



Hilary Term  
[2013] UKSC 4  
*On appeal from: [2011] EWCA Civ 828*

## **JUDGMENT**

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

before

**Lord Neuberger, President**  
**Lady Hale**  
**Lord Kerr**  
**Lord Sumption**  
**Lord Carnwath**

**JUDGMENT GIVEN ON**

**30 January 2013**

**Heard on 5 December 2012**

*Appellant*  
Hugh Southey QC  
Kate Markus  
(Instructed by Birnberg  
Peirce and Partners)

*Respondent*  
Robin Tam QC  
Steven Gray  
(Instructed by Treasury  
Solicitor)

**LORD KERR (with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Carnwath agree)**

1. An Algerian national whose true identity has not been revealed, but who has been referred to throughout these proceedings as 'B', was sentenced to four months' imprisonment by the Special Immigration Appeals Commission (SIAC) on 26 November 2010. That sentence was imposed because of what was found to be B's deliberate and contumelious refusal to obey an order made by SIAC on 19 July 2007. By that order, SIAC had required B to give particulars of his true identity and to consent to provide a sample for the purpose of DNA testing. B had supplied the sample but had steadfastly refused to disclose his identity or the other particulars.

2. B appealed SIAC's order committing him for contempt. Before the Court of Appeal [2011] EWCA Civ 828 the principal arguments advanced on his behalf were that the sentence of imprisonment gave rise to breaches of his rights under articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Secondary submissions were made that SIAC had failed to give reasons for a critical finding that B was likely to continue to take medication while in prison and that the sentence was excessive. The significance of the point about medication was that it underlay SIAC's conclusion that B was unlikely to suffer a relapse into paranoid psychosis if he was committed to prison. He had suffered from that condition previously and there was medical evidence that, if sent to prison, he was likely to react by refusing to take prescribed medication and that, in consequence, he would revert to a psychotic state.

3. The Court of Appeal found that SIAC had erred in expressing confidence that B would not relapse into paranoid psychosis if he was sent to prison. In particular, it had erred in rejecting, in effect, the evidence of two consultant psychiatrists, Dr Deeley and Dr Payne, that B would refuse to take his medication and that, in consequence, the onset of a psychotic state was likely. Moreover, SIAC had misunderstood the evidence of another doctor, Dr Thompson, that B would take medication if detained. Dr Thompson had expressed that opinion on the basis that B would be detained in a secure hospital. He did not hold that view in relation to B's detention in prison which was, of course, the place that he would be detained on foot of SIAC's order.

4. A majority of the Court of Appeal (Longmore LJ and Laws LJ) held that, notwithstanding SIAC's error, the appeal against the four months' committal order should be dismissed. They rejected the arguments based on articles 3 and 8 of

ECHR. Longmore LJ accepted that there was a risk of relapse if B did not continue to take his medication in prison (para 16) and it is implicit in that finding that there was also a risk that he would not do so. A relapse into a psychotic condition whilst in prison would not amount to a breach of article 3, in Longmore LJ's view, because arrangements would be in place for B's transfer to hospital if such a relapse occurred. (Section 48 of the Mental Health Act 1983, as amended by section 1(4) of, and paragraph 11 of Schedule 1 to, the Mental Health Act 2007, empowers the Secretary of State, if satisfied that a civil prisoner – which would be the appellant's status – was in need of urgent medical treatment, to ensure that such treatment was received in hospital.)

5. On the question whether the four months' imprisonment was excessive, the majority found that it was not. Longmore LJ said:

“Many people might think that a sentence of four months for a deliberate and contumelious contempt, frustrating the Secretary of State's intention to deport B and causing SIAC great difficulty in its final disposition of the appeal before it, is a sentence which is comparatively merciful.” (para 20)

6. Laws LJ was of like mind. At para 37 he said:

“... this was a grave and deliberate contempt of court. Even on the footing that the appellant is at risk of a relapse into paranoid psychosis, I am wholly unpersuaded that there is the least possibility of any violation of ECHR article 3 or 8. This was a lenient sentence.”

7. Etherton LJ, while agreeing that SIAC had erred in the manner found by Longmore LJ, was of the view that the case should be remitted to SIAC for reconsideration. He considered that SIAC was in “a far better position” (para 33) than was the Court of Appeal to evaluate recent medical evidence about B's mental state.

#### *The appeal to this court*

8. The Court of Appeal refused permission to appeal but certified the following questions:

“(1) whether the Court of Appeal is correct that it should adopt the approach of the Court of Appeal (Criminal Division) and only allow an appeal where a sentence is manifestly excessive or whether section 13 of the Administration of Justice Act 1960 (when read with the Civil Procedure Rules) gives it a broader discretion that enables it to remit a case where a first instance judgment regarding sentence was flawed and/or procedurally unfair?”

(2) whether the Court of Appeal must remit a case where a first instance judgment regarding sentence imposed in a contempt case was flawed and/or procedurally unfair unless it concludes that the court below would have reached the same conclusion even if it had not fallen into error”

9. The focus of the appeal in this court was distinctly different from that which had been central to the hearing before the Court of Appeal. Before this court it was argued that the Court of Appeal had unwarrantably deferred to SIAC’s selection of the appropriate sentence and had wrongly determined that the sentence of four months was proper on the basis that it was not manifestly excessive. Mr Southey QC, on behalf of the appellant, took particular issue with Longmore LJ’s statement in para 12 of his judgment where he said:

“As in any appeal against a sentence of imprisonment, the question for this court is whether the sentence imposed was excessive or, indeed, to use the almost invariable language of the Criminal Division of this court, ‘manifestly excessive’ since there is, of course, a wide discretion given to any sentencing tribunal. ”

10. To adopt the conventional approach taken by the Court of Appeal, Criminal Division to appeals against sentence by first instance courts was wrong, the appellant argued, for three reasons. First, it treated SIAC’s decision as having residual validity, despite it having been found that the basis on which that decision had been reached was flawed. The second reason was related to the first. Section 13(1) of the Administration of Justice Act 1960 gives an automatic and broadly based right of appeal from a decision of a court in the exercise of its jurisdiction to punish for contempt of court. Section 13(3) gives an unfettered power to the appellate court to reverse or vary the order of the lower court. It was therefore wrong, the appellant contended, to constrain the exercise of that power by reference to the possible propriety of the lower court’s penalty. It was necessary for the appellate court to take an entirely de novo decision on the proper penalty, if any, to impose on the defendant in a contempt proceeding. Finally, it was argued that, in general, where an appellate court has found that the court exercising the power to punish for contempt had done so on an unlawful basis, it should remit the

matter to the original sentencing court so that the defendant's right to have the case properly adjudicated by a first instance court and to have an opportunity to appeal from that decision was preserved.

### *Discussion*

11. Where an appellate court has concluded that the basis on which the decision of the lower court to sentence someone for contempt is flawed, it does not follow that the sentence chosen by the lower court is inevitably wrong. It may be an entirely correct sentence but for different reasons from those articulated by the original sentencing court. The affirmation of the original sentence does not necessarily entail an endorsement of the reasons for which the decision to sentence was made. Where it has been determined that the basis for the original sentence of imprisonment is wrong, a *de novo* assessment must indeed occur. A fresh look at the circumstances material to the question of whether imprisonment is the right disposal should take place in light of the correct understanding of those circumstances.

12. It is not essential, however, even as a matter of generality, that the fresh look be undertaken by the original sentencing court. If it is sufficiently clear to the appellate court that a sentence of imprisonment is appropriate in light of its revised view of the relevant facts, it is not required as a matter of principle or of practice that the matter be remitted to the court which first imposed the sentence. As Jackson LJ said in *JSC BTA Bank v Solodchenko (No 2)* [2012] 1 WLR 350 para 60, where an appellate court is seised of the case and in possession of all relevant facts, the proper course is for the appellate court to determine what the proper sentence for contempt should be on the basis of the true facts. Where, of course, a fresh investigation of new facts is required and it is necessary or desirable that this be undertaken by a first instance court, remittal will be suitable. This is not such a case. The Court of Appeal was able to evaluate the medical evidence and reach reliable conclusions on its significance. It could decide what the appropriate sentence should be and it was right to do so.

13. In the present case it is quite clear that the Court of Appeal undertook a fresh examination of the question whether it was appropriate to sentence the appellant to prison for his admitted contempt. Two principal reasons that he should not be sent to prison were advanced on the hearing of the appeal before this court. The first of these does not appear to have featured in the appellant's arguments before the Court of Appeal, at least not in the form that it was pursued in this court. It was that the committal order would have no coercive effect whatever. The second argument was that the appellant's incarceration would lead to his relapsing into a psychotic state.

14. A third, supplementary, argument was made that, because of the already considerable restrictions on the appellant's liberty, committal to prison was inappropriate (on his release from prison in 2005 he was made subject to a control order and has been, since appearing before SIAC, under restrictive bail conditions). There is nothing to show that the Court of Appeal was unmindful of the significant limitation on the appellant's liberty that the current bail conditions require. It is, in any event, at least questionable that this could be a factor of any significance in deciding whether committal should be ordered. Committal is appropriate where it can reasonably be expected that this will induce the contemnor to purge his contempt (the coercive effect). It is also appropriate to punish contempt of a court's order (the penal element). Frequently both elements will underlie a committal order. Where there is reason to believe that committal will secure compliance with a court's order, the fact that the person subject to it has already substantial restrictions on his liberty is immaterial. Where it is required in order to properly punish the contemnor, the loss of residual liberty is unlikely to weigh heavily against the making of the order.

15. Contrary to the appellant's argument on the first two grounds, the Court of Appeal in effect reached conclusions which were favourable to the appellant on both issues and, so far as it was required, their conclusions on those issues amounted to a de novo examination of the question whether the imposition of a sentence of imprisonment was appropriate.

16. SIAC did not find that the appellant's committal to prison would have a coercive effect on him in terms of persuading him to disclose his true identity. Rather, it approached the question of possible coercive effect by considering whether it had been shown that sending him to prison would not in any circumstances induce him to divulge the required information. At para 71 of its judgment SIAC said:

“... the Commission agrees with Mr Tam that the position at the present time is not such that it can be said that committal of the appellant to prison would be so unlikely to coerce him into obeying the Commission's order as to render committal (for that reason) disproportionate, either in terms of article 8 or otherwise to make it inappropriate to commit the appellant to prison.”

17. In the appellant's skeleton argument for the hearing in the Court of Appeal, it was suggested that this passage from SIAC's judgment “shows that the Commission considered that the prospect of committal having a coercive effect may be very remote”. There is nothing in the skeleton or in the Court of Appeal's treatment of the appellant's argument to indicate that it was suggested on the

appellant's behalf that the prospect of committal having a coercive effect was not only remote but non-existent.

18. In any event, in as much as the medical evidence indicated that committal would not induce the appellant to comply with SIAC's order of 19 July 2007, there is no reason to suppose that this was not accepted by the Court of Appeal. In para 8 of his judgment Longmore LJ set out the detailed summary of the medical evidence that SIAC had provided in para 47 of its judgment. This included Dr Payne's opinion that the appellant's mental health difficulties were not causing his refusal to disclose his identity. That refusal, in Dr Deeley's opinion, was based "on an understandable fear" that his family might be mistreated or tortured if he did make the required disclosure and that he might himself be deported and subjected to ill-treatment or torture. It was Dr Deeley's view that this fear and the appellant's motivation in refusing to disclose his identity were likely to endure even if his mental health problems were treated. SIAC's summary of the medical evidence also recorded the opinion, held by both Dr Payne and Dr Deeley, that sending the appellant to prison would result in his being uncooperative with prison authorities and mental health teams. Ultimately, this would lead to his re-admission to a psychiatric facility.

19. All of this was recorded uncritically by Longmore LJ. Indeed, he expressly accepted (in paras 10 and 11) Mr Southey's criticism of SIAC for its disregard of the evidence of Dr Payne and Dr Deeley and for its expression of confidence that the appellant would not relapse into paranoid psychosis if he was sent to prison. Acceptance of the doctors' opinion as to the likely outcome if the appellant were returned to prison necessarily involves recognition that he would not comply with the order – in other words, that committal to prison would not have a coercive effect. And, indeed, there is nothing in the judgments of any of the members of the Court of Appeal that is remotely suggestive of a view that sending the appellant to prison would bring about a change of heart on his part. The judgments of the majority make it clear that the committal was required in order to punish, not to induce compliance of, the contempt.

20. It is plain that the second argument against committing the appellant – that this would cause him to relapse to a psychotic state – was dealt with on an entirely different basis from that which was considered by SIAC. That the Court of Appeal dealt with this as a *de novo* assessment is beyond argument. Its conclusions on this aspect of the case were premised on the real risk that such a state would develop but that this did not contraindicate a prison sentence because of the arrangements that were in place which would enable his transfer to hospital if it materialised. This is completely different from the basis on which SIAC decided that committal to prison was appropriate.



21. There is nothing therefore in the appellant's claim that there has not been a de novo examination of the question of whether he should be sent to prison because of his admitted contempt. What then of his complaint that the affirmation of the four months' sentence imposed by SIAC constituted unacceptable deference to that court's decision? In considering this issue it is necessary at the outset to draw a distinction between, on the one hand, the validity of the decision to make a committal order and, on the other, the selection of the sentence necessary to achieve the objects of the order. Here the basis for SIAC's decision that a committal order should be made was found to be misconceived. That has been corrected by the Court of Appeal's re-consideration of that issue on what it perceived to be the true import of the evidence. That re-assessment has not been challenged on its merits. One must focus, therefore, on the question whether the Court of Appeal, in deciding that four months' imprisonment was not excessive, paid undue regard to SIAC's selection of that term as the appropriate sentence.

22. The Court of Appeal was faced with a sentence chosen by SIAC on an erroneous basis but it was a sentence that was nevertheless designed to punish the contempt which SIAC had found to exist. On the hearing before the Court of Appeal the appellant had accepted that he was guilty of contempt. That court then had to consider whether a sentence of imprisonment should be imposed for the contempt. The majority concluded that it should be, albeit for different reasons than those found by SIAC. Having so concluded, it was entirely unexceptionable that the court should consider the propriety of the sentence which SIAC had chosen. This did not involve any deference to the SIAC's reasoning in deciding that a sentence of imprisonment should be imposed. It merely involved an examination of whether a sentence of four months' imprisonment was suitable, given that both SIAC and the majority of the Court of Appeal had both concluded that some term of imprisonment was required.

23. Where an appellate court decides that the basis for the original sentencing was wrong, it may not be appropriate to consider the propriety of the sentence imposed solely by asking whether it was manifestly excessive. If the choice of sentence has been influenced by the reasons for finding that imprisonment is required, the sentence chosen may be open to challenge on that basis, quite apart from considerations of obvious immoderation. In the present case, however, the sentence imposed by SIAC was not determined by the reasons that it had concluded that imprisonment was appropriate. The length of the sentence was not influenced by the conclusion that the appellant would not relapse into paranoid psychosis. It was chosen to reflect the seriousness of the appellant's contempt. It was therefore not inappropriate for the Court of Appeal to consider whether the sentence imposed was manifestly excessive.

24. In light of that conclusion, the first certified question does not require an answer. The Court of Appeal concentrated exclusively on the propriety of the

length of sentence in order to decide how long the appellant should serve as punishment for his contempt. There was nothing untoward about testing that decision against the sentence chosen by SIAC since it was engaged on essentially the same exercise as that on which the Court of Appeal was required to embark. There is no reason that the Court of Appeal should ignore SIAC's sentence. To do so would be artificial. It would introduce an air of unreality about the sentencing exercise. I would answer the second certified question that an appellate court need only remit a case where a first instance judgment regarding sentence imposed in a contempt case was flawed and/or procedurally unfair if it considers that a fresh investigation of new facts is required and it is necessary or desirable that this be undertaken by the first instance court.

25. I would dismiss the appeal.