Neutral Citation Number: [2020] EWHC 2508 (Admin)

Case No: PTA/10/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st September 2020

**Before** :

**MRS JUSTICE FARBEY**

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**Between :**

**QX** — **Claimant**

**- and -**

**Defendant**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

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**Mr Dan Squires QC & Ms Joanna Buckley** (instructed by **ITN Solicitors**) for the **Claimant**
**Mr Steven Gray** (instructed by the **Government Legal Department**) for the **Defendant**
**Special Advocates: Ms Shaheen Rahman QC & Ms Rachel Toney** (instructed by the **Special Advocates' Support Office**)

Hearing date: 21 July 2020

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 21 September 2020 at 4:30pm.

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**MRS JUSTICE FARBEY:**

## Introduction

1. This is my judgment on whether the present proceedings breach the claimant's right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention"). The claimant applies for a review of two of the obligations imposed on him after his return to the United Kingdom under a Temporary Exclusion Order ("TEO"). The obligations are made under section 9 of the Counter-Terrorism and Security Act 2015 ("the 2015 Act"). In their current form, they are as follows:

> (i) A reporting obligation: the claimant must report daily to a named police station between specified hours; and
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> (ii) An appointments obligation: the claimant must each week attend a two-hour appointment with a mentor from the Home Office Desistance and Disengagement Programme ("DDP") and a two-hour appointment with a theologian.

2. In his written grounds for review the claimant seeks an order quashing the obligations. He submits that each of the obligations engages his right to respect for private and family life under article 8 of the Convention and that they breach article 8 because they are neither necessary nor proportionate.

3. The Secretary of State seeks to justify and maintain the obligations relying in part on closed material that has not been provided to the claimant or to the lawyers instructed by him. In a previous preliminary judgment, I held that article 6 applies to these review proceedings, and that the claimant and his lawyers are therefore entitled to the level of disclosure in cases that fall within the principles set down by *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. My previous judgment (handed down on 15 May 2020) bears the neutral citation number [2020] EWHC 1221 (Admin).

4. I did not at that stage decide the further question of whether or not the material that the Secretary of State had to date provided to the claimant met the *AF (No 3)* test. The resolution of that question needed to await (i) the Secretary of State's decision as to whether to provide further information to the claimant in accordance with orders I made at a closed hearing; and (ii) the Secretary of State's clarification of the nature and extent of her case which I directed should be provided in writing. In an amended open statement of case dated 5 June 2020, the Secretary of State provided further information in response to my orders and direction.

5. At the request of the Special Advocates, a further hearing took place on 19 June 2020 in order to deal with various outstanding points relating to disclosure under CPR 88.28. The hearing took place in closed session in the absence of the claimant and his lawyers. The Special Advocates asked me to rule that the proceedings breached article 6 on the grounds that the *AF (No 3)* test had not been met. In the absence of the claimant, I declined to hear argument on that issue. There was no reason for me to confine my consideration of article 6 to closed session: such a course would have offended the principle of open justice and would not have been fair to the claimant. I directed that any further submissions on article 6, whether open or closed, should be

incorporated in the parties' skeleton arguments for the review hearing. I directed that skeleton arguments should also address the appropriate stage in the proceedings at which further article 6 issues should be determined. I asked the parties to consider in particular whether those arguments should be decided as a further preliminary issue at the outset of the review hearing or at the end of the open session when each party's open case would have been fully and definitively ventilated, or at some other stage.

6. In the event, at the invitation of both parties, I heard article 6 arguments as a further preliminary issue at the outset of the review hearing. Having heard open and closed submissions, I announced my decision to the effect that I was presently satisfied that the proceedings would be compatible with article 6 but that I would actively review my decision at the close of evidence. These are my reasons for reaching that decision.

## Background

7. The facts of the case, and the legal arguments for and against the section 9 obligations, will be a matter for determination at the substantive hearing. I am limited at this stage to the consideration of whether the determination of the issues in the case will be fair and compatible with article 6. For that purpose, it is necessary for me to consider the case which the Secretary of State makes against the claimant and his case in response. In setting out the parties' respective cases, I express no view on the factual or legal issues one way or the other.

8. The Secretary of State's case is that the section 9 obligations are and always have been necessary and proportionate to the risk that the claimant poses to national security. The claimant has spent time in Syria. During that time, he aligned himself with a group that was itself aligned with al Qaeda ("AQ"). He held a significant leadership role. Since his return to the United Kingdom, he has continued to engage in activities which pose a risk and a danger to national security.

9. In assessing the risk to national security posed by the claimant, the Secretary of State has relied on information from the Security Service about AQ. For ease of reference in court proceedings, that information has been collated into a Security Service statement on the threat to national security from individuals with United Kingdom links who have aligned with an AQ-aligned group in Syria. The statement contains general material. I am told that it has been deployed in a number of cases. Although it is general, it forms part of the Secretary of State's case against the claimant.

10. The statement says that AQ's long-term strategy is to act as a vanguard to attack the West and its interests. Violence is the most effective method of achieving this objective. In order to undermine the West, AQ has persistently attempted to recruit or inspire Western nationals to undertake terrorist attacks in their countries of origin, including terrorist attacks against the United Kingdom.

11. As set out in the statement, the Security Service assesses that anyone who has travelled voluntarily to align with an AQ-aligned group demonstrates a high level of commitment to the ideology and aims of AQ and is aware of the attacks that it has carried out. Such an individual will be subject to radicalisation and desensitised to violence, so this ideological commitment is likely to persist.

12. The statement goes on to say that, if British nationals align themselves with an AQ-aligned group, they have done so because they support AQ and are likely to have made an ideological commitment to the "extreme and violent beliefs, values and worldview of AQ." Given all these factors, the Security Service assesses that AQ-aligned individuals may seek to conduct attacks in the United Kingdom or to assist others to conduct extremist activity, putting national security at risk.

13. This Security Service assessment of AQ - and the individuals who support it - is cited in the statement of the Secretary of State provided to the claimant and his representatives in relation to his own case. It is plain from a reading of the material which is specific to the claimant's own case that the Secretary of State took the more general material into consideration when making the TEO and when imposing the obligations under challenge. The claimant was provided with a copy of the general material in February 2020. He has not sought to challenge it, either by representations to the Secretary of State or by evidence submitted to the court.

14. As to the individual obligations, the open material available to the claimant says that the reporting obligation reduces the risk that he will abscond. It reduces his ability to engage in terrorism-related activity. It provides general assurance as to his location at frequent points throughout the week which assists in mitigating the risk to national security that the claimant is assessed to pose. The appointments with the mentor and the theologian are necessary and proportionate because they support the claimant's reintegration into UK society. They reduce the claimant's ability to engage in terrorism-related activity and provide an opportunity to "understand QX's mindset." They provide general assurance as to his location at frequent points throughout the week.

15. In his witness statements, the claimant denies that he is or has been aligned with an AQ-aligned group. He says that he travelled to and from Syria between 2013 and 2018. He realised that there was a need for teaching and educational projects aimed at both adults and children in Syria, and he assisted in such projects during that period.

16. The claimant says that it is impossible for him to respond to the allegation about his activities in the United Kingdom which was not conveyed to him before 5 June 2020 (as a consequence of the disclosure process in these proceedings). He says that the allegation about these activities is too vague to allow him to know what he is supposed to have done and when he is supposed to have done it. He cannot respond to the allegation without further detail.

17. The claimant's witness statements set out his response to the reporting obligation and to the mentor and theologian appointments. He gives an account of the effects of daily reporting on his personal life and on the lives of his family members. He says that, when the mentoring sessions started, he suspected that the sessions were being used for gathering intelligence so that he avoided answering personal questions. For a personal reason which I need not set out here, he indicated in March 2019 that he did not wish to engage in conversation. From July 2019, he ceased to speak to either of the mentors who have been supplied to him since the requirement was imposed, at least in any meaningful way that would be conducive to rehabilitation. During the sessions, he has played chess with the mentor and read books. He says in his First Statement:

> "Although I am obliged to attend the appointments with [the mentor], I am not under any compulsion to speak to him. This has been confirmed by [the Secretary of State]…As I am not engaging in the sessions, they are a complete waste of both mine and my mentor's time."

18. The claimant appears to have taken a similar approach to the theologian sessions, saying that he has read a book during all sessions. He says that he does not understand the purpose of sessions if, as the Home Office has confirmed to him, he is not required to engage with them. He says in his First Statement:

> "I am also concerned that information I provide on potentially personal matters would be shared with others. That makes me feel very uncomfortable in itself but I am also worried that information could be used against me in family, criminal or other proceedings. Therefore, if I am forced to continue to attend mentoring I intend for the rest of the sessions…to read a book or engage in some other similar activity and will not be engaging in the sessions."

19. His witness statements express his concerns about (among other things) the experience, training and qualifications of the mentors and theologian. He alleges that his first mentor made racist remarks. He regards his mentor (as at 6 July 2020) as someone who is actively seeking to influence these proceedings and to undermine his relationship with his lawyers. He expresses concerns about the confidentiality of the sessions and about data protection. He challenges the purpose of the sessions which he regards as an information-gathering exercise for use against him in "current or future proceedings." In such circumstances, neither the reporting obligation nor the DDP sessions are necessary or proportionate.

20. The Secretary of State resists the claimant's account of the sessions and their benefits, stating:

> "Many of the benefits pertain regardless of QX's engagement, and in any event, removing the requirement on the basis of non-engagement would create an incentive for subjects to decline to participate which would be damaging to national security…
>
> The mentoring obligation is designed to support an individual's re-integration into UK society. We assess that QX has not taken steps to reintegrate into UK society and has not achieved re-integration."

## Legal framework

21. The legal framework is set out in my previous judgment but I summarise the key elements here for ease of reference. The Secretary of State may impose a TEO on an individual if certain conditions are met (section 2(2) of the 2015 Act). They include:

> Condition A: The Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom; and
>
> Condition B: The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the individual.

22. It is possible for a person to enter and remain in the United Kingdom during the currency of a TEO. Section 5 of the 2015 Act permits individuals to enter under a "permit to return." A person who is subject to a TEO and has returned to the United Kingdom may by notice be required to comply with certain "permitted obligations" (section 9(1) of the 2015 Act). The permitted obligations (as defined by section 9(2)) include an obligation to report to a police station and an obligation to attend at appointments. The Secretary of State may issue a further notice varying or revoking a previous notice of obligations (section 9(4)).

23. An individual who is subject to a TEO and who is in the United Kingdom may apply to this court for a review of (among other things) the imposition of the TEO and the decision to impose any of the section 9 obligations (section 11(2)(b) and (d) of the 2015 Act). In determining the review, the court must apply the principles applicable on an application for judicial review (section 11(3)). Schedule 3 to the 2015 Act makes provision for a closed material procedure subject to rules of court. CPR 88 makes provision for the appointment of special advocates to represent the interests of a person from whom material is withheld.

24. The test as to whether the claimant has received sufficient disclosure of the case against him in order to have a fair trial under article 6 of the Convention is the same as in control order cases under the Prevention of Terrorism Act 2005 and is set out in *AF (No 3)*. The key passage in *AF (No 3)* is to be found in the speech of Lord Phillips at para 59:

> "…the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists of purely general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be".

25. For present purposes, both parties accept that an individual is not permitted in the course of a review of section 9 obligations to challenge the Secretary of State's assessment of whether the individual is or has been involved in terrorism-related activity outside the United Kingdom (Condition A, set out above); nor may the individual challenge the Secretary of State's assessment that it was necessary to

impose a TEO (Condition B, set out above). Those conditions may be challenged in a review of the TEO itself but may not be challenged through the side-wind of a review of section 9 obligations. I was referred to *LG v Secretary of State for the Home Department* [2016] EWHC 3217 (Admin), para 17(i), which reached a similar conclusion in relation to comparable measures under the Terrorism Prevention and Investigation Measures Act 2011. This does not mean that no part of the national security case may be challenged in a review of individual section 9 obligations. There is no bar to a claimant challenging those aspects of the national security case that are relevant to the Secretary of State's assessment that the section 9 obligations remain necessary and proportionate despite the passing of time or the claimant's changed personal situation.

26. In *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin), [2010] 1 All ER 847, an individual was the subject of a control order which required him to reside in London. He was subsequently served with a modified order which required him to relocate to Leicester. Mitting J concluded that the appeal against the modification involved the determination of BM's civil rights and that article 6 was engaged. The case is an example of this court accepting that an individual is entitled to *AF (No 3)* disclosure in proceedings that may touch on national security or other risks even if the purpose of the proceedings is something other than a wholesale challenge to the justification for executive action in the first place.

27. The open case before Mitting J turned on the allegation that BM posed an imminent risk of absconding before relocation, and that relocation was necessary to minimise the risk. Having concluded that BM had not received *AF (No 3)* disclosure, Mitting J went on to hold that the Secretary of State could not rely on anything other than the open material without a breach of article 6. Having limited the Secretary of State to her open case, he considered (at para 14) the strength of the case against BM on the basis of the open material alone. He held:

> "All that is left of the Secretary of State's case is the bare assessment of the Security Service that BM posed an imminent risk of absconding...On the open material, that assessment is groundless…What I have decided is that the open material is not capable of supporting the decision."

On the basis that the open material was not capable of supporting the modification, he granted relief to the claimant.

28. Mitting J's approach is illuminating. Having found that the Secretary of State's reliance on closed material would breach article 6, he did not move straight to the grant of relief. He was willing to consider the force of the Secretary of State's case in open and whether the open material could support the decision under challenge. I agree with that approach. There are sound public policy reasons as to why the court, having found that a single allegation is insufficiently particularised to meet the *AF (No 3)* test, should go on to consider what is left of the open material and whether it is capable of supporting the Secretary of State's case. Any other conclusion would mean that the Secretary of State's case would not be permitted to proceed at all – notwithstanding that the claimant would be capable of meeting the open case against him and could have a fair trial on other allegations that did not depend solely or

decisively on closed material. That would be neither in the interests of national security nor in the interests of justice.

## The parties' submissions

29. On behalf of the claimant, Mr Squires submitted in writing and orally that the allegation relating to the claimant's activities since his return to the United Kingdom is too broad and vague to allow the claimant to give effective instructions, contrary to the test in *AF (No 3)*. The test sets a "relatively high standard" and "suggests that where detail matters, as it often will, detail must be met with detail" (*AF (No 3)*, para 87, per Lord Hope of Craighead). The claimant is not able to deny in any meaningful way or to refute the allegation because he does not know what activities are alleged; when they are said to have been carried out; and who else was involved.

30. Mr Squires submitted that the allegation of in-country activities is significant and forms a key part of the Secretary of State's justification for the continuation of the section 9 obligations to date. By reference to the evidence, he submitted that the Secretary of State's justification for the obligations has not altered since the imposition of the TEO. The assessment of the risk to national security has remained the same, despite the passing of time and despite the claimant's changed circumstances. The claimant has now gained and started employment at a charity. He has a settled family life. The Secretary of State's unchanged assessment implies that the claimant has undertaken activities which have not been disclosed but which cause the Secretary of State to assess that the claimant continues to pose no lesser risk than when the obligations were imposed. It follows that the case for continuing the section 9 obligations is to be found in the closed material.

31. Mr Gray submitted that the Secretary of State had complied with the court's orders made as a result of the disclosure process. The claimant had been provided with sufficient material for article 6 purposes.

32. In a brief closed session, the Special Advocates supported Mr Squires' submissions by reference to the closed material. Mr Gray referred to parts of the closed material which he submitted demonstrate that the Secretary of State has provided sufficient disclosure for the review hearing to proceed compatibly with article 6.

## Analysis and conclusions

33. I shall take out of the equation the broad allegation in relation to the claimant's United Kingdom activities. As matters stand, such an allegation would in my judgment be too broad on its own to sustain the section 9 obligations compatibly with article 6. However, adopting the approach in *BM*, I shall consider what is left of the Secretary of State's case and whether it is capable of supporting the necessity and proportionality of the section 9 obligations. If it is capable of so doing, the substantive review should proceed.

34. I do not accept that, taking the United Kingdom activities out of the equation, the Secretary of State's case for imposing or retaining the obligations is bound to fail. Key allegations in the open case include:

(i) The claimant had a significant leadership role in an AQ-aligned group in Syria.

(ii) He is therefore likely to have made an ideological commitment to the violent beliefs and values of AQ (a group which seeks to carry out terror attacks in the United Kingdom).

(iii) He has refused to engage with the mentoring and theologian measure, which is designed to counter-balance any ideological commitment to violence.

(iv) National security requires individuals to submit to mentoring and theologian sessions even if they do not engage, at least in part because the removal of an appointments measure for want of co-operation would incentivise other dangerous individuals to do the same.

35. In my judgment, the Secretary of State is properly able to put her case on the basis that the claimant has been and is a person with an ideological commitment to a terrorist group that seeks to carry out violent attacks on the West and on the United Kingdom. He has held a significant leadership role in Syria. Since his return to the United Kingdom, he has failed to engage with the mentors and theologians who have been provided to rehabilitate him under the statutory scheme. The Secretary of State may properly contend that, for these reasons, the claimant remains a threat to national security and that the section 9 obligations are necessary and proportionate. That case may or may not succeed on the principles of judicial review which the court will apply; but I am not now concerned with the merits of the case. In my judgment, the Secretary of State is entitled to put such a case. The claimant is able to give effective instructions in order to answer and refute it. There is no breach of article 6.

36. During the course of the closed session, the Special Advocates seemed to go some way to suggesting that the Secretary of State is in difficulties in sustaining her case to the court without relying to a decisive degree on the additional allegation about United Kingdom activities. That allegation had been taken into consideration in the Secretary of State's decision-making process. The Secretary of State must, for the purposes of the review proceedings, withdraw a building block from the edifice on which her section 9 decisions have been and continue to be founded. It follows that the justification for the section 9 obligations is vulnerable.

37. Such a submission may be proved right as and when the substantive review hearing takes place. However, it is not a foregone conclusion and it would be premature for me to rule on it now. The review will be concerned with a person who has held a leadership role in an AQ-aligned group and who has not engaged with measures introduced by Parliament for the rehabilitation of those who are reasonably suspected of having been involved in terrorism-related activity outside the United Kingdom. The question as to whether such a person may lawfully be subject to obligations of the kind, and to the extent, which have been imposed in this case raises real issues for the court to determine.

38. Mr Squires suggested that the claimant cannot be expected to rebut the general material in the Security Service statement about AQ: he is only capable of rebutting a particular allegation about him. I disagree. The claimant is alleged to have had a significant leadership role in an AQ-aligned group. AQ is assessed to pose a threat of

violent attack within the United Kingdom. The submission that the claimant is unable, and should not be expected, to deal with the suggestion that he may have an ongoing violent and dangerous outlook is unreal.

39. The claimant objects strongly to the obligations and, in particular, makes serious criticisms of the mentors and theologian. He will be able to make those criticisms in the review proceedings. He will be able to argue that a scheme which requires attendance at DDP appointments but does not require engagement at the sessions is not rationally connected to the objective of rehabilitation that Parliament intended. He will be able to argue that the lack of a rational connection demonstrates that the sessions are neither necessary nor proportionate. However, I do not accept that these arguments should cause me to grant relief at this stage, without reference to opposing arguments from the Secretary of State on the basis of all the evidence (including the oral evidence of the Home Office witnesses who have yet to be heard).

40. For these reasons, the proceedings do not as matters stand breach article 6. However, as I indicated at the hearing, the court will keep the question of disclosure under review in the exercise of its duties as a public authority under section 6(1) of the Human Rights Act 1998. This court has adequate powers, and will be astute, to ensure that the Secretary of State does not rely solely or decisively on closed allegations. I would propose to review the compatibility of the proceedings with article 6 at the close of evidence.

## Postscript

41. The extent to which the claimant seeks to rebut the Secretary of State's assessment that he is a threat to national security was not made clear until Mr Squires' oral submissions. A national security witness was not asked to give oral evidence, from which the court inferred that neither Mr Squires nor the Special Advocates sought to challenge the risk to national security that the claimant is alleged now to pose. Mr Squires' skeleton argument for the review hearing says (at para 18) that the claimant does not seek to challenge the national security case. Nevertheless, it appears that the claimant would wish to rebut the allegation that he remains a threat to national security in light of his changed and more settled personal situation. The wisdom of not requesting a national security witness is not clear. Counsel will need to take this into account in proposing any further case management directions in relation to the review hearing, which was in the event adjourned by consent, pending this judgment and pending the parties' consideration of consequential matters which have arisen.

42. There is a brief closed judgment supplementing this open judgment by reference to closed material.