A

Queen's Bench Division

Regina (Kaitey) *v* Secretary of State for the Home Department (Bail for Immigration Detainees intervening)

[2020] EWHC 1861 (Admin)

B

2020 June 4; July 13 — Elisabeth Laing J

Immigration — Detained person — Immigration bail — Foreign national detained pending deportation but later released on immigration bail as person "liable to detention" — Whether person liable to detention if power to detain not capable of being exercised lawfully at relevant time — Immigration Act 2016 (c 19), Sch 10, para 1(2)(5)

C

The claimant, a foreign national, entered the United Kingdom and unsuccessfully applied for asylum. He was later convicted of possessing false documents and sentenced to a term of imprisonment. The Secretary of State made a deportation order against him pursuant to the automatic deportation provisions of section 32 of the UK Borders Act 2007 and he was held in immigration detention pending his removal, pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. The claimant was subsequently released on bail in 2011 pursuant to paragraph 22 of Schedule 2 to the 1971 Act after the Secretary of State was unable to obtain an emergency travel document for him. Over the next five years the claimant's bail continued as the Secretary of State attempted unsuccessfully to obtain an emergency travel document. When the Immigration Act 2016[1] came into force the claimant was granted conditional immigration bail under paragraph 1(2) of Schedule 10 to that Act. The claimant sought judicial review of the Secretary of State's decision to impose immigration bail, contending that the power in paragraph 1(2) of Schedule 10 to grant bail if a person was "liable to detention" under the relevant provisions of the 1971 or 2007 Acts applied only where such detention would be lawful on the *Hardial Singh* principles, which would not be the case if there was no realistic prospect of securing that person's deportation. In particular, he submitted that paragraph 1(5) of Schedule 10, which provided that a person who was liable to detention could be granted and remain on immigration bail even if he could no longer be detained, should be construed as being limited 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.

On the claim—

Held, dismissing the claim, that when enacting the Immigration Act 2016 Parliament had intended that immigration bail under Schedule 10 to that Act should replace temporary admission, temporary release and bail under Schedule 2 to the Immigration Act 1971; that, further, there was nothing to displace the presumption that Parliament had intended the phrase "liable to detention" in paragraph 1(2) of Schedule 10 to the 2016 Act to be interpreted in the way in which the House of Lords had interpreted the same phrase in paragraph 21 of Schedule 2 to the 1971 Act in the context of temporary admissions; that when interpreting the 1971 Act the House of Lords had recognised a distinction between circumstances in which a person was potentially "liable to detention" and the circumstances in which the power to detain could, in any case, properly be exercised; that, thus interpreted, paragraph 1(2) of Schedule 10 to the 2016 Act empowered the Secretary of State to grant immigration bail to a person who was liable to detention, whether or not the power to detain

D E F G H

[1] Immigration Act 2016, Sch 10, para 1(2): "The Secretary of State may grant a person bail if the person is liable to detention under a provision mentioned in sub-paragraph (1)."
Para 1(5): see post, para 41.

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could lawfully be exercised in that person's case; that, further, there was no reason why "can no longer be detained" in paragraph 1(5) of Schedule 10 should be read as meaning "can no longer be detained for practical reasons"; that, rather, paragraph 1(5), which was wide and unqualified, made it clear that the Secretary of State could give immigration bail to a person who had been, but could no longer be, detained provided that person was "liable to detention"; and that, accordingly, immigration bail under paragraph 1(2) of Schedule 10 to the 2016 Act could be granted even when the underlying or background power of detention could not lawfully be exercised (post, paras 70–75, 80–81, 86).

R (Khadir) v Secretary of State for the Home Department [2006] 1 AC 207, HL(E) applied.

B (Algeria) v Secretary of State for the Home Department (No 2) [2016] QB 789, CA not followed.

The following cases are referred to in the judgment:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
B (Algeria) v Secretary of State for the Home Department (No 2) [2015] EWCA Civ 445; [2016] QB 789; [2015] 3 WLR 1031, CA; [2018] UKSC 5; [2018] AC 418; [2018] 2 WLR 651; [2018] 2 All ER 759, SC(E)
Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402, HL(Sc)
Court Enforcement Services Ltd v Marston Legal Services Ltd (formerly Burlington Credit Ltd) [2020] EWCA Civ 588; [2021] QB 129; [2020] 3 WLR 777, CA
Padfield v Minister of Agriculture, Fisheries and Food [1968] UKHL 1; [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E)
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)
R v Governor of Durham Prison, Ex p Hardial Singh [1984] 1 WLR 704; [1984] 1 All ER 983; [1983] Imm AR 198
R (George) v Secretary of State for the Home Department [2014] UKSC 28; [2014] 1 WLR 1831; [2014] 3 All ER 365; [2014] Imm AR 958, SC(E)
R (Khadir) v Secretary of State for the Home Department [2005] UKHL 39; [2006] 1 AC 207; [2005] 3 WLR 1; [2005] 4 All ER 114, HL(E)
R (N) v Lewisham London Borough Council [2014] UKSC 62; [2015] AC 1259; [2014] 3 WLR 1548; [2015] 1 All ER 783, SC(E)
Stellato v Ministry of Justice [2010] EWCA Civ 1435; [2011] QB 856; [2011] 2 WLR 936; [2011] 3 All ER 251, CA
Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1996] UKPC 5; [1997] AC 97; [1996] 2 WLR 863; [1996] 4 All ER 265, PC
Thet v Director of Public Prosecutions [2006] EWHC 2701 (Admin); [2007] 1 WLR 2022; [2007] 2 All ER 425, DC

The following additional cases were cited in argument:

A v United Kingdom (Application No 3455/05) (2009) 49 EHRR 29, GC
AB (Sierra Leone) v Secretary of State for the Home Department (unreported) 7 July 2017, CA
Ismail v United Kingdom (Application No 48078/09) (2013) 58 EHRR SE6
JN v United Kingdom (Application No 37289/12) The Times, 3 June 2016
Khlaifia v Italy (Application No 16483/12) (unreported) 15 December 2016, GC
Mangouras v Spain (Application No 12050/04) (2010) 54 EHRR 25, GC
Muşuc v Moldova (Application No 42440/06) (unreported) 6 November 2007, ECtHR
R (Antonio) v Secretary of State for the Home Department [2017] EWCA Civ 48; [2017] 1 WLR 3431, CA

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A *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604; [2003] 3 WLR 252; [2003] 3 All ER 827; [2003] Imm AR 570, HL(E)
R (Gedi) v Secretary of State for the Home Department [2016] EWCA Civ 409; [2016] 4 WLR 93, CA
R (Hamzeh) v Secretary of State for the Home Department [2014] EWCA Civ 956, CA
B *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196, CA
R (Jalloh (formerly Jollah)) v Secretary of State for the Home Department [2020] UKSC 4; [2021] AC 262; [2020] 2 WLR 418; [2020] 3 All ER 449, SC(E)
R (L) v Secretary of State for the Home Department [2003] EWCA Civ 25; [2003] 1 WLR 1230; [2003] 1 All ER 1062; [2003] Imm AR 330, CA
R (MS, AR and FW) v Secretary of State for the Home Department [2009] EWCA Civ 1310; [2010] INLR 489, CA
C *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin), The Times, 13 October 2003
R (WL (Congo)) v Secretary of State for the Home Department (JUSTICE intervening) [2011] UKSC 12; [2012] 1 AC 245; [2011] 2 WLR 671; [2011] 4 All ER 1, SC(E)
RA (Iraq) v Secretary of State for the Home Department [2019] EWCA Civ 850; [2019] 4 WLR 132; [2019] Imm AR 1212, CA
D *Zamir v United Kingdom* (Application No 9174/80) (1985) 8 EHRR CD108

The following additional cases, although not cited, were referred to in the skeleton arguments:

Engel v The Netherlands (No 1) (Application No 5100/71) (1976) 1 EHRR 647
HLR v France (Application No 24573/94) (1997) 26 EHRR 29, GC
Mendizabal v France (Application No 51431/99) (2006) 50 EHRR 50
E *Ostendorf v Germany* (Application No 15598/08) (2013) 34 BHRC 738
R v Governor of Richmond Remand Centre, Ex p Asghar [1971] 1 WLR 129, DC
R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21; [2003] 1 AC 563; [2002] 2 WLR 1299; [2002] 3 All ER 1, HL(E)
R (SK (Zimbabwe)) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening) [2011] UKSC 23; [2011] 1 WLR 1299; [2011] 4 All ER 975, SC(E)
F *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41; [2002] 1 WLR 3131; [2002] 4 All ER 785, HL(E)
R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2013] EWHC 2492 (Admin); [2014] 1 WLR 1022
Schiesser v Switzerland (Application No 7710/76) (1979) 2 EHRR 417
Vasileva v Denmark (Application No 52792/99) (2003) 40 EHRR 27

G **CLAIM** for judicial review

By a claim form dated 3 December 2019, and with permission to proceed granted by May J on 23 January 2020, the claimant, Seth Kaitey, a foreign national against whom a deportation order had been made, sought judicial review of the decision of the defendant, the Secretary of State for the Home Department, to impose conditional immigration bail upon him pursuant to paragraph 1(2) of Schedule 10 to the Immigration Act 2016. The grounds of H the claim were that the power in paragraph 1(2) to grant immigration bail if a person was "liable to detention" under the relevant provisions of the Immigration Act 1971 or UK Borders Act 2007 applied only where detention would be lawful which, applying established legal principles on the lawfulness of detention, was not the case where there was no realistic

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prospect of securing the claimant's deportation; and, further, that paragraph 1(5) of Schedule 10, which provided that a person who was liable to detention could be granted and remain on immigration bail "even if the person can no longer be detained", should be construed accordingly as limited 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. By order dated 21 February 2020 Fordham J granted permission for Bail for Immigration Detainees to intervene in the proceedings by oral and written submissions.

The facts are stated in the judgment, post, paras 1, 4–13.

Alex Goodman and *Matthew Fraser* (instructed by *Duncan Lewis*) for the claimant.

The power to impose conditional bail under paragraph 1 of Schedule 10 to the Immigration Act 2016 cannot lawfully be exercised unless the person being bailed could lawfully be detained. Where a person breaches a condition of bail granted by paragraph 1(2) of Schedule 10, paragraph 10 of Schedule 10 provides for a range of powers by which a person may be detained. In particular, the First-tier Tribunal or Secretary of State "must"—according to paragraph 10(12) of Schedule 10—detain them under the power to which they are liable to detention. That is a clear indication that this is an ordinary form of bail. Therefore, if detention would exceed the implied limits on the exercise of the power to detain for immigration purposes as determined in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, the power to impose immigration bail, and thus the power to impose conditions which are capable of severely curtailing the liberty of the person concerned, falls away. The clearest possible words would be required to establish that bail conditions could lawfully be imposed on someone who cannot lawfully be detained, and, in the absence of such words, bail powers permitting the grant of immigration bail must be read narrowly and strictly as presupposing a power to detain lawfully. Such an approach was taken to the power under the Immigration Act 1971, the predecessor to the 2016 Act, to grant bail to a person "detained": see *B (Algeria) v Secretary of State for the Home Department* [2016] QB 789. The 2016 Act similarly does not achieve the clearest possible words required to depart from the general principle that the power to grant bail presupposes the existence and the ability to exercise a power to detain lawfully. Accordingly, the words "liable to detention" in paragraph 1 of Schedule 10 to the 2016 Act must be read as meaning liable to lawful detention or liable to a decision to detain which would not be a nullity.

In summary, the *Hardial Singh* limits on immigration detention are that: (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period which is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and (iii) the Secretary of State should act with reasonable diligence and expedition to effect removal: see *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245, para 22, per Lord Dyson JSC. Given that it has been more than a decade since the first interview of the claimant in detention with a view to obtaining an emergency travel document ("ETD") from the Guinean

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A authorities, and that repeated attempts by the Secretary of State to obtain an ETD have proven unsuccessful and the Guinean Embassy has concluded that the claimant is not Guinean, there is no obvious reason why the Guinean authorities would reverse that decision and there are no further realistic steps to be taken. Based on that factual background, the claimant could not at that time be lawfully detained, having regard to the *Hardial Singh* limits on immigration detention (as the Secretary of State does not expressly B dispute).

The issue as to the extent of the power to impose immigration bail is significant because the evidence shows that there are a large number of individuals subject to conditional immigration bail; the conditions can be highly restrictive; for some (like the claimant who has been on conditional bail for nearly a decade) those restrictions can apply for many years with no C foreseeable end in sight; and there is evidence that that can have seriously detrimental effects.

In so far as the Secretary of State makes claims of non-co-operation by the claimant, those are unsupported and not properly particularised, and it is not possible to draw clear conclusions as to the claimant's allegedly non-co-operative conduct. [Reference was made to *R (Antonio) v Secretary of State for the Home Department* [2017] 1 WLR 3431, para 78, per D Irwin LJ.] Even if the Secretary of State's criticisms had been properly particularised and valid, the significance of a lack of co-operation would be negligible after 9½ years on bail since the previous 2½ years of detention ended.

The continued imposition of bail on the claimant is unlawful because bail cannot be imposed under paragraph 1 of Schedule 10 to the 2016 Act on a E person where a decision to detain would be unlawful and/or a nullity either because there is no power at all to detain in the narrow sense of jurisdiction (see *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97), or the exercise of a detention power would be unlawful because it would breach the first, third and/or fourth *Hardial Singh* principles.

In so far as paragraph 1(5) of Schedule 10 to the 2016 Act provides that a person may remain on immigration bail even if the person can no longer be F detained, the distinction and relationship between the two phrases "can no longer be detained" and "liable to detention" has not been definitively explained across all contexts, and certainly not in the present context of interpreting the bail power under the 2016 Act. It has been considered only in the different context of the former power to grant "temporary admission" under the 1971 Act, which was a more limited power than the power to G impose bail and bail conditions and to which a less strict approach to statutory construction was applied: see *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207. [Reference was also made to *R (Gedi) v Secretary of State for the Home Department* [2016] 4 WLR 93.] On a straightforward reading, paragraph 1(5) applies where a person is liable to lawful detention and yet can no longer be detained, i e for reasons other than that detention is unlawful.

H The Secretary of State appears to accept that bail cannot lawfully be imposed if there is not "some prospect" of removal, and that is not the position here. It also seems to be accepted that it would be an unlawful exercise of the powers to detain the claimant and, where a notional detention is unlawful for that reason, the same consequences flow.

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The Secretary of State's construction would lead to absurd and anomalous results because, contrary to what must have been Parliament's intention, it would allow for bail conditions to be imposed even where re-detention, the mechanism for enforcing compliance with bail conditions, is unavailable.

Furthermore, a statutory scheme for bail which would enable the imposition of conditions in the absence of a lawful power to detain would breach the right to liberty and security of person under article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular article 5(1)(f).

The consequence of a determination that the claimant cannot lawfully be (a) removed, (b) detained or (c) on bail is that he must be granted leave to remain as the only remaining option. For the claimant to be placed in a status or category known to the law is a requirement of the rule of law, the need for regularity and the need for certainty of those subject to United Kingdom laws: see *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin) and *R (L) v Secretary of State for the Home Department* [2003] 1 WLR 1230. Further, and/or in the alternative, granting leave to remain is the only remaining rational course open to the Secretary of State and will give to the claimant a status which enables him to make a proper contribution to the community: see *Khadir* [2006] 1 AC 207, para 4, per Baroness Hale of Richmond.

In so far as the Secretary of State contends that the claimant should have pleaded a separate ground for judicial review to establish that leave to remain should be granted to the claimant applying the test in *RA (Iraq) v Secretary of State for the Home Department* [2019] 4 WLR 132, that argument mistakenly confuses and conflates two different routes to the grant of leave. The claimant relies on the entitlement to leave as the legal consequence of a determination that he cannot lawfully be on bail, and that requires no distinctly pleaded ground because it flows as a direct result of his main ground of challenge. It is therefore distinct from an entitlement to leave under article 8 of the Convention applying the *RA* test.

Robin Tam QC and *Emily Wilsdon* (instructed by *Treasury Solicitor*) for the Secretary of State.

Assertions made by the claimant and the intervener about the immigration bail system in general, and in particular concerns expressed about the practical effect of the grant of bail and of bail conditions on individuals in the immigration system, fall outside the scope of the present case in which the arguments relate to issues of statutory construction, to which such evidence can have no more than peripheral or contextual relevance. Moreover, bail conditions prohibiting, for example, work or recourse to benefits very often do not deprive the individual of anything which he would otherwise have, since many individuals would not have any right to work or to claim benefits regardless of whether they have been granted immigration bail. Further, if in any specific case the conditions of an individual's bail are considered to be inappropriately stringent, there are specific remedies which the individual can pursue to seek a variation of the conditions. None of that affects the issue of statutory construction concerning the availability of bail.

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A The ongoing uncertainty about the claimant's nationality has necessarily prolonged his time on bail as it has prevented a travel document from being obtained and the deportation order from being executed. The claimant's own actions or inaction, i e his claim to be Guinean when he is Ghanaian, or failure to take active steps to evidence his Guinean nationality, have either caused or significantly contributed to that period, although that is relevant only to the claim that some form of leave should be granted.

B The Immigration Act 2016, which provides for the current law concerning bail set out in Schedule 10, was passed following, and in response to, the decision of the Court of Appeal in *B (Algeria) v Secretary of State for the Home Department (No 2)* [2016] QB 789, in which the power to grant bail under the legislation then in force was held to presuppose the existence of, and the ability to exercise, a power to detain lawfully. C Section 61(3)–(5) of the 2016 Act by its express terms is an immediate interim measure pending the inception of the new bail system in Schedule 10 and, by section 94(3), is unique amongst the Act's provisions in coming into force "on the day on which this Act is passed". Further, they were given express retrospective effect. Such drastic legislative action must have been intended by Parliament to have had some significant effect on the then extant law. D Parliament's intention was clearly to ensure that, even when an individual could no longer be lawfully detained, he could nevertheless be granted, and remain on, bail under the pre-Schedule 10 provisions. That therefore provides a statutory basis for the claimant's immigration bail.

As set out in *Bennion on Statutory Interpretation*, in order to understand the meaning and effect of a provision in an Act, it is legitimate to take into account the legislative history; and if an Act re-enacts words used in previous E statutory provisions which have already been the subject of authoritative judicial interpretation, there is a presumption that Parliament intended those words to bear that settled meaning. The intended meaning of section 61 of the 2016 Act is absolutely clear, given the legislative history as well as the words of the section, "even if the person can no longer be detained" and "if the person is liable to detention", the meaning of which was definitively F decided by the House of Lords in *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207. Although that case concerned temporary admission, in relation to which a less strict approach to construction was applied, that is insufficient to displace the definitive distinction and relationship there expressed between the circumstances in which a person is potentially liable to detention and the circumstances in which the power to detain can in any particular case properly be G exercised. A person will cease to be "liable to detention" only if there is no longer any prospect at all of the individual's removal, and thus a person may be "liable to be detained" where there is power to detain him even if it would not be a proper exercise of that power actually to do so.

Section 61(3) is therefore clearly intended to operate so as to permit bail to be granted in some situations in which a person cannot lawfully be H detained and is not confined to situations where the principles in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 permit the individual's detention. Accordingly, the claimant is wrong to submit that a person who is "liable to detention" but "can no longer be detained" must be someone who cannot be detained for reasons other than that detention is unlawful. Notwithstanding the repeal of section 61(3) of the

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2016 Act, it has continuing relevance now to any proper question concerning the lawfulness of immigration bail granted before 15 January 2018, and due to its retrospective effect it applied to the entire period of the claimant's immigration bail up to and including 14 January 2018.

The fact that, where a person cannot lawfully be detained, it will not be possible to re-detain him in response to a breach of bail conditions does not militate against such a construction since re-detention is not the only mechanism for enforcement of a breach but is simply one of several routes, which also include enforcement of a financial condition or criminal prosecution. Moreover, it is not the case that, once the *Hardial Singh* principles no longer permit detention in a particular individual's case, that individual simply cannot be detained again. The *Hardial Singh* lawfulness of detention depends on all the circumstances of the case, and the fact of a breach of bail conditions may be a sufficient change of circumstance to render it lawful once again to detain a person, if, for example, it shows a higher risk of absconding or reoffending than was previously believed to exist. The *Hardial Singh* balance may, in any event, be different for a short interim period of loss of liberty after a suspected breach of bail, thus permitting lawful arrest and production even if the Secretary of State could not at that time lawfully detain the individual under the main detention powers.

Paragraph 1(5)(a) of Schedule 10 to the 2016 Act does not preclude the application of bail to an individual who has not been detained. There is no illogicality in the proposition that someone who happens never to have been detained at all can nevertheless be someone in respect of whom the detention power can no longer be lawfully exercised.

It follows that the claimant was a person "liable to detention" at all relevant times, since he was liable to detention in principle as a person in respect of whom a deportation order had been made.

Even if, contrary to the foregoing, the claimant's interpretation of "liable to detention" is held to be correct, it is not appropriate to consider the claimant's arguments that he cannot be detained lawfully either because he could not be detained "pending removal or departure" or by virtue of the first, third and/or fourth *Hardial Singh* principles. Since the Secretary of State did not in fact seek to re-detain the claimant and no view was ever taken on the lawfulness of re-detention, to consider that matter now would involve detailed consideration of all the circumstances across the whole bail period, to determine whether hypothetical re-detention would have become unlawful or lawful at different points in time, and is outside the scope of the present hearing. The claimant's argument could otherwise have the absurd consequences that the court might be required to embark on an exercise of determining whether it would have been *Hardial Singh* lawful to detain an individual at various times, even though he was never actually detained, the Secretary of State never had any intention of detaining him, and he had always been on bail.

There is no warrant for implying *Hardial Singh*-type limitations on the lawful exercise of the power to grant bail, there being no proper analogy between detention (to which the *Hardial Singh* principles apply) and bail. Detention is binary, in that an individual is either detained or not, and, in those circumstances, the courts have developed limitations on the circumstances in which the Secretary of State can exercise a power which

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A on its face otherwise allows open-ended and indefinite administrative detention. By contrast, the conditions attached to bail are not binary and may be set at an appropriate level of the management of the individual in question, and conditions may be varied from time to time in relation to any particular individual, including the possibility of the removal of all but minimal conditions, without bail having to cease altogether. Sufficient safeguards are provided by the fact that the Secretary of State's decision in B any individual case to impose bail conditions (whether extremely minimal or stringent), and any decision made in relation to the variation of conditions, will be subject to judicial review on all the usual public law grounds. There is no need for additional formalised judicial limits on the statutory bail power.

Under the new scheme of immigration bail introduced by section 61 of C and Schedule 10 to the 2016 Act, various alternatives to detention (temporary admission, temporary release on bail and release on restrictions under the Immigration Act 1971) have been replaced with a single power to grant immigration bail and the Secretary of State's power to grant a person bail if the person is "liable to detention" must be understood within that context.

D Similar considerations apply to the intervener's contention that *Hardial Singh*-type limitations can be derived from the Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular from articles 5 and 8. It would only be in rare circumstances, which are not relevant here, that any conditions of bail would deprive an individual of his liberty so that article 5 would be engaged by that grant of bail. It is almost inconceivable that that would occur in the normal immigration context. E The statutory scheme allowing immigration bail to be imposed in such circumstances is not incompatible with article 5. So far as article 8 is concerned, any unwarranted or unduly prolonged interference with article 8 rights (including in any "limbo" situation) can be ameliorated by a variation of the relevant bail conditions, and does not require limitations to be imposed on the very exercise of the power to grant bail.

F Regarding the claimant's contention that, if he succeeds in relation to the meaning of "liable to detention", his position should now be "regularised" by a grant of leave to enter or leave to remain, the legal basis for that form of relief is unclear. It does not necessarily flow directly from a determination that the claimant cannot lawfully be on bail. A person who is not subject to immigration bail is not a person to whom leave must inevitably be granted. Contrary to the claimant's submissions, leave does not have to be granted as G "the only remaining option". The statutory powers for the grant of leave are separate from the statutory powers for the management of those who do not have leave and are either seeking it or seeking to avoid the enforcement consequences of an unsuccessful application for leave. A grant of leave is not an alternative form of management even if the other statutory management powers are not at present immediately exercisable, and there is no requirement flowing from the rule of law to grant leave to any individual H whom the Secretary of State does not detain or place on immigration bail: see *RA (Iraq) v Secretary of State for the Home Department* [2019] 4 WLR 132. [Reference was also made to *R (Hamzeh) v Secretary of State for the Home Department* [2014] EWCA Civ 956.] The claimant cannot short-circuit the necessary detailed examination of his current and likely

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future circumstances simply by establishing, if he is able, that immigration bail in his case is or has become unlawful. A

Laura Dubinsky, *Anthony Vaughan* and *Eleanor Mitchell* (instructed by *Allen & Overy LLP*) for the intervener.

As illustrated by the intervener's witness evidence, the exercise of the bail powers under the Immigration Act 2016 is liable to result in the imposition of conditions which may significantly impinge upon liberty and private life. B

B (Algeria) v Secretary of State for the Home Department (No 2) [2016] QB 789 established the principle that the power to grant conditional bail must be read as arising only where a person was (or could be) lawfully detained, with the clearest possible words being required to achieve a contrary result. Fortifying that conclusion, it has further been held that a curfew (precisely the type of restriction applied under the present bail powers even to low or mid-level offenders) constitutes an imprisonment, C engaging fundamental constitutional protections: see *R (Jalloh (formerly Jollah)) v Secretary of State for the Home Department* [2021] AC 262. In interpreting the bail powers, Parliament is therefore deemed not to intend to interfere with the liberty of the subject without making its intention clear.

The wording of the relevant provisions of the 2016 Act does not meet that exacting threshold of clarity. It follows that the bail powers in the 2016 Act D exist only where a person is liable to lawful detention.

The primary authority relied on by the Secretary of State in support of a broader construction, *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207, mandates no different conclusion, since it was not concerned with a power capable of resulting in severe curtailment or deprivation of liberty, but only with the scope of the power to grant temporary admission under the Immigration Act 1971. Accordingly, the principles E mandating a strict and narrow construction applicable to the present case were not in play in *Khadir*.

The narrower construction is congruent with the statutory language. The 1971 Act bail powers considered in *B (Algeria)* importantly all referred to detention powers which arose where a person was detained "under the authority of" the Secretary of State or an immigration officer, which, as the F Supreme Court held, referred to lawful detention, not purported detention. The same is true of paragraph 1(1) and (3) of Schedule 10 to the 2016 Act. The detention powers cited at paragraph 1(1) and (3) of Schedule 10 as the basis for the bail powers each refer to detention "under the authority of" the Secretary of State. When paragraph 1(1) and (3) of Schedule 10 refer to the power to grant bail to a person who "is being detained" under the relevant detention powers, that must refer to a person who is being lawfully detained G under those powers. Paragraph 1(5) of Schedule 10 addresses the situation where the individual, albeit still liable to lawful detention, can no longer practicably be detained. That construction makes sense of section 61(3), which applied prior to Schedule 10 coming into force, referring to a person being "released" on bail where they could "no longer" be detained. Section 61(3) simply affirms, as does paragraph 1(5) of Schedule 10, that a H person released from detention can be bailed notwithstanding that detention is no longer practicable, provided that the person remains liable to lawful detention. If the Secretary of State's broader construction were adopted, section 61(3) would have the anomalous effect of limiting bail to cases where a person was released from detention and that detention had previously been

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A lawful. The bail power would not extend to situations where a person had never been lawfully detained, or had never been detained at all. Paragraph 1(5) of Schedule 10 is to the same effect, applying the strict principles of statutory construction applicable to bail powers (indeed the Secretary of State's own case is that section 61(3) and paragraph 1(5) have identical effect).

B The exercise of the bail powers in circumstances where there is no underlying power of lawful detention would moreover render the operation of the statutory scheme difficult if not unworkable. The power to re-detain for breach of bail conditions is fundamental to the operation of a power to grant conditional bail. In its absence, the Secretary of State's only options for enforcement would be financial penalties and/or minor criminal sanctions, which would create a potential "revolving door" of release, arrest, C criminal detention and potential prosecution which would do little to further the statutory purpose of effecting removal, at high administrative cost. That cannot have been Parliament's intention. The Secretary of State's interpretation to the contrary yields anomalous results, including the unavailability, where the detention power can no longer lawfully be exercised, of fundamental enforcement mechanisms for bail.

D The narrower reading of the 2016 Act for which the claimant and intervener contend is also congruent with the jurisprudence of the European Court of Human Rights concerning the right to liberty under article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to the power to grant conditional bail: see *Muşuc v Moldova* (Application No 42440/06) (unreported) 6 November 2007 and *Mangouras v Spain* (2010) 54 EHRR 25. Although in those cases the European court E was considering a grant of bail falling within articles 5(1)(c) and 5(3), namely, bail where a person would otherwise be detained pending trial for a criminal offence, the reasoning applies also to article 5(1)(f), concerning bail where a person would otherwise be detained to prevent unauthorised entry or while action is being taken with a view to deportation. In both contexts, conditional bail presupposes the legality of the underlying detention, since an unmet condition may lead to the denial of release, and anticipated or F actual breach may lead to re-detention. Moreover, it is because bail presupposes the legality of detention that the European court has held, in the context of article 5(1)(f), that bail is not a determination of the legality of detention for article 5(4) purposes: see *Zamir v United Kingdom* (1985) 8 EHRR CD108 and *Ismail v United Kingdom* (2013) 58 EHRR SE6.

Contrary to the Secretary of State's submission, the primary position G advanced by the claimant and the intervener would not lead to absurd results, but, in practice, would simply mean that, where the situation of a person subject to conditional bail had materially changed such that the person was no longer liable to lawful detention, that could be brought to the attention of the Secretary of State with a view to seeking the termination of bail. Compliance could be monitored, and any potential liability avoided, by regular review of the availability of the bail powers and the necessity and H proportionality of the conditions imposed.

If that primary position is not accepted, and paragraph 1(2) to (5) of Schedule 10 to the 2016 Act is considered to contain the "clearest possible words" needed to achieve a result whereby the bail powers may subsist even where the underlying power of detention does not, there remain important

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limits on the existence and lawful exercise of the bail powers (and the ancillary powers of re-detention contained in Schedule 10). A

Those limits may be engaged in the present case and, even if they are not, since this is the first opportunity for the courts to consider the scope and limits of the bail powers it remains appropriate to consider them. On that issue, the bail powers arise only where a person is either detained or "liable to detention" and thus where, as in the claimant's case, the relevant power of detention arises under the provisions connected with deportation set out in Schedule 3 to the 1971 Act, that power only exists, and a person can only be "liable to detention", where the making of a deportation order is "pending" (see paragraph 2(1) and (2)) or where "removal or departure" is "pending". Whether a person is detained "pending removal" is a jurisdictional fact for the courts to determine for themselves: see *Tan Te Lam* [1997] AC 97. Thus the existence of a closely related power, such as the bail power, also turns on whether the relevant step in the expulsion process can properly be described as "pending". On an analysis of the authorities dealing with that issue, the liability to detention upon which the existence of the bail powers is conditional lapses if, at a minimum, there is no prospect of removal or deportation in the foreseeable future, or where the prospects of removal or deportation at any point are remote. In short, the prospect of expulsion must be realistic: see *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704. Whether that is the case is a matter for the courts to determine for themselves: see *Khadir* [2006] 1 AC 207, *AB (Sierra Leone) v Secretary of State for the Home Department* (unreported) 7 July 2017, *R (MS, AR and FW) v Secretary of State for the Home Department* [2010] INLR 489 and *RA (Iraq) v Secretary of State for the Home Department* [2019] 4 WLR 132. B C D E

Where the bail power exists, there are also implied limits on its lawful exercise. The limits for which the intervener contends reflect orthodox principles of statutory interpretation and the need to construe narrowly a power which may severely curtail liberty or authorise its deprivation. The principles in themselves are simply the strict application, where individual liberty is at stake, of the principles that a statutory power should only be exercised for the purpose for which it was conferred (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997) and must be exercised reasonably (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). The power to grant bail must be construed in accordance with the same principles of interpretation which apply to the powers of administrative detention to which they are ancillary: see *B (Algeria) (No 2)* [2016] QB 789. Thus, in the intervener's alternative submission, even if the *Hardial Singh* principles do not apply directly (in that the bail power lapses if the detention power can no longer lawfully be exercised), an analogue of the *Hardial Singh* principles, appropriately modified, applies to the bail power. The bail power may be exercised only for the purpose for which the power is conferred, namely, effecting deportation or removal; it can only be lawfully exercised for the period which is reasonably necessary for that purpose; it can no longer be lawfully exercised once it becomes apparent that removal or deportation will not be achieved within a reasonable period; and the Secretary of State is required to exercise all reasonable expedition to effect removal or deportation. The assessment of a "reasonable period" will, as in a detention case, take account of a range of factors, including the period F G H

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A for which the individual has been subject to bail conditions; the nature of the outstanding obstacles to removal or deportation; the diligence, speed and effectiveness of the steps being taken by the Secretary of State to surmount those obstacles; the nature of the conditions imposed; the impact of those conditions on the person and his or her family; and the risks of absconding or reoffending if the person were not subject to those conditions: see *R (I) v Secretary of State for the Home Department* [2003] INLR 196. As a matter B of logic, a "reasonable period" of conditional bail is likely to be longer than a reasonable period of detention, as the impact of the relevant restrictions is likely to be less severe; similarly, the less restrictive the bail conditions to which an individual is subject, the longer a "reasonable period" is likely to be.

Determining whether the implied limits have been exceeded in any given C case will involve the type of context-sensitive exercise with which the courts are amply familiar and which they are well equipped to undertake. The imposition of such limits is important to avoid undesirable results, such as a person being subjected to bail conditions for an impermissible purpose; a person being subjected to unnecessary bail conditions for an indeterminate, and potentially unlimited, period; a vulnerable person being subjected to D highly restrictive conditions, or conditions experienced particularly acutely owing to his vulnerability, for an indeterminate period; or a person being subjected to restrictive conditions for a period of years despite the Secretary of State being grossly dilatory in progressing his/her removal. The Secretary of State does not, and cannot, dispute the applicability to the bail powers of fundamental principles of statutory construction, heightened for a power E capable of interfering with individual liberty. The Secretary of State is also constrained to accept that there are some implied limits on the lawful exercise of the bail powers, but has not sought to articulate what those limits might be other than by making vague reference to appropriateness. Her case that the implied limitations contended for by the intervener are "not needed" because bail conditions can be varied to make them less onerous, and a refusal to vary can be challenged by way of judicial review, is flawed. F "Need" is not the legal test for the recognition of an implied limit on the lawful exercise of a broad statutory power. The question is what Parliament intended, having regard to the language of the relevant provisions and the applicable principles of statutory construction.

The exercise of the bail powers may unquestionably result in a deprivation of liberty for the purposes of article 5. In consequence, and at G least in those cases, the limitations derived from the relevant jurisprudence of the European court concerning article 5(1)(f) of the Human Rights Convention apply, the relevant principles applied by that court being almost identical to the *Hardial Singh* principles: see *A v United Kingdom* (2009) 49 EHRR 29, *Khlaifia v Italy* (Application No 16483/12) (unreported) 15 December 2016 and *JN v United Kingdom* (Application No 37289/12) The Times, 3 June 2016. Recognition of the common law limits for which H the intervener contends would ensure that the specific requirements of article 5(1)(f) are complied with whenever bail conditions amounted to a deprivation of liberty and would serve to ensure that any interference with article 5 rights caused by the exercise of the bail powers complies with the requirement that it be "in accordance with the law".

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Finally, if the Secretary of State's broader construction of the bail power is adopted, the Secretary of State can never exercise her powers under paragraph 10(12)(a) of Schedule 10 to re-detain a person in respect of whom the exercise of the underlying power of administrative detention would be unlawful. That is because there is no separate source of power to re-detain. Nor, in many such cases, will the limited "bridging" power under paragraph 10(9)(b) (exercisable following arrest for breach of bail conditions) be available. If an individual's detention would breach the *Hardial Singh* limits, detention under the "bridging" power will almost invariably be unlawful under article 5 of the Human Rights Convention, as it will neither satisfy the mirror safeguards of article 5(1)(f), nor fall within any of the other permitted exceptions under article 5(1).

The court took time for consideration.

13 July 2020. **ELISABETH LAING J** handed down the following judgment.

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 Alex Goodman and Mr Matthew Fraser. BID was represented by Ms Laura Dubinsky, Mr Anthony Vaughan and Ms Eleanor Mitchell. The Secretary of State ("D") was represented by Mr Robin Tam QC and Ms Emily 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's 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

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A 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 B 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 C 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 ("FTT"). D 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.

E 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 F 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 G particular, are significant. They are *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207, *B (Algeria) v Secretary of State for the Home Department (No 2)* [2016] QB 789 (CA) and *B (Algeria) v Secretary of State for the Home Department (No 2)* [2018] AC 418 (SC(E)).

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

H

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 of Eaton-under-Heywood at paras 14–22 of his speech. Some,

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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 respect to . . . the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom 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 to 10A or 12 to 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 or release 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

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A 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

B **21** The appellant in *Khadir* [2006] 1 AC 207 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 C 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.

D **22** The appellant appealed to the House of Lords. Lord Brown said (speech, para 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 E 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 F 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 (para 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 G 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 H persons, not in the context of removal (under Schedule 2 to the 1971 Act), but in the context of deportation (under Schedule 3), such as *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. 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

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Secretary of State pending his removal or departure from the United Kingdom". He observed (para 25) 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 para 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 (para 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 (para 32) 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 (para 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*": para 33. Lord Brown's conclusion (para 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 the alternative to detention": para 35.

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

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A 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) of Schedule 3, paragraphs 22 to 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 B 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 C 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 admission or 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 22. 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 D 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)* [2016] QB 789 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 E 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* [2006] 1 AC 207, which concerned the power to grant temporary admission, and in relation to which Parliament had used different language, was irrelevant (paras 27 and 28). F 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 At para 30:

G "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 H liable to detention or being detained."

Bail could not be granted, either, where the person was unlawfully detained, or not detained at all, and could not be lawfully detained (para 31).

35 Provisions purporting to curtail liberty by administrative detention should be strictly construed. Paragraphs 22 and 29 should be given a

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restrictive interpretation (para 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 presupposed 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 (para 33).

36 In para 34, Lord Dyson MR 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 MR 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 and remain on bail under paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971 even if the person can no longer be detained under a provision of the Immigration Acts to which that paragraph applies, if the person is liable to detention under such a provision."

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 sub-paragraph (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)).

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A **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."

B

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" (i e, the deportation provisions). In deportation cases, and subject to exceptions, an electronic monitoring condition is mandatory, not optional. The exceptions include cases in which C the Secretary of State considers that such a condition would breach a person's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. 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.

D

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 E 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 F 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 13 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 G 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 13 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)

H **46** The Secretary of State appealed against the decision of the Court of Appeal. The Supreme Court heard argument in *B (Algeria)* [2018] AC 418 in November 2017. Judgment was handed down on 8 February 2018. It is clear from para 23 of the judgment of Lord Lloyd-Jones JSC (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 JSC recorded that it was

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common ground that B could not lawfully be detained after 13 February 2014. A

47 In para 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". B

48 It was common ground that the power to grant bail was predicated on actual detention (para 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": para 31. In para 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". C

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

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

(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' is clear and 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. F

50 In paras 47–52, Lord Lloyd-Jones JSC considered the second part of Lord Dyson MR'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 MR's approach. In para 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 while "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, para 25 (in G H

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A 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 (para 54). The article 5 arguments added nothing (para 56).

B

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 C 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)* [2018] AC 418, 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, D but required the clearest possible words to show such an intention. Fundamental rights cannot be overridden 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 E 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.

F

54 The only alternative to immigration bail was that C should be granted leave. Mr Goodman relied on *R (George) v Secretary of State for the Home Department* [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 G 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".

H

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

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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* [2006] 1 AC 207 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

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A there is no power to detain, there is no power to grant bail. If *Hardial Singh* [1984] 1 WLR 704 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 of Agriculture, Fisheries and Food* B [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.

C **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 D 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 para 15 of *Thet v Director of Public Prosecutions* [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 E construe it, in accordance with the decision in *Pepper v Hart* [1993] AC 593. 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 section 24.5 is: "In order to understand the meaning and effect of a provision in an Act it is essential to take into account F 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 Trawling and Fishing Co Ltd* [1933] AC 402. In G the words of Lord Leggatt JSC:

> "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 e g *Lowe & Potter, Understanding Legislation* (2018), para 3.53 and the cases there cited" (per Lord Leggatt JSC, giving the H judgment of the Court of Appeal in *Court Enforcement Services Ltd v Marston Legal Services Ltd (formerly Burlington Credit Ltd)* [2021] QB 129, para 31).

In *R (N) v Lewisham London Borough Council* [2015] AC 1259, para 53 Lord Hodge JSC said that: "where Parliament re-enacts a statutory provision

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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 to 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)* [2016] QB 789 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* [2006] 1 AC 207, when he interpreted "is liable to detention" in paragraph 21 of Schedule 2, which Lord Dyson MR 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

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A 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 B 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 para 75, below). C 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 D a person who is liable to detention (i e, 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, E 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 F 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)* [2016] QB 789 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 G 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 H 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

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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* [2006] 1 AC 207, 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)* [2016] QB 789.

82 The decision of the Supreme Court in *B (Algeria)* [2018] AC 418 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 JSC 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.

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A **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* [1984] 1 WLR 704, or that the imposition of such conditions contravenes the *Padfield* principle, or is *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB
B 223). 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
C would have been obliged to give him leave. I will say no more than that paras 31–33 of *George* [2014] 1 WLR 1831, 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 para 4 of the judgment of Baroness Hale of Richmond 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
D 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
E 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
F 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* [2006] 1 AC 207: 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,
G Parliament stepped in to reverse that decision by a substantial and unusual provision (section 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 section 67.

H 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 (section 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

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(section 67), thus clearly intending the phrase to have had the same meaning in section 61(3) as was ultimately decided in *Khadir*.

6. The current bail powers are given effect by a provision (section 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 section 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 section 61(3) and the corresponding provision in the current bail powers (section 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 of the Convention has nothing to do with any of this, because bail deprives an individual of liberty for article 5 purposes only in rare circumstances, and if it does, then their article 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.

Claim dismissed.

SALLY DOBSON, Barrister

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