Neutral Citation Number: [2020] EWHC 1861 (Admin)

Case No: CO/4729/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2020

Before :

MRS JUSTICE ELISABETH LAING

- -

Between :

SETH KAITEY	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
BAIL FOR IMMIGRATION DETAINEES	**Intervener**

- -

MR ALEX GOODMAN AND MR MATTHEW FRASER
(instructed by **DUNCAN LEWIS SOLICITORS**) for the **Claimant**
MR ROBIN TAM QC AND MISS EMILY WILSDON
(instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**
MISS LAURA DUBINSKY, MR ANTHONY VAUGHAN AND MISS ELEANOR MITCHELL
(instructed by **ALLEN & OVERY LLP**) for the **Intervener**

Hearing dates: 4 June 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10:30am on 13 July 2020.

The Hon. Mrs Justice Elisabeth Laing:

Introduction

1. This is an application for judicial review of 'the Defendant's decision to impose conditional bail on the Claimant' ('C'). The claim was lodged on 3 December 2019. Permission to apply for judicial review was given by May J on 23 January 2020. By an order dated 21 February 2020 Fordham J gave Bail for Immigration Detainees ('BID') permission to intervene by oral and written submissions. This is a case with potentially wide ramifications, as according to BID's evidence, there may be more than 90,000 people who are subject to immigration bail.

2. At the remote hearing on 4 June 2020 C was represented by Mr Goodman and Mr Fraser. BID was represented by Ms Dubinsky, Mr Vaughan and Ms Mitchell. The Secretary of State ('D') was represented by Mr Tam QC and Ms Wilsdon. I thank counsel for their helpful written and oral submissions.

3. This application for judicial review concerns the meaning and effect of Schedule 10 to the Immigration Act 2016 ('the 2016 Act'). It is not necessary for me to say much about the background facts, which do not seem to be in dispute in any way which is relevant to the construction of Schedule 10.

The facts

4. C' nationality is obscure. He claims to be a Guinean national. It is possible that he is a Ghanaian national, which is what the Guinean authorities assert. D accepts that she has delayed in investigating that issue. In her most recent decision in his case, she says that she is now looking into this as part of her consideration of C's outstanding submissions.

5. C has been in the United Kingdom for 13 years. He entered clandestinely, on 17 December 2006, he claims. D refused his application for asylum on 16 January 2007.

6. On 9 June 2009 he was convicted of possessing false documents. He was sentenced to 14 months' imprisonment. This meant that he was subject to the automatic deportation regime in the UK Borders Act 2007. A deportation order was made in November 2009. His appeal against the decision to deport him was dismissed on 4 February 2010. An application for permission to appeal to the Upper Tribunal was refused.

7. In 2010, D tried, unsuccessfully, to get an emergency travel document ('ETD') from the Guinean Embassy ('the Embassy'). C completed a bio-data form. He was also interviewed at the Embassy.

8. He was accordingly released from immigration detention on bail on 27 January 2011. He has not been detained since. He has been on bail since then.

9. The Secretary of State continued to try, during the next five years, and without success, to get an ETD. The application was on a monthly review list.

10. In May 2016 D decided that C should complete a new bio-data form. D applied for an ETD. C was again interviewed by the Embassy. The Embassy decided in August 2016 that C was not a Guinean national. It refused to issue an ETD.

11. C was again interviewed by D. He completed a further bio-data form in November 2016. It does not seem that in the last three years D has made any further attempts to get an ETD from the Guinean Embassy. D has very recently, I was told, refused C's protection and human rights claims. That decision generates a right of appeal to the First-tier Tribunal. I was also told that D now believes that C is Ghanaian.

12. Since his release, C has not committed any more offences. He has made many applications for the deportation order to be revoked and for leave to remain as a stateless person. D has either refused these applications, or has made no decision on them. C has complied with his reporting conditions.

13. C's current bail conditions permit him to work in a job in the 'shortage occupation list'. There is a residential requirement and a requirement to report to police every four weeks.

The legislation

14. The provisions in this case relate to a relatively new concept, 'immigration bail'. They are in the 2016 Act. The relevant provisions of the 2016 Act repeal and replace provisions of the Immigration Act 1971 ('the 1971 Act'). The power to grant immigration bail replaces three powers conferred by the 1971 Act. Those are the powers to grant temporary admission, and in deportation cases, temporary release, and the power to grant bail. There is an interplay in the legislative history between decisions of the courts and amendments to the legislation. Three decisions, in particular, are significant. They are *Khadir v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207, *B (Algeria) v Secretary of State for the Home Department* [2015] EWCA Civ 445, [2016] QB 789, and *B (Algeria) v Secretary of State for the Home Department* [2018] UKSC 5; [2018] AC 418.

15. In the next section of this judgment, I will review the legislative history, which may, potentially, inform the interpretation of the current provisions.

The relevant provisions as in force when Khadir was decided at first instance

16. *Khadir* concerned, not bail, but temporary admission. The relevant provisions, when Crane J decided *Khadir* at first instance, are summarised by Lord Brown at paragraphs 14-22 of his speech. Some, for example those relating to leave to enter, are still in force. A person who is not a British citizen generally requires leave to enter or to remain. Leave may be given for a short period and subject to conditions. Section 4(2) of the 1971 Act enacts Schedule 2, which has effect, among other things, 'with regard to the exercise by immigration officers of their powers in relation to entry to the United Kingdom and the removal of persons refused leave to enter or entering or remaining unlawfully', and 'the detention of persons pending examination or pending removal from the United Kingdom, and for other supplementary purposes'.

17. Where a person is refused leave to enter, paragraph 8(1)(c) of Schedule 2 enables an immigration officer to give the carrier directions for the person's removal. Paragraph 9(1) provides that an immigration officer might give such directions as are authorised by paragraph 8(1) to an illegal entrant who is not given leave to enter or remain. Where it appears to the Secretary of State that directions might be given to a person under paragraphs 8 or 9, but it is not practicable for them to be given, the Secretary of State can give paragraph 8 or 9 directions to a carrier, or himself make removal arrangements.

18. Paragraph 16(2) provides

> '*If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8-10A or 12-14, that person may be detained under the authority of an immigration officer pending – (a) a decision whether or not to give such directions; (b) his removal in pursuance of such directions*'

19. Paragraph 21 was headed 'Temporary admission of persons liable to detention'. It provided

> *'(1) A person liable to detention or detained under paragraph 16 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 may from time to time be notified to him…'.*

Section 67 of the Nationality Immigration and Asylum Act 2002

20. Section 67 of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act') was brought into force on 7 November 2002. It provided

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

The decision in Khadir

21. The appellant in *Khadir* entered the United Kingdom clandestinely in 2000. He claimed asylum and was given temporary admission. His claim was refused. His appeal against that decision was dismissed. The Secretary of State issued removal

directions. But it was not possible to remove him to the Kurdish Autonomous Area of Iraq. The Secretary of State continued his temporary admission. He applied for judicial review of the Secretary of State's refusal to give him exceptional leave to enter. Crane J held that temporary admission was no longer lawful and that the reasoning in the Secretary of State's decision was inadequate. After Crane J's decision, Parliament enacted the 2002 Act (see above). Section 67, which came into force immediately on enactment (on 7 November 2002), reversed Crane J's decision. The Court of Appeal allowed the Secretary of State's appeal, finding section 67 decisive.

22. The appellant appealed to the House of Lords. Lord Brown said (speech, paragraph 18) that the question was whether as at 3 May 2002 (the date of the relevant decision) the appellant could be temporarily admitted under paragraph 21. That turned on whether he was 'a person liable to detention …under paragraph 16'. There could be no dispute but that he was an illegal entrant who had not been given leave to enter or remain, and was thus someone in respect of whom directions could be given under paragraphs 9 and 10 (within the meaning of paragraph 16(2)). So he was a person who 'may be detained… pending a decision whether or not to give removal directions, or pending his removal under such directions'. On the face of it, he was liable to detention under paragraph 16 and so could be temporarily admitted under paragraph 21.

23. Lord Brown summarised section 67 of the 2002 Act. It applied to the construction of a provision which did not confer a power to detain a person, but which referred (in any terms) to a person who 'is liable to detention under a provision of the Immigration Acts' (section 67(1)). He quoted section 67(2) and section 67(3).

24. Lord Brown said (paragraph 20) that it was obvious that section 67(2) of the 2002 Act had been enacted to deal precisely with this sort of case. He noted that section 67 did not affect provisions like paragraph 16(2) (the detention power), but rather, provisions like paragraph 21, which confers a power temporarily to admit those 'liable to detention'. He said, 'In short, the section recognises that it is one thing to detain a person during what may be a long delayed process of removal, quite another to provide for his temporary admission during such delays'.

25. He then considered a line of cases dealing with the detention of persons, not in the context of removal (under Schedule 2), but in the context of deportation (under Schedule 3), such as *R v Governor of Pentonville Prison ex p Hardial Singh* [1984] 1 WLR 704 and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, PC. Paragraph 2(3) of Schedule 3 provided that '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'. He observed that the consequence of the Appellant's argument was that a person could not be released subject to conditions under paragraph 2(5) and (6) of Schedule 3, which would be surprising.

26. He summarised the steps in the Appellant's argument in paragraph 26. In essence, the argument was that the power to detain only existed when removal was 'pending'. Removal was not pending unless it could be effected within a reasonable time (which was why the applicants in that line of cases had to be released). If removal was not pending, they were not liable to be detained. That limited not only the exercise, but the existence, of the power. If they were not liable to be detained, they could not be

subject to the restrictions in paragraph 2(5) of Schedule 3, and Khadir was not liable to be temporarily admitted under paragraph 21 of Schedule 2.

27. Lord Brown had no doubt that, in the Court of Appeal, Mance LJ had been right to recognise a distinction between the circumstances in which a person is potentially liable to detention (and can be temporarily admitted) and the circumstances in which the power to detain can in any case properly be exercised (paragraph 31). The fact that detention could not be justified on the facts did not mean that the person was not liable to be detained. He considered (paragraph 31) that 'pending' in paragraph 16 meant no more than 'until'. The word was being used as a preposition, not an adjective. Paragraph 16 does not say that removal must be pending, still less that it must be impending. So long as the Secretary of State remains intent on removal and there is some prospect of achieving that, paragraph 16 authorises detention in the meanwhile. It may become unreasonable to detain someone pending a long delayed removal. But that does not mean that the power had lapsed. The person remains 'liable to detention', and he can be temporarily admitted (paragraph 32).

28. The *Hardial Singh* line of cases said 'everything about the exercise of the power to detain (when properly it can be exercised and when it cannot); nothing about its existence' (paragraph 33). Lord Brown's conclusion (paragraph 36) was that section 67 was an unnecessary enactment: 'what it provided for had in any event always been the law'.

29. The Appellant had an alternative argument, that the Secretary of State should have granted him exceptional leave to enter ('ELE'). Lord Brown rejected that challenge because 'it must require an altogether stronger case on the facts than this to impugn a refusal of ELE in circumstances where Parliament has expressly provided for temporary admission as an alternative to detention'.

The relevant provisions as in force at the date of the decision to grant bail in B (Algeria)

30. At the time of the decision of the Special Immigration Appeals Commission ('SIAC') to grant bail in *B (Algeria)*, paragraph 2(2) of Schedule 3 to the 1971 Act provided that where notice of a decision to make a deportation order had been given, and a person was not detained pursuant to a sentence of the court, he could be detained under the authority of the Secretary of State pending the making of a deportation order. Paragraph 2(3) provided that where a deportation order was in force against a 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)'.

31. By paragraph 2(4A), paragraphs 22-25 of Schedule 2 to the 1971 Act applied as they applied to a person detained under paragraph 16 of Schedule 2. Paragraph 2(4A) was added on 10 February 2003 by section 54(4) of the Immigration and Asylum Act 1999. Before that date, there were no provisions about bail for persons who were subject to a deportation order and detained. The only route out of detention (unless deportation had been recommended by a court) was a direction by the Secretary of State under paragraph 2(3). By paragraphs 2(5) and (6), a person who was liable to be detained under paragraph 2(2) or (3) could be subject to conditions notified by the Secretary of State 'while by virtue of a direction of the Secretary of State he is not so detained'.

32. Paragraph 22 of Schedule 2 was headed 'Temporary release of persons liable to detention'. By paragraph 22(1), 'a person detained' under various powers could be released on bail in accordance with paragraph 21. Paragraph 29 provided that where a person had an appeal pending under Part 5 of the 2002 Act 'and is for the time being detained under Part 1 of this Schedule', he might be released on bail.

The decision of the Court of Appeal in B (Algeria)

33. *B (Algeria)* concerned the power of SIAC to grant bail under paragraph 22 of Schedule 2 (as applied to a deportation case by paragraph 2(4A) of Schedule 3). The Secretary of State accepted that the appellant could not lawfully be detained after 13 February 2014. On that date, SIAC decided that there was no reasonable prospect of removing the appellant to Algeria. Lord Dyson MR, giving the judgment of the Court of Appeal, held that the decision in *Khadir*, which concerned the power to grant temporary admission, and in relation to which Parliament had used different language, was irrelevant (paragraphs 27 and 28). The power to give temporary admission could be exercised in relation to someone who was liable to be detained. That reasoning could not be applied to the question whether it was lawful to grant bail to a person who could not lawfully be detained. Paragraphs 22 and 29, crucially, provided that a person who is detained may be released on bail.

34. 'The distinction between a person "detained" and a person "liable to be detained" is clear, and must have been deliberate. The distinction is made in paragraph 21 itself. As the House of Lords explained, a person may be liable to detention, (and therefore susceptible to temporary admission) when he may no longer be detained pending deportation. In the scheme of the 1971 Act, bail is predicated on an individual being detained, whereas temporary admission is predicated on the individual being either liable to detention or being detained' (paragraph 30). Bail could not be granted, either, where the person was unlawfully detained, or not detained at all, and could not be lawfully detained (paragraph 31).

35. Provisions purporting to curtail liberty by administrative detention should be strictly construed. Paragraphs 22 and 29 should be given a restrictive interpretation (paragraph 32). If Parliament had intended that immigration officers should be able to grant bail to people who were not lawfully detained, or could not be lawfully detained, it should have made that clear. The word 'detained' in paragraphs 22 and 29 should be read as meaning 'lawfully detained'. The power to grant bail presupposes the existence of, and the ability to exercise, the power to detain lawfully. The power to grant bail pre-supposed the existence of and the ability to exercise the power to detain lawfully. That was why a writ of habeas corpus could issue when a person was on bail (paragraph 33).

36. In paragraph 34, Lord Dyson referred again to the distinction between the existence of the power to detain, and whether it can be exercised, which was made by Lord Brown in *Khadir*. If Lord Brown had held that the power to grant bail exists or can be exercised when the power to detain can no longer be exercised, that was not necessary to Lord Brown's reasons, and Lord Dyson disagreed with any such view. Judgment was handed down in *B (Algeria)* on 6 May 2015.

The Immigration Act 2016

37. The 2016 Act received Royal Assent on 12 May 2016. Section 61(3)-(5) came into force on the day it was passed (section 94(3)). Section 61(1) enacted Schedule 10

(headed 'Immigration bail'). Section 61(5), echoing section 67(3) of the 2002 Act, provided that section 61(3) and (4) were to be treated as always having had effect. Section 61(3) provided that 'A person may be released 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'. Section 61(4) made clear that the reference to paragraphs 22 and 29 of Schedule 2 included a reference to that paragraph as applied by any other provision of the Immigration Acts. Section 61(6) repealed section 61(3)-(5) on the coming into force of the repeal (by paragraph 20 of Schedule 10 to the 2016 Act) of paragraphs 22 and 29 of Schedule 2. Schedule 10 to the 2016 Act came into force on 15 January 2018, and it follows, section 61(3)-(5) is now no longer in force.

38. Paragraph 1(1) of Schedule 10 provides that the Secretary of State may grant a person bail 'if the person is being detained' under (a) paragraph 16(1), (1A) or (2) of Schedule 2 to the 1971 Act), under (b) paragraph 2(1), (2) or (3) of Schedule 3 to the 1971 Act, under (c) section 62 of the 2002 Act, or under (d) section 36(1) of the UK Borders Act 2007.

39. Paragraph 1(2) gives the Secretary of State power to grant a person bail if the person is 'liable to detention' under a provision mentioned in subparagraph (1). Paragraph 1(3) gives the FTT power, if an application is made to it, to grant bail in the same circumstances as are referred to in paragraph 1(1).

40. Paragraph 1(4) provides that in Schedule 10, references to the 'grant of immigration bail', in relation to a person, are to the grant of bail to that person under any of sub-paragraphs (1) to (3) of paragraph 1 of Schedule 10 (or under paragraph 10(12) or (13) (release following arrest for breach of bail conditions)).

41. Paragraph 1(5) provides

> '*A person may be granted and remain on immigration bail even if the person can no longer be detained, if—*
>
> *(a) the person is liable to detention under a provision mentioned in sub-paragraph (1), or*
>
> *(b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1) of the Immigration Act 1971*'.

42. Paragraph 2 provides that different bail conditions are available generally (paragraph 2(1)), and in the case of a person 'who is being detained under a provision mentioned in paragraph 1(1)(b), or (d), or who is liable to detention under such a provision' (ie, the deportation provisions). In deportation cases, and subject to exceptions, an electronic monitoring condition is mandatory, not optional. The exceptions include cases in which the Secretary of State considers that such a condition would breach a person's Convention rights. Paragraph 4 defines 'electronic monitoring condition' for the purposes of Schedule 10. Further provision about electronic monitoring is made in paragraph 7. Paragraph 7(1)(b) again uses the phrase 'detained or liable to detention'. See also paragraph 8(1)(b). These two provisions are not yet in force.

43. Paragraph 10 gives an immigration officer or a constable power to arrest without a warrant a person on immigration bail if they have reasonable grounds to believe a person is likely to fail to comply with a bail condition, or if he has reasonable grounds for suspecting that a person is failing, or has failed so to comply. A person arrested under paragraph 10 may be detained by the Secretary of State pending his being brought before the relevant authority (the Secretary of State or the FTT, as the case may be).

44. Mr Goodman repeatedly stressed the importance of paragraph 10(12). It provides

> '*If the relevant authority decides the arrested person has broken or is likely to break any of the bail conditions, the relevant authority must—*
>
> *(a) direct that the person is to be detained under the provision mentioned in paragraph 1(1) under which the person is liable to be detained, or*
>
> *(b) grant the person bail subject to the same or different conditions, subject to sub-paragraph (14).*'

45. Paragraph 11 provides that regulations made under section 92(1) of the 2016 Act may make transitional provisions including provisions for treating a person who at the specified time had been given temporary admission under paragraph 21 of Schedule 2 to the 1971 Act as having, for such purposes as might be specified, been granted immigration bail. Paragraph 11 also refers, more than once, to a person who was 'liable to detention' under various provisions.

The decision of the Supreme Court in B (Algeria)

46. The Secretary of State appealed against the decision of the Court of Appeal. The Supreme Court heard argument in *B (Algeria)* in November 2017. Judgment was handed down on 8 February 2018. It is clear from paragraph 23 of the judgment of Lord Lloyd-Jones (with whom the other members of the Court agreed) that the Secretary of State did not rely on section 61 of the 2016 Act. Lord Lloyd-Jones recorded that it was common ground that B could not lawfully be detained after 13 February 2014.

47. In paragraph 29, he said that it is a fundamental principle of 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…'. Despite the fact that the purpose of bail was to effect release from detention, the same principle of statutory interpretation applied, because the conditions of bail might severely curtail liberty. The principle of legality was 'in play'. The Court was required to interpret the provisions 'strictly and restrictively'.

48. It was common ground that the power to grant bail was predicated on actual detention (paragraph 30). Applying the appropriately strict approach, the references in the four relevant provisions to persons 'detained'… 'must be taken to refer to detention which is lawful'. The words were not appropriate to refer to 'a state of purported detention or to embrace both lawful and unlawful detention' (paragraph 31). In paragraph 33, in a passage on which C and BID rely, he said, referring to a case in which it has ceased to be lawful to detain a person, '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'.

49. Lord Lloyd-Jones considered the relevance of paragraph 21 and of the decision in *Khadir* at paragraphs 35-39. His conclusion was that *Khadir* did not help the Secretary of State, for the reasons given by Lord Dyson in paragraphs 29-31 of the judgment of the Court of Appeal (see paragraphs 34 and 37, above). He summarised those in three propositions, at paragraph 39.

    i. *Khadir* concerned the power to grant temporary admission, not detention, or the power to grant bail under paragraphs 22 or 29.

    ii. There was a material difference in the language of paragraph 21, and paragraphs 22 and 29. 'The distinction between a person "detained" and a person "liable to be detained" must have been deliberate'.

    iii. The distinction between the exercise and existence of the power 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.

50. In paragraphs 47-52, Lord Lloyd-Jones considered the second part of Lord Dyson's reasoning. He said that as a matter of 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'. He then considered some of the relevant authorities. He did not find the cases on habeas corpus much help, but other modern cases which suggested that the grant of bail did not decide whether detention was lawful supported Lord Dyson's approach. In paragraph 53, he said that '…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'. He acknowledged that 'the clearest possible words' would be needed 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'. He said it was possible that there were exceptions to the general principle stated by the Court of Appeal. He referred to a passage in the judgment of Stanley Burnton LJ in *Stellato v Ministry of Justice* [2011] QB 856 at paragraph 25 (in which he had said that the general principles about bail were subject to any statutory provision), and to the provisions governing police bail in sections 34, 37 and 41 of the Police and Criminal Evidence Act 1984. He also referred to section 61 of the 2016 Act. In view of 'such possible statutory inroads into the principle stated by the Court of Appeal' he preferred to decide the appeal on the interpretation of the provisions of Schedule 2 (paragraph 54). The article 5 arguments added nothing (paragraph 56).

The submissions

51. Both Mr Goodman and Ms Dubinsky submitted that 'liable to detention' in paragraphs 1(2) and 1(5) of Schedule 10 means 'liable to lawful detention'.

52. Mr Goodman submitted that the question was whether the provisions about bail should be interpreted in accordance with *Khadir* or with *B(Algeria)*. The amendments to the scheme remove temporary admission. In *B(Algeria)*, the Supreme Court recognised that 'bail' was a legal term of art with a consistent meaning, and that the

power to grant bail derives from the decision to detain. He accepted that *B(Algeria)* did not rule out the possibility that Parliament could change that, but required the clearest possible words to show such an intention. Fundamental rights cannot be over-ridden except by clear words, and powers to detain should be strictly construed. He submitted that paragraph 10(12) showed that Parliament intended the detention which underlies immigration bail to be lawful. If detention was incompatible with the implied limits on the power to detain, there was no power to detain, or to grant bail.

53. Mr Goodman submitted that it was common ground that, if there was 'no power' to detain, there was no power to grant bail. If there was no prospect of deportation, C was not liable to detention. D's construction was incompatible with article 5. C was not asking for a declaration of incompatibility, but for a reading of the provisions pursuant to section 3 of the Human Rights Act 1998. Article 5.1.f only permits detention where action with a view to deportation is being taken. There was no realistic prospect of deportation, so detention was not within article 5.

54. The only alternative to immigration bail was that C should be granted leave. Mr Goodman relied on *George v Secretary of State for the Home Department* [2014] UKSC 28; [2014] 1 WLR 1831. The controls stipulated in section 3 of the 1971 Act as conditions subject to which leave could be granted enabled the Secretary of State to exercise the necessary control over someone in C's position, even though section 3 does not permit electronic monitoring or curfews. If C was at large, he would be in an even worse position than when subject to immigration bail, because he would not be allowed to work. There was every reason to suppose that Parliament wanted to abolish temporary admission.

55. Paragraph 1(2) is the Secretary of State's power to grant bail. Paragraph 1(5) is simply declaratory. It explains what paragraph 1(2) means. 'Liable to detention' means 'liable to lawful detention'.

56. The effect of paragraph 10(12) is that if a person breaches bail, he must either be detained or re-bailed. If he is detained, he must be detained under the power under which he is liable to detention. It is integral to the statutory scheme that a breach of bail may entail detention. That is a reference to a person who may lawfully be detained under a relevant provision. The legislative scheme adopts an 'ordinary' approach to bail, not an 'extraordinary' approach. Conventionally, a grant of bail says nothing about whether or not the applicant's detention is lawful. Once an independent court has granted bail, a person can no longer be detained (as per paragraph 1(5)). Paragraph 1(5) is not oxymoronic. It describes the situation when bail is granted in the majority of cases. The Secretary of State's construction 'grates with the mandate' in paragraph 10(12). C's interpretation is mandated by the canons of construction described in *B(Algeria)*. It would be extraordinary if Parliament intended that bail could be granted if it would be unlawful to detain the applicant.

57. Mr Goodman did not accept that section 61 and Schedule 10 were a response to the decision of the Court of Appeal in *B(Algeria).* Parliament knew what the Court of Appeal had decided and intended to enact an ordinary bail power. He argued that despite the history, Parliament had decided to enact an 'ordinary' bail provision in Schedule 10. Parliament had not used the 'clearest words' to reverse the proper understanding of the term 'bail'. The word 'lawfully' should be read in to paragraph 1(5). A person could not be 'liable to detention' if he could no longer be detained. If Parliament had wished to avoid the interpretation in *B(Algeria)*, it would have had to

use the words 'can no longer be detained' as a bare minimum. It would have helped if Parliament had specifically excluded habeas corpus and expressed paragraph 10(12) differently so as to make clear that the power is not an 'ordinary' bail power. He appeared to submit that *Khadir* is irrelevant to this exercise because it concerned temporary admission, and not bail.

58. BID argued, in agreement with Mr Goodman, that 'can no longer be detained' means 'can no longer in practice be detained'. Paragraph 1(5) applied to people who were liable to lawful detention but whom it was not practicable to detain, because of, for example, overcrowding, a strike, or an emergency such as Covid-19. If there was no power to detain, enforcement was difficult. The interpretation of 'liable to detention' in *Khadir* could not be transposed to the context of bail. Temporary admission was fundamentally different.

59. BID submitted that the Secretary of State's construction was unworkable.

    i. If a person would not comply with bail conditions, the Secretary of State was required to impose bail conditions and must overlook a mandatory consideration, knowing that a breach of bail is inevitable. If there is no underlying authority to detain, there is no remedy if the person refuses to comply with the conditions of his bail.

    ii. If a person was about to breach the conditions of his bail, he had to be brought before the relevant authority which had to decide whether to maintain or revoke the conditions. If there was no underlying power to detain, that was a breach of article 5 (see footnote 27 of BID's skeleton argument).

    iii. How, Ms Dubinsky asked rhetorically, was the relevant authority to re-direct the detention of a person under paragraph 10(12) if the person was not liable to lawful detention?

60. Parliament could not have intended a revolving door of prosecutions.

61. BID's alternative submission was that, on ordinary public law principles, there must be implied limitations on the power to grant bail. If there is no power to detain, there is no power to grant bail. If *Hardial Singh* did not apply to bail via detention, an analogue of the *Hardial Singh* principles must be implied. A court should be slow to decide that a statutory power had been conferred which permitted unreasonable detention. The power of detention was conferred for the purpose of enabling deportation. The principles in *Hardial Singh* are a manifestation of the approach in *Padfield v Minister for Agriculture Fisheries and Food* [1968] AC 997.

62. Parliament had abolished temporary admission and deprived the Secretary of State of the power to impose conditions on a person who could not lawfully be detained. Ms Dubinsky accepted that the consequence of this approach was that the Secretary of State had the choice of granting leave to people like C, or leaving them subject to no conditions at all.

63. Mr Tam and Ms Wilsdon helpfully reduced their submissions to 13 propositions. Those are annexed to this judgment.

Discussion

The potential relevance of the legislative history

64. C's primary position in oral argument was that I could not look at the legislative history at all. I questioned that approach during oral submissions, and the parties agreed to provide me with extracts from *Bennion on Statutory Interpretation* after the hearing.

65. C relied on some passages in *Bennion* and on paragraph 15 of *Thet v DPP* [2006] EWHC 2710 (Admin); [2007] 1 WLR 2022. I accept D's submission that this is irrelevant. It is an obiter comment about whether or not, if a criminal statute is ambiguous, Parliamentary debates are admissible to construe it, in accordance with the decision in *Pepper v Hart*. D is not seeking to rely on Parliamentary debates, but on the legislative history.

66. The Secretary of State relied on a number of passages from *Bennion*. The proposition stated at paragraph 24.5 is 'In order to understand the meaning and effect of a provision in an Act it is essential to take into account the state of the previous law and, on occasion, its evolution'. The purpose of an Act is normally to make changes in the law. A court cannot judge the mischief which a provision is intended to remedy unless it knows the previous state of the law, the defects found in the law and the facts which caused Parliament to pass the legislation.

67. *Bennion* also refers to the principle recognised by the House of Lords in *Barras v Aberdeen Steam Fishing and Trawling Co Limited* [1933] AC 402. In the words of Leggatt LJ (as he then was), 'it is to be presumed that, in re-enacting words used in previous statutory provisions which have been the subject of authoritative judicial interpretation, Parliament intended those words to bear that settled meaning: see eg Lowe and Potter, *Understanding Legislation* (2018), paragraph 3.53 and the cases there cited' (per Leggatt LJ, giving the judgment of the Court of Appeal in *365 Business Finance Limited v Bellagio Hospitality WB Limited* [2020] EWCA Civ 588, at paragraph 31). In *R (N) v Lewisham Borough Council* [2014] UKSC 62; [2015] AC 1259 at paragraph 53 Lord Hodge said that '[W]here Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that the case law had already established'.

68. The 2016 Act and the 1971 Act deal with the same subject matter. In particular, the 2016 Act repeals and replaces the provisions in Schedules 2 and 3 of the 1971 Act which dealt with temporary admission, temporary release and bail. When the 2016 Act was enacted, the Court of Appeal in *B(Algeria)* had decided two things: (1) 'detained' in the bail provisions in paragraphs 22 and 29 of Schedule 2 to the 1971 Act meant 'lawfully detained', and (2) the distinction made by Lord Brown in *Khadir*, when he interpreted 'is liable to detention' in paragraph 21 of Schedule 2, which Lord Dyson recognised, and did not purport to overrule, did not apply in the interpretation of paragraphs 22 and 29.

69. In these circumstances, I consider that there is a presumption that where Parliament in the 2016 Act used the phrase, 'liable to detention', which had been authoritatively interpreted (by the House of Lords in *Khadir*), it intended it to mean what the House of Lords said it meant. That is a presumption, not a rule of law, but I have to consider whether there is anything in the language and context of Schedule 10 which displaces that meaning. If there is nothing, there is a further question, which is whether, in provisions which potentially impinge on the right to liberty, Parliament has used 'the clearest possible words' to achieve the result for which D contends, that is, to make

the power to grant bail available in a case in which the underlying or background power of detention cannot lawfully be exercised.

70. Paragraph 21 of Schedule 2 to the 1971 Act, which conferred the power to grant temporary admission was interpreted by the House of Lords in *Khadir*. As so interpreted, paragraph 21 enabled the Secretary of State to impose conditions as an alternative to detention on a person who could, when the conditions were imposed, be lawfully detained, but also to impose conditions on a person, like *Khadir*, who could not. *Khadir* recognised a distinction, inherent in the phrase 'is liable to be detained' between circumstances in which a person is potentially liable to detention, and the circumstances in which the power to detain can, in any case, properly be exercised. Temporary admission, thus understood, was plainly a useful power, because it enabled the Secretary of State to keep track of such a person, as an alternative to that person's being at large. The 2016 Act repeals the powers to grant temporary admission, temporary release and bail, and replaces them with Schedule 10. One of my starting points is that Parliament is unlikely to have intended to abolish temporary admission and not to replace it with a similar power.

71. Another starting point is that, in Schedule 10, Parliament has repeatedly used the phrase 'is liable to be detained' in a context which appears (because of my first starting point) in part to coincide with the territory occupied by paragraph 21 of Schedule 2. It is at least probable, it seems to me, that Parliament intended the phrase to mean the same in this context as, we know from *Khadir*, it meant in paragraph 21. I also note that neither the Court of Appeal nor the Supreme Court in *B(Algeria)* cast any doubt on the reasoning in *Khadir*, or on the distinction on which that reasoning rests. They simply held that that reasoning did not apply to paragraphs 22 and 29 of Schedule 2.

72. A further starting point is that, if Parliament used the phrase 'is liable to be detained' in Schedule 10 as meaning what it meant in paragraph 21 of Schedule 2, Parliament has clearly distinguished, in Schedule 10, between a person who is being detained, a person who is liable to be detained, and a person who can no longer be detained. It is not necessary for me to express a view about whether the word 'lawfully' should be read into the phrase 'is being detained' as I am not concerned with such a case. C and BID submitted that it should (consistently with the reasoning in *B(Algeria)*), and D, that it should not.

73. The phrase 'can no longer be detained' is new in this statutory context (it was used in section 61(3), now repealed: see paragraph 76, below). There is no reason why it should be read as meaning, only, 'can no longer be detained for practical reasons'. The phrase is wide, and unqualified. In its ordinary meaning it is wide enough to cover both a person whose continued detention is impractical, and a person whose continued detention would be unlawful. I reject C's and BID's submissions to the contrary.

74. Paragraph 1(1) therefore appears to give the Secretary of State power to grant immigration bail to two groups; a person who is being detained, and a person who is liable to detention (ie, whether or not that person could be lawfully detained, per *Khadir*). It does not matter whether a person in the second group has previously been detained, or not. Paragraph 1(5) goes somewhat further, by covering the situation of a person who has been, but 'can no longer' be detained. It makes clear that the

Secretary of State can also give immigration bail to a person who has been, but can no longer be, detained.

75. My reading of these provisions is supported by the terms, and timing, of section 61 as originally enacted. The heading suggests that section 61 introduced a new concept, 'immigration bail'. Section 61(3)-(5) dealt with the position of people pending the coming into force of Schedule 10. These provisions show Parliament's clear intention that a person could be released and remain on bail under paragraph 22 or paragraph 29 of Schedule 2 'even if the person can no longer be detained under a provision of the Immigration Acts… if the person is liable to detention under such a provision'. It is hard to see how Parliament could more clearly have shown its intention to reverse the decision of the Court of Appeal in *B(Algeria)* pending the coming into force of Schedule 10, and its intention that the law should be treated as always having had that effect (section 61(5)). It does not matter that section 61(3)-(5) was repealed when Schedule 10 came into force, because (as I have explained) Schedule 10 is to similar effect.

76. I do not consider that paragraph 10(12) undermines this construction. It applies when a person on immigration bail is arrested for a possible breach of his bail conditions. Once arrested, the person must be brought before the relevant authority. The relevant authority (defined in paragraph 10(10)) must decide whether the person has broken or is likely to break any of the bail conditions. If so, the relevant authority must direct that the person be detained under the provision under which he is liable to be detained, or grant him bail with the same or different conditions.

77. This provision does not oblige the relevant authority to direct the detention of a person who is liable to detention. Rather, it requires the relevant authority to direct the detention of that person, or to grant him bail. When the relevant authority makes that decision, a mandatory relevant consideration is whether or not it would be lawful for that person to be detained. Paragraph 10(12)(a) is a power to direct detention. But it would be unlawful to exercise that power if any such detention would be unlawful, for example, because deportation was not likely to be effected within a reasonable time.

78. Paragraph 10(12)(a) is not an independent authority for detention. It does not make detention lawful if it would otherwise be unlawful. Any direction by the Secretary of State under paragraph 10(12) is liable to challenge on public law grounds if its effect would be that a person who could not lawfully be detained should be detained. If a person cannot be lawfully detained at the point when the relevant authority decides that he has breached his immigration bail, nothing in paragraph 10(12) can make his detention lawful.

79. I do not consider, therefore, that paragraph 10(12) casts any light on the proper interpretation of Schedule 10 as a whole, or that it supports the C's submissions. It does not show that immigration bail is what Mr Goodman described as 'ordinary' bail.

80. For these reasons, I conclude that there is nothing to displace the presumption that Parliament intended the phrase 'liable to be detained' in Schedule 10 to be interpreted as it was in *Khadir*, and that it is absolutely clear that Parliament intended that immigration bail should replace temporary admission, temporary release and bail, and that immigration bail should be available when the underlying or background power of detention cannot lawfully be exercised.

81. The term 'immigration bail', or 'bail' is used in Schedule 10 to cover the field formerly occupied by those three powers. I also consider that it is absolutely clear that immigration bail is not 'ordinary' bail, precisely because it is available, as was temporary admission, when a person is liable to detention (rather than being detained), and because it is available, as was temporary admission, when a person can no longer be detained (whether as a matter of law, or in practice), if that person is liable to detention under one of the listed provisions (cf *Khadir*). In that respect, it is absolutely clear from the language Parliament used that Parliament intended to reverse the decision of the Court of Appeal in *B(Algeria)*.

82. The decision of the Supreme Court in *B(Algeria)* has a limited bearing on the interpretation of section 61. It articulates, in a similar way to the Court of Appeal, the principles which apply to the interpretation of such a provision, but that is all. It has no further relevance for two reasons. First, the Secretary of State did not rely on section 61 in the Supreme Court. Second, Lord Lloyd-Jones expressly recognised that other provisions did, and section 61 might, have the effect which I have held it has, that is, to permit 'bail' to be granted in circumstances when the underlying or background power of detention cannot lawfully be exercised.

83. I do not consider that this case raises any discrete article 5 issue. It is not suggested that C's bail conditions are a deprivation of liberty. Article 5 issues might arise in a case where different conditions were imposed, but no purpose would be served by abstract theorising about such cases divorced from any actual facts.

84. I am not persuaded by BID's alternative argument. I do not consider that, particularly in a case which clearly falls into the territory formerly occupied by temporary admission, and where the bail conditions are as they are in this case, there are any concerns about breaches of the principles in *Hardial Singh*, or that the imposition of such conditions contravenes the *Padfield* principle, or is *Wednesbury* unreasonable. This argument is essentially a circular one; either the principles in *Hardial Singh* apply, or they do not. As Ms Dubinsky acknowledged, the decision in *Hardial Singh* is no more than an application of the *Padfield* approach in the context of administrative detention.

85. That makes it unnecessary for me to decide whether or not, if the Secretary of State did not have power to impose bail conditions on C, she would have been obliged to give him leave. I will say no more than that paragraphs 31-33 of *George*, on which Mr Goodman relies, go nowhere near establishing that: *George* was a case in which the Secretary of State had granted successive periods of six-months' leave. Nor does paragraph 4 of the judgment of Baroness Hale in *Khadir*. It would be surprising if the courts had decided that it was appropriate for a court to step, in effect, into the Secretary of State's shoes and, by way of relief on an application for judicial review, exercise the power which, in enacting section 3 of the 1971 Act, Parliament has conferred on the Secretary of State.

Conclusion

86. I dismiss this application for judicial review. There was some skirmishing about timing points in the papers. In the light of my conclusion on the merits of the claim, I do not consider that it is necessary, or proportionate, to deal with those points.

Propositions

1. The phrase "liable to detention" has the same meaning whether it is in a power to grant temporary admission or temporary release, or in a power to grant bail, because all of the relevant provisions are in the same series of statutes and there is an unbroken legislative line running through them.

2. The phrase has a broad meaning, as definitely decided in *Khadir*: a person is "liable to detention" whenever the detention power in question exists, whether or not the detention power can be lawfully exercised at that time.

3. When a court decided that the phrase had a narrower meaning, Parliament stepped in to reverse that decision by a substantial and unusual provision (s.67 of the 2002 Act) that retrospectively specified that the phrase always had a broader meaning.

4. In the case of the temporary admission power then under consideration, this proved to have been unnecessary, because the phrase had always had a meaning even broader than provided by s.67.

5. When a court decided that a bail power could be exercised only within a narrower ambit, Parliament again stepped in to reverse that decision by a substantial and unusual provision (s.61(3) of the 2016 Act) that retrospectively specified that the bail power was always exercisable in wider circumstances. Parliament used the same phrase that had been in issue in *Khadir* and that had been the subject of the previous retrospective legislation (s.67), thus clearly intending the phrase to have had the same meaning in s.61(3) as was ultimately decided in *Khadir*.

6. The current bail powers are given effect by a provision (s.61(1)) in the same section as contained that legislative intervention, showing that when the phrase is used in the current bail powers, it must have been intended by Parliament to have the same meaning as in s.61(3).

7. If the Claimant and BID are correct in their contention that "liable to detention" must be interpreted as "liable to lawful detention", then s.61(3) and the corresponding provision in the current bail powers (s.61(5)) are otiose and meaningless.

8. It is incorrect to say that re-detention would necessarily be unavailable following a breach of bail, if the individual was bailed when they could not have been actually detained for *Hardial Singh* reasons.

9. BID's argument that the bail powers only exist if the relevant step can be described as "pending" was exactly the argument rejected by the House of Lords in *Khadir*.

10. The current bail powers do not only exist where the individual was previously lawfully detained, because although under the 1971 Act an individual could only be bailed if they were actually detained, the circumstances in which bail may be granted have been expressly widened from those in the 1971 Act.

11. It is unnecessary for the court to create *Hardial Singh*-type limits on the exercise of the bail powers, because there is judicial control over the almost infinite variety of combinations of bail conditions, which can if appropriate be relaxed to meet the circumstances of the case.

12. Article 5 ECHR has nothing to do with any of this, because bail deprives an individual of liberty for A5 purposes only in rare circumstances, and if it does, then their A5 rights can be respected through the exercise of that judicial control.

13. Even if these submissions are rejected and an individual can no longer be bailed, it does not follow that they are automatically entitled to leave to enter or remain.