Neutral Citation Number: [2022] EWHC 836 (Admin)

Case No: PTA/10/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 April 2022

Before :

MRS JUSTICE FARBEY

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Between :

QX	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr Dan Squires QC & Mr Darryl Hutcheon (instructed by **ITN Solicitors**) for the **Claimant**
Mr Steven Gray & Mr William Hays (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: 30 November, 1 December, 2 December 2021

REPORTING RESTRICTIONS APPLY

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Approved Judgment

THE HON MRS JUSTICE FARBEY :

Introduction

1. This is another preliminary judgment in proceedings launched in 2019. On 26 November 2018, the Secretary of State made a temporary exclusion order ("TEO") against the claimant under section 2(2) of the Counter-Terrorism and Security Act 2015 ("the 2015 Act" or "the Act"). The claimant is a British citizen. He has spent time in Syria. At the time of the order, he was in Turkey. On 9 January 2019, under the terms of a permit to return granted by the Secretary of State under section 5 of the Act, he returned to the United Kingdom. The Secretary of State thereafter imposed a number of in-country obligations upon him under section 9 of the Act. The TEO and the section 9 obligations expired on 25 November 2020.

2. The Secretary of State took these measures because she alleges that, while in Syria, the claimant aligned himself with a group that was itself aligned with al Qaeda ("AQ") and that he held a significant leadership role. I shall call this "the Syria allegation." The Secretary of State alleges too that, following his return to the United Kingdom, the claimant continued to engage in activities which posed a risk to national security. I shall call this "the UK allegation." In light of these allegations, the Secretary of State maintains that the TEO and the section 9 obligations were justified from the date of their imposition until the date of their expiry.

3. By written application dated 8 November 2019, the claimant applies for a review of two of the section 9 obligations: (i) a reporting obligation (in short, that he report daily to a named police station between specified hours); and (ii) an appointments obligation (in short, that he 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 each week). The application for a review of the section 9 obligations was lodged while the TEO and obligations were in force.

4. By an amended application dated 10 June 2021, the claimant seeks in addition to challenge the Secretary of State's decision to impose and maintain the TEO itself. The application for a review of the TEO was made after it had expired.

5. The preliminary issues which now arise for decision have come about in the following way. The Secretary of State has at all times been willing to tender for cross-examination two witnesses employed by the Home Office. Those witnesses will give evidence relating to the necessity and proportionality of the section 9 obligations. At a CLOSED disclosure hearing on 4 October 2021 from which the claimant was excluded, the Special Advocates (Ms Shaheen Rahman QC and Ms Rachel Toney) informed me that the Secretary of State did not propose to provide a Security Service witness to give evidence in relation to the national security case which is said to justify the TEO itself and which has now come into sharper relief in light of the claimant's amended case.

6. As a consequence of concerns that I expressed at the 4 October hearing, the Secretary of State wrote to the claimant's solicitors setting out her reasons for adhering to her long-held position that no national security witness would be called. In response, the claimant filed written submissions to the effect that he is entitled by virtue of article 6 of the European Convention on Human Rights ("the Convention") to cross-examine a witness in order to challenge the national security case against him.

7. At a case management hearing on 28 October 2021, neither party was willing to initiate any procedural step to facilitate the court's consideration of whether a national security witness was required. I indicated to the parties that they would be fixed with the consequences of their actions in contributing to any procedural "stand-off". The claimant thereafter reflected. Following further correspondence with the court, he made a formal application for a direction under CPR 3.1(2)(m) that a national security witness provide a witness statement and attend the final hearing.

8. I heard the claimant's application for the provision of a national security witness in OPEN and CLOSED session. At the request of both parties and with the consent of the Special Advocates, I also heard OPEN and CLOSED submissions as to whether the OPEN material provided to the claimant in relation to the Syria allegation was sufficient to meet the disclosure requirements of article 6. I had ruled in September 2020 that the proceedings did not breach article 6 but that I would review article 6 issues at the close of the evidence: [2020] EWHC 2508 (Admin) ("the September 2020 ruling"). The claimant maintained that the situation had changed since my ruling because of the new challenge to the imposition of the TEO and that I should not now await the oral evidence in relation to the Syria allegation. Neither party asked me to review the article 6 compliance of the UK allegation which (it was agreed) should await the final hearing in accordance with the September 2020 ruling.

The facts

9. I shall not repeat those elements of the factual background that are already set out in the September ruling (cited above) or in my earlier May 2020 judgment on the applicability of article 6 to TEO proceedings ([2020] EWHC 1221 (Admin), [2021] QB 315 ("the May 2020 judgment")). It is sufficient to focus on more recent events.

Criminal proceedings

10. On 24 March 2021, the claimant was convicted on three counts of breaching the reporting obligation. I have not been directed to any documents relating to the criminal trial or to the judge's sentencing remarks. I have been told that the claimant was sentenced to 42 days' imprisonment suspended for six months on the basis that the judge was not sure that the claimant's breaches were deliberate. I was told at the hearing that, if the TEO or the reporting obligation were to be quashed in these proceedings, the claimant would apply to the Court of Appeal for leave to appeal against his convictions. Given that the TEO and its obligations have now expired, the sole purpose in pursuing these proceedings is to enable such an appeal to take place.

The claimant's case

11. After the conclusion of the criminal proceedings, the claimant filed amended grounds for review and additional evidence in support of his amended case. As they now stand, the claimant's grounds maintain that he did not engage in terrorism-related activity outside the UK and that it was not reasonable to suspect that he had done so. He denies any connection with AQ. Any activity in which he did engage did not justify the imposition of the TEO. The requirement that he report in person to a police station seven days a week for the lifetime of the TEO breached his right to respect for private and family life (article 8 of the Convention), as did the requirement to attend mentoring and theology sessions. In relation to both the Syria and UK allegations, he has not been provided with sufficient information

to enable him to respond to the case against him. Consequently, the proceedings breach article 6 of the Convention.

12. In a witness statement dated 9 June 2021 (his fourth statement in these proceedings), the claimant said that he had previously felt unable to challenge the Syria allegation because he had been under a criminal investigation in relation to membership of a proscribed organisation. Given the overlap with that criminal investigation, he had not wanted to take the risk of self-incrimination by giving any account of his time in Syria. He was informed on 10 March 2020 that the police would take no further action against him. He claimed, however, that it was not until June 2021 that he felt safe enough to deal with his time in Syria in these proceedings. In any event, it was impossible for him to respond to the Syria allegation in the absence of more detailed information or evidence. He was unable to do more than deny the allegation that he has been aligned with an AQ-aligned group.

13. The claimant gave an account of his time in Turkey and Syria from 2013 to 2018. He said that he became interested in humanitarian work in Syria after visiting hospitals and refugee camps for displaced Syrians in Turkey in February 2013. He had travelled to Syria for the first time in around September of that year when he visited Latakia. After that, he went back and forth between the UK, Turkey and Syria where he spent time in Latakia, Idlib and Aleppo as a teacher of reading, writing and Islam.

14. Following his marriage in May 2014, the claimant and his wife moved to Syria for four years. He founded a company which provided adult education and a second company which provided infrastructure using renewable energy (such as solar-powered water wells). He chose to stay in areas where there was no conflict.

15. In around 2017, the claimant and his wife decided to return to the UK for the benefit of their two young children and for other personal reasons. They did not find a safe way to cross the border into Turkey until September 2018. On 16 October 2018, they were detained by the Turkish police. They were taken to a deportation centre and deported to the UK on 9 January 2019.

16. The claimant asserted that he was not a violent person. He had never fired a gun or participated in any violent act or training. Owing to the limited disclosure, he did not know if there were some activities which the Secretary of State had wrongly assessed as relating to the conflict in Syria. He said: “If further disclosure is provided, I may be able to respond and to correct those errors, but at present I am unable to do so”.

17. In a fifth witness statement dated 1 November 2021, the claimant responded to further material and disclosure from the Secretary of State. In particular, he responded to the Secretary of State’s evidence that the areas in which he claimed to have spent time in Syria were areas in which fighting took place. He said that he had travelled within Syria to help internally displaced people and got to know where conflict was happening. He had become integrated into Syrian society which helped him to understand how to avoid the location of conflict. At any particular time, he was at least 35-80 km away from any fighting. Given that the roads may have been closed or damaged due to the conflict, he would have been at a significant distance in practical terms.

18. In a sixth witness statement dated 8 November 2021, the claimant responded to some further disclosure, essentially maintaining that the Secretary of State had provided insufficient disclosure of the Syria allegation: he had been provided with no further information about the AQ-aligned group or his own actions.

The parties' positions

19. The Secretary of State considered the claimant's witness statements but maintained the Syria allegation. For present purposes, I need not deal in detail with the parties' respective positions on the UK allegation. The Secretary of State maintains the UK allegation and the claimant maintains that he cannot be expected to address it because it is lacking in detail.

Legal framework

The 2015 Act

20. The Secretary of State may impose a TEO on an individual if certain conditions are met (section 2(2) of the 2015 Act). They are:

    Condition A: The Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom.

    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.

    Condition C: The Secretary of State reasonably considers that the individual is outside the United Kingdom.

    Condition D: The individual has the right of abode in the United Kingdom.

    Condition E: The court gives the Secretary of State permission under section 3 of the Act.

21. Although it is called an exclusion order, it is possible for a person to enter and remain in the UK 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 entered the UK may remain here; but the Secretary of State may by notice require him 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)).

Statutory review

22. An individual who is subject to a TEO and who is in the UK may apply to the court for a review (section 11 of the Act). In the present case, the TEO and its obligations have expired. The Secretary of State's position is that in these circumstances the function of the court is to review the Secretary of State's decisions that the relevant conditions for the imposition of the TEO were met and continued to be met up until the date of expiry. The court will review the Secretary of State's decisions as to the necessity and proportionality of the obligations during the period in which they were in force. I did not understand this approach to be in dispute.

23. The decisions under review are decisions taken by the Secretary of State and her officials on the basis of the material before them. The claimant and his lawyers have not been provided with all the material. 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. As I have mentioned, Special Advocates have been appointed in this case. They have vigorously pursued the claimant's interests in detailed written and oral submissions.

24. By virtue of section 11(2) of the Act, the court may review the Secretary of State's decision to impose the TEO (section 11(2)(b)) and the decision that any of Conditions A to D was met in relation to the imposition of the TEO (section 11(2)(a)). It may review a decision that Condition B continues to be met (section 11(2)(c)). These various aspects of the court's powers of review all concern in various ways the Secretary of State's decision-making in relation to the initial and continuing imposition of the TEO.

25. In addition, the court has the power to review a decision to impose any of the section 9 obligations (section 11(2)(d)). In my judgment, the individual and discrete elements of section 11(2) mean that Parliament has separated questions relating to imposition of the TEO from questions relating to the obligations.

Review of Conditions A and B

26. Conditions A and B concern the national security case that the Secretary of State mounts against an individual. Prior to the amendment of his case, the claimant had accepted 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 UK (Condition A). The claimant had accepted too that in a review of section 9 obligations the individual may not challenge the Secretary of State's assessment that it was necessary on national security grounds to impose a TEO (Condition B). I do not understand the claimant to have changed his position in this regard.

27. I would add that the question of whether Condition B continues to be met also falls outside the scope of review of section 9 obligations because it concerns the continuing necessity for a TEO to be imposed on national security grounds (section 11(2)(c) read with section 2(4) of the 2015 Act). That is not the same question as whether the section 9 obligations are necessary and proportionate which is encapsulated in section 11(2)(d). As I held in my September 2020 ruling, Conditions A and B 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.

28. This does not mean that no part of the national security case may be challenged in a review of individual section 9 obligations. The necessity and proportionality of imposing any particular obligation on any particular person stand to be affected by the nature and seriousness of what, from a national security perspective, he has done to cause the TEO to be imposed in the first place. The national security case is or may be part of the context (May 2020 judgment, para 70). 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 are necessary and proportionate (September ruling, para 25).

29. It follows that there may be an evidential or factual overlap between a review of the TEO and a review of the section 9 obligations. In my judgment, there is no legal barrier to an interpretation of the statutory scheme which permits the court to consider the same evidence for different purposes. In the present context, for instance, the Syria allegation may be part of the context both of the decision to impose a TEO (which involves Conditions A and B) and of the necessity or proportionality of the obligations. This overlap does not mean that the court must apply the same procedures in carrying out what are different elements of its

review function. Different aspects of a section 11 review may give rise to different procedural rights if that is what is required to achieve fairness and compatibility with the claimant's human rights (*R* (*Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765, para 69).

Scope and intensity of review

30. By virtue of section 11(3) of the 2015 Act, the court must in carrying out its review function apply the principles applicable on an application for judicial review. In general terms, the enactment of section 11(3) makes plain that Parliament has entrusted to the Secretary of State and not to the court the decision-making function in relation to the imposition of TEOs and the section 9 obligations. The court will not generally reconsider factual matters for itself but will review the lawfulness of the Secretary of State's factual analysis in accordance with the scheme of the 2015 Act and the conventional principles of judicial review.

31. In cases involving issues of national security, the courts must accord to the Secretary of State a large margin of judgment. That margin will be granted not only in relation to the reasonableness or rationality of the Secretary of State's assessments but also in relation to the court's consideration of the proportionality of executive actions (*R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 1, [2016] AC 1457, para 57, per Lord Carnwath JSC).

32. The limitations on judicial powers in the sphere of national security have been recently restated in *Begum*. The Supreme Court considered (among other things) the principles to be applied by the Special Immigration Appeals Commission ("SIAC") in an appeal brought under section 2B of the SIAC Act 1997 against the Secretary of State's decision to deprive a person of British citizenship on grounds of national security. Giving the judgment of the court, Lord Reed JSC at para 60 cited *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, para 57, in which Lord Hoffmann compared the institutional competence of the Secretary of State and SIAC:

> "Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which [SIAC], despite its specialist membership, cannot match".

In my judgment, this observation applies with equal force to the High Court. Even if the High Court were to prefer a different view of the facts, the Secretary of State's institutional competence is a sound constitutional reason for judicial restraint unless the Secretary of State's view cannot be reasonably entertained on public law grounds.

33. Lord Reed in para 62 of *Begum* cited Lord Hoffmann (in para 62 of *Rehman*) in relation to a second and equally important basis for judicial restraint:

> "It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they

> must be made by persons whom the people have elected and whom they can remove."

34. These twin pillars of institutional competence and democratic accountability were emphasised in *Secretary of State for the Home Department v P3* [2021] EWCA Civ 1642 (Bean LJ, Elisabeth Laing LJ, Sir Stephen Irwin) in which the court considered the effect of *Begum*. The Secretary of State had appealed from a decision of SIAC which had allowed P3's appeal pursuant to section 2(1)(a) of the SIAC Act 1997 against the Secretary of State's decision to refuse his application for entry clearance. The main issue was whether SIAC had adopted a correct approach to its function when considering the Secretary of State's assessment of the interests of national security in a case raising Convention rights (which in P3's case included articles 3 and 8 of the Convention). The appellate jurisdiction of SIAC covers both factual and legal questions and is not limited to judicial review principles (albeit that SIAC has a statutory review function in other contexts). Parts of the judgment concern SIAC's status as a specialist statutory tribunal and are irrelevant to the issues before me. However, parts of the court's reasoning and conclusions have wider application than in SIAC.

35. Giving the leading judgment, Elisabeth Laing LJ analysed in detail the Supreme Court's judgment in *Begum* in which Convention rights were not in play. She held that irrespective of whether or not a case raises Convention rights, it is not open to SIAC to make its own assessment of the interests of national security:

> "95. The decision in *Begum* is clear about the approach which SIAC should take to this issue in a case which does not involve Convention rights. The question is whether SIAC may take a different approach in a human rights case, and in particular, whether SIAC may make its own assessment of the interests of national security. The key point is that when the House of Lords considered the appeal in *Rehman* SIAC had full jurisdiction to decide questions of fact and law (see paragraph 74, above), and could exercise differently any administrative discretion conferred on the Secretary of State (see paragraph 73, above). Despite that full jurisdiction, SIAC's role on an appeal was limited in the way that Lord Hoffmann described.
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> 96. The Supreme Court considered obiter, in passages which are, nonetheless, strongly persuasive, what approach SIAC should take to Convention rights. In the passages which I have quoted or summarised in paragraphs 72, 83, and 85 the Supreme Court said that when SIAC has to decide whether the Secretary of State has acted incompatibly with an appellant's Convention rights, SIAC's function is not a secondary reviewing function. It has to decide for itself whether the impugned decision is lawful. It has to decide the matter 'objectively on the basis of its own assessment'; it 'must reach its own view…as an independent tribunal, rather than reviewing the decision of the Secretary of State'.
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> 97. The parties' submissions might suggest that there is a tension between those passages. I do not consider that there is. Even

when SIAC had full jurisdiction in fact and law, and had power to exercise the Secretary of State's discretion afresh, there were narrow limits on its institutional capacity to review the Secretary of State's assessment of the interests of national security. SIAC has full power to review the compatibility of the Secretary of State's decisions with Convention rights. That means that SIAC must assess the risk of any breach of article 3, and the proportionality of any interference with qualified rights for itself. It does not entail, in my judgment, however, that SIAC can, in assessing proportionality, substitute its evaluation of the interests of national security for that of the Secretary of State. The starting point for an assessment of proportionality is that the Secretary of State's assessment goes into one side of the balance, unless it is susceptible to criticism in one of the ways described in *Rehman*.

…

102. In my judgment, SIAC must apply the approach which is described in *Begum* to the Secretary of State's assessment of the interests of national security in an article 8 case, just as much as it should in a case in which Convention rights are not at issue. That was the approach of the Supreme Court in *Lord Carlile*'s case. I accept that there are significant procedural differences between an appeal to SIAC and the application for judicial review in that case. Nonetheless, there is a common principle, which is that in both contexts, what is balanced against the Convention rights of the appellant or claimant is the assessment of the executive, tested in the limited ways which are described in *Rehman* and endorsed in *Begum*. Despite its expert membership, SIAC does not have the institutional competence to assess the risk for itself as a primary decision-maker. Nor is it democratically accountable. If SIAC were to call the risk incorrectly, the executive, not SIAC, would suffer the political fallout. The executive can be removed at a general election; SIAC cannot."

36. Sir Stephen Irwin at para 126 agreed with Elisabeth Laing LJ that in approaching the evaluation of the national security assessment of the Secretary of State, SIAC must pay real respect to that assessment. It is not a permissible approach for SIAC simply to substitute its own views on national security. He held:

"it is the function of SIAC to scrutinise all the evidence, OPEN and CLOSED, with a critical and expert intelligence, to test the approach and the evidence bearing on the assessment, both for and against the conclusions of the Secretary of State, and then applying due deference, to decide whether the conclusions of the Secretary of State were reasonable and, adopting the phrase of the Strasbourg Court, conformed with common sense. In doing so, SIAC is bound to show deference at all stages and at all levels, to the assessments of those responsible for making those

> assessments professionally. In matters of high policy, that deference will be effectively simply acceptance. At more granular levels, SIAC will ask questions and consider the detailed replies. Experience suggests these questions will be considered thoughtfully, and the answers very frequently persuasive. Proper deference there must be, but it does not amount to a simply supine acceptance of the conclusions advanced by the Secretary of State. I do not understand that to be in any way implied by the decisions in *Rehman* or *Begum*."

37. Elisabeth Laing LJ regarded her analysis as amounting to the same as Sir Stephen Irwin's analysis (para 102) and did not dissent from anything in his judgment. Bean LJ agreed in the following terms (para 135):

> "As Sir Stephen Irwin has written at paragraph 126, with which I entirely agree, SIAC must grant due deference to the assessment made by the Secretary of State. In matters of high policy, that deference is likely to amount simply to acceptance. But at more granular levels there must be careful scrutiny of the evidence as a whole, and proper deference in the context of properly tested evidence is not to be equated with obligatory acceptance of the position advanced by the Secretary of State."

38. In practical terms, the threshold for judicial interference will be high even in the court's consideration of individual pieces of intelligence (which is how I would respectfully interpret the reference to granular matters in *P3*). The Secretary of State's institutional competence relates not only to her judgment of what amounts to a risk to national security but also to matters of the assessment of intelligence. The interpretation of any particular piece of intelligence and the factual conclusions that should be reached from the intelligence picture are matters properly decided by people with day-to-day involvement in security matters. If the High Court were to piece together the intelligence incorrectly and reach erroneous findings of fact, the risk to national security would be obvious but would bring no opportunity for democratic accountability.

39. Parliament has nonetheless entrusted judges to review the lawfulness of the exercise of intrusive executive discretions. It would be a derogation of judicial responsibility if the outcome of a review under the 2015 Act were to be a foregone conclusion.

Article 6 of the Convention

40. The court moreover retains its own obligations under article 6 of the Convention as a public authority under section 6 of the Human Rights Act 1998. Article 6(1) guarantees fair procedures – including the right to disclosure of information – in the determination of a person's civil rights and obligations.

41. As to the engagement of article 6 in the present proceedings, a TEO may only be imposed on a person who has the right of abode in the UK (Condition D). The right of abode is laid down by section 2(1)(a) of the Immigration Act 1971. In the May 2020 judgment, I held that the imposition of a TEO, whether on its own or in combination with a permit to return, qualified an individual's right of abode as it constituted a "let or hindrance" (within the meaning of section 1(1) of the 1971 Act) on that person's freedom to come into and go from the UK. I held that the qualification of the right of abode, as an aspect of the control

of persons entering the territory of the UK, fell outside the scope of civil rights protected by article 6(1) and within the hard core of public-authority prerogatives which did not attract the procedural guarantees of article 6(1) of the Convention. It follows that, in matters touching on the imposition of a TEO, I have already decided that article 6 of the Convention is not engaged.

42. I went on to hold in the same judgment that the nature and extent of the obligations imposed on the claimant under section 9 of the Act were not to be regarded as controlling his right of abode and so did not fall within the hard core of public-authority prerogatives. In relation to the section 9 obligations, article 6(1) of the Convention applied. I held that the test as to whether the claimant has received sufficient disclosure of the case against him in order to have a fair review of the section 9 obligations under article 6(1) is the same as in control order cases under the Terrorism Act 2005. The test is set out in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. 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".

43. In the earlier case of *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2007] QB, the court considered the scope of review under the relevant parts of the control order legislation in which judicial review principles were applicable. Giving the judgment of the court, Lord Phillips of Worth Travers CJ (as he then was) confirmed at para 48 that a court conducting a judicial review has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to substitute its own judgment for that of the decision-maker, if that is what article 6 requires. The case went to the Supreme Court ([2007] UKHL 46, [2008] 1 AC 440) which did not interfere with this passage of the judgment.

The parties' submissions

44. On behalf of the claimant, Mr Dan Squires QC (with Mr Darryl Hutcheon) submitted in writing and orally that the Secretary of State's case in relation to Condition A was the Syria allegation which did not come close to satisfying the requirements of *AF (No 3)*. Despite the disclosure process that had taken place during the course of the proceedings, the position remained that the entirety of the OPEN allegation of terrorism-related activity outside the UK was that the claimant had aligned with and had a significant leadership role in an unnamed group at some point during his time in Syria. He had not been provided with sufficient information to enable him to give effective instructions to the Special Advocates. He had not been told which group he was said to have "aligned with", what he was said to have done, or with whom, and when he was supposed to have done it. The claimant was unable to respond to the Syria allegation in any way other than to give a bare denial.

45. Mr Squires illustrated his submission by reference to the degree of detail provided to, or required to be provided to, other people in other cases where article 6 applied: *Secretary of State for the Home Department v LG* [2017] EWHC 1529 (Admin); *Secretary of State for the Home Department v LF* [2017] EWHC 2685 (Admin); *Secretary of State for the Home Department v JM and LF* [2021] EWHC 266 (Admin); *A v United Kingdom* (2009) 49 EHRR 29. He sought to contrast the position in those cases with the generalised disclosure provided to the claimant.

46. Mr Squires submitted that, absent written and oral evidence from a Security Service witness, the proceedings would breach the claimant's entitlement to a fair opportunity to challenge the case which was part of the right to a fair hearing at common law and under article 6. It is a key requirement of fairness pursuant to the common law and article 6 that individuals have a fair opportunity to challenge the case against them. That requires, at a minimum, allegations to be fairly put and properly evidenced if a court is being asked to accept them. Mr Squires submitted that in the present context fairness requires that the claimant with the assistance of the Special Advocates be able to question, in OPEN and CLOSED, those attesting to the truth of allegations made against him. The allegations caused the imposition of a draconian executive order which, if breached, led to a criminal conviction. The claimant could not challenge the allegations or the legality of the TEO in his criminal trial for breaches of the order. Fairness required that he should at least be given a proper opportunity to pursue such a challenge in a TEO review.

47. At present, the allegation of terrorism-related activity is entirely contained in two documents called "statements" but accompanied by no statement of truth. The Secretary of State had declined to identify any witness to attest to their veracity. It was not clear what the documents were; who wrote them; whether they are submissions written by lawyers or constitute evidence; whether the contents are believed to be true; and, if so, who holds that belief. It was impossible to see what evidential value may be attached to documents submitted on the Secretary of State's behalf without this information.

48. Mr Squires submitted that, in the absence of a properly evidenced national security case, I should exclude the material on which the Secretary of State relied for the imposition of the TEO. If the material were to be excluded, there would be no evidence to satisfy Condition A and the TEO would fall to be quashed.

49. On behalf of the Secretary of State, Mr Steven Gray (with Mr William Hays) submitted that the claimant's submissions on article 6 had already been considered by the court and dealt with in the May 2020 judgment and September 2020 ruling. Nothing in Mr Squires' present submissions was capable of interfering with the court's previous conclusions.

50. The court had no power to direct witness statements or cross-examination under CPR 3.1(2)(m) on which the claimant relied. That power could only be exercised as a case management power in aid of the overriding objective in the CPR which was not relevant here. The court has the documentary evidence which will assist it and the production of documents cannot give rise to a duty to produce a witness to speak to them. There was no requirement and no need for a witness statement or cross-examination on the national security case.

51. It was not only in the claimant's interests but also in the interests of the Security Service to justify the allegations against the claimant. That process had taken place through the provision of careful and detailed national security statements. The production of OPEN statements and their CLOSED counterparts had been carried out in accordance with the Secretary of State's duty of candour and co-operation with the court, as elucidated in cases

such as *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin). Compliance with that duty enabled the Secretary of State to provide a full and accurate explanation of the issues which the court must decide. It made no difference in the context of a judicial review framework that the statements were not signed by an individual official: their purpose was originally to inform public law decision-making and is now to demonstrate to the claimant and to the Special Advocates the material on which the Secretary of State had relied.

52. Mr Gray emphasised that there would be a significant operational impact on the Security Service in providing a witness to give evidence to support the Secretary of State's assessment of national security issues. The resources involved in preparing a witness would be more effectively deployed in operational work which would be in the interests of national security. In light of the limited nature and effect of the section 9 obligations under challenge, it would be disproportionate for the court to require a witness.

53. In closed session, the Special Advocates supported Mr Squires' submissions by reference to the CLOSED material. They indicated the passages of the CLOSED material on which they would wish to cross-examine without wanting to tie their hands at this stage. 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.

Imposition of the TEO: article 6 of the Convention

The May 2020 judgment

54. I have already held in the May 2020 judgment that the imposition of a TEO does not engage article 6(1) of the Convention. Mr Squires emphasised the fundamental importance of fairness and the court's general duty to ensure a fair hearing at every stage, directing me to *AF (No 3)*, para 63, in which Lord Phillips referred to the "strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him." While the imperative of fair trial procedures is beyond dispute, I do not regard Lord Phillips' general observation as meaning that a party should inevitably be free to ask a court to wind back the clock. Fairness does not involve unbounded judicial acceptance of a party's desire to re-run points of law. Any other conclusion would leave the processes of the court open to misuse and would damage the principle of finality in litigation.

55. Mr Squires emphasised that the Secretary of State had consented to the new ground of challenge to the TEO. He submitted that, by consenting to the amendment of the claimant's case, the Secretary of State could not complain if the claimant asked the court to reconsider points that had already been considered before the amendment. In my judgment, it cannot be inferred from any part of the Secretary of State's conduct of the litigation that she consented to the re-opening of questions of law already decided by the court.

56. The claimant says that he did not challenge the imposition of the TEO earlier because he feared that he would incriminate himself. That untested evidence may be true, but it does not provide a reason for revisiting conclusions of law that were reached after an adversarial process on questions of law in which the claimant's lawyers were able to – and did – play a full part.

57. More importantly, I have been provided with no sound reason to revisit my conclusions. Mr Squires made no submissions on why the qualification of the right of abode or the legally conditioned manner of the claimant's entry to the UK should attract the guarantees of article 6. No proper legal argument has been mounted which would suggest that the May 2020 conclusions of law were wrong.

58. For these reasons, I decline to depart from the conclusions of the May 2020 judgment. It follows that neither article 6 nor *AF (No 3)* apply to the claimant's newly-drafted challenge to the imposition of the TEO. Contrary to Mr Squires' submissions, it is irrelevant that control order and TPIM subjects have received *AF (No 3)* disclosure on the basis of similarly-worded statutory provisions: in these other contexts, article 6 applied. In so far as the Syria allegation underpins a statutory review relating to the imposition of the TEO, the clamant is not entitled to *AF (No 3)* disclosure because article 6 does not apply.

Condition A

59. Condition A concerns terrorism-related activity outside the UK – in this case, the Syria allegation. Condition A was not in issue before the recent amendment of the claimant's case but the amendment has no effect on disclosure. The claimant is not entitled to *AF (No 3)* disclosure in relation to Condition A which (under section 11(2)(a)(i)) is reviewable only in relation to the imposition of the TEO.

Condition B

60. As I have set out above, Condition B is capable of having a dual role in a section 11 review. On the one hand, it is, like Condition A, reviewable in the context of the original imposition of a TEO (section 11(2)(a)(ii)). To this extent, it does not engage article 6(1) and the claimant is not entitled to *AF (No 3)* disclosure in relation to whether it was met at the date of the original imposition of the TEO.

61. On the other hand, the Secretary of State's decision that Condition B "continues to be met" is reviewable under section 11(2)(c). It is not in dispute that the court's role in this regard is to review the Secretary of State's decision on the continuing necessity of the TEO rather than substitute its own conclusion for that of the Secretary of State. In order to establish the continuing necessity of the TEO, the Secretary of State will need to provide evidence to the court that post-dates the original decision to impose the TEO. The Secretary of State has in the present case updated her evidence on the continuing necessity of the TEO during the course of the proceedings.

62. Although the Secretary of State will therefore rely on evidence that post-dates the original decision to impose the TEO, the wording of Condition B in section 2(4) of the Act means that a review of whether Condition B continues to be met is a review of the continuing necessity for the TEO "to be imposed on the individual" – i.e. the continuing necessity of the qualification of an individual's right of abode. It follows that, in accordance with my May 2020 judgment, the updating evidence does not engage article 6(1). The claimant is not entitled to *AF (No 3)* disclosure of the updating evidence.

63. For these reasons, neither the court's review of Condition A nor its review of Condition B engage article 6. It follows that the claimant's amendments to his statement of case have had no legal effect on the extent of disclosure to which he is entitled or on the compatibility of these proceedings with article 6. In relation to article 6 and the extent of his right to

disclosure, the claimant is in the same position as he was when I gave my September 2020 ruling.

Imposition of the TEO: national security witness

No formal witness statement

64. I reject Mr Squires' submission that the material before the court should be excluded solely because it is not in the form of a witness statement signed by an identified individual for or on behalf of the Secretary of State. Acceptance of such a submission would amount to a triumph of form over substance with no practical advantage for the claimant.

Power to direct oral evidence

65. Mr Gray's written and oral submissions appeared to suggest that I have no power to give case management directions in relation to witnesses. He did not take me to any part of the 2015 Act that might prevent the court from directing or hearing oral evidence. He took objection to the claimant's submission that the court may deploy CPR 3.1(2)(m) but did not suggest an alternative. In my judgment, this court has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses, to enable it to comply with article 6 (*MB*, para 48). In the absence of persuasive argument to the contrary, I would regard the powers under CPR 3.1(2)(m) as providing an appropriate and convenient mechanism for doing so.

Resources

66. Over many centuries of the common law, judges have required intrusive state powers to be justified. It is not in dispute that judges will respect the special responsibility of the Secretary of State in matters of national security. But judges of the High Court are constitutionally responsible for ensuring that the executive does not overreach itself. That hallmark of English law is now exercised in accordance with the principles of the modern law of judicial review (as applicable in the 2015 Act). The High Court is an impartial adjudicator on questions of law. It cannot enter into the arena by becoming involved in the extent of Security Service resources which is a political matter for the government. I am therefore unmoved by Mr Gray's submissions on resources.

The court's discretion

67. It is well-established that a party to judicial review proceedings should only be permitted to adduce oral evidence or to cross-examine witnesses in the most exceptional case. The position was summarised by Lord Neuberger of Abbotsbury MR (as he then was) in *Bubb v Wandsworth London Borough Council* [2011] EWCA Civ 1285, [2012] PTSR 1011, para 24:

> "I accept that it is, as a matter of principle, open to a judge, hearing a judicial review application, to permit one or more parties to adduce oral evidence. That was made clear by Lord Diplock in his speech in *O'Reilly v Mackman* [1983] 2 AC 237, 282H-283A. However, for reasons of both principle and practice, such a course should only be taken in the most exceptional case. As its name suggests, judicial review involves a judge reviewing a decision, not making it; if the judge receives

> evidence so as to make fresh findings of fact for himself, he is likely to make his own decision rather than to review the original decision. Also, if judges regularly allow witnesses and cross-examination in judicial review cases, the court time and legal costs involved in such cases will spiral."

68. Mr Squires accepted that the court's duty to apply judicial review principles is relevant to whether oral evidence is required for there to be a fair process. He relied nevertheless on *Carmarthenshire County Council v Y* [2017] EWFC 36, [2017] 4 WLR 136, para 9, in which Mostyn J cited Brennan J's dictum in *Goldberg v Kelly* (1970) 397 US 254 at p.269: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Mostyn J was considering the position in family proceedings and not judicial review. More specifically, he relied on Brennan J's dictum to support his conclusion at para 7 that oral evidence tested under cross-examination is generally the "gold standard" in a trial of the facts. It is a central cannon of the law of judicial review that it is not a trial of the facts. I do not regard the *Carmarthenshire* case as advancing the claimant's submissions.

69. Mr Squires relied on *MB*, para 48, which concerned the compatibility of control order proceedings with article 6 and which (as I have already mentioned) confirms the wide powers of the court in relation to oral evidence. As Mr Squires observed, this passage in *MB* is commonly regarded as the legal source and origin of the practice of the Administrative Court which hears oral evidence from a Security Service witness in control order, TPIM and other legally comparable cases in which a party is excluded from part of the proceedings. It is common practice in such cases for the Secretary of State to call a Security Service witness who may be cross-examined in OPEN and CLOSED session. From the authorities placed before me, it appears that the most recent example is *JM & LF v Secretary of State for the Home Department* [2021] EWHC 266 (Admin), which was a TPIM case in which I handed down judgment having heard oral evidence from a Security Service witness.

70. Where article 6 of the Convention does not apply, it is less clearly the common practice to hear cross-examination of Security Service personnel. For example, in *T2 v Secretary of State for the Home Department* (SN/129/2016) (5 January 2018), SIAC did not hear oral evidence in a review of the Secretary of State's decision to exclude T2 from the United Kingdom. The review – under section 2C of the SIAC Act 1997 – was subject to judicial review principles. Having abandoned his human rights arguments, T2's submission that judicial review was such a flexible remedy that SIAC could be required to make findings of fact received short shrift.

71. Mr Squires emphasised that the Syria allegation was in its effect a serious criminal allegation. As such, the Secretary of State needed to present the allegation to the court in a form that would enable the claimant to give instructions on the truth of the allegation and to test its truth by cross-examination of a witness. The court was under a duty to make factual findings and, as I understood Mr Squires' position, would be entirely free to substitute its own views of the claimant's activities in Syria.

72. I do not agree. The importance of the claimant's interests cannot be the sole criterion in determining the court's function. Democratic accountability for decisions on matters of national security is also important, as is the institutional competence of the Home Secretary and her advisers to make decisions that affect public safety.

73. Further, in bringing independent scrutiny to bear on Condition A, the court will not be concerned with whether a person has in fact engaged in terrorism-related activity but with the Secretary of State's grounds for suspicion. Parliament's purpose in enacting the 2015 Act was to protect the public from acts of terrorism and the threat of terrorism. Given the precautionary nature of this objective, the Act provides a power to impose a TEO on a reasonable suspicion. The scheme of the Act empowers the Secretary of State to impose a TEO on the basis of intelligence and risk, rather than on evidence and facts.

74. As I put to Mr Squires in argument, the establishment of a reasonable suspicion does not involve the same task as the establishment of facts found to some standard of proof such as the balance of probabilities. If there is no factual basis for a suspicion, it will not be reasonable and the court will exercise its power to interfere on conventional public law grounds. However, having a reasonable suspicion is not the same as being satisfied of any particular fact.

75. Mr Squires relied on the Court of Appeal's conclusion in *MB*, para 60, that whether there are reasonable grounds for suspicion is "an objective question of fact" in the sense that the court will itself decide whether the facts relied on by the Secretary of State amount to reasonable grounds for suspicion. In my judgment, this passage of *MB* does not say or imply that the facts on which the Secretary of State relies as the basis of her reasonable suspicion may be the subject of a fresh decision by the court. In the present context, such an interpretation would effectively substitute reasonable suspicion with an inquiry into the truth of the allegation – contrary to the plain wording of Condition A. In any event, the court in *MB* was considering reasonable suspicion through the prism of article 6 of the Convention which raises different questions.

76. Given the statutory wording, Mr Squires appeared at times in his oral submissions to accept that the issue for the court in considering Condition A is whether there was evidence before the Secretary of State on which it was reasonably open to her to suspect that the claimant was involved in terrorism-related activity. The claimant is able to put forward his account of events in Syria which the Secretary of State is bound to consider and which the court may take into account (within the limits of judicial review principles). In relation to Condition A, however, I see no reason for the court to adjudicate in a contest between the claimant's account of events and the Secretary of State's assessment. Any such contest would lead to witness evidence and cross-examination going beyond the statutory question and beyond the court's function in judicial review.

77. I have concentrated in this section of my judgment on Condition A because it formed the focus of oral submissions but similar reasoning applies to Condition B. On the conventional principles of judicial review, it would be impermissible for the High Court simply to substitute its own view in relation to Condition B.

78. In circumstances where the court will not reach a view of its own but will carry out a review of the material on which the Secretary of State based her decision, I am not persuaded that I am bound to hear evidence from a Security Service witness on matters relating to the imposition of a TEO or its continuation. On the facts of this case, nothing in the material before me causes me to consider that the absence of oral evidence (including cross-examination) would lead to an unfair or unjust result in relation to Condition A and Condition B. The court will give careful scrutiny to the evidence as a whole and can be expected to use its other case management powers to ensure that the executive is held to account in relation to the imposition and continuation of the TEO.

The section 9 obligations

Article 6 of the Convention

79. In my May 2020 judgment, I held that article 6 applied to a review of the section 9 obligations. In my September 2020 ruling, I held that the review of the obligations did not as matters stand breach article 6 but that I would review the compatibility of the proceedings with article 6 at the close of the evidence at the final hearing. Neither party asked me to depart from my ruling. There were no new arguments for me to determine on this aspect of the case. I need say no more about it.

National security witness

80. Mr Squires accepted that the challenge to the section 9 obligations relates not to the Secretary of State's determination of fact but to her judgment as to whether it was necessary and proportionate to impose and maintain the individual obligations (*MB*, above, paras 57 and 63; *Secretary of State for the Home Department v LG* [2017] EWHC 1529, para 45). In these circumstances, he accepted that the court's role is to review the Secretary of State's decisions rather than substitute its own conclusions for that of the Secretary of State.

81. Mr Gray submitted that the TEO regime is a new statutory regime and that the Secretary of State is not obligated to put forward a national security witness even if she has been willing to do so in TPIM and other proceedings. Past practice should not determine future obligation to the court. The issues in TPIM cases are much more complex and the measures imposed on TPIM subjects are more intrusive and more likely to give rise to complex issues of assessment. The review of the necessity and proportionality of the section 9 obligations is akin to a bail application of the sort regularly considered in the criminal courts on the basis of written evidence only.

82. I accept that the practice in other proceedings is not determinative. It would seem however to cast a bright light on what the courts have expected in cases where article 6 and *AF (No 3)* apply. I have already held at paras 73 and 83 of the May 2020 judgment that the nature and extent of the obligations under challenge in this case was onerous. The daily reporting obligation coupled with the obligation to attend appointments for four hours each week had the effect of restricting the claimant's freedom of movement within the UK. The obligations constituted executive action against the claimant which was intended to disrupt his activities. They were (as I have already held) comparable with others of the sort described as "virtual imprisonment" (*Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, para 27, per Lord Mance JSC). That the obligations may have been less complex than in the generality of TPIM cases does not in my judgment detract from these points to any significant or material extent.

83. While there may be some comparison with bail applications, the court in the present proceedings must perform specific tasks within the context of a complex and calibrated statutory scheme. It has its own duties under the Human Rights Act to ensure a fair trial which are not co-extensive with the duties of the Secretary of State. In my judgment, the court's duties mean that it will recognise the inability of the Special Advocates to take instructions from the claimant on the material covered by the closed procedure. In a case where one party does not have all the material, the court has a heightened obligation to consider the material with care and to apply, if it serves the interests of a fair trial, a more flexible procedural approach than in other areas of judicial review where the claimant will be able to challenge in full the reasons advanced for the decision (*R (Secretary of State for*

the Home Department) v SIAC [2015] EWHC 681 (Admin) DC, [2015] 1 WLR 4799, paras 28-29, per Sir Brian Leveson P with whom Macur LJ and Ouseley J agreed). These heightened obligations fall squarely on the court. The Secretary of State's duty of candour and co-operation is not a substitute.

84. In a review of the necessity and proportionality of the section 9 obligations, the appropriate deference to the Secretary of State's assessments is high but is not to be equated with simple acceptance. Appropriate deference may properly follow (and may be more securely founded upon) the court's scrutiny of the evidence through the forensic process of the asking of questions designed to test and probe the Secretary of State's assessment.

85. Taking these factors into consideration, I have concluded that on the facts of this case fairness requires the national security case to be tested by way of oral evidence to the extent that it is part of the context of, and relevant to, the necessity and proportionality of the section 9 obligations. I say more about why I have reached this conclusion on the facts of this case in a brief CLOSED judgment.

86. The Secretary of State should therefore file and serve a witness statement from a person able to speak to the national security case. It will be sufficient for the witness statement to adopt as evidence in chief the material (OPEN and CLOSED) that is already before the court but the maker of the statement should be available for cross-examination at the final hearing.

87. I shall permit cross-examination (in OPEN and CLOSED) only on those matters that are relevant to the claimant's case on the necessity and proportionality of the section 9 obligations. I understand the claimant's case on the obligations to be set out in para 48(2) and (3) of the amended statement of case. I have given some indication as to the areas on which oral evidence may assist the court in the CLOSED judgment.

88. I will not permit cross-examination in relation to the claimant's case on the imposition of the TEO which I understand to be set out in para 48(1) of the amended statement of case. For the avoidance of doubt, cross-examination on Condition A and Condition B will not be permitted. Although not pertinent to my decision, I anticipate that the Secretary of State's resource concerns should in this way be assuaged as the national security evidence will be confined to the issues that I have indicated.

89. It will be a matter for the Secretary of State to decide the details of who will give the evidence. The Secretary of State may agree or undertake to arrange a witness, failing which I shall give appropriate directions.

Conclusion

90. To this extent, the claimant's application is allowed.

91. I apologise for the delay in circulating a draft judgment to the parties which was caused by the effects of the current Covid-19 pandemic on my judicial commitments.