SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBER: SN/147/2018

DATE OF HEARING: 5,6,7,8 and 9 October 2020

DATE OF JUDGMENT: 2ND December 2020

BEFORE:

THE HONOURABLE MR JUSTICE SAINI
UPPER TRIBUNAL JUDGE L SMITH
MRS JILL BATTLEY

BETWEEN:

O3

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR HUGH SOUTHEY QC & MR ALEX BURRETT (instructed by the J D Spicer Zeb Solicitors) on behalf of the Appellant

MR MARTIN GOUDIE QC & AARON WATKINS (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

MR DAVID BLUNDELL QC & MR ANDREW BYASS (instructed by the Government Legal Department) appeared on behalf of the Respondent.

OPEN JUDGMENT

The Honourable Mr Justice Saini:

This is our OPEN judgment in O3's appeal and it is divided into 8 main parts as follows:

I.	Overview	paras.[1]-[19]
II.	Immigration History	paras.[20]-[31]
III.	Legal Framework	paras.[32]-[57]
IV.	The National Security Case	paras.[58]-[121]
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I. Overview

1. The Secretary of State wishes to deport the Appellant, a foreign national, on the basis that he is an Islamist extremist aligned to Islamic State in the Levant (ISIL). She argues that if he is permitted to remain in the United Kingdom, he may plan and execute a mass casualty attack. The legality of that assessment is the principal issue in this appeal.

2. By an Order of the Commission dated 26 May 2020, an anonymity order and extensive reporting restrictions apply to this appeal. In summary, by that Order the Appellant is to be known as "O3" and nothing may be published which directly or indirectly identifies O3 as an appellant in these proceedings including, but not limited to, his name, his age, his current and former addresses, his nationality and country of return, his ethnicity or his family members.

3. Given the terms of the Order, and the risk of undermining the restrictions within it by including confidential material in an OPEN judgment of the normal public type, we have decided, following submissions from the parties and having given media representatives an opportunity to address the matter, to divide our judgments into three parts: this OPEN judgment (a public document), an OPEN CONFIDENTIAL ANNEXE (to be shared with only the parties) and a CLOSED JUDGMENT (to be shared with the Special Advocates and Secretary of State, in the normal way in the present type of appeal).

4. All parties agreed with this course. We record however that we were satisfied that the interests of justice justify this incursion into the principle of open justice (that is, use of an OPEN but confidential annexe) given the sensitive nature of the subject-matter of these proceedings; and to avoid a situation where a public judgment identifying certain matters would lead to identification of O3 and thereby put him and his family members at risk through possible "jigsaw" identification.

5. We have sought to include as much information as possible in this OPEN JUDGMENT in order to make it possible for interested persons and the media to obtain a general grasp of the matters in issue, including the legal issues. We will refer to the country of which O3 is a national as "Country X".

6. Turning to the issues in the appeal, and as identified above, O3 is alleged by the

Secretary of State to be an Islamist extremist aligned with ISIL. He has been assessed by her advisers within the Security Service (MI5) as likely to be involved in planning and then conducting a mass casualty attack within the United Kingdom.

7. The Secretary of State relies upon both OPEN and CLOSED evidence in support of her national security case. She has produced in OPEN materials said to have been found on O3's devices, and (on any view) certain of those materials promote and espouse extremist Islamist views, and are supportive of terrorism and travel to Syria to fight for ISIL.

8. O3 says, in response and by way of summary, that he admits he downloaded certain online materials (but not all of these relied upon against him) and he did so in furtherance of scholarly and academic work; and in furtherance of creative media research for film and podcast projects.

9. Both through Counsel and in his own oral evidence, O3 says that he is a moderate (or, in his words, "neutralist") Muslim convert who regards extremism as a "social cancer". O3's evidence is that he has for some time been engaged in research projects concerning modern Muslim youth subculture and extremism, and has on occasion posted content online, posing on occasion as an extremist, as part of his ongoing research.

10. The Secretary of State argues that O3's claims of scholarly or media related research are in fact a front to engage with extremists and access the extremist online content which was found on his digital devices following his arrest.

11. On 21 November 2017, in light of the national security risk he was alleged to pose, a decision was taken by the Secretary of State to make a deportation order against O3 under section 5(1) of the Immigration Act 1971 ("the 1971 Act").

12. On 4 January 2018, he was served with a deportation order on the grounds that his presence in the UK was not "conducive to the public good" for reasons of national security. On 22 January 2018, O3 made representations which were treated by the Secretary of State as an application to revoke this deportation order. That application was refused on 2 February 2018. On 14 December 2018, O3 made a claim for asylum and humanitarian protection. That claim was refused on 28 March 2019.

13. In this appeal, O3 challenges every aspect of the national security case against him. He also claims that if he is returned to Country X, he would be at risk of persecution contrary to the UN Convention on the Status of Refugees 1951 (the "Refugee Convention") on grounds of religious belief and imputed political opinion owing to his profile as an Islamist extremist and by reason of certain matters related to his identity.

14. Since he denies the national security case, he also alleges that the Secretary of State erred in excluding him from refugee protection under Article 1F of the Refugee Convention.

15. For the same reasons, he claims that he will be at risk of treatment contrary to Article 3 of the European Convention on Human Rights (the "ECHR"). Finally, he claims that deportation would amount to an unjustified interference with his rights

under Article 8 ECHR. He makes a claim for humanitarian protection but accepts it adds nothing of substance to his other claims. We will not address it further in this judgment.

16. In addition to receiving witness statements and extensive documentary materials, we heard oral evidence from O3 in person, and evidence on his behalf from a distinguished academic with particular expertise in the history and modern politics of Country X.

17. We also received and heard OPEN and CLOSED evidence from two witnesses on behalf of the Secretary of State. Those witnesses gave oral and written evidence both in OPEN and CLOSED dealing with the national security case (given by witness "KG", a member of the Security Service), and the refugee/safety on return issues (given by Laura Weight, Head of the Home Office Special Cases Unit within the Office for Security and Counter-Terrorism).

18. The CLOSED parts of KG's and Ms. Weight's evidence were subject to probing, extensive and robust cross-examination by the Special Advocates in CLOSED session. They were thoroughly tested.

19. We record that we received substantial assistance from all the advocates in their concise and well-structured submissions.

II. Immigration History

20. The Appellant is a national of Country X. On 19 December 2000, he entered the UK as a child with his brother in order to visit their mother, and was granted six months Leave to Remain ("LTR") in the UK as a visitor.

21. O3's mother had four years' LTR as a work permit holder at the time of O3's entry. On 24 May 2001, she applied for further LTR for her sons as her dependants. On 15 June 2001, this application was refused. On 4 October 2002, the decision was maintained. On 10 September 2004, an appeal against the refusal was dismissed. On 29 September 2004, the Appellant's appeal rights became exhausted.

22. On 22 March 2005, applications for LTR outside the Immigration Rules were lodged on behalf of O3 and his brother. On 16 August 2006, they were refused. On the same date, O3 and his brother were served papers as over stayers. On 1 September 2006, further representations were made on their behalf. On 5 February 2010, O3 and his brother were granted LTR on long residence grounds.

23. On 28 November 2017, O3 was served with a decision to make a deportation order against him. This decision contained a section 120 "One-Stop Notice" inviting him to submit written reasons as to why he should not be deported and explain any reasons why he should remain in the UK.

24. On 3 January 2018, the decision to deport O3 was maintained as no submissions were received within the required time frame. A deportation order was signed the same date and served on O3 the following day.

25. On 15 January 2018, O3 was served with removal directions. On 16 January 2018, the Secretary of State received detailed hand-written representations from him

challenging the basis of his deportation. The removal directions were cancelled as a result. The representations, together with additional submissions made on 22 January 2018, were treated by the Home Office as an application to revoke the deportation order.

26. On 2 February 2018, the application to revoke the deportation order was refused. On 9 February 2018, O3 appealed to the Commission against the refusal to revoke the deportation order. His grounds of appeal asserted that it would be unlawful to remove him from the UK and return him to Country X as to do so would breach his rights under Articles 8, 3 and 5 ECHR. At this stage, no mention was made of any political affiliations or of any asylum claim arising from his family name and suggestions that he might be persecuted for the same.

27. Some months later, on 12 December 2018, O3 submitted Amended Deportation Appeal Grounds, in which he referred to a claim for asylum and humanitarian protection. On 14 December 2018, he formally sought asylum and humanitarian protection.

28. O3 raised a number of potential grounds for the alleged risk of persecution (or mistreatment) on his return, including his national security profile, his faith, and his alleged links to a certain familial group. On 17 and 22 January 2019, O3 was interviewed in relation to his asylum claim.

29. On 28 March 2019, O3's further claims were considered and refused by means of a revised decision letter. In summary, the Secretary of State decided:
    (1) In light of the risk O3 posed to national security, he was excluded from protection as a refugee, in accordance with Article 1(F)(c) of the Refugee Convention:
    (2) In the alternative, Article 33(2) of the Refugee Convention permitted O3's return to Country X on the basis that, even if properly considered a refugee, there were reasonable grounds for regarding him as a danger to the security of the UK; and
    (3) Even if Articles 1(F)(c) and 33(2) did not apply, O3 had failed on the facts to substantiate his claim to asylum or humanitarian protection.

30. O3 appealed against these decisions to the Commission on 28 March 2019.

31. The parties are agreed that in broad terms, the grounds of appeal raise the following specific issues for determination by the Commission: (a) the national security issue; (b) exclusion from refugee protection; (c) substantive qualification as a refugee/Article 3 ECHR, and (d) Article 8 ECHR.

III. Legal Framework

32. There are three material areas of law and we will summarise the principles below in the following order: the law on deportation, ECHR and Refugee Convention. We did not detect any dispute between the parties on the applicable law on these questions.

Deportation

33. By section 3(5)(a) of the 1971 Act, a person who is not a British citizen is liable to

deportation from the United Kingdom if the Secretary of State "deems his deportation to be conducive to the public good". Section 5(1) of the 1971 Act further provides that where a person is liable to deportation, the Secretary of State may make a deportation order against him, the effect of which will be to invalidate any leave to remain in the UK and to prohibit the individual from returning to the UK following deportation.

34. As set out in paragraph 396 of the Immigration Rules (HC 395) (the "Rules"), there is a presumption that the public interest requires the deportation of someone liable to deportation. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
    (1) The grounds on which the order was made;
    (2) Any representations made in support of revocation;
    (3) The interests of the community, including the maintenance of effective immigration control; and
    (4) The interests of the applicant, including any compassionate circumstances.

35. Revocation of a deportation order will not normally be authorised unless the situation has materially altered, either by a change of circumstances since the order was made, or by, fresh information coming to light which was not before the appellate authorities or the Secretary of State (paragraphs 390 and 391A of the Rules).

ECHR

36. Article 3 ECHR provided that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". As is well-established Article 3, imposes both negative and positive obligations. The positive obligations imposed on States include the need to take reasonable steps to avoid a real and immediate risk of ill-treatment contrary to Article 3.

37. Of specific relevance in the present appeal is the well-established principle that an individual cannot be deported if there are substantial grounds for believing that they would face a real risk of being subjected to treatment contrary to Article 3 in the receiving state: Soering v. UK (1989) 11 EHRR 439.

38. It is for O3 to show that there are *substantial grounds* for believing there is a *real risk* of treatment contrary to Article 3. A mere possibility of mistreatment will not suffice: Vilvarajah v. UK (1992) 14 EHRR 248, at [111]. Providing the risk is sufficiently low, an individual may be deported notwithstanding a persisting risk of mistreatment. What a government must do when substantial grounds have been shown is to demonstrate that there is not a real risk, not that there is no risk at all; Othman v. Secretary of State for the Home Department (12 November 12, unreported, SC/15/2005, at [9]).

39. If relying on evidence which describes the general situation in a country, an applicant must usually demonstrate the existence of further special distinguishing features which would place him at real risk of ill-treatment contrary to Article 3. The Strasbourg Court has held that it is only in the most extreme cases of general violence that it is possible to demonstrate a real risk of Article 3 ill-treatment simply by being exposed to such violence on return: NA v. UK (2009) 48 EHRR 15, at [115].

40. Similarly, where an applicant alleges that they are a member of a group systematically exposed to a practice of ill-treatment, the Strasbourg Court will only exceptionally consider that Article 3 protection *"enters into play"* without the need to show further special distinguishing features if the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group in question: NA, at [116].

41. Article 8 ECHR protects the right to respect for private and family life, the home and correspondence. In accordance with section 117A of the Nationality, Immigration and Asylum Act 2002, when considering whether the refusal to revoke O3's deportation order breaches Article 8 (and specifically whether any alleged interference is justified under Article 8(2)), the Commission must have regard to the considerations listed in section 117B.

42. Section 117B (1) notes that the maintenance of effective immigration controls is in the public interest. Further, by virtue of sections 117B(4) and (5) respectively, little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully or at a time when the person's immigration status is precarious. We observe that this section is not of real relevance in the present case because O3 had enjoyed ILR for a substantial period before the removal process was initiated.

Refugee Convention

43. Article 1(F) of the Refugee Convention excludes three categories of person from the definition of a refugee. Article 1(F)(c) provides that:
"The Provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
...

(c) He has been guilty of acts of contrary to the purposes and principles of the United Nations..."

44. This provision is mirrored in Article 12 of EU Council Directive 2004/83/EC (the "Qualification Directive"):
"(2) A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
...
(a) He or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and articles 1 and 2 of the Charter of the United Nations.

(3) Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crime or acts mentioned therein".

45. In this regard, recital (22) to the Qualification Directive provides that:
"Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that

'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".

46. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (the "Qualification Regulations") transpose the Qualification Directive into domestic law. Regulation 7 provides that: "A person is not a refugee, if he falls within the scope of Article 1F of the Geneva Convention".

47. Section 54 of the Immigration, Asylum and Nationality Act 2006 (the "2006 Act") provided further guidance as to the meaning of Article 1(F)(c) stating:

"(1) In the construction and application of Article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular –
(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
(b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).
(2) In this section –
'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000"

48. "Terrorism" is defined in section 1 of the Terrorism Act 2000 as "the use or threat of action" involving serious violence against a person; serious damage to property; endangering a person's life (other than the terrorist's); creating a serious risk to the health and safety of the public or a section of the public; or designed seriously to interfere with or seriously to disrupt an electronic system: section 2. The use of such threat or action must be designed to influence the government or an international governmental organisation, or to intimidate the public or a section of the public, and be made for the purpose of advancing a political, religious or ideological cause: section 1.

49. In the context of revoking or refusing to renew refugee status, Paragraph 339AA of the Rules states:
"This paragraph applies where the Secretary of State is satisfied that the person should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006. As regards the application of Article 1F of the Refugee Convention, this paragraph also applies where the Secretary of State is satisfied that the person has instigated or otherwise participated in the crimes or acts mentioned therein."

50. Paragraph 336 of the Rules provides that an application which does not meet the criteria set out in para. 334 will be refused. The criteria set out in para. 334 include that an individual is a refugee as defined in regulation 2 of the Qualification Regulations (para.334(ii)) and that there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom (para.334(iii).

51. Section 55(1) of Immigration, Asylum and Nationality Act 2006 allows the Secretary of State to issue a certificate that an appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1F applies

(section 55(1)(a)) or Article 33(2) applies on national security grounds (section 55(1)(b)).

52. This provision requires the Commission to begin substantive consideration of the asylum appeal by considering the statements in the certificate (section 55(3)). If the Commission agrees with the statements in the certificate, then it <u>must</u> dismiss the appeal insofar as it relies on the Refugee Convention (section 55(4)) before considering any other aspect of the case.

53. Regulation 2 of the Qualification Regulations defines a "refugee" as a person who falls within Article 1A of the Geneva Convention and to whom regulation 7 does not apply (i.e. an excluded individual). A person is thus a refugee where he is outside the country of his nationality and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (provided that he is not excluded from protection).

54. The well-known provisions of Article 33(1) of the Refugee Convention prohibit the expulsion or return ("refoulement") of such an individual, stating:

    " No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

55. However, by virtue of Article 33(2), the benefit of the Article 33(1) may not be claimed by a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is ...".

56. Article 33(2) has been given effect in EU law by Article 21(2) of the Qualification Directive and in domestic law by para. 334(iii) of the Rules set out above. Where para. 334(iii) is satisfied, this will lead to a refusal of asylum under para. 336.

57. We turn next to the first main issue, the national security case.

IV. <u>The National Security Case</u>

58. The first matter we need to decide is the correct role and approach of the Commission in an appeal before it under section 4 of the Special Immigration Appeals Commission Act 1997.

59. In our judgment, the approach identified recently by the Commission in <u>U2 v Secretary of State for the Home Department</u> (19 December 2019, SC 130/2016) is the correct one and it faithfully reflects the binding decision of the House of Lords in <u>Secretary of State for the Home Department v Rehman</u> [2001] UKHL 47 [2003] 1 AC 153.

60. <u>Rehman</u> was a case in which the Secretary of State made a deportation order against the respondent on the grounds it was conducive to the public good in the interests of national security. That is on all fours with the present appeal. All members of the Appellate Committee broadly agreed about the approach which the Commission

should adopt in this type of case. The appeal is a merits appeal, and the Commission could review the decision of the Secretary of State on questions of fact and law. A broad and generous appellate jurisdiction is provided to the Commission.

61. However, Rehman also establishes that significant "deference" should be given to the assessments of the Secretary of State. That would in modern language perhaps be described as a recognition of the "institutional competence" of the Secretary of State in matters of national security. Importantly, we consider that the *ratio* of the Rehman case is that the task for the Secretary of State, and for the Commission, is not to ask whether a series of factual allegations had been proved on the civil balance of probabilities, but to evaluate *future* risk by looking at the whole picture disclosed by the evidence, and to answer what we in argument described as a "global question". Answering this global question is a classic exercise in assessment, as opposed to fact finding as in ordinary civil proceedings.

62. This approach was reflected in Irwin J's valuable summary in Y1 v Secretary of State for the Home Department (SC/112/2011), 13 November 2013, which was applied in U2 and has stood the test of time.

63. As explained by Irwin J in Y1 at para. 56:

> 'We have cited reasonably extensive passages from Rehman...The critical points...are...firstly, there must be a proper factual basis for the decision; secondly, the Secretary of State is entitled to take the material together, to form an overview, and there is no obligation to treat each discrete piece of information as a separate allegation, which, if refuted or weakened one by one, necessitates without more a decision against deprivation; thirdly, the essence of the test is that the individual represents a "danger" to national security, not that he or she can be proved to have already damaged it: the Secretary of State is entitled to take a preventative or precautionary approach; fourthly, national security is engaged with matters beyond the borders of the United Kingdom, perhaps particularly in relation to terrorism, even where that activity is directed against other States; fifthly, due deference must be shown to the policy of the Executive with regard to national security, and the views of the Secretary of State must be given considerable weight'.

64. For the avoidance of doubt, we should record that contrary to what was submitted on O3's behalf, we do not consider there is anything in Y1 (and the later Commission cases cited to us) which is inconsistent with Rehman.

65. By way of a road-map, in the next part of our judgment we will first summarise at a high level the Secretary of State's case (which is based very largely as regards OPEN aspects on the downloaded material and admissions made by O3). We will then summarise that evidence (including our conclusions, where there may be disputes, as to the nature of that material). The evidence in relation to the nature of the material came from KG. We consider him a thoroughly knowledgeable and reliable witness with a detailed knowledge of the history and development of ISIL, and its surrounding literature. We accept his evidence without reservation. Indeed, it was not the subject of any serious challenge. He made appropriate concessions in evidence and was a measured and wholly reliable witness.

66. After our summary of the Secretary of State's case we will consider O3's

responsive case, including his written and oral evidence, and finally express our conclusions as to whether the national security case has been made out.

67. As we have indicated above, the real dispute in relation to the downloaded material is not, in the main, as to its extremist nature but rather as to O3's *purposes* in accessing such material and himself "acting" as an extremist online.

68. Before we turn to the facts, we should record a submission on the part of O3 that the test in ZZ (France) v Secretary of State for the Home Department [2014] QB 820 applies in this appeal and he is entitled to "the essence of the allegations" against him, albeit not necessarily the evidence. We heard an interesting argument on this point and tend to prefer the Secretary of State's submission that EU law is not engaged in this appeal.

69. However, we do not need to resolve the issue because the more onerous test in AF (No.3) and disclosure in accordance with that test, has for practical reasons been applied in this case by the Secretary of State. The point is academic.

The Secretary of State's national security case in summary

70. The Secretary of State relies upon two national security statements (OPEN and CLOSED versions) supported by the evidence of witness KG. The Secretary of State's assessment, based on the OPEN and CLOSED evidence, is that O3 is an Islamist extremist aligned with ISIL. More specifically, he is assessed as likely to have been involved in planning a terrorist attack in the UK, and as a person who maintains an aspiration to engage in attack planning.

71. In OPEN the Secretary of State supports this assessment primarily by reference to material found on O3's devices, and assessments that his possession of a bladed article in 2010 and attempts to learn to drive a high-powered Mercedes vehicle in September 2017 (when considered in the context of well-known ISIL inspired attacks between 2015 and 2018, such as the Nice attack on Bastille Day on 14 July 2016), support the national security case as to the risk he poses.

The Downloaded Material

72. The following material was discovered on O3's devices following his arrest on 27 November 2017:

(a) A PDF document "Al-Wala' Wa'l-Bara' – According to the 'Aqeedah of the Salaf", by Muhammed al-Qahtani. Al-Qahtani is a Saudi theological scholar. "Al-Wala Wa'l-Bara" was originally submitted as a thesis for his Masters' dissertation at Umal Qura University, Saudi Arabia. Based on the evidence we have heard from KG (which we accept), we find, accepting KG's evidence, that this is an Islamist extremist theological text exhorting violent jihad. 'Part 3' of the document, which was on O3's devices, deals with the contemporary application of al-Qahtani's doctrine and includes a chapter on *jihad*, which refers to "the necessity of *jihad* in all its forms".

(b) A PDF document with the title "Advice for Those Going Ribat", by 'Abu Saeed al Britani' (widely reported as a *kunya* (nom de guerre) for Omar HUSSEIN). Omar HUSSAIN is currently in Syria fighting with ISIL. He travelled to Syria in

December 2013, originally joining the Al Nusrah Front. It is not in issue that he maintains a significant online media presence and uses this to encourage individuals to travel to Syria to join ISIL. He has defended the beheadings of ISIL hostages and encouraged attacks against the UK. It is clear that this document is an instructional manual for how to behave while fighting for ISIL in Syria.

(c) An image of children in military dress with the overlaid text "We're going to kill you, O Kuffar. Insha'allah [God willing] we'll slaughter you". *Kuffar* is an Arabic term used to refer to non-Muslims or "unbelievers". It is often used as a derogatory term. *Kafir* is the singular term.

(d) A mocked-up image depicting an ISIL "passport", and ticket to the Islamic State.

(e) A video featuring Abu Bakr AI-BAGHDADI, and individuals assessed to be ISIL fighters. As is well-known, AL-BAGHDADI is the leader of ISIL. On 29 June 2014, he declared his accession to the position of "caliph" and the creation of the so-called "caliphate" in the areas under his control. He has made several speeches calling for individuals to travel to the caliphate or conduct attacks in their home countries.

(f) An image of a decapitated body (assessed to be James Foley), overlaid with Foley's last words. Foley was kidnapped in Syria in 2012, and executed by Muhammed EMWAZI in 2014. ISIL released a video of his execution online. EMWAZI was a dual Kuwaiti-British national who travelled to Syria in August 2012. He became well known in the press by the moniker "Jihadi John" after he reportedly featured in a number of videos in which he executed ISIL hostages. In November 2015, EMWAZI was killed in an airstrike.

(g) An ISIL propaganda video which depicts an alleged Jordanian pilot in a cage wearing an orange boiler suit being burned alive.

73. As may already be obvious from the terms of our summary above, we find that this material is extremist in nature and that it positively supports the appalling acts of ISIL and exhorts viewers to join jihad with ISIL overseas (specifically, to attack non-believers). Indeed, this much was not substantially disputed by O3, save as regards the text Al-Wala' Wa'l-Bara.

74. The Secretary of State's assessment is that as a result of his alignment with ISIL, O3 aspires to engage in activities directed by, inspired by, or in the name of ISIL. She argues that this assessment is supported by the following further selection of material from O3's devices:

(a) An image of a gun, covered in blood, with the text "YODO – YOU ONLY DIE ONCE WHY NOT MAKE IT MARTYRDOM".

(b) An image featuring the Parisian skyline, images of the Paris attackers, and the words "JUST TERROR" and "LET PARIS BE A LESSON FOR THOSE NATIONS THAT WISH TO HEED". On 13 November 2015, six targets in and around Paris were attacked by ISIL gunmen and suicide bombers; 130 people were killed, and a further 368 people were injured. The meaning of the image is obvious.

(c) An ISIL propaganda video titled "The Fertile Nation", featuring an opening speech by Abu Mohammed AI-ADNANI. AI-ADNANI was the official public spokesman for and a senior figure within ISIL. He has released a number of speeches, including "Indeed Your Lord is Ever Watchful", "Say, Die in Your Rage" and "O Our People Respond to the Caller of Allah", which call for Western-based individuals to conduct unsophisticated attacks in their home countries. He was killed in an airstrike on 30 August 2016. In the video, AL-ADNANI is seen praising fighting against non-ISIL-aligned individuals; a clip featuring injured children is shown, with narration by a figure who identifies himself as "Abu Yousef of Australia" that blames the injuries on indiscriminate bombing by the US and allies. "Abu Yousef" is then shown fighting in a bunker or trench with an automatic weapon, and calling for either *hijrah* (migration) to ISIL, or *jihad* in the West. We discuss AL-ADNANI further below.

(d) A document which discusses the ways in which it is permissible to kill *kuffar*, which includes the line "The basic principle is that the blood and money of a *Kafir* is permissible (to shed and take) and that there is no innocent *Kafir*, and there is no such thing as a 'civilian' *Kafir*". Again, this document admits of an obvious meaning.

(e) An image featuring a hand holding a rife and a London Routemaster bus, with the text "SOMETIMES YOU JUST GOT TO GET UP AND GO". There was some dispute as the meaning of this image. We find that this image is encouraging both travel to fight overseas and attacks on Londoners. We will return to it below when we consider KG's evidence which was the subject of certain cross-examination on this image.

75. The evidence before us shows that it is well documented that ISIL has encouraged and inspired individuals to conduct attacks in the West. On 21 September 2014, AI-ADNANI released a speech entitled "Indeed Your Lord Is Ever Watchful". This calls for attacks against disbelievers, stating "Do not ask for anyone's advice and do not seek anyone's verdict. Kill the disbeliever whether he is civilian or military, for they have the same ruling. Both of them are disbelievers". The speech went on to state "If you are not able to find an IED or a bullet...smash his head with a rock, or slaughter him with a knife, or run him over with your car, or throw him down from a high place, or choke him, or poison him".

76. We agree with the Secretary of State's assessment that this speech (and the material summarised above) was designed to encourage individuals to undertake attacks in their own home countries. The evidence establishes that ISIL has continued to encourage attacks in Europe in its media output, including in the magazine Rumiyah, which features articles glorifying "successful" ISIL attacks, as well as providing advice aimed at increasing the capability of potential attackers.

77. The Secretary of State's assessment of the risks posed by O3 is said to be supported by his own evidence, in which he makes a number of admissions in written evidence, of engaging in activity consistent with holding an Islamist extremist mindset.

78. A number of examples were specifically drawn to our attention in argument. They include the following:

a) O3 confirms that he knowingly held various ISIL-related material on his devices and posted ISIL propaganda on social media;
b) He admits that Instagram deleted some of his posts for being "extreme";
c) He admits that some of his social media posts could be interpreted to be in support of ISIL;
d) He admits to having images and videos of beheadings;
e) He admits that he read a book by AL-Marwari (assessed to be Abu AL-MAWARDI) that he states is 'much more extreme [than] the material referred [to] by the Secretary of State';
f) He admits that some of the documents refer to the punishment of Kuffar;
g) He admits to messaging an individual in Syria and enquiring about the safest routes into Syria.

79. We agree with the Secretary of State that the list of ISIL related attacks such as the Nice attack in 2016 and the stabbings in Paris in 2018, show that attacks of this nature may include attacks using explosives, vehicles, knives or any form of weapon. These attacks may be 'lone wolf' attacks or coordinated with others, and the targets may be law enforcement officers, politicians, the military or simply civilians who have been regularly targeted in mass casualty attacks.

80. The examples are sadly well-known and do not need to be set out. They include the Westminster Bridge attack in March 2017 and the Barcelona attack in August 2017, both of which involved use of vehicles to cause mass loss of life.

81. The Secretary of State's evidence is that police checks have been carried out to identify whether O3 presented any risk factors when judged against known ISIL methodology as described above.

82. These checks revealed that O3 has previously been arrested for knife crime. On 6 August 2010, police were conducting a knife operation at Finsbury Park station which identified O3 as a suspect. Following a search, a surgical blade was found in the rolled-up area of his shorts, and he was arrested for possession of an offensive weapon. He was due to appear at Highbury Corner Magistrates' Court on 19 August 2010 in relation to this offence, but did not attend, and a warrant for his arrest was issued. O3 was subsequently arrested at his home address on 16 July 2012 for this failure to attend; he pleaded guilty and was detained at the courthouse for one day. In January 2013, O3 pleaded not guilty to the original offence and was acquitted as no evidence was offered.

83. The Secretary of State also refers in her national security evidence to the fact that on 12 September 2017 O3 was seen to drive a high-powered Mercedes S500. This car had been obtained approximately two weeks earlier by his brother. His brother was the passenger, and O3 appeared to be having a driving lesson. O3 was stopped from driving this vehicle by officers in a marked police vehicle. Checks demonstrated that neither brother had full driving licences or insurance. When spoken to by the officers, they suggested that they did not believe these were required as O3 was only learning.

84. Given O3's ISIL alignment, the nature of its historic acts (including vehicle use as set out above) and the activities identified by the police, the Secretary of State assessed that O3 has engaged in terrorism related activity.

O3's case

85. O3's response to this body of evidence is essentially two-fold. First, he openly accepts (and indeed seeks credit for this admission) that he downloaded most of the material relied upon against him. He argues that it was for research and journalistic purposes (we refer to this below as the "research argument"). O3 also says that he has provided details of other material which is not relied upon against him. In his written evidence he states that he was researching Islamist Extremism to produce 'Films, podcasts and books'.

86. Secondly, he denies downloading certain materials.

O3's written and oral evidence.

87. O3 submitted a very detailed and well-structured witness statement (running to 50 pages) in which he describes his personal background including his time in Country X and arrival in the UK, his schooling and conversion to Islam in 2007 (a year after his brother had converted). We also have a second statement from him concerning certain experiences in Belmarsh.

88. In eloquent terms, O3 describes himself as "individualist" or "neutralist" Muslim and rejects labels such as "moderate" or "extreme" Muslim. In his statement, he says on more than one occasion that he rejects violence as a part of Islam and does not condone the attacks mentioned by the Secretary of State in her evidence. O3 says he regards extremism as a "social cancer".

89. Having studied media at school, O3 explains that he has conducted substantial research on Islam and the Caliphate and the works of scholars who one might regard as extreme. He accepts that certain of the material found on his devices was of an extreme nature but that is the nature of this research. He also accepts he has posed as an extremist online as part of his research.

90. Of some importance to his case is his written evidence that between 2010-2015 he had a large range of what he calls "condensed portfolios" of research including downloads and notes from lectures. He says that when his hard drive crashed in 2015 he lost this material, apart from a few fragments he was able to save. O3 says that the material relied upon by the Secretary of State is just 1% of the material he had stored on his devices and this small set of data has been viewed negatively in the current terror climate. He says that the vast majority of material on his devices was in fact completely innocent.

91. In oral evidence he described his research as being based around Muslim youth subculture and radicalisation, and it was argued on his behalf (and suggested in cross-examination of KG), that those involved in such research may sometimes need to present an image of being involved in a certain life as part of research. The example was also used of hip hop artists who may musically promote a violent gang culture as part of expression but not in fact act violently. This was a kind of "pretending to play the game to understand the game" theory which it is true is sometimes adopted by artists.

92. O3 says he used various social media platforms including Instagram, Twitter and YouTube as a way of discussing, researching and gauging opinion on the Islamic faith. He expressly denies any support or promotion of ISIL and stated that he did not agree that anyone including UK residents should fight for ISIS/ISIL. As we have recorded, his evidence is clear that he is against extremism and violence as part of Islamic doctrine.

93. O3 stood firmly by his statement in cross-examination and specifically his case is that he was involved in scholarly and creative research and that the sole purposes of holding the material were furtherance of such research and media projects.

94. We will give our more specific assessment of his oral evidence below but one important matter is that he admitted in his witness statement that he posted an image on Instagram about the Manchester Arena attack in May 2017 adding the words "u can't pray for a dead kaffir tho lol what millah are you upon O Temple [emoji] theres no "rahmatullah aleyhum" upon them. Allah loves no the kaffireen #facts" to the image". O3 has provided an explanation of this posting for what on its face appears to be supportive of the attack.

95. O3 also said that the surgical blade incident from 2010 arose because his mother, a nurse, had inadvertently brought the blade home and he wished to dispose of it. He was not in fact convicted in relation to this matter because no evidence was offered. As to the driving incident in September 2017, he explained that he is a car enthusiast (referring to material about cars he had downloaded) and he explained to the police he was learning to drive. This was an innocent exercise, on his evidence.

96. As we have indicated above, the Secretary of State argues that O3 has presented the research argument as a "front" for covering his extremist views. As to attack planning, the Secretary of State does not appear to rely any longer upon the blade incident of 2010 but does rely upon the driving incident in September 2017 in support of her case. She also relies upon CLOSED material in support of her case in this regard.

Conclusions on O3's evidence and the national security case.

97. As to our assessment of O3's evidence, we consider him to be an intelligent and articulate person. However, having considered both his written and oral evidence, as well as the downloaded material, we do not consider him to have been a truthful witness. The CLOSED case is also relevant in this regard.

98. We consider the Secretary of State to be correct in her assessment that the research argument presented by O3 is a front for a person who is in fact an Islamist extremist. Specifically, we find that the downloaded material was not obtained by O3 for scholarly or creative purposes but in fact because he is aligned to ISIL. We also find that the items which he denies having downloaded were in fact downloaded by him.

99. There are nine broad matters we rely upon for our conclusions which we will now summarise.

100. First, we start with our finding that, on any analysis, the material O3 accepts having downloaded is a very substantial body of material indicating support for

ISIL and Islamist extremist mindset. He also accepts posting extremist material (some of which was taken down by Instagram).

101. These facts are capable of innocent explanation and rebuttal. Specifically, we accept that a scholar or creative producer *might* have downloaded such material and *possibly* posed as an online extremist for research purposes, but we do not accept that O3 was such a person.

102. That is because there was no material at all to show journalistic or creative purposes. In cross-examination O3 accepted his only relevant qualification in this field was a NVQ level 3 award in media studies; he had no relevant qualifications after school; he had never sought work experience in the journalism sector; he had never contacted newspapers, magazines, film companies, television companies or producers of podcasts to develop his plans; he had never written any film scripts, books or articles; he had never written any drafts outlines or plans; and he had not even kept any notes of his research.

103. Secondly, O3's explanation for his lack of evidence was that his plans were as we understood it all "in his head" and that he wanted to retain creative control (hence no contacts with studios and the like). Yet we find that is inconsistent with his other evidence that he had a high attention to detail and a dedication to cataloguing his work. We find the claim of a crash of his drive in 2015 to be false and there is no explanation why no other research documents for 2016 and 2017 exist, even if there was a prior crash. The 2015 crash is a cover story for the lack of any research material.

104. We do not consider it credible (even in the relative informality of media production and development in the digital age) that O3 was involved in creative or journalistic projects in circumstances where he was unable to produce a single piece of supportive corroborative evidence.

105. Thirdly, turning to his extremist views and focussing at this stage on the Manchester posting (discussed above) O3 accepted in oral evidence that adding "lol" (accepted by him to mean "laugh out loud") in his post about the bombing would be viewed as highly offensive. The only reasonable interpretation of O3's posts is that he was saying that the victims of the attack are not deserving of sympathy. O3's explanation in evidence that he was simply trying to show the theory or philosophy of Islamic law is not credible – "lol" was the one term he failed to deal with in his witness statement.

106. Fourthly, O3 suggested that some of the extremist material on his devices had been suggested to him by algorithm targeting. But we find that this was because he searched for large volumes of such material.

107. Fifthly, the only other explanations for the amount of extreme material he offered were that friends or people he followed online were carrying out searches for large amounts of extremist material and were themselves extremists. This may have led to inadvertent downloading. That explanation does not assist him. It demonstrates his extremist mindset. He was following extremists.

108. Sixthly, O3's reluctance to accept that the picture of a rifle and a London Route Master was designed to encourage attacks in London is also in our view telling. He was prepared to accept that "outside Islam" it would be perceived this way.

109. In our judgment, it is not credible to suggest that within Islam it would be any different. As witness KG correctly noted in cross-examination, whether the image represented a call to arms for an attack in London, or an encouragement to travel for jihad in Syria, it was an extremist document either way. And the suggestion that this was a post originating from 2013/2014 is irrelevant and, in any event, inconsistent with O3's own expert evidence; the second CYFOR report confirms the document was downloaded on 30 July 2017.

110. Seventhly, we also accept witness KG's evidence in OPEN that high levels of dedication would be required to source and find some of the documents held (such as the video of the Jordanian pilot burned alive by ISIL). Certain of this material is only available via the Dark Web. We note O3 does not accept he downloaded this video but we reject that evidence.

111. Eighthly, we reject O3's evidence that he did not download all the material found on his devices. Of specific relevance, he denies downloading the following material:

(i) A document entitled advice for those going to ribat;
(ii) An image of the Paris attackers with the words "JUST TERROR Let Paris be a lesson for those nations that wish to take heed";
(iii) A document discussing the ways in which it is permissible to kill kuffar, or non-believers; and
(iv) A graphic image of James Foley after he had been beheaded.

112. As to the basis of his denial, O3 said this material is "clearly lacking in the scholarly detail … and not typical of the way [O3] conducted his work". As to how it came to appear on his devices, he said others could have downloaded the material and he asserted that this explanation was credible since he had no reasons to admit to most of the material but deny that the remaining was not downloaded.

113. We reject those explanations for the following reasons. O3 accepted that all these documents were of an extremist nature or associated with ISIL. Specifically, the document discussing ways to kill kuffar was accepted to be "definitely" extremist in his own words. O3 accepted in cross-examination that this document was associated with his email address to which no one else had access. He claimed that it might be an automatic or bulk download; but when further pressed that this was inconsistent with his claimed rigour with cataloguing his research, his response was simply to say that "every human being is prone to human error". This is an unconvincing response. So far as the lack of scholarly detail in these items is concerned, it is obvious that much of O3's claimed research involved downloading/ viewing documents of exactly the same nature, with no scholarly credentials. O3 accepted that his mother and brother did not download this material on their shared computer. While accepting that only left him as the downloader, he maintained his denial of ever downloading this material. We also find O3 has every reason to lie about having downloaded these documents. He is seeking to avoid deportation. We are not impressed by the argument that he deserves to be believed in his evidence that he did not download very extreme material because he admits having downloaded other extreme material.

114. Ninth, and finally, in addition to our findings above we rely upon the CLOSED material in rejecting O3's elaborate journalistic façade and accept the simple and inherently more likely explanation that O3 is aligned with ISIL and aspires to carry out attack planning in the UK.

115. We consider the Secretary of State was correct to assess that the downloaded material and his overt acts (the Mercedes driving matter) in the context of historic ISIL based terror attacks justify the assessment that he is an Islamic extremist likely to have been involved in planning an attack and who maintains an aspiration to engage in attack planning.

116. We make this finding relying also upon CLOSED material and conclude that the national security case is made out applying the legal tests set out earlier in this judgment. Specifically, bearing in mind the preventative and precautionary approach, in our judgment the Secretary of State was entitled to conclude that O3 is a danger to national security.

117. Were it relevant, we record we consider that the balance of probabilities test is amply satisfied on the OPEN and CLOSED material so as to support this conclusion, applying a conventional civil proof standard.

118. Finally, we should record that submissions were made to us that if O3 had downloaded material for creative purposes that engaged Article 10 of the ECHR. This interesting point does not arise because it was common ground that if the purpose of O3 was related to an extremist agenda and attack planning (as opposed to creative/journalistic purposes) Article 10 was not relevant.

119. Had it been necessary to consider this matter, in our view a series of Strasbourg cases establishes that expression of extremist views falls outside the scope of Article 10 ECHR. See, for example, <u>Roj TV A/S v Denmark</u> (2018) 67 EHRR SE8.

120. It is well established that speech that is incompatible with the values proclaimed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention. As explained by the Strasbourg Court in the <u>Roj</u> case, the test (when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17) is whether the statements are directed against the Convention's underlying values, for example by stirring up hatred or violence, and whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it": <u>Roj</u>, at [31]. That test would be easily satisfied in this case.

121. The Secretary of State succeeds in her national security case and the next issue that arises is the Refugee Convention exclusion issue.

V. <u>The Refugee Convention</u>

122. When deciding to refuse O3's asylum claim, the Secretary of State concluded that he was excluded from the protection of the Refugee Convention because his

actions fell within Article 1F(c) or because Article 33(2) applied to him on grounds of national security. Further to this conclusion, the Secretary of State issued a certificate under section 55 of the 2006 Act certifying that O3 was not entitled to the protection of Article 33(1) of the Refugee Convention.

123. As we have already explained, the legal effect of this certificate is that the Commission must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate: section 55(3) of the 2006 Act. If the Commission agrees with those statements it must dismiss O3's asylum appeal before considering any other aspect of the case: section 55(4) of the 2006 Act.

124. We have set out the legislative provisions relevant to the exclusion issue above. The exclusion provisions in Article 1F have been considered in numerous CJEU and domestic authorities and ultimately there was no real dispute of law in relation to the principles, which we summarise below.

125. The starting point is Al-Sirri v. Secretary of State for the Home Department [2012] UKSC 54, [2013] 1 AC 745, at [16], where the Supreme Court held that Article 1F should be interpreted restrictively and applied with caution, and that there should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security". We will return to Al-Sirri below because it contains further important guidance.

126. Focussing on the specific matters which we need to resolve in this appeal, in our judgment the relevant principles governing the approach to Article 1F(c) are as follows:

(i) It is not necessary for the acts relied upon as engaging Article 1F(c) to be either completed or attempted terrorist acts, nor is it necessary for it to be shown that the acts in question constitute a crime or crimes in international law: Youssef v Home Secretary [2019] QB 445, at [74]; Case C-573/14 Commissaire general aux refugies et aux apatrides v Lounani [2017] 2 CMLR 36, at [79].

(ii) This is consonant with section 54(1) (a) and (b) of the 2006 Act, which expressly provide that the "acts" under article 1F(c) do not need to amount to either an actual or inchoate offence. Even an inchoate offence would not require there to have been a completed or attempted crime.

(iii)The purposes and principles of the United Nations against which the acts in question fall to be tested can be derived from United Nations Resolutions: Yousseff, at [55]; Lounani, at [45]. These Resolutions include express statements that the planning of terrorists acts is contrary to the purposes and principles of the United Nations. We refer in this regard to the finding of the Commission in N2 v SSHD (1 December 2016, unreported, SC/125/2015), in which N2 was found to have been planning terrorist acts, without it being demonstrated that he had been involved in the commission, preparation or instigation of an act of terrorism. See also, Lounani at [48], [49], [66] and [70].

(iv)Acts which are designed to induce terror in the civilian population or put extreme pressures upon a government are capable of affecting international peace and security, and thus satisfying the need for the acts in question to have an international dimension: Al-Sirri at [38]-[40] and Youseff, at [83].

(v) It is necessary in all cases to undertake an assessment of the specific facts in question: Lounani, at [72] and Al-Sirri, at [75].

(vi) In Al-Sirri, the Court drew the following conclusions in respect of the approach to take to the evidence:

> "(1) serious reasons" is stronger than "reasonable grounds".
> (2) The evidence from which those reasons are derived must be "clear and credible" or "strong".
> (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker.
> (4) The decision-maker need not to be satisfied beyond reasonable doubt or to the standard required in criminal law.
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he has done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of Convention (and the Directive) in the particular case".

(vii) The assessment of whether a person should be excluded from the protection of the Convention under Article 1F is not conditional on an assessment of proportionality in any given case: Federal Republic of Germany v B (Joined Cases C-57/09 and C-101/09) [2012] 1 WLR 1076, at [106]-[111]. See, also, AH (Algeria) v Secretary of State for the Home Department [2016] 1 WLR 2071:

> "20...article 1 of the Convention is a definition section. In the administration of the exclusion provisions in article 1C, D and E the decision-maker is required to decide only matters of objective fact. Once he has ascertained the facts, he applies the exclusion or not, as the case dictates. He is not called on to evaluate the individual's merits in light of the ascertained facts. The drafters must surely have intended article IF to be of a piece with this-ejusdem generis".

127. We now turn to the application of these principles on the facts.

Article 1F(c)

128. As explained above, we have concluded that the Secretary of State was entitled to assess that O3 is likely to have been involved in planning a terrorist attack in the UK and maintains an aspiration to engage in attack planning. She was also entitled to assess O3 to be an Islamist extremist, aligned with ISIL. Contrary to the submissions made to us on behalf of O3, the assessment was not simply that he has aspirations to act. Rather, it is that O3 is also likely to have been involved in actually planning to act.

129. For the reasons set out above by us in relation to the national security case, and in CLOSED, there is in our judgment clear, credible, and strong evidence on the basis of which we conclude that O3 did undertake this planning, and that he had aspirations to undertake Islamist extremist activity in the UK. It is not necessary, as O3's Leading Counsel accepted, for the Secretary of State to demonstrate that the Appellant has committed an actual inchoate criminal offence.

130. It is notable, in this regard, that in Yousef, the Court of Appeal drew particular attention to the Security Council having passed Resolution 2178 (2014), which stated, *inter alia*, as follows:

"*Expressing grave concern* over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a state other than their states of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and resolving to address this threat..."

Expressing particular concern that foreign terrorist fighters are being recruited by and are joining entities such as Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other calls, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), recognising that the foreign terrorist fighter threat includes, among others, individuals supporting acts or activities of Al-Qaida and its cells,affiliates, splinter groups, and derivative entities, including by recruiting for or otherwise supporting acts or activities of such entities, and stressing the urgent need to address this particular threat, ...

Calling upon states to ensure, in conformity with international law, in particular international human rights law and international refugee law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, including by foreign terrorist fighters...."

131. We note that the Court of Appeal described the Resolution as being "very direct in its call to action" (at [84]).

132. In our judgment, it supports and reinforces the Secretary of State's submission that by reason of O3's alignment with ISIL and the assessment that he is an Islamist extremist, the attack planning that he is assessed to have likely undertaken involves: (a) the necessary international dimension, and (b) the level of gravity or seriousness (given the likely causalities involved in any such attack), so as to be contrary to the purposes and principles of the United Nations.

133. Accordingly, there are serious reasons for considering that O3's planning was likely to relate to acts which were intended to induce terror in the civilian population or put extreme pressures upon the government. Article 1F(c) applies to O3.

Article 33(2)

134. The certificate issued by the Secretary of State under section 55 was alternatively made on the basis that Article 33(2) applies to O3 on grounds of

national security. That is, that there are in any event reasonable grounds for regarding O3 as a danger to the security of the United Kingdom. The Secretary of State relies upon essentially the same matters as above in submitting that the requirements of Article 33(2) (which import the lower test of "reasonable grounds", see Al-Sirri at [75]) are met.

135. If we are satisfied that such reasonable grounds exist, it follows that O3's asylum appeal must be dismissed: see section 55(4) of the 2006 Act. This did not seem to be in dispute in the submissions addressed to us on behalf of O3 and we accordingly say nothing further on this issue.

Substantive refugee status and Article 3 ECHR

136. Although the Refugee Convention claim on substantive grounds is not in issue for the reasons set out above, we received detailed argument and evidence on this issue and have considered the material. The grounds for the Article 3 ECHR claim also mirror the Refugee Convention claim. Our factual reasoning in relation to these two matters is in the CONFIDENTIAL ANNEXE but we set out below our summary of the main legal principles applied in coming to our conclusions that substantive Refugee Convention and Article 3 ECHR claims fail on the merits.

137. The test for qualifying for refugee status under the Refugee Convention is well-known: O3 must demonstrate a well-founded fear of persecution for a Convention reason, as a result of which he is outside his country of nationality and unable or unwilling to avail himself of its protection. Three particular points in the case law are relevant to the present appeal:

(a) The burden is on an asylum-seeker to make out his claim for protection under the Refugee Convention: Aziz v. Secretary for the Home Department [2003] EWCA Civ 118.

(b) In terms of the standard of proof, what has to be demonstrated is "*a reasonable degree of likelihood*": R v. Secretary of State for the Home Department, ex parte Sivakumaran [1988] 1 AC 958, *per* Lord Keith at 994F. In that case, Lord Keith approved, at 995B, the use of phrases "*a reasonable chance*", "*substantial grounds for thinking*" or "*a serious possibility*" in R v. Governor of Pentonville Prison, ex parte Fernandez [1971] 1 WLR 987, *per* Lord Diplock at 994. Lord Templeman referred to an entitlement to asylum unless there was "*no real and substantial danger of persecution*": Sivakumaran, at 996F. A "*reasonable chance*" has also been contrasted with a "*fanciful risk*": MH (Iraq) v. Secretary of State for the Home Department [2007] EWCA CIV 852, *per* Laws LJ at [22].

(c) In evaluating future risk, the approach to evidence is a holistic one, which gives each piece of evidence the weight it deserves: Brooke LJ in Karanakaran v. Secretary of State for the Home Department [2003] 2 All ER 499, at [102-104] and Sedley LJ [18]. There is a need to take into account, in a classic public law sense, all relevant material and accord to it the weight which the Commission, viewing matters in the round and in the exercise of its expert judgment, considers appropriate.

138. As to Article 3 ECHR, we have set out above the case law which establishes that it is for O3 to show that there are *substantial grounds* for believing there is a *real risk* of treatment contrary to Article 3.

VI. Article 8 ECHR

139. The factual part of this aspect of the appeal is addressed in the CONFIDENTIAL ANNEXE. As to the law, we have applied the approach in Razgar v Secretary of State for the Home Department [2004] 2 AC 368 at [17] and AU v Secretary of State for the Home Department [2020] 1 WLR 1562 in deciding the Article 8 ECHR claim fails on the facts. The national security considerations justify such interference as we have found with O3's Article 8 ECHR rights.

VIII. Conclusion

140. For the above reasons and those in the CONFIDENTIAL ANNEXE and CLOSED judgment, O3's appeal is dismissed.