Neutral Citation Number: **[2023] EWHC 541 (Admin)**

Case No: CO/3655/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2023

Before:

MR JUSTICE JAY

- -

Between:

LLC SYNESIS	**Claimant**
- and –	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**Defendant**

- -
- -

Alex Haines and Sophie O'Sullivan (instructed by **Candey**) for the **Claimant**
Sir James Eadie KC, Maya Lester KC and Jason Pobjoy (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 2nd and 3rd March 2023

- -

Approved Judgment

MR JUSTICE JAY:

INTRODUCTION

1. For a number of years now, sanctions have been imposed by the international community on a targeted basis against sectoral interests, officials, individuals and companies in the Republic of Belarus. It is in the public domain that Belarus has been responsible for human rights abuses and electoral malpractices on a systematic basis, and the purpose of these sanctions is and has been to pressurise and to constrain the activities of those who are deemed to be bound up with this regime.

2. LLC Synesis ("the Claimant") is a technology company established in 2007 in Minsk, Belarus. On 17th December 2020 it was originally designated under the sanctions regime of the European Union under the name "JSC Synesis". The USA has taken similar action. The terms of the EU designation were later changed for reasons of accuracy. On 31st December 2020, at the end of the transition period following the withdrawal of the United Kingdom from the EU, the Claimant (still described as "JSC Synesis") was designated by the Secretary of State for Foreign, Commonwealth and Development Affairs ("the Defendant") under the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 (2019 SI No 600) ("the 2019 Regulations"). Subsequently, the Claimant sought a Ministerial review of that designation. That took place; it was refused; and the Claimant now applies to this Court to set aside the Defendant's decision under section 38 of the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA").

3. I understand that this is the first application to reach the Administrative Court under this provision. Section 38(4) provides that the principles applicable to an application for judicial review must be applied to the current exercise. It follows, with respect to the Claimant, that this Court is not being asked to reinvent the wheel.

4. The claim raises issues as to the legal test the Defendant should apply in the exercise of his powers under the 2019 Regulations; the legal test to be applied by this Court under section 38(4); whether the decision at issue promoted the policies and objects of SAMLA; and, the proportionality of the decision.

5. I received a wealth of evidence and submissions, probably more than was necessary to resolve this application under section 38(4). I appreciate the importance of this case to both parties: to the Claimant, owing to the obvious ramifications of the decision on its business and reputation; and to the Defendant, as custodian of the public interest. Despite apparently polarised positions in some of the correspondence and pleadings, it became clear during the course of argument that the differences between the parties as to the applicable legal principles were nothing like as great. The real issue is whether the Defendant could rationally conclude that there were reasonable grounds to suspect that the Claimant was an "involved person" under the 2019 Regulations. That formulation is not to place entirely to one side the detailed legal submissions attractively advanced by Mr Alex Haines on the Claimant's behalf. It is simply a realistic identification of where the true battleground in this case exists.

6. The structure of this judgment is as follows:

(1) Essential Factual Background.

(2) The Legal Framework.

(3) The Evidence before the Defendant.

(4) The Defendant's Analysis of the Evidence.

(5) The Claimant's Further Evidence.

(6) The Claimant's Grounds.

(7) The Claimant's Submissions.

(8) Discussion and Conclusions.

ESSENTIAL FACTUAL BACKGROUND

7. I derive this from the Claimant's Statement of Facts and Grounds, the parties' skeleton arguments, and the witness statement of David Reed who is Director of the Sanctions Directorate of the Defendant.

8. The Claimant is a "business-to-business" company that specialises in software products and technology solutions for transport logistics, artificial intelligence and modern public security systems.

9. When the Claimant was designated in the UK on 31st December 2020, the Statement of Reasons published on that date provided:

> "JSC Synesis provides the "Kipod" video surveillance system to the Republican System for Monitoring Public Safety ["RSMPS"]. This system is utilised by the Ministry of Internal Affairs, including by security and police units. JSC Synesis therefore bears responsibility for providing support and technology to the Ministry of Internal Affairs that enhances the capacity of the Lukashenko regime to carry out human rights violations and repress civil society following the protests in the aftermath of the August 9th elections."

10. On 7th April 2021 the Claimant notified the Defendant of its intention to seek revocation of this designation by Ministerial review in accordance with section 23(1)(b) of SAMLA. The Claimant sought copies of the supporting evidence. Those were provided by the Defendant on 30th June 2021, and included the Sanctions Designation Form ("the SDF"), the Sanctions Designation Form Evidence Pack ("the SDFE"), and three annexes containing many exhibits.

11. On 18th January 2022 the Claimant formally applied for a Ministerial review. This application was accompanied by nine annexes comprising expert reports and witness statements. There were three essential bases for the application:

(1) Although it was accepted that the Claimant provided the "Kipod" system through its subsidiary 24x7 Panoptes ("Panoptes"), the functions and use by the RSMPS

were specific, limited and defined, with limited technical capability and physical presence, and did not contribute to any relevant activity as set out in regulation 6 of the 2019 Regulations. It follows that the requirements of section 11(2) of SAMLA were not fulfilled.

(2) The Defendant's evidence in respect of human rights violations and repression of civil society and democratic opposition by the Lukashenko regime did not refer to the Claimant in any way, and were accordingly irrelevant to the designation decision.

(3) In accordance with both SAMLA and the 2019 Regulations, where there are no reasonable grounds to suspect that the Claimant has been an "involved person", the legislative purposes have not been met and the designation cannot be justified.

12. In short, it was contended that the Defendant's basis for designating the Claimant was "wrong, having been founded on vague, unsubstantiated and incorrect assertions".

13. The procedure adopted by the Defendant in connection with this review has been explained by Mr Reed. The Claimant's material was reviewed and further open-source checks were carried out. The Defendant also obtained a copy of the evidence pack relied on by the EU to justify its designation, and updated the SDF and the SDFE. Officials produced an Administrative Review Form; a case meeting took place on 17th May 2022 at which it was decided to uphold the designation; and a submission was sent to Ministers on 5th July 2022 with a recommendation to that effect.

14. On 7th July 2022 the Defendant notified the Claimant of his decision, and enclosed an updated SDF and an updated SDFE. I will be referring to these in due course. The revised published Statement of Reasons provided as follows:

> "LLC Synesis ("Synesis"), including through its former wholly-owned subsidiary, LLC 24x7 Panoptes ("Panoptes"), has supplied the Kipod Technology ("Kipod") to the Republic of Belarus for use with the "Republican System for Monitoring Public Safety" ("RSMPS"), which is a video surveillance and monitoring system. The RSMPS is used by the Belarus Ministry of Internal Affairs, as the State body authorised to coordinate the use of the RSMPS, and law enforcement agencies, including by security and police units. Kipod is a key part of the RSMPS.
>
> The RSMPS, relying on Kipod, has provided the Ministry of Internal Affairs and law enforcement agencies with the capability inter alia, to track down civil society and pro-democracy activists, in order to repress them. Further, that capability has been so used. For example, following the elections on 9 August 2020, Nikolay Dedok, a civil society activist who was in hiding was tracked down by the RSMPS using the Kipod system. He was subsequently detained and tortured.

> Synesis has therefore been involved in the commission of a serious human rights violation or abuse in Belarus and/or the repression of civil society or democratic opposition in Belarus as Synesis has been responsible for and/or has provided support for, either or both such activities; and/or that Synesis has been involved in the supply to Belarus of technology which could contribute to either or both such activities."

THE LEGAL FRAMEWORK

SAMLA

15. The power to make sanctions regulations, in the light of the UK's exit from the EU, is to be found in SAMLA. At the material time SAMLA provided as follows:

> "**1 Power to make sanctions regulations**
>
> (1) An appropriate Minister may make sanctions regulations where that Minister considers that it is appropriate to make the regulations –
>
> …
>
> (c) for a purpose within subsection (2).
>
> (2) A purpose is within this subsection if the appropriate Minister making the regulations considers that carrying out that purpose would –
>
> …
>
> (f) provide accountability for or be a deterrent to gross violations of human rights, or otherwise promote –
>
> (i) compliance with international human rights law, or
>
> (ii) respect for human rights,
>
> …
>
> (i) promote respect for democracy, the rule of law and good governance."

16. Section 11 of SAMLA sets out the framework for designation of persons:

> "**11**
>
> (1) This section applies to regulations under section 1 which authorise an appropriate Minister to designate persons by name.

(2) The regulations must contain provision which prohibits the Minister from designating a person by name except where the Minister —

(a) has reasonable grounds to suspect that that person is an involved person (see subsection (3)), and

(b) considers that the designation of that person is appropriate, having regard to—

(i) the purpose of the regulations as stated under section 1(3), and

(ii) the likely significant effects of the designation on that person (as they appear to the Minister to be on the basis of the information that the Minister has).

(3) The regulations must provide that "an involved person" means a person who—

(a) is or has been involved in an activity specified in the regulations,

(b) is owned or controlled directly or indirectly by a person who is or has been so involved,

(c) is acting on behalf of or at the direction of a person who is or has been so involved, or

(d) is a member of, or associated with, a person who is or has been so involved.

(4) An activity may not be specified in the regulations by virtue of subsection (3) unless the Minister considers that specifying the activity is appropriate having regard to the purpose of the regulations as stated under section 1(3).

…

(7) The regulations must, in relation to any case where the Minister designates a person by name, require the information given under the provision made under section 10(3) to include a statement of reasons.

(8) In subsection (7) a "statement of reasons" means a brief statement of the matters that the Minister knows, or has reasonable grounds to suspect, in relation to that person which have led the Minister to make the designation.

…"

17. The right to request revocation of a designation is set out in section 23. As has already been pointed out, a decision adverse to the designated person may be challenged in court proceedings under section 38 of SAMLA.

The 2019 Regulations

18. Regulation 4, as originally enacted (and therefore the relevant version for present purposes) provided in material part:

> "**Purposes**
>
> **4.** The purposes of the regulations contained in this instrument that are made under section 1 of the Act are to encourage the Government of Belarus to —
>
> …
>
> (b) refrain from actions, policies or activities which repress civil society in Belarus,
>
> …
>
> (d) comply with international human rights law and to respect human rights, including in particular to —
>
> …
>
> (ii) respect the right of persons not to be subjected to torture or cruel, inhuman or degrading treatment or punishment in Belarus, including inhuman or degrading conditions in prisons;
>
> (iii) afford persons in Belarus charged with criminal offences the right to a fair trial;
>
> (iv) respect the right to liberty and security, including refraining from the arbitrary arrest and detention of persons in Belarus;
>
> (v) afford journalists, human rights defenders and other persons in Belarus the right to freedom of expression, association and peaceful assembly;
>
> (vi) secure the human rights of persons in Belarus without discrimination, including on the basis of a person's sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

19. The power to designate persons for the purposes *inter alia* of financial sanctions is contained in regulation 5.

20. Regulation 6 sets out the relevant designation criteria:

"**Designation criteria**

6.

(1) The Secretary of State may not designate a person under regulation 5 unless the Secretary of State —

(a) has reasonable grounds to suspect that that person is an involved person, and

(b) considers that the designation of that person is appropriate, having regard to—

(i) the purposes stated in regulation 4, and

(ii) the likely significant effects of the designation on that person (as they appear to the Secretary of State to be on the basis of the information that the Secretary of State has).

(2) In this regulation an "involved person" means a person who —

(a) is or has been involved in—

…

(ii) the commission of a serious human rights violation or abuse in Belarus,

(iii) the repression of civil society or democratic opposition in Belarus, or

…

(3) Any reference in this regulation to being involved in an activity set out in paragraphs (2)(a)(i) to (iv) above includes being so involved in whatever way and wherever any actions constituting the involvement take place, and in particular includes—

(a) being responsible for, engaging in, providing support for, or promoting, any such activity;

…

(d) being involved in the supply to Belarus of goods or technology which could contribute to any such activity, or in providing financial services relating to such supply;

…"

21. At this stage it is opportune to highlight the following general points about both SAMLA and the 2019 Regulations.

22. In the first place, in SAMLA, as originally enacted two conditions had to be fulfilled before a person could be properly designated under secondary legislation: there must be reasonable grounds to suspect that the person in question is an "involved person", and the Minister must consider that it is appropriate to make the designation in the light of the regulatory purposes as set out in section 1(3). It may further be seen that these conditions were reflected in the 2019 Regulations in their unamended form, as set out above. However, on 15th March 2022 the Economic Crime (Transparency and Enforcement) Act 2022 ("the 2022 Act") came into force. The effect of section 58 was to remove the appropriateness criterion set out in section 11(2)(b) of SAMLA, and the effect of section 61(1) and (3)(c) was to deem "pre-commencement regulations" to omit any reference to this test. It follows that Regulation 6(1)(b) is to be treated as statutorily abrogated.

23. Given that possible HRA compliance and proportionality *were* considered by the Defendant in relation to the Claimant's designation, the removal of Regulation 6(1)(b) makes little or no practical difference in the circumstances of this particular case. Even under the new regime, the Defendant clearly has a discretion to designate, and the inquiry does not notionally cease as soon as he has reasonable grounds to suspect that the entity at issue is an involved person. But a list of all the factors potentially relevant to the exercise (or non-exercise) of the discretion under these provisions is not required for current purposes.

24. The 2019 Regulations were further amended on 5th July 2022 in respects irrelevant to the present case.

25. Secondly, the definition of "involved person" under both SAMLA and the 2019 Regulations is broad inasmuch as it includes an entity who *has been* involved in a relevant activity. In situations where that involvement has not been recent there may well be an argument that designation of the person should not occur in any reasonable exercise of discretion, although (and in whatever terms the argument is precisely formulated) that would always be a question of fact and degree for the judgment of the decision-maker.

26. Thirdly, the terms of Regulation 6(3)(d) are also extremely broad. The Defendant does not have to have reasonable grounds to suspect that the goods or technology at issue did *in fact* contribute to a proscribed activity; all that is required is a reasonable suspicion that the goods or technology *could* contribute to any such activity.

27. Fourthly, it is not suggested that the 2019 Regulations are other than *intra vires* the enabling powers in SAMLA.

28. Fifthly, it should be noted that in a slightly different context, although in terms equally apposite to the instant case, this Court has held that the review arrangements under section 38 of SAMLA are compliant with a designated person's rights under Articles 6 and 8 of the ECHR: see para 104 of the decision of Garnham J in *R (Youssef) v SSFCDA* [2021] EWHC 3188 (Admin); [2022] 1 WLR 2454.

29. Finally, my attention was drawn to the overview provided by Cockerill J in *PJSC National Bank Trust and another v Mints and others* [2023] EWHC 118 (Comm), as follows:

> "13. The current regime is to be found in the Sanctions and Anti-Money Laundering Act 2018 and regulations made under it. However that legislation is very far from coming into being independently or against the backdrop of a blank slate. Both parties to different extents pray in aid the fact that it represents the continuation of a scheme of sanctions which originated first with the United Nations, and was then picked up by the EU.
>
> 14. The Claimant and the Defendants were agreed that in broad terms the UK statute and regulations should be seen as consistent with that history and that ethos (though there are points where the Defendants would say that there has now been a deliberate parting of the ways). It follows that the old law in the form of the UN resolutions and EU Regulations is part of the background against which the 2018 Act falls to be construed.
>
> 15. This has an impact on the approach to construction and how that feeds into the basic legal common ground, which is that I am endeavouring to ascertain the intention of the legislator.
>
> …
>
> 45. Following Brexit, the UK needed a new sanctions regime both to implement UN sanctions and to impose its own. That regime is to be found in the 2018 Act. The Explanatory Notes state that the legislation contains "*the powers that the UK will need to carry on implementing sanctions as it currently does*". It is therefore apparent from this that the basic intention was to continue the approach adopted via the UN and EU. That theme of continuity can also be seen in an answer to a Parliamentary question on the Regulations which states in terms that "*the instrument transposes existing EU sanctions regimes; it does not add to or amend them. The process has been to transpose as identically as possible the EU regimes into what will be our law when we leave.*"'"

30. Mr Haines submitted that SAMLA and the 2019 Regulations should be interpreted in line with EU law, alternatively that the latter provides important context. Sir James Eadie KC for the Defendant submitted that the correct starting-point for this interpretative exercise is the language of the post-Brexit secondary legislation which does not fall to be construed against specific provisions of the EU sanctions regime, the UK no longer being a part of it. In my judgment, Sir James is correct but in the circumstances of this case it matters not. One must start with the domestic regime and interpret it as a piece of domestic legislation. In view of the Explanatory Notes referred to by Cockerill J, the expectation must be that the application of home-grown principles of statutory interpretation will lead to an outcome which is harmonious

with the EU regime although the UK is no longer part of it. That expectation may, at least in theory, be thwarted; but, as it happens, in my opinion (for reasons to which I will be coming below) there is no material difference between domestic law on the one hand and EU law on the other. This is the end-point and not the starting-point.

THE EVIDENCE BEFORE THE DEFENDANT

31. Mr Haines made detailed submissions about the amended SDFE dated 7th July 2022. He helpfully sub-divided the various exhibits into categories, and I will adopt his approach.

32. Exhibits 2, 3 and 6 reference material and summaries from the Claimant's website. These make clear that the Kipod technology has the capability through AI-powered video analytics "to find missing and wanted people". The website highlights as part of its capability in "transforming all CCTV cameras into your smart agents, working 24/7", the ability for "face recognition", "instant search of people and vehicles" and to "find and track" individuals.

33. According to exhibit 17, in February 2022 RUE Beltelecom replaced Panoptes as the exclusive operator of the RSMPS. Mr Haines submitted that this meant that the statutory purpose in designation could no longer be fulfilled. I reject that argument in the stark terms in which it was put forward. I have already drawn attention to the regulatory language – "*has been* involved" – from which it is clear that the Defendant is not prevented from having regard to a past state of affairs. I will be considering the proportionality of the Defendant's actions in these circumstances under the rubric of Ground 3.

34. The second category of information consists in exhibit 1, the Presidential Decree of the Republic of Belarus, No. 187, dated 25th May 2017. The principal purpose of the RSMPS is the "maintenance of public order". Mr Haines' submission was that, taken in isolation, this does not amount to evidence of any proscribed activity under the 2019 Regulations. The difficulty here is that exhibit 1 cannot be taken in isolation.

35. The third category of information relates to the arrest of an activist, Nikolai Dedok, in November 2020. This information is derived from a number of sources, all of which must be considered in their proper context.

36. First, an article dated 5th November 2020 in news.tut.by reported the Claimant's connections to the Belarusian government, including the provision of surveillance systems. According to this article:

> "Telegram channels recently accused Synesis of helping security forces "identify protesters" using the Kipod platform. In response the company issued a statement emphasising that online cameras at the Minsk railway station and in the subway are connected to the platform, and the video analytics system is designed "exclusively to search for predefined people in the video stream from connected online cameras". It cannot be used to analyse photos and videos from any other sources not connected to the platform, including mobile phones, camcorders, social networks."

37. So, the way in which this technology works is quite specific. The operator must upload the photograph or "person card" of the "predefined" person onto the system, and then if the online cameras at the Minsk railway station or elsewhere find a potential match the operator is alerted to that fact. In my view, this limitation in the functionality of the system is not any form of obstacle to the attempted location of persons of interest to the RSMPS, and the Claimant's response (at least as recorded in the article) is somewhat disingenuous. The RSMPS will know whom they are looking for. All that is required is the uploading of a photograph or "person card" of a known person of interest, and the AI-powered video analytics takes over if that person comes within the scope of any camera.

38. According to exhibit 5, which is a news article on euroradio.fm, the Claimant's co-founder Alexander Shatrov gave an hour-long interview on You Tube seeking to rebut the basis on which EU sanctions were imposed. Mr Shatrov accepted that the software can "recognise" 200,000 faces per second although it is not a mass identification tool. It operates only on the basis of uploaded photographs. As the authors of this news article point out:

> "But this does not mean that the system cannot be used pointwise – to search for specific individuals!"

Again, I have to say that this is a fair point.

39. This article further states that the system "is believed to have helped track down activist Nikolai Dedka [sic], who was hiding from the security forces until November 2020". Mr Dedok took regular bus trips from the village of Sosnovy in the Osipovichi district of Belarus to the Mogilevskaya metro station in Minsk. From there, he went down to the subway and was caught on a camera. The article implies that with the use of this information, presumably read in conjunction with bus timetables or similar information, the security forces were able to work out Mr Dedok's hiding place and his likely movements. When he was arrested gas was sprayed into his face.

40. The article makes a number of other points which it is unnecessary to summarise.

41. According to a further article published on 23rd December 2020 on euroradio.fm, Mr Dedok was arrested on 12th November. After his arrest he was tortured by the security forces, and State propaganda media published a video of his "confessions" showing the use of tear gas. Further information relating to the torture appears in an article published in Novaya Gazeta on 1st July 2021, based on an account Mr Dedok gave during a court hearing.

42. In an article on the Claimant's website dated 17th February 2022 (apparently taken down on or before 11th April 2022), the argument was advanced that Mr Dedok's hiding place was 76.2 kms away from the metro station in Minsk.

43. On 27th March 2021 euroradio.fm published an interview with a former employee of the Organised Crime and Corruption Task Force. He said:

> "I personally worked with this software. Its algorithms are used to identify people."

44. In an article published on dev.by former employees of the Claimant were interviewed. One of them said this:

> "Three or four years ago, there was not much love for the current government either. But the question of whether our work is ethical did not arise. "Video surveillance", "state order" sounded normal in and of themselves. And when Oleksin bought a stake in Synesis, the majority did not know about it, I suppose that they had not even heard such a surname. But after the elections, the situation changed. Yes, everyone understood that Kipod was operated in Minsk by law enforcement agencies, and that this system was working. Point your camera at the crowd, of course – Kipod doesn't recognise everyone. Obviously, the system was not a mass recognition tool on large marches. But with its help, you can work on specific people: upload a photo, run it through the archive and see if there were any matches. For example, was such and such person exposed somewhere in the subway last week? There it is pointless to assert that not a single protester was harmed by it."

I think that the "Oleksin" referred to here is otherwise known as Alexei Aleksin, a Belarussian businessman whom I address in more detail below.

45. The same employee agreed that the Claimant did not have access to any details of the individuals whose photographs were uploaded onto the system.

46. An article on svaboda.org dated 24th December 2020 contains an interview with Mr Shatrov. He accepted that it was possible that the photograph of a well-known oppositionist "was uploaded to the system and caught using the system". He added: "I do not do and am not interested in what I cannot influence".

47. Exhibit 14 is an article published on belarusff.org on 15th March 2021 by Belarus Freedom Forum. There is an entry for 10th March which states as follows:

> "The Belarussian regime relied on Kipod, AI-based recognition software, to track and identify protesters. Kipod is used to analyse video from numerous CCTV cameras. One of the first to warn about its use for surveillance purposes was a prominent anarchist blogger Nikolai Dedok. Dedok himself was tracked down and detained with the help of Kipod. Dedok was severely beaten and tortured at the time of his arrest. Kipod software is the product of Synesis, a company residing in Belarus's state-supported High-Tech park, a kind of institutionalised silicon valley …"

48. Finally in terms of the amended SDFE, there is an article published on euroradio.pl, accessed by the Defendant on 7th February 2022. This shows that the Claimant is part-owned by Energo-Oil-Invest, a company in turn owned by Alexei and Inna Aleksin. The former was said to have close links to the Lukashenko regime.

49. As part of its application to revoke the designation, the Claimant also provided evidence from two lawyers in Belarus stating that evidence from the Kipod system had not been used in administrative proceedings against civilians on politically motivated charges. As I pointed out in oral argument, this sort of evidence is of very limited value. The Kipod system is a "track and trace" technology; it would be surprising if it yielded evidence of politically motivated offences during the course of their commission. The system is used to find people who thereafter may or may not be subjected to legal process. Even if they were, the evidence against them would not be derived from Kipod itself but from other sources altogether, including for example of alleged anti-regime activity.

50. The Claimant also placed before the Defendant an expert report from Alexandre V. Antonov, whose expertise is in information technology. He was supplied with a copy of an anonymised "security log" showing the operation of the Kipod system between 4th April 2019 and 30th November 2020. Essentially, the system works on the basis of uploaded "person cards" or facial photographs. Further:

> "To initiate monitoring of a person, operator of KIPOD can create a "person card" and upload one or more photographs of that person's face along with personally identifiable information into the system.
>
> For each one of the faces from photographs loaded into KIPOD as part of a "person card" a "similarity degree" is calculated to each one of the faces from video.
>
> …
>
> Using that functionality, the operator of KIPOD can make a match/no match decision by visually confirming the similarity of faces from photographs from a "person card" to faces from video. By making a decision that two photographs are a match, the operator identifies matches of the person on live video feed to the personal information previously loaded into KIPOD as a part of a "person card" thus identifying the person on the live video feed."

51. According to Mr Antonov, 683 cameras were deployed in Minsk before the end of November 2020. Cameras were first introduced into the Minsk metro in July 2020. The cumulative total of "face created" and "face deleted" events between the dates under consideration was 1,184. On my arithmetic, a total of 1,484 different "person cards" or photographs were uploaded: the difference between these two figures is that the 1,184 is a running total, which takes into account deletions. Mr Antonov points out that there was not a "spike" in the number of "person cards" after July 2020. He also opines that the maximum number of people who could have been identified by Kipod between the beginning of August 2020 (the Presidential elections were held on 9th August) and the end of November 2020 was 1,323, and that only 266 of those had been added to the system between those dates. He remarks that the similar system operated in Germany appears to be much larger, although he does not state for what purpose or purposes the Face Recognition Technology, as it is called, is used in that country.

THE DEFENDANT'S ANALYSIS OF THE EVIDENCE

52. I derive this from the amended version of the SDF.

53. It was the evaluation of the Defendant that the source materials contained in the amended SDFE were "credible". The Defendant pointed out that eight law enforcement agencies are connected to the RSMPS. By way of conclusion:

> "In sum, exhibits 1-18 provide the evidential basis for the view that there are reasonable grounds to suspect that:
>
> (1) Synesis, including through its wholly-owned subsidiary Panoptes, supplied the Kipod technology to the Republic of Belarus.
>
> (2) Kipod technology has been used in the RSMPS, of which it is a key part.
>
> (3) That the RSMPS, of which the Kipod technology is a key part, provided the Belarus Ministry of Internal Affairs, and law enforcement agencies, including security and police units, with the capacity to track down civil society and pro-democracy activists, in order to repress them.
>
> (4) That this capacity has been so used.
>
> (5) For example, Nikolay Dedock [sic], a civil society activist who was in hiding, tracked down by the RSMPS, and then tortured in detention.
>
> Further, the Annex to the SDFE (and the exhibits supporting the Annex) provides evidence of the scale of the serious human rights violations of civil society activists and protesters carried out by the Republic of Belarus before and after the August 2020 elections. It can be reasonably inferred that the RSMPS, being a surveillance system used by the Republic of Belarus, including its Ministry of Internal Affairs and law enforcement agencies, has been used in support of these serious human rights violations, and in particular, the repression of civil society and pro-democracy activists."

54. The Defendant also examined, and rejected, the arguments advanced by the Claimant in favour of revocation. I focus on just three of these:

> "The argument as to the number and location of cameras does not rebut the evidence that (at least) some of the cameras were used in the manner set out above.
>
> The argument as to the number of people that could be caught by the system does not undermine the listing criteria relied on, the number of people not being a legally relevant factor in the criteria relied on.

…

> The argument that Kipod evidence has not been adduced by the government of Belarus in administrative proceedings against civil society and pro-democracy activists also does not undermine the listing criteria relied on: non-reliance on Kipod evidence by the Belarus government in open court does [not] engage with, let alone rebut, the evidence in the exhibits above." [I have inserted the word "not". Its omission is a typographical error]

55. Given the language of the amended SDF, it is clear that the Defendant was relying on Regulation 6(2)(a)(ii) (viz. the commission of a serious human rights violation or abuse in Belarus) and/or Regulation 6(2)(a)(iii) (viz. the repression of civil society or democratic opposition in Belarus) of the 2019 Regulations.

56. In Part 3 of the amended SDF the Defendant addressed in some detail the issue of proportionality, including the extent to which designation advanced the purposes of the 2019 Regulations and the impact on the Claimant.

THE CLAIMANT'S FURTHER EVIDENCE

57. I intend to refer specifically only to the witness statements of Alexey Pavlovich Knysh and Alexander Gluhovksy both dated 10th January 2023.

58. Mr Knysh is the managing director of Panoptes. He confirms that the company never had access to any identifying information relating to the "person cards". He also corrects a point raised by Mr Reed to the effect that the replacement of one person card with another might not be reflected in any increase in the overall number of cards as recorded. In my view, Mr Knysh has made perfectly fair and reasonable points which I can take into account.

59. Mr Gluhovsky is a senior associate in a law firm based in Virginia, USA. His firm is representing the Claimant and Mr Shatrov in seeking the reconsideration in their cases of sanctions imposed by the United States' Office of Foreign Assets Control. He draws attention to source material which calls into question the credibility of the BYPOL sources in the SDFE, namely exhibits 7, 10 and 19. In relation to BYPOL the SDF had said this:

> "The BYPOL initiative was set up by former law enforcement officers who do not recognise election results of August 2020. The initiative's goal is to restore democratic rule to Belarus under the leadership of Svetlana Tikhanovskaya, a human rights activist who ran as an independent presidential candidate against President Lukashenko. After the elections she fled to Lithuania in fear of repercussions. The BYPOL initiative's activity includes recording and conducting investigations into crimes perpetrated by the Belarus regime and championing law enforcement reform. The organisation works with other national and international human rights organisations. We judge this to be a credible source."

60. I have looked closely at paragraph 4 of Mr Gluhovsky's witness statement but cannot agree that what he says undermines the Defendant's evaluation of BYPOL's credibility. Exhibits 7 and 10 are of a piece with other material in this case. Aside from being post-decision evidence and inadmissible, Mr Gluhovsky's argument is, in my view, somewhat far-fetched.

THE CLAIMANT'S GROUNDS

61. By Ground 1 it is argued that the Defendant's decision that there were "reasonable grounds to suspect" that the Claimant was an involved person is irrational. By Ground 1a, it is pleaded that the Defendant applied the wrong standard of proof. By Ground 1b it is said that even if the correct standard of proof were applied, the decision and its outcome was irrational.

62. By Ground 2 it is argued that the decision to designate the Claimant was *ultra vires* because the Defendant exceeded the powers conferred upon it and/or breached the duties imposed by SAMLA and the 2019 Regulations, and/or the Defendant's decision frustrated the purposes which SAMLA and the 2019 Regulations conferred upon it.

63. By Ground 3 it is maintained that the decision is disproportionate and fails to show that it was rationally connected to a legitimate aim.

THE CLAIMANT'S SUBMISSIONS

64. Mr Haines advanced a number of wide-ranging submissions based on passages in *Bennion on Statutory Interpretation*, 7th edition. (The 8th edition has very recently been published but nothing turns on this). His basic point was that the terminology of "reasonable grounds to suspect" must be understood in its proper statutory context; that the present case has nothing to do with terrorism and risk of harm; and that what is required is a "generic" approach which reflects the use of this language in various statutory contexts.

65. Mr Haines criticised the "matrix of alleged facts" approach set out by the Court of Appeal in *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 415, para 67. He argued that this was apposite only in the context of terrorism. What was required was a sufficiently solid factual basis for the decision. The lessening of the standard of proof in terrorist cases has no relevance here.

66. In relation to the standard of review, Mr Haines submitted – if I understand him correctly – that the law was correctly set out by the Court of Appeal in *MB*, at para 60. In particular, and in harmony with the EU jurisprudence, whether there were reasonable grounds to suspect is an objective question of fact. On any view, it required more than speculation and bare allegation. There must be a sufficiently solid factual basis for the decision.

67. Mr Haines advanced a number of detailed submissions on the facts. His basic theme was that the Defendant was relying on speculation, rumour and surmise. As regards the arrest of Mr Dedok, Mr Haines emphasised that his clients had no knowledge of the use to which the Kipod system was put by the RSMPS. He said that the subscribers own the cameras and that the only interaction between them and the

Claimant is in the form of payment of a monthly subscription. Furthermore, Mr Haines argued that the relatively low usage of the system (whether the true figure is 1,484 "person cards", 1,323 or 1,184 probably matters little for the purpose of this submission) renders it unlikely that it was ever deployed against Mr Dedok or anyone else. Moreover, given the 76.2 kms between the village and Minsk, it was implausible that this technology could ever have played a role in securing his arrest. What has happened here, submitted Mr Haines, is that the Defendant has effectively reversed the burden of proof, in seeking to require the Claimant to prove a negative.

68. In support of Ground 2, Mr Haines submitted that the Defendant has as a matter of law failed to meet the requisite evidential threshold to hold that the Claimant was an "involved person". It follows that no statutory purpose could be promoted by the designation.

69. In support of Ground 3, Mr Haines submitted that there is insufficient evidence to support the Defendant's conclusions that (1) the original basis for the designation remained valid in light of past actions and in achieving the purposes of the 2019 Regulations, (2) the severity of the harm enabled, namely, the torture of a civil society activist, and (3) the reasonable inference that the technology, more broadly, enabled the repression of civil society. It followed that the Defendant has erroneously determined that the designation is proportionate.

70. Grateful as I am for them, it is unnecessary for me to summarise Sir James' helpful submissions advanced both orally and in writing. The Defendant may assume that I have taken them into account.

DISCUSSION AND CONCLUSIONS

71. A distinction needs to be drawn and maintained between the statutory threshold – "reasonable grounds to suspect" – and the standard of review applied by this Court. The former requires a state of mind rather than a state of affairs. The threshold is part objective and part subjective, otherwise "reasonable" would be otiose. If the epithet were not present, it would likely make no difference because the Court would notionally insert it, otherwise the fallacy of *Liversidge v Anderson* would be resurrected. The latter – the standard of review - requires no more and no less than the application of well-established principles.

72. Mr Haines was right to submit that the "reasonable grounds to suspect" formulation appears in a number of different statutory contexts. From the perspective of the decision-maker, whether he be a police officer or a Secretary of State, the words always mean the same thing. The role of the Court may, however, vary somewhat according to the context and, in particular, whether human rights are in play.

73. When it comes to the statutory threshold, the decision-maker must consider all the material or information known to him or ought to have been within his knowledge following reasonable inquiry. For present purposes, there are two key points. The first is that "material" or "information" is not limited to evidence that would be admitted in a court of law. The net goes far wider. The decision-maker is certainly entitled to take hearsay into account; he is also entitled to consider other information which might be described as "allegations", "multiple hearsay" or (in the appropriate case) "intelligence". The weight to be given to this information and material, possessing as

it does a weaker character than evidence properly so called, is for the decision-maker to assess; although the Court will normally expect that at least some recognition has been given to its inherent quality. The second key point is that the "reasonable grounds to suspect" criterion does not import any standard of proof. To suspect does not require the finding of a fact. It entails the assessment or evaluation of the available information and material, the drawing of inferences from all the circumstances, and then the acquisition in good faith of a state of mind once that exercise has been completed.

74. At para 67 of his judgment in *MB*, Lord Phillips CJ (as he was then) said:

> "We consider that in these passages the judge is confusing substance, relevant to the substantive Articles of the Convention, and procedure, relevant to Article 6. The PTA authorises the imposition of obligations where there are reasonable grounds for suspicion. The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. ***That exercise may involve considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether this matrix amounts to reasonable grounds for suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof.*** It is the procedure for determining whether reasonable grounds for suspicion exist that has to be fair if Article 6 is to be satisfied." [emphasis supplied]

75. There are difficulties with the third sentence from this citation. I address those below in the context of para 60 of *MB*. However, the highlighted passage has in my view survived the test of time. Mr Haines took issue with "matrix of alleged facts" on the basis that it applies only to terrorism cases where one of the key questions concerns future risk. I would respond to that submission in two ways. First, the term "matrix" is apt to reinforce the point that the decision-maker has reasonable grounds to suspect once he has considered all the material in the round, including possible links between various strands of information and the inferences to be drawn from them, and has come to a view. Secondly, I do not consider that the particular context of *MB*, namely terrorism, creates the material difference urged on me by Mr Haines. On the facts of *MB*, a control order was imposed on the ground that he posed a risk of terrorism. It is true that risk is looking to the future, but the assessment that someone poses a risk has to be based on an evaluation of past and present facts; or, more precisely, of material and information as to what the person either has done or is doing. So, the assessment of risk amounts to no more than an additional inferential conclusion from all these circumstances. The absence of the need to draw that further inference in the instant case does not alter the essential nature of the exercise the decision-maker is performing.

76. At para 50 of his judgment in *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] AC 1457, Lord Carnwath JSC stated:

> "50. … The position of a decision-maker trying to assess risk in advance is very different from that of a decision-maker trying to determine whether someone has actually done something wrong. Risk cannot simply be assessed on a balance of probabilities. It involves a question of degree. The Court of Appeal were right to attach weight to the notes to the FATF Special Recommendation which referred to the "preventative" purpose of designation, and the requirement to freeze terrorist-related funds based on "reasonable grounds, or a reasonable basis, to suspect or believe" that they could be used to finance terrorist activity. This is similar in substance to the language used by the Ombudsperson in her Fifth Report dated 31 January 2013, where she rejected a test based on probability, and proposed the standard "whether there is sufficient information to provide a reasonable and credible basis for the listing". She saw this as one which recognised "a lower threshold appropriate to preventative measures", while setting a "sufficient level of protection for the rights of individuals". As a member of the 1267 committee, the Secretary of State was not only entitled, but would be expected, to apply the same approach as the committee as a whole. On this ground also the appeal must fail."

77. Sir James relied on this passage, as well as on similar dicta in *Ahmed v Her Majesty's Treasury* [2010] UKSC 2; [2010] 2 AC 534, at paras 57-60 (per Lord Hope of Craighead DPSC) and paras 174-174 (per Lord Rodger of Earlsferry JSC). I have already recognised that the concept of risk is forward-looking and involves a further inferential conclusion, and as Lord Carnwath clearly explains the notion of proof on the balance of probabilities is simply inapposite in a situation where something has not yet happened. Nonetheless, had Parliament wished to introduce a probabilistic standard into SAMLA it would have said so expressly, and in my judgment the purpose of requiring something less than proof is to recognise that it is in the public interest, and consonant with the UK's international obligations where this country may be expected to act consistently with others, to enable punitive and restrictive measures of this sort to be applied even if a civil court would not be satisfied on the same material. Parliament has also recognised that when it comes to entities such as the Claimant, based and operating outside the jurisdiction in circumstances where evidence may not be readily available, proof of a fact to the civil standard may be difficult.

78. Overall, therefore, I reject the submission that the concept of risk is a key distinguishing feature. A police officer may lawfully act on reasonable grounds to suspect that something has either happened or is happening, and so may the Defendant.

79. I move on to consider the standard of review. Here, Mr Haines placed particular reliance on the following passage from para 60 of Lord Phillips' judgment in *MB*. In order to provide the full context, I also set out para 59:

> "59. The test of reasonable suspicion is one with which the Strasbourg court is familiar in the context of Article 5(1)(c) of

the Convention.

> "Having a 'reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence" – *Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157 at paragraph 38.
>
> 60. Whether there are reasonable grounds for suspicion is an objective question of fact. We cannot see how the court can review the decision of the Secretary of State without itself deciding whether the facts relied upon by the Secretary of State amount to reasonable grounds for suspecting that the subject of the control order is or has been involved in terrorism-related activity. Thus far we accept Mr Starmer's submission as to the standard of the review that must be carried out by the court."

80. My first observation is that the first two sentences of para 60 are not supported by *Fox, Campbell and Hartley* at para 38. I have no difficulty with the formulation, "facts or information which would satisfy an objective observer" provided that it is interpreted to mean that the decision-maker must be acting objectively (that is required by the adjective "reasonable") and not that the Court must place itself in the shoes of the decision-maker. My second observation is that para 60 of *MB* must now be read in the light of paras 120-126 of the judgment of Elisabeth Laing LJ in *QX v Secretary of State for the Home Department* [2022] EWCA Civ 2022. There, it was made clear that in *MB* the Court of Appeal was applying section 3 of the Human Rights Act 1998 to "read down" the relevant legislative wording in a case involving human rights (see para 123(iv)), and in any event that para 60 of MB could not be reconciled with recent Supreme Court authority such as *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765.

81. It follows, in my judgment, that this Court cannot stand in the shoes of the Defendant when conducting this review exercise under section 38 of SAMLA. Instead, the Court's role is to examine whether the Defendant's decision was either based on no evidence or was irrational.

82. The extent to which the *Wednesbury* test imports a flexible standard has been subject to much judicial consideration, and I have attempted my own analysis when writing the judgment for the Special Immigration Appeals Commission in *Begum* (SC/184/2021), available on www.siac.decisions.tribunals.gov.uk. It is unnecessary to travel over the same ground, particularly given that Mr Haines's submissions do not require me to do so. There is a certain flexibility built into the *Wednesbury* test, and it should be recognised that the subject-matter of the present case is not national security. Even so, I accept Sir James' submission that the margin of appreciation, as he put it, must be broad in a context such as the present, involving as it does the making of expert judgments in an area of government policy.

83. Mr Haines also relied on the decision of the Third Chamber of the General Court of the EU in *Al-Ghabra v European Commission* (Case T-248/13) in support of his submissions under both headings, namely the meaning of "reasonable grounds to suspect" and the standard of review. I have considered paras 113-121 of that case. In

my view, these are addressing the first heading and not the second. Indeed, this authority supports Sir James' argument more than Mr Haines' inasmuch as it makes clear that *evidence* in the strict sense is not required to satisfy the test: the General Court refers to "information" (paras 117 and 118) and to "the existence of material such as to raise suspicions" (para 120). The requirement for a "sufficiently solid factual basis" referred to at para 117 should not be understood as demanding nothing less than evidence or hard facts, nor as suggesting that it is for the reviewing court to decide for itself whether this basis exists. *Al-Ghabra* was not addressing the separate question of the standard of judicial review in the EU.

84. It follows that I must reject the Claimant's Ground 1a. I have concluded that the statutory criterion of "reasonable grounds to suspect" does not import a standard or proof. What it requires is an evaluation or assessment of all the available material and information which the Court, if asked to do so, will review applying well-established principles.

85. Turning now to Ground 1b, I have to say that the Claimant's submissions fall a long way short of demonstrating a *Wednesbury* error.

86. I propose to focus on the wording of regulation 6(3)(d) of the 2019 Regulations – "being involved in the supply to Belarus of goods or technology which could contribute to any such activity, or in providing financial services relating to such supply". The present continuous "being involved" also covers the past, "has been involved".

87. The words "could contribute" are important in this context. The Defendant would be entitled to have reasonable grounds to suspect even without the information and material relating to Mr Dedok.

88. There can be little doubt that this is a "find and track" surveillance system. It does not function on the basis of an algorithm which permits what has been described as the "mass recognition" of persons. Instead, someone has to decide to place a "person card" onto the system, and once that has been done the algorithm takes over. All of this is accepted by the Claimant.

89. I do not think that there is any merit in the argument that tens of thousands, say, of "person cards" have not in fact been inputted before November 2020. The numbers are either 1,184, 1,323 or 1,484, and these are not vast. However, the capacity of the Kipod system is unknown although Mr Shatrov has referred to the possibility of it being "drowned" if, I paraphrase, too much is expected of it. More importantly, the intentions, objectives, purposes and overall resources of the RSMPS are unclear, and it is reasonable to infer that they have used the system in a targeted manner rather than attempt to carry out mass surveillance. There is no evidence as to the number of "activists" or "oppositionists" in Belarus, still less of those likely to be of real interest to the authorities.

90. Thus, it is clear in my view that the Kipod system "could contribute" to a relevant activity under the 2019 Regulations, in particular "the repression of civil society and democratic opposition in Belarus". The Defendant was certainly entitled to reach that conclusion.

91. The Claimant says that it has no idea how the system was used by the Belarussian authorities over the period analysed by Mr Antonov. I shall assume that this is the case. I also agree with the Claimant that it may be difficult to draw adverse inferences from the raw data covering the period before and after the Presidential elections in August 2020. Even so, and given what is in the public domain about this particular regime, it would I think be naïve if not disingenuous to imagine that the system has only be used to track and trace the lost and the vulnerable. In this context the Presidential decree is relevant, as well as the expertise of the Defendant. The latter knows far more about Belarus than do I, or indeed than is contained in the court bundles. The interviews with former employees of the Claimant rather reinforce what I have said, as well as the links between those with shareholdings in the Claimant and the Lukashenko regime.

92. The question also arises as to whether the Kipod system was in fact used for this purpose. The statutory test would be met even without this feature, although a considerable amount of the material and information before the Court relates to the arrest of Mr Dedok.

93. The news articles which claim that the Kipod system was instrumental in bringing about the arrest of Mr Dedok may be replicative to some extent (in the sense that they may be relying on the same source) and they fail to explain how precisely it was used. The Defendant has not speculated about this. However, the fact that the village in which Mr Dedok was apparently hiding is about 76 kms away from the nearest camera is not an answer to the mass of material that the Defendant has referenced. The Belarussian authorities could have worked out his movements from bus timetables; they could also have carried out discreet surveillance by other means, including by following Mr Dedok onto the bus, once they had worked out where he was likely to be. It is unnecessary to come up with an explanation which joins all the notional dots. The Defendant was in my view entitled to rely on this information and evidence from the various sources which it regarded to be credible.

94. I have already addressed Mr Haines' submission, repeated in his reply, that the inference to be drawn from the limited number of "person cards" known to be uploaded onto the system is that it is "improbable" that Kipod was used in this fashion against Mr Dedok. If it is reasonable to predicate that the system was used in a targeted manner, the relatively low number of "person cards" deployed is a factor militating more against the Claimant's submission than in favour of it. Mr Dedok was clearly someone of interest to the Belarussian regime.

95. The material and information before the decision-maker must be considered as a whole. It cannot be disaggregated or salami-sliced. I have concluded that Ground 1b is unsustainable and must be rejected.

96. I agree with the Defendant that Grounds 2 and 3 must fail if Ground 1 cannot be upheld.

97. As for Ground 2, the objectives of the 2019 Regulations are satisfied if, and only if, the Defendant had reasonable grounds to suspect the Claimant to be or have been an "involved person". In the absence of such reasonable grounds, the statutory and regulatory purposes would be frustrated; but in the presence of those grounds these purposes are advanced. On analysis, Ground 2 adds nothing.

98. Sir James made the sound submission that if what the Claimant is saying is that the statutory purposes are frustrated if the evidence goes no further than "reasonable grounds to submit", this is the threshold imposed by both SAMLA and the 2019 Regulations.

99. As for Ground 3, the amended SDF did address the issue of proportionality, including harm to the Claimant, in some considerable detail. Mr Haines' submissions rather assumed that proportionality is for the Court to determine rather than the decision-maker. To the extent that it remains relevant following the abrogation of Regulation 6(1)(b) of the 2019 Regulations by virtue of the 2022 Act, proportionality was considered and the conclusion reached was not unreasonable.

DISPOSAL

100. Notwithstanding Mr Haines' well-presented oral arguments, this application for review brought under section 38 of SAMLA must be dismissed.