, in the context of Control orders. The issue had been ventilated in *SSHD v JJ* [2008] AC 385 and, in the later case, Lord Brown approved and adopted the headnote to the official report of *JJ*, in the following terms:

> "Deprivation of liberty might take a variety of forms other than classic detention in prison or strict arrest… the Court's task was to consider the concrete situation of the particular individual and, taking account of a whole range of criteria including the type, duration, effects and manner or implementation of the measures in question, to assess their impact on him in the context of the life he might otherwise have been living …"

53. In the course of paragraph 2 of his opinion in *AP* Lord Brown went on to say:

> "In the context of Control Orders, it therefore follows that within what has been described as the grey area between fourteen-hour and eighteen-hour curfew cases, other restrictions than mere confinement can tip the balance in deciding, as in every case the judge has to decide as a matter of judgment, whether the restrictions overall deprive the controlee of, rather than merely restrict, his liberty."

54. In further guidance set out in paragraph 4 of his opinion, Lord Brown said:

> "I nevertheless remain of the view that for a Control Order with a sixteen-hour curfew (*a fortiori* one with a fourteen-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living."

55. In *SSHD v AH* [2008] EWHC 1018 (Admin), again a Control Order case, Mitting J extracted four principles from *JJ*. Those same principles had been applied at first instance in *AP* [2008] EWHC 2001 (Admin) and were by implication approved in Lord Brown's opinion in *AP*. The four principles adumbrated by Mitting J are:

> "(1) There is no "bright line" separating deprivation of liberty from restriction of liberty.
>
> (2) The test is objective: the task of the Court is to assess the impact of the measures "on a person in the situation of the person subject to them".

> (3) Many relevant factors must be taken into account, but the starting point or "core element" is the length of the curfew…
>
> (4) Social isolation is a significant factor, especially if it approaches solitary confinement during curfew periods…"

56. Mr Southey QC for the Appellant submits that the reference to the judgment of Mitting J in *AH* contained in paragraph 4 of Lord Brown's speech in *AP*, does not constitute approval of the approach of Mitting J. Mr Gray, for the Secretary of State, submits to the contrary. So far as it goes, it appears to us that the approach of Mitting J was regarded as appropriate: see paragraph 20 of the speech of Lord Brown.

57. Lord Dyson, in paragraph 25 of the judgment, confirmed that:

> "The Court's task is to consider the "concrete situation" of the particular individual taking account of "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question". See *Guzzardi v Italy* 3 EHRR 333, para 92 and, for example, paras 15 and 18 or Lord Bingham of Cornhill's speech in *Secretary of State for the Home Department v JJ* [2008] AC 385."

58. In paragraph 29 of the judgment, Lord Dyson emphasises that he does not find it helpful to use the subjective/objective terminology:

> "The focus of the Article 5 enquiry is on the actual effect of the measures on the controlee in the circumstances in which he finds himself."

59. The approach to setting conditions of bail for this Appellant has throughout been to set a balance between the legitimate needs for security voiced by the Secretary of State and the particular circumstances of B. Conditions of bail have been varied on a number of occasions, mostly with a view to enabling effective medical treatment and support. His mental health problems are of long standing. It is not appropriate to set out here a detailed ruling on the nature and extent of those problems, an exercise which could only properly be done following oral evidence, including testing of the evidence of his clinicians. There is in any event no need to go through such an exercise. It is sufficient to say that his mental health difficulties cannot be said principally to originate from his bail conditions and that the bail conditions imposed have at all stages been crafted with his mental health problems and treatment in mind. The variability of the "non-curfew" periods during the week reflects exactly that consideration.

60. An eleven-hour curfew on Monday to Wednesday cannot possibly be regarded as a deprivation of liberty. On Thursday and Friday the curfew is fourteen hours and again, in our judgment, this is not capable of amounting to a deprivation of liberty.

61. On Saturdays and Sundays there is a nineteen hour curfew. Of course, if such hours extended over the whole week, they would or could amount to a deprivation of

liberty. That would be a wrong way of understanding B's position. His position overall is the question. Overall, absent any special factor, in our judgment this is not a case amounting to a deprivation of liberty. This pattern is not within the "grey area".

62. Mr Southey submits that the special factor here is the requirement to attend for medical treatment. Mr Southey states that this is to be regarded as an incremental compulsion by a State actor, even though this treatment has been as a voluntary patient until days before the hearing in front of us.

63. There are two problems with that submission. Firstly, until his detention under the Mental Health Act, B was under no compulsion to attend for treatment. He was doing so voluntarily. Secondly, he should and presumably would have attended for this treatment, whether or not he was the subject of bail conditions from SIAC: his treatment would and should have been part of "the life [B] might otherwise have been living". Thus insofar as Mr Southey submits that the time spent by B in attending for medical treatment should in effect be "totted up" with his curfew hours, we reject this submission.

64. That does not mean that his position as someone requiring continuing medical treatment is irrelevant. That need is and was an important circumstance in B's life. It should not be and has not been ignored when setting the bail conditions under which he has lived. We have borne fully in mind the overall situation which B has faced and the impact of the restrictions which have been set. Within his non-curfew periods he has had considerable independence of movement. He has a reasonable range of facilities available to him within his boundary, which in itself has been extended recently at his request. From the beginning of the period in question, conditions were set so as to permit him to go swimming regularly as his chosen recreation. As with many of the SIAC Appellants, he has had members of the public who have befriended him and given him support. He has also had a good deal of professional support to live in the community. Taking all of the facts about B's life into account, including his treatment needs, we reject the submission that he has been the subject of a deprivation of liberty throughout the period in question.

The Future

65. We have reached two conclusions: firstly, that absent a change of heart by B, there is no reasonable prospect of B being removed to Algeria, and secondly, that B has not been the subject of a deprivation of liberty up to the point in January 2014 where he became detained under the Mental Health Act. However, two further facts are also obvious: firstly, B has had a very significant restriction on his liberty throughout the period we have been considering. Second, that restriction has to be seen in the context of a very long period over which B has either been detained or has been subject to a deprivation of liberty through initially tighter bail conditions. Given the very poor prospects of removal and the history, we must go on from our finding that he has not suffered a deprivation of liberty and that, for that reason, detention does not need to be justified according to the principles confirmed in *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

66. Accordingly, SIAC has directed that there should be a hearing as soon as practicable so as to consider, in the context of the extremely long history of this case and the poor

prospects of removal, whether the existing significant restrictions on B's liberty can be justified. That re-examination must include a review of whether and to what extent B represents a threat to national security today. In addition, Mr Southey seeks to advance an argument based on the submission that there has been an unlawful differential treatment of B, contrary to Article 14 of the European Convention of Human Rights, compared with those currently held under TPIM orders.

67. Further, the Secretary of State is to consider whether B's refusal to identify himself in the face of the Commission's order, whilst at the same time seeking to invoke the appellate jurisdiction of SIAC, constitutes an abuse of process. The Commission has set a time within which the Secretary of State must indicate whether such an argument is to be relied on or not and what order is sought as a result. Finally, the history of this case makes it imperative that the substantive appeal should be heard as soon as it possibly can be. A timetable has been set to that end.