SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/180/2021
Hearing Date: 12th & 13th October 2022
Date of Judgment: 15th November 2022

Before

THE HONOURABLE MRS JUSTICE STEYN DBE
UPPER TRIBUNAL JUDGE ALLEN
SIR ANDREW RIDGWAY

Between

D9

Applicant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Anthony Vaughan and Mr Donnchadh Greene (instructed by **Duncan Lewis**) appeared on behalf of the Appellant

Cathryn McGahey KC and Natasha Barnes (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Martin Goudie KC and David Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

OPEN JUDGMENT OF THE COMMISSION:

Introduction

1. The Applicant, "D9", is a national of Afghanistan. He entered the UK in 2001, then aged 22 years old, and claimed asylum on 20 May 2001. His claim was refused on 21 July 2001, but he was granted exceptional leave to remain for four years and then, on 22 November 2005, he was granted indefinite leave to remain. D9's wife and six children (aged between 17 and 6 years old) are also Afghan nationals; and they have lived in Afghanistan throughout, save to the extent that D9's wife was living in Pakistan when their eldest child was born. D9 has lived in the UK since 2001, visiting his family in Afghanistan frequently during the last ten years, often for several months at a time.

2. D9 last left the United Kingdom on 31 December 2019. Due to the Covid-19 pandemic he remained in Afghanistan longer then he had initially intended. On 18 December 2020, the Secretary of State for the Home Department personally directed that D9 should be excluded from the United Kingdom "on grounds of national security on the basis that your presence in the UK is not deemed conducive to the public good" ('the exclusion decision'). The underlying reason given is that it is assessed that D9 has an "Islamist extremist mindset", presenting a risk to national security which is best protected by denying him access to the United Kingdom. The decision was certified by the Secretary of State under s.2C of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') so that any legal challenge is heard by the Commission.

3. D9 applies pursuant to s.2C of the 1997 Act for review of the decision to exclude him. He contends that:

    1) The exclusion decision is procedurally unfair because (a) the Secretary of State acted unfairly in failing to afford D9 an opportunity to make representations prior to reaching her decision; and (b) if and to the extent that the Secretary of State placed decisive or substantial reliance on parts of the port stop interview records that D9 disputes, without giving him an opportunity to comment on them. **(Ground 1: procedural unfairness)**

    2) The exclusion decision is irrational because (a) the Secretary of State failed to make due enquiry by asking D9 questions in relation to the definition of "extremism" in the guidance entitled *Exclusion from the UK*; (b) the finding that D9 had an Islamist extremist mindset and that any ground to exclude applied was irrational; (c) the conclusion that D9 posed a risk to national security was irrational; and (d) if and to the extent that the Secretary of State relied on any information or intelligence that may have been obtained by torture, such information was unreliable and the Secretary of State erred in taking it into account. **(Ground 2: irrationality)**

    3) The exclusion decision directly discriminated against D9 on the grounds of his religion and/or belief as a Salafist Muslim, a quietest Salafist Muslim and/or because of his belief in a conservative interpretation of Islam, contrary to sections 10, 13(1) and 29(6) of the Equality Act 2010. **(Ground 3: Direct discrimination)**

4) The exclusion decision may have indirectly discriminated against D9 contrary to sections 19 and 29(6) of the Equality Act 2010, as the policy of and/or approach taken by the Secretary of State may have a disproportionately prejudicial effect on quietest Salafis. **(Ground 4: Indirect discrimination)**

5) The exclusion decision breaches D9's right to private and family life under article 8 of the European Convention on Human Rights. **(Ground 5: Article 8 ECHR)**

Although we have addressed the grounds below in the order in which they were pleaded, we have borne in mind that the Applicant has put Ground 2 (particularly 2(a) and (b)) at the forefront of both his written and oral submissions.

4. Insofar as it is possible to do so, without damaging the interests of national security, we address the Applicant's claim in this OPEN judgment. We are handing down a CLOSED judgment at the same time which contains additional reasoning which we do not consider can be disclosed without damaging the interests of national security.

5. The letter of 18 December 2020 also contained a decision to cancel the Applicant's indefinite leave to remain in the United Kingdom. That decision is the subject of a separate judicial review claim filed in the Administrative Court (CO/1035/2021).

6. We had the benefit of excellent written and oral submissions from Counsel for the Applicant and for the Secretary of State in OPEN, and from the Special Advocates and Counsel for the Secretary of State in CLOSED, for which we are most grateful.

Preliminary point

7. In his skeleton argument, the Applicant submitted that as the Secretary of State's OPEN case against him is based solely on her assessment of his mindset, it would be impermissible under the common law for the Secretary of State to advance a CLOSED case which is wider than "mindset", without the Applicant first having been given notice of, and depending on the circumstances, the gist of, that case.

8. The Secretary of State has not confirmed or denied whether the CLOSED case against D9 is based solely on her assessment of his mindset, but she contests the point as a matter of principle. Disclosure of the detail of the reasons for exclusion is not required where disclosure of those reasons would be contrary to national security: *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), [2014] Imm AR 32, Ouseley J at [29] and [71] and rule 4 of the Special Immigration Appeal Commission Rules 2003. There has been a thorough rule 38 process and D9 has been provided with all reasons that can be disclosed to him without damaging national security. In this context there is no irreducible minimum of information that must be disclosed to an applicant for review, irrespective of the harm that such disclosure may do to national security.

9. In his oral submissions, leading Counsel for the Applicant, Mr Vaughan, acknowledged that in light of the authorities the Commission would be bound to find against him on this point. He did not seek to argue the point but reserved the right to raise it in the event of an appeal.

Legal framework

10. The Secretary of State's power to direct that a foreign national should be excluded from the United Kingdom is derived from the prerogative. Section 3(1) of the Immigration Act 1971 states:

> "Except as otherwise provided by or under this Act, where a person is not a British citizen –
>
> (a) He shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act."

11. Where the Secretary of State has personally directed that a person should be excluded from the United Kingdom that person must be refused leave to enter the United Kingdom: see paragraph 9.2.1 of the Immigration Rules.

The Guidance

12. Version 3.0 of the guidance entitled "Exclusion from the UK" ('the Guidance') was published on 8 October 2020 and in effect when the exclusion decision was made. The Guidance makes clear that an "exclusion decision or exclusion order should only be made in respect of a person who is believed to be outside the UK". The Guidance provides:

> **"Grounds for exclusion**
>
> This page tells you about the types of cases where the use of exclusion is appropriate.
>
> Exclusion of a person from the UK is normally used in circumstances involving national security, criminality, international crimes (war crimes, crimes against humanity or genocide), corruption and unacceptable behaviour.
>
> **National security**
> National security threats will often be linked to terrorism. Terrorist activities are any act committed, or the threat of action designed to influence a government or intimidate the public, and made for the purposes of advancing a political, religious or ideological cause and that:
>
> - involves serious violence against a person
> - may endanger another person's life
> - creates a serious risk to the health or safety of the public
> - involves serious damage to property
> - is designed to seriously disrupt or interfere with an electronic system
>
> ...
>
> **Extremism**
>
> In October 2015 the Government published its Counter-Extremism Strategy, which contains a commitment to make it more explicit that the criteria for exclusion on the

grounds of unacceptable behaviour include past or current extremist activity, either here or overseas. A person who has previously engaged in unacceptable behaviour may still be considered for exclusion, if their views were particularly abhorrent, even if they have since publicly retracted those views and have not re-engaged in such behaviour.

..."

13. The definition of extremism which is contained in the Secretary of State's Counter-Extremism Strategy dated October 2015 ('the 2015 Extremism Definition'), and referenced in the section of the Guidance quoted above, is as follows:

> "Extremism is the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs. We also regard calls for the death of members of our armed forces as extremist."

14. The Guidance also addresses the approach to decision-making concerning children:

> **"The best interests of the child**
>
> The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of a child under the age of 18 in the UK, together with Article 3 of the UN Convention on the Rights of the Child means that consideration of the child's best interests must be a primary consideration in immigration decisions affecting them. ...
>
> Although the duty in section 55 only applies to children in the UK, the statutory guidance – Every Child Matters – Change for Children – provides guidance on the extent to which the spirit of the duty should be applied to children overseas. You must adhere to the spirit of the duty and make enquiries when you have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention. ..."

Equality Act 2010

15. Part 2 of the Equality Act 2010 ('EA 2010') sets out the key concepts on which the Act is based, including the "protected characteristics" to which it applies. Section 10 of the EA 2010 provides, so far as material:

> "(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> (3) In relation to the protected characteristics of religion or belief –
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to person who share a protected characteristic is a reference to persons who are of the same religion or belief."

16. The EA 2010 prohibits direct and indirect discrimination. Section 13(1) provides:

"**Direct discrimination**
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Section 19 provides, so far as material:

"**Indirect discrimination**

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

...

religion or belief; ..."

17. Part 3 of the EA 2010 makes it unlawful to discriminate against a person when providing a service or when exercising a public function. Section 29 provides, so far as material:

"(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

...

(9) In the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the meaning of the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom.

(10) Subsection (9) does not affect the application of any other provision of this Act to conduct outside England and Wales or Scotland."

18. There are specific exceptions in Schedule 3 (which is given effect by s.31(10)). Paragraphs 15A and 16-18 of Schedule 3 provide certain exceptions to s.29 in respect of the protected characteristics of age, disability, nationality and ethnic or national origins and religion or belief, respectively. However, the Secretary of State does not contend that the exclusion decision falls within paragraph 18 of Schedule 3 (which relates to religious or belief-related discrimination) or any other specific exception.

19. Part 14 of the EA 2010 contains general exceptions. Section 192 provides:

"A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose."

20. Section 217 of the EA 2010 addresses the extent of the Act, making clear that it forms part of the law of England and Wales, that with some exceptions it also forms part of the law of Scotland and that certain of its provisions extend to Northern Ireland.

21. The Explanatory Notes to the EA 2010 explain that in relation to the non-work provisions, the Act is "generally silent on territorial application, leaving it to the courts to determine whether the law applies. However, in a limited number of specific cases, express provision is made for particular provisions of the Act to apply (or potentially apply) outside the United Kingdom".

The Special Immigration Appeal Commission Act 1997

22. Section 2C of the 1997 Act states:

"**Jurisdiction: review of certain exclusion decisions**
(1) Subsection (2) applies in relation to any direction about the exclusion of a person from the United Kingdom which –
(a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the person is conducive to the public good,
(b) is not subject to a right of appeal, and
(c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public –
(i) in the interests of national security,
...
(2) The person to whom the direction relates may apply to the Special Immigration Appeals Commission to set aside the direction.
(3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.
(4) If the Commission decides that the direction should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings.
(5) References in this section to the Secretary of State are to the Secretary of State acting in person."

The exclusion decision

23. On 3 December 2020 the Security Service (otherwise known as 'MI5') sent the Special Cases Unit its assessment that D9 should be excluded from the United Kingdom, and have his indefinite leave to remain revoked, on the basis that his exclusion was conducive to the public good on grounds of national security. The OPEN Security Service assessment states:

> **"Key Assessments**
>
> A. MI5 assesses that [D9] has an Islamist extremist mindset.
>
> ...
>
> **Future Risk**
>
> 1. [D9]'s Islamist extremist mindset presents a risk to national security. National security is best protected by denying such individuals access to the UK."
>
> **Conclusion**
>
> 2. Accordingly MI5 recommends that [D9] should have his Indefinite Leave to Remain (ILR) revoked, and be excluded from the UK on the basis that exclusion is conducive to the public good on grounds of national security."

24. On 10 December 2020 a Ministerial Submission recommended that the Secretary of State exclude D9 from the United Kingdom "on the grounds that his presence in the UK is not conducive to the public good for reasons of national security". A copy of the Security Service's assessment of 3 December 2020 was attached as Annex A to the Ministerial Submission.

25. The OPEN Ministerial Submission states:

> **"Background and Immigration History**
>
> 1. **[D9] is an Afghan national who claimed asylum in the UK on 20 May 2001. On 21 July 2001 his asylum claim was refused but he was granted Exceptional Leave to Remain for four years as he could not be returned to Afghanistan due to fear of persecution. On 22 November 2005 he was granted ILR.** He has resided in the UK since 2001 but in recent years has frequently returned to Afghanistan to visit. In the last five years [D9] has travelled several times to Afghanistan. He has been out of the UK for a number of months before returning.
>
> 2. A comprehensive referral of [D9]'s case was received by the SCU on 3 December 2020, recommending that [D9]'s ILR should be revoked and that he should be excluded from the UK on the basis that his exclusion is conducive to the public good on grounds of national security. The full national security case can be found at Annex A.
>
> **Discussion**

Exclusion consideration

3. **MI5 has provided an intelligence case attached at Annex A in which they assess [D9] as having an Islamist extremist mindset.**

4. **MI5 assesses that [D9] has an Islamist extremist mindset. MI5 recommends that [D9] presents a risk to national security. National security is best protected by denying such individuals access to the UK.**

5. **The SCU assess that if [D9] is allowed to re-enter the UK he would pose a serious threat to the UK's national security due to his extremist mindset, and that excluding him is the most effective way to mitigate the threat he poses.** In light of this SCU assess that excluding [D9] from the UK would significantly reduce the risk he poses to the UK's national security. It is therefore considered that excluding [D9] is conducive to the public good.

Other options considered

ECHR considerations

6. **[D9] has lived in the UK (on and off) for nineteen years. In any challenge against his exclusion [D9] may seek to raise ECHR Article 8 grounds (right to respect for family and private life), however we assess that his Article 8 rights would not be engaged as he would be outside the relevant jurisdiction.** Furthermore, Article 8 is a qualified right, not an absolute one, and in certain circumstances interference in this right in the interest of public security is expressly permitted by ECHR legislation provided that the interference is deemed proportionate. The Home Office consider it likely that any interference with their Article 8 rights would be justified and proportionate (although any claim would need to be considered on the facts) bearing in mind the threat [D9] poses. We therefore consider his exclusion to be an entirely proportionate action." (Original emphasis.)

The OPEN evidence

26. In addition to the exclusion decision and the OPEN Ministerial Submission, there is an OPEN national security statement which states:

"National Security Case

A. MI5 assess that [D9] has an Islamist extremist mindset.

1. During a ports interview with police on 27 February 2014, [D9] explained his thoughts on American and British troops in Afghanistan, stating that "... it was time the Western troops pulled out of Afghanistan" as he believed that the troops "gave radical clerics and leaders excuses to cause bloodshed". The reporting further indicates that [D9] stated that he was a supporter of President Hamid KARZAI, but that "...the government could not be trusted as it had elements of the Taliban and other Mujaheedin groups present within them". [D9] also acknowledged that he was aware of Ahmad Shah MASSOUD, who [D9] stated was "... a great figure for Afghanistan and had fought to bring peace to Afghanistan." He believed MASSOUD was a good person, and was aware that he was a Mujahideen

fighter and a member of Jamiet-I-Islami, who had fought against and captured many Taliban members.

In a recent port intelligence report dated 22 March 2019, [D9] indicated that he is opposed to ISIL's acts of violence and atrocities. In that interview, [D9] stated he opposed British foreign policy in Afghanistan; he specified that the government the UK is supporting in Afghanistan is corrupt and unjust, and that crimes are often not investigated nor punished. [D9] stated that he had lived under Taliban rule, and there were "... problems with this it was peaceful and there was less crime". He believed that the corruption and injustice cause people to join groups like Daesh or ISIS to fight against the Afghan government, and without this, ISIS and the Taliban would lose members. [D9] further stated that he does not understand why ISIS and other groups would commit atrocities around the world and does not know anyone with the groups."

27. Following the rule 38 process, the Secretary of State disclosed, very largely as exculpatory evidence, four port stop interview records, dated 5 February 2002, 27 February 2014, 28 June 2017 and 22 March 2019.

28. D9 has filed a witness statement, a report from Professor Robert Gleave, a Professor of Arabic Studies at the University of Exeter, and a report from Mr Tim Foxley MBE, who has been studying Afghanistan since 2001.

Ground 1: Procedural unfairness

1(a) Alleged failure to give an opportunity to make representations prior to the decision

29. D9 had no prior warning that the Secretary of State was considering excluding him from the United Kingdom and no opportunity to make representations before that decision was made. He was not provided with the OPEN first national security statement or the port stop interview records before the exclusion decision was made, and so he had no opportunity to comment on them.

30. The Applicant submits that the Secretary of State acted unfairly in failing to give him prior notice that she was minded to exclude him, failing to provide him with the OPEN first national security statement and port stop interview records, and failing to give him an opportunity to make representations before she made her decision. He relies on *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39, [2014] AC 700, Lord Sumption [31].

31. He draws attention to the representations that he has been able to make in these proceedings as demonstrative of the matters that he would have been able to draw to the Secretary of State's attention if he had been notified that she was considering excluding him and been provided with the material that, following the rule 38 process, he has been provided with. Among other matters, in his witness statement D9 has (i) drawn attention to aspects of the port stop interview records which he says do not accurately record what he said, and he has given his account of what he said; (ii) responded to the allegation that he has an Islamist extremist mindset; (iii) responded to the allegation that he poses a threat to UK national security; and (iv) described his contacts and relationships with various individuals. In addition, he has adduced a report from Professor Robert Gleave, a Professor of Arabic Studies at the University of Exeter, who has reviewed the OPEN material, conducted an interview with D9

(via telephone), and provided his view that D9 is a "quietest" Salafi Muslim who does not exhibit an Islamist extremist mindset, indeed Professor Gleave considers D9's views are "the opposite of the Home Office definition of Islamist extremist". In addition, D9 relies on the report of Mr Tim Foxley MBE, who has been studying Afghanistan since 2001, as showing that D9's comments regarding corruption in Afghanistan were justified.

32. Mr Vaughan contends that it is no answer that the Secretary of State may have wished to ensure that D9 could not stymie any decision to exclude that she might make by re-entering the United Kingdom on being notified that she was minded to exclude him. He drew attention to the terms of the Authority to Carry Scheme which include the statement that:

> "Authority to carry to the UK may be refused in respect of the following person:
> ...
> (e) Third country nationals who have been excluded from the UK by the Secretary of State, or in relation to whom the Secretary of State is in the process of making an exclusion decision, under rule 320(6) of the immigration rules;"

33. So, Mr Vaughan submits, the Secretary of State could have notified D9 that she was minded to exclude him and added him to the 'No Fly List' while she was in the process of receiving his representations and making her determination. Indeed, it is apparent from the Ministerial Submission of 10 December 2020 that Home Office officials added D9's details to the No Fly List prior to the exclusion decision "on the basis that you (Home Secretary) are in the process of making a decision on exclusion, making him an individual to whom the Authority to Carry Scheme (ATC) applies".

34. Mr Vaughan submits that the port stop interview records show that D9 was never asked questions going to the elements of the 2015 Extremism Definition, that is, whether he is vocal or active in opposing democracy, the rule of law, individual liberty, mutual respect and tolerance of different faiths and beliefs (or any other fundamental values of the UK), or whether he calls for the death of members of the British armed forces. He also submits that D9 required an interpreter when interviewed during the port stops and insofar as anything in those records was treated as inculpatory (rather than exculpatory) it was unfair to rely on it.

35. The Secretary of State submits there was no unfairness in failing to give D9 an opportunity to make representations prior to the decision in this case. As a general principle the Secretary of State contends fairness does not require consultation in advance of making an exclusion decision. She was under no legal requirement to provide him with a 'minded to' letter before deciding to exclude him. Nor can any such requirement be found in the Guidance. In the context of an exclusion decision, where the individual is by definition outside the UK at the time, and any form of notification to the individual will often be impracticable, and the individual would then be alerted to an opportunity to defeat the proposed exclusion by returning to the UK, to the detriment of national security, fairness does not require the individual to be given an opportunity to make representations. Although the port stop interview records were disclosed following the rule 38 process, as the Commission observed in *L3 v Secretary of State for the Home Department* (SC/144/2017) at [75]:

> "There is no unfairness if the information is initially withheld in the genuine belief that disclosure would be damaging to the interests of national security but is then subsequently

disclosed – see *Farooq v Secretary of State for the Home Department* (SN/7/2014 and SN/8/2014)."

36. Finally, the Secretary of State submits that this case is akin to *R (ALO) v Secretary of State for the Home Department* [2022] EWHC 2380 (Admin) in which Swift J rejected a claim that the lack of opportunity to make representations prior to a decision to refuse entry clearance to a former interpreter for the British forces in Afghanistan, and his family, was unfair on the basis that no effective opportunity could have been given because the nature of the evidence that weighed against the application could not be disclosed to him.

37. There is no statutory requirement, nor any requirement under the Guidance, for a person who the Secretary of State is considering excluding to be given notice of that fact, the reasons for it, and an opportunity to make representations. The question is: what does the common law require in this case? The common law requirements of procedural fairness are context-specific. Lord Mustill addressed the applicable principles in *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531 at 560D-G. We note, in particular, his observations that:

> "(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to securing its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

38. In this case, the exclusion decision is clearly one by which D9 is adversely affected. He had been living in the United Kingdom for 19 years (albeit he had also spent significant periods during that time in Afghanistan). He had the benefit of indefinite leave to remain in the United Kingdom. That was an important right of which he was inevitably deprived as a consequence of the exclusion decision. We recognise that an opportunity to make representations before a decision that adversely affects a person is made is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information, and that it is properly tested, and such an opportunity is important in avoiding the sense of injustice that a person who has had no opportunity to be heard is bound to feel.

39. We accept that there may be practical difficulties in exclusion cases, where the subject of the decision will inevitably be abroad, in providing such an opportunity. But the possibility that an individual *may* not be able to avail themselves of the opportunity to make representations does not, in our view, mean that fairness does not require the Secretary of State to seek to provide such an opportunity. In this case, if a 'minded to' letter had been sent to D9's home address in the United Kingdom it is likely that it would have come to his attention in Afghanistan, just as the notice of exclusion reached him.

40. We consider that there is more force in the Secretary of State's concern that an individual who is alerted that the Secretary of State is considering excluding them may take the opportunity, before the decision is made, to return to the United Kingdom, to the detriment of national security. D9 has given evidence regarding the unsuccessful attempt he made to return to the

United Kingdom after he had been notified of the exclusion decision. It would be possible, as the Applicant submits, for such an individual to be put on the 'No Fly List', making it more difficult for them to return to the United Kingdom. Nevertheless, we accept that it is possible to enter the United Kingdom by other means, and it is likely to be more difficult to do so once an exclusion decision had been made (and leave cancelled). That is an important part of the context in circumstances where the Security Service's assessment was that the risk to national security posed by D9 could best be mitigated by preventing him returning to the United Kingdom.

41. In the final analysis, we consider that fairness did not require D9 to be given an opportunity to make representations before the decision was made because, as Swift J observed in *ALO* at [42]:

> "A legal requirement for a decision-maker to give notice of a proposed decision to permit the person who would be affected to make representations that the proposed decision should not be made, presupposes that an opportunity to make representations would be an effective opportunity – i.e., the person would have the chance to understand the reason for the proposed decision and make representations that engaged with those reasons. The Claimants rely on the judgment of the Supreme Court in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700. However, that decision does not make good the submission that the Claimants make in this case. On the facts before it in *Bank Mellat,* the Supreme Court (per Lord Sumption at paragraphs 28-37) concluded that prior notice of an order imposing sanctions pursuant to the provision of the Counter-Terrorism Act 2008 should have been given. Nevertheless, the Court accepted that this was not the consequence of any common law rule, and that no such obligation could arise if it would require disclosure (whether implicit or explicit) of secret intelligence material (see the judgment at paragraph 31)."

42. In this case, the nature of the evidence that weighed in favour of excluding D9 was such that it could not be disclosed to him since to do so would have risked damage to the interests of national security. We acknowledge that in the course of these proceedings, with the involvement of the Special Advocates, the port stop interview records were disclosed and the OPEN national security statement was amended. However, we do not consider that it was unfair that those records, which were disclosed primarily as exculpatory material, were only disclosed in the course of these proceedings: *L3 v Secretary of State for the Home Department* (SC/144/2017) at [75]. We have addressed this ground further in our CLOSED judgment.

1(b) Alleged unfair reliance on the port stop interviews

43. The Applicant submits that it was, in any event, unfair to place any reliance on the port stop interview records given that they were conducted without an interpreter. In his statement D9 has indicated those comments which have been attributed to him which he disputes saying. The Secretary of State maintains that she has not acted unfairly in her approach to the port stop interview records, for reasons she has given in CLOSED.

44. D9 had been living and working in the United Kingdom since 2001. On the face of the port stop interview records the only reference to his ability to converse in English is in the 2014 record where it states:

"The subject has language skills and spoke Farsi and obviously English in which the Examination was conducted."

45. There is nothing on the face of the port stop interview records that would indicate he had difficulty speaking in English. Nor has D9 given evidence that he had any such difficulty. He has stated that there was no interpreter, but not that he needed one. In submissions, the Applicant states that all conferences with his solicitor "have needed to take place using an interpreter", but there is no evidence to this effect. In any event, decisive or substantial weight had not been placed on the comments that are disputed. The port stop interview records were primarily disclosed as exculpatory documents and, as we explain further in CLOSED, there has been no unfairness in the approach the Secretary of State took to them.

Ground 2: Irrationality

2(a) Alleged failure to make due enquiry

46. The Applicant submits that before the Secretary of State could conclude that he had an Islamist extremist mindset she should have taken reasonable steps to inform herself of D9's mindset, as required by the *Tameside* principle.

47. Mr Vaughan drew our attention to *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 in which Underhill LJ, giving the judgment of the Court of Appeal, held at [70]:

> "The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, paras 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

Mr Vaughan placed particular emphasis on the sixth principle.

48. The Applicant submits the Secretary of State could not reasonably decide to exclude him without first making due inquiry of D9 himself regarding key aspects of his mindset in relation to each of the matters listed in the 2015 Extremism Definition. If he had been questioned by reference to that definition, the Secretary of State may have concluded, as Professor Gleave did in his report, that "D9's views are the opposite of the Home Office definition of Islamist extremist". The statements, acts or omissions of D9 on which Professor Gleave based his view are set out in detail at paragraph 4.1 of his report. In addition, the Secretary of State ought reasonably to have known, before concluding that D9 had an Islamist extremist mindset, that the vast majority of Salafists are non-violent, many are non-political and only a tiny minority are violent extremists.

49. The Secretary of State submits D9 has been subject to extensive questioning on his political and religious beliefs, including at port stops on 27 February 2014 and 22 March 2019. It was not necessary to ask further specific questions about the 2015 Extremism Definition. The exclusion decision was taken on the basis of the risk D9 posed to national security. The Secretary of State was entitled to consider that she had sufficient material before her on which to conclude that D9 should be excluded from the UK on grounds of national security. Moreover, the Secretary of State submits that a further interview once D9 had left the United Kingdom was impractical and, in any event, self-serving answers to further questions by reference to the 2015 Extremism Definition could only be given limited weight.

50. In our judgment, having regard to all the material that was before the Secretary of State, it cannot be said that no reasonable minister could have been satisfied on the basis of the inquiries made that they possessed the information necessary to make the decision. D9 had, in fact, been questioned extensively regarding his political and religious beliefs, including during a 3 hour examination on 22 March 2019.

2(b) Alleged irrational finding of grounds for exclusion under the Guidance

51. The Applicant submits that there is no sustainable basis on the OPEN material for the Secretary of State's conclusion that any of the six grounds for exclusion identified in the Guidance ("national security", "criminality", "international crimes", "corruption", "extremism" and "unacceptable behaviour") applied. Consequently, the Secretary of State's decision was in breach of her policy.

52. More broadly, under this head, Mr Vaughan put forward his substantive case that the exclusion decision was irrational. The port stop interview records that have been disclosed are incapable of founding a rational conclusion that D9 had committed or posed a threat of committing any "terrorist activities" as defined in the Guidance, such as to satisfy the "national security" ground. With respect to the "extremism" ground in the Guidance, the Applicant submits there is, again, nothing in the OPEN material capable of founding a rational conclusion that he holds or has expressed extremist views, has "vocally" or "actively" opposed "our fundamental values", or has engaged in extremist activity, whether in the United Kingdom or overseas.

53. Insofar as this ground is based on a failure to comply with the Guidance, the Secretary of State submits that the discretion to exclude is broad, and it is not limited to behaviour which falls within the six definitions identified in the Guidance. Those definitions are not intended to provide an exhaustive set of criteria that must be satisfied before an exclusion decision can

be made. Rather, they provide details "about the types of cases where the use of exclusion is appropriate". In respect of the national security ground, the Guidance says no more than that "national security will <u>often</u> be linked to terrorism".

54. The Secretary of State relies on the reasoning of the Commission in *L3* at [64], when rejecting the same argument:

> "The difficulty with this argument is that the policy does not prescribe an exhaustive list of actions that will render a person liable to exclusion. Rather, it provides a broad description of the types of conduct which might have that result. As the authorities recognise, the Secretary of State has to undertake a wide discretionary assessment in making this type of decision. Nothing within the policy prevents the Secretary of State from deciding to exclude a person where she rationally concludes that the presence of the individual in the UK would be a threat to UK national security."

55. In this case, the Secretary of State submits the ground for exclusion was national security. The Secretary of State was entitled to rely on the Security Service's assessment and recommendation that D9 should be excluded as "D9's Islamist extremist mindset presents a risk to national security" and that "national security is best protected by denying such individuals access to the UK".

56. We agree with, and adopt, the statement of the Commission in *L3* quoted above. The "Secretary of State is entitled to take a precautionary approach and has a wide ambit of discretionary judgment as to the circumstances in which it would be conducive to the public good to make such a decision, particularly in the field of national security": *L3* at [50]. The Secretary of State concluded that D9's presence in the United Kingdom would be a threat to national security. That conclusion was based on the recommendation of the Security Service. In view of the expertise of the Security Service in this field the Secretary of State was entitled to accord great weight to their assessment. We have borne in mind, as Mr Vaughan urged us to do, the distinction between the assessment of facts and the evaluation of risk: *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, Lord Hoffmann at [54]. We acknowledge that the OPEN material alone would not demonstrate a sound factual basis for the evaluation of risk. But the Secretary of State's decision was not based only on the OPEN material. We have reached the clear conclusion, having regard to the OPEN and CLOSED material, that the exclusion decision was rational and it was not inconsistent with the terms of the policy. We have addressed this sub-ground further in our CLOSED judgment.

2(c) Alleged irrational finding that D9 posed a risk to national security and/or that it would be proportionate to exclude him

57. The Applicant contends that even if it was open to the Secretary of State, acting lawfully and rationally, to conclude that he has an Islamist extremist mindset, nonetheless there was no reliable and reasonable basis to conclude that he had and/or would engage in any kind of behaviour which would pose any risk to national security. Professor Gleave states, "[D9]'s focus as a practising Muslim is on personal piety and leading his own life according to God's law". In the circumstances, the Applicant contends that the Secretary of State's conclusion that he posed a risk to national security and that it was proportionate to exclude him was irrational.

58. The Secretary of State submits, for reasons that have been addressed in CLOSED, that she was entitled to conclude that D9 posed a risk to national security.

59. In our judgment, for the reasons that we have explained in our CLOSED judgment, the Secretary of State's conclusion that D9 posed a risk to national security was one that was open to her, based on a rational consideration of the information before her. Having concluded that the Applicant posed a risk to national security, the Secretary of State's conclusion that it was proportionate to exclude him from the United Kingdom was one that was clearly open to her. We have addressed this sub-ground further in CLOSED.

2(d) Alleged insufficiency or unreliability of evidence

60. The Applicant contends that to the extent that there are reasonable grounds to believe that the Secretary of State may have relied upon information or intelligence which may have been obtained by torture, such information was unreliable and the Secretary of State erred in taking it into account: *A v others v Secretary of State for the Home Department (No.2)* [2005 UKHL 71, [2006] 2 AC 221. In particular, the Applicant submits that the Secretary of State knew, or ought to have known, that the Afghan authorities in 2020 habitually employed torture of those in its custody with a view to extracting confessions and intelligence. In support of this submission the Applicant relies on a report of Tim Foxley, dated 19 April 2021, which was served in D9's judicial review proceedings, and a Note on Security Practices of the Former Afghan Government dated 25 February 2022.

61. The Applicant also submits that to the extent that the Respondent relied on material emanating from the Afghan authorities, the Secretary of State was obliged to exercise a high degree of caution over the reliability of the material (irrespective of whether it may have been obtained from torture). In this regard, too, the Applicant relies on the report of Mr Foxley.

62. The Applicant draws attention to the Guidance which states that a "recommendation to exclude an individual from the UK must be based on reliable evidence". The Applicant submits that to the extent that the Secretary of State relied on information from third party individuals, she was required to pay close attention to the reliability of the individual, the inherent reliability and plausibility of their statements, the context in which they were made, and the extent to which relevant information ought to have been put to the Applicant in the interests of fairness.

63. The Secretary of State's response is, quite simply, that she has not relied upon insufficient or unreliable evidence when making the exclusion decision. She has addressed this ground of review further in CLOSED.

64. We reject this sub-ground: the exclusion decision was not based on unreliable information. Nor (as we have said in the context of Ground 2(b)) was the information relied on insufficient. We have explained our reasons more fully in CLOSED.

<u>Grounds 3 and 4: Direct and Indirect Discrimination</u>

Does the Equality Act 2010 apply?

65. The Applicant contends that in exercising the public function of determining whether to direct his exclusion from the United Kingdom, the Secretary of State directly and indirectly

discriminated against him on grounds of his religion or belief contrary to sections 13 and 19 of the EA 2010. The Secretary of State's first argument in response is that the EA 2010 does not have extra-territorial application such as to govern a decision to exclude a foreign national who was outside the United Kingdom when the decision was made.

66. Mr Vaughan submits that properly analysed the exercise of a public function that is challenged in this case is not one that is extra-territorial. The decision was taken in the United Kingdom, for the benefit of the United Kingdom. It was made personally by the Secretary of State, a minister of the government of the United Kingdom. It was an exercise of prerogative power and, as such, was made under English law. The notice of exclusion was posted to D9's address in the United Kingdom. And the exclusion decision *per se* had no effect on D9 while he remained outside the United Kingdom. The effect on him while abroad flowed from the separate decisions to revoke his indefinite leave to remain and refuse him entry to the UK.

67. There are two key judgments of the Court of Appeal on which both parties rely: *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438 and *R (Turani) v Secretary of State for the Home Department* [2021] EWCA Civ 348.

68. In *Hottak* the claimants were Afghan nationals, living in Afghanistan, who were recruited by the UK government to work as interpreters with the British forces in Afghanistan. The UK government established a scheme of assistance for such locally engaged staff on the withdrawal of British forces from Afghanistan. The claimants alleged discrimination on grounds of nationality on the basis that a similar scheme for locally engaged Iraqi staff was said to have been more generous. The first head of the claim was based on the claimants' status as employees and brought pursuant to Part 5 of the EA 2010. The Court of Appeal upheld the Divisional Court's rejection of that claim on the basis that Part 5 does not have a wider territorial reach than the unfair dismissal provisions in the Employment Rights Act 1996 and on the facts there was not a sufficiently strong connection to justify a presumption that Parliament intended Part 5 to apply to them. The court noted at [54]:

> "They are not British citizens: they are Afghan nationals. They lived in Afghanistan. They were recruited in Afghanistan. Their employment contracts were governed by Afghan law. They worked exclusively in Afghanistan and there was no UK, international or peripatetic element to their employment. ..."

69. The claimants' alternative case relied on s.29(6) of the EA 2010 on the basis that the promulgation of the Afghan scheme was a discriminatory exercise of a public function. The Court of Appeal rejected this alternative case, too. The first basis for doing so was that:

> "Section 28 provides that Part 3 of the 2010 Act does not apply to discrimination that is prohibited by Part 5. That means that a work-related discrimination claim can be brought only under Part 5 and not under Part 3. ... my intuitive sense as to Parliament's presumed intention is that (a) if a work-related discrimination claim can be brought, it can only be brought under Part 5; and (b) if, for jurisdictional reasons, a work-related claim cannot be brought under Part 5, it cannot be brought at all."

70. The second basis on which the Court of Appeal in *Hottak* rejected the claimants' alternative case is the key one, for our purposes. Sir Colin Rimer (with whom Richards and Arden LJJ agreed) held:

> "I would anyway accept Mr Swift's submission that section 29(6) should not be interpreted as extending to claims other than in respect of the exercise of public functions in Great Britain. I would not accept that there is any warrant for imputing to Parliament an intention to extend it to claims based on the extra-territorial effect of exercise of public functions." (Emphasis added.)

71. In *Turani* the Secretary of State had introduced an ex gratia scheme to make resettlement in the United Kingdom available to refugees fleeing the Syrian conflict. The claimants, Palestinian refugees who had fled Syria and were in the Lebanon, were unable to access the scheme. They claimed that by making the scheme dependent on referral by the United Nations High Commissioner for Refugees, from whose mandate they were excluded by reason of being Palestinian refugees in a country covered by the exclusive mandate of the United Nations Relief and Works Agency, the Secretary of State indirectly discriminated against them on grounds of nationality contrary to s.29(6) of the EA 2010.

72. The Court of Appeal held that the application to the claimants' cases of the requirement for a referral from the Commissioner, which had the effect of excluding them from consideration for resettlement with the grant of entry clearance under the scheme, fell within the scope of s.29(9) of the EA 2010. Unlike in *Turani*, it is not suggested in this case that s.29(9) applies.

73. In *Turani*, Simler LJ (with whom Warby and Underhill LJJ agreed) addressed the passage of *Hottak* that we have quoted in paragraph 70 above in the following terms at [53]:

> "The second reason, that section 29(6) does not have 'extraterritorial effect' in relation to claims based on the exercise of public functions, concerned the claim for provision of financial benefits. Read in the context of the earlier paragraphs, I do not think that Sir Colin Rimer can have intended by the second reason to hold that Part 3 of the EA 2010 can never apply extraterritorially to the exercise of public functions. Such a conclusion would be inconsistent with his implied statement that the second reason was narrower than the first, and his earlier conclusion that the extraterritorial effect of Part 3 of the EA 2010 should not be interpreted as going further than Part 5, where the case law has established extraterritorial effects in certain cases. More importantly, the court in *Hottak* was only concerned with territorial effect relating to the provision of financial benefits, and not with any claim for relocation (or entry clearance) where, at the very least, the role of section 29(9) would require consideration. In these circumstances I do not consider that the ratio is binding on this court in relation to the territorial reach of Part 3 of the EA 2010 in this case."

74. Consequently, the Court of Appeal in *Turani* approached the question of the territorial reach of Part 3 of the EA 2010 from first principles. Simler LJ stated:

> "54. ... As Lord Hoffmann observed in *Lawson* [2006] ICR 250 at para 6, the United Kingdom rarely purports to legislate for the whole world and accordingly there is a general presumption that our domestic legislation does not extend beyond the United Kingdom's

territory, There are exceptions, and in some cases the question of territorial scope is not straightforward, but again as Lord Hoffmann held:

> '6 ... In principle, however, the question is always one of ... construction ... As Lord Wilberforce said in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, it 'requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp or intendment, of the statute under consideration'.'

55. A more nuanced approach to the general presumption was adopted recently in *R (KBR Inc) v Director of the Serious Fraud Office* [2021] 2 WLR 335, which concerned the extraterritorial effect of section 2(3) of the Criminal Justice Act 1987, at paras 21-32. The Supreme Court held that where the principle of comity that underlies the presumption has less force (perhaps because the state is legislating for the conduct of its own nationals abroad or seeking to hold state officials to certain standards wherever they exercise public functions) the strength of the presumption may itself be reduced. However, ultimately the question in each case is a question of construction to be decided according to established principles of statutory interpretation, seeking to give effect to what Parliament can reasonably be taken to have intended, on the premise that Parliament intended a rational and coherent scheme.

...

57. So I start by considering the scheme of section 29 of the EA 2010. Sir James Eadie made a number of general points in relation to its broad structure, which I accept. First, it concerns the provision of a service (section 29(1)) and the exercise of a public function not to do with the provision of services (section 29(6)), to the public or a section of the public. It is reasonable to infer that in both cases 'the public' is the same; and that the public referred to in section 29(1) in particular, given its scope, is the public in Great Britain, rather than the rest of the world. Secondly, given that the language of section 29(6) of the EA 2010 tracks the language of section 29(1) to include public functions, on the face of it these provisions have the same territorial reach. Thirdly, section 29(9) and (10) do not distinguish between the provision of services to the public and the exercise of public functions. They apply equally to both.

58. Whatever its scope, section 29(9) of the EA 2010 is a specific and limited provision that extends the territorial reach of section 29, to conduct outside the United Kingdom, but only in its application 'to the granting of entry clearance (within the meaning of the Immigration Act 1971) 'so far as 'relating to race or religion or belief'. The words 'relating to' (which are used to refer to the protected characteristics in question) or other similar words (such as 'in connection with the grant of entry clearance') could have been but were not used in referring to the grant of entry clearance. Instead, the language demonstrates an express intention by Parliament to extend the territorial effect of section 29 to things done outside the United Kingdom but only in specified, limited circumstances. It follows from this subsection that a natural reading of section 29(1) and (6) is that they do not ordinarily extend to things done outside the United Kingdom because otherwise section 29(9) would not be necessary. That is consistent with Parliament's intention to legislate for conduct relating to its own citizens – the public – in the United Kingdom. ..." (Emphasis added.)

75. Despite the eloquence of Mr Vaughan's submissions, we have come to the view that the exclusion decision is not within the territorial scope of s.29(6) of the EA 2010:

1) The starting point in considering the scope of s.29 is the presumption that legislation is generally not intended to have extra-territorial effect. When the presumption applies it has the effect that, unless the contrary intention appears, the legislation will not be interpreted as applying to people and matters outside the territory to which it extends. The territory to which the EA 2010 extends is limited to the United Kingdom (see paragraph 20 above).

2) It is not necessary in invoking the presumption to demonstrate that the extra-territorial application of the legislation in issue would infringe the sovereignty of another state in violation of international law; the rationale underlying the presumption and its resulting scope are wider than this: *R (KBR) v Director of the Serious Fraud Office* [2022] AC 519, Lord Lloyd-Jones JSC at [24]-[25]. We recognise that the strength of the presumption may be diminished in circumstances where the principle of comity which underlies it has less force, and that may be the case where Parliament seeks to hold state officials to certain standards wherever they exercise public functions: *Turani,* [55]. But this is a question of statutory construction. The terms of s.29(9) show that it was not Parliament's intention that s.29(6) should ordinarily have extra-territorial effect: see Turani, [58].

3) In *Turani* the Court of Appeal answered the question, who is within the legislative grasp or intendment of s.29(6)? The answer given was that the territorial reach of s.29(6) was the same as s.29(1), and in s.29(1) Parliament was legislating for "the public in Great Britain, rather than the rest of the world" ([57]). In *Turani,* s.29(9) applied to rebut the presumption, but there is no suggestion that s.29(9) applies in this case.

4) Although we acknowledge that the exclusion decision was taken in the United Kingdom and posted to D9's address in this country, it was (by definition) made in respect of a foreign national who was, and was known to be, outside the United Kingdom. We agree with Ms McGahey KC, leading counsel for the Secretary of State, that the effect of the exclusion decision is, and was bound to be, felt by D9 outside the United Kingdom. The purpose of the decision was to prevent D9 entering this jurisdiction from beyond the borders of the United Kingdom. The exclusion decision was put into effect by the removal of indefinite leave to remain but that does not mean that the effect of the exclusion decision itself was felt by D9 anywhere other than abroad.

76. It follows that both the direct and indirect discrimination claims fail on the grounds that the statutory provisions relied on are inapplicable. Nevertheless, in case we are wrong in concluding that the relevant provisions of EA 2010 are inapplicable, we address the discrimination grounds on the assumption that they apply.

Direct discrimination

77. The Applicant contends that in assessing that he has an Islamist extremist mindset, and in making the exclusion decision, the Secretary of State has directly discriminated against him because of his religion, namely as (i) a Salafist Muslim and/or (ii) a quietest Salafist Muslim and/or (iii) because of his belief in a conservative interpretation of Islam. Mr Vaughan acknowledged that on the OPEN materials there is nothing to indicate that the Respondent

categorised D9 as a Salafist or a quietest Salafist Muslim. He raised those descriptions for consideration in the CLOSED session, if appropriate on the CLOSED material.

78. Mr Vaughan focused on D9's belief in a conservative interpretation of Islam. He submits that the OPEN material compels the inference that the Secretary of State was influenced by a discriminatory view of D9's belief in a conservative interpretation of Islam. He highlighted these key elements:

1) The Secretary of State knew that D9 followed a conservative approach to Islam because (i) he had said during the port stop interview on 27 February 2014 that music was prohibited in Islam; and (ii) during the same interview he had said that he prayed five times a day.

   (We note that the port intelligence report dated 27 February 2014 does not record any conversation about music. Even if it took place as D9 states, in the absence of any record it does not provide a basis for imputing knowledge to the Secretary of State or the Security Service. The same port intelligence report states, "The subject is a Sunni Muslim and followed the Hanafi school of thought. The subject stated that he prayed two-three times a day and fasted during the holy month of Ramadan". In his witness statement D9 acknowledges he may have said he was a Sunni Muslim and followed the Hanafi school of thought but he says, "I said that I pray five times a day. I am not a Shia so I don't pray three times a day and would not have said that. I may have said that I go to the mosque to pray three times a day". Again, even on the (doubtful) assumption D9's recollection of the conversation is more accurate than the contemporaneous record, the Secretary of State's knowledge could only be based on the record. In addition, we note that the port intelligence report dated 22 March 2019 recorded, "The subject is a Muslim, he does not follow any branch of Islam, the first chapter of the Qu'ran does not give labels and states everyone is human, therefore he just classes himself as Muslim. The subject is a devout Muslim he prays as much as possible although he accepts that when he is at work it is not always possible but he does try to pray when he can, he cannot recite the Qu'ran as his memory is not good enough." Nevertheless, Mr Vaughan did not understand this point to be disputed and we are prepared to assume the Secretary of State would have been able to infer from the port intelligence reports that D9 followed a conservative interpretation of Islam.)

2) There is an absence of any evidence in OPEN to support the assessment that D9 has an Islamist extremist mindset.

3) D9 is said to have commented during port stop interviews that (i) "...it was time the Western troops pulled out of Afghanistan" as their presence "gave radical clerics and leaders excuses to cause bloodshed" (27 February 2014); (ii) he had "lived under Taliban rule and although there were problems with this it was peaceful and there was less crime" (22 March 2019); (iii) he "believes that the corruption within the government and the fact there is no justice is causing people to join groups like Daesh" (22 March 2019). D9 disputes saying it was time the Western troops pulled out of Afghanistan but, in any event, the Applicant submits that on the OPEN material there is a leap from these justified comments to the assessment that he has an Islamist extremist mindset.

79. Mr Vaughan drew attention to the well-known passages in Lord Nicholls' speech in *Nagarajan v London Regional Transport* [2000] 1 AC 501 at 511H-512D and 512H-513B in support of the points that direct discrimination may be subconscious and it is sufficient if religion or belief-based discrimination was "a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor" or "had a significant influence on the outcome".

80. On the basis of the OPEN material, the Applicant submits the Secretary of State must have assumed a conservative interpretation of Islam was necessarily a dangerous and/or extremist one, conflated a belief in a conservative interpretation of Islam with a belief in or agreement with violent jihadists, misinterpreted D9's answers or otherwise drew incorrect inferences or conclusions to accord with a preconceived view that a belief in a conservative interpretation of Islam correlated with support for violent jihadis and a belief British troops should be killed.

81. Ms McGahey submits that the Secretary of State has not treated D9 less favourably than others because of his religious belief whether consciously or subconsciously. The decision to exclude D9 was not taken because D9 was a Muslim or because he followed a conservative interpretation of Islam. He was excluded because he was assessed to pose a risk to national security, with that risk arising from his "Islamist extremist mindset". It was the risks associated with this extremist mindset (regardless of its underlying doctrinal or philosophical basis) that led to the decision.

82. We have no hesitation in concluding that even if the EA 2010 applies the direct discrimination claim is unfounded. We acknowledge that on the OPEN material the assessment that D9 has an Islamist extremist mindset is not made out. However, having had the benefit of seeing both the OPEN and CLOSED material, it is plain that the assessment and the exclusion decision were not based on any misinterpretations, unjustified inferences, assumptions, leaps or preconceived notions based on D9's religious belief. We agree with the Secretary of State's submissions as summarised in paragraph 81 above. Our reasons for reaching this conclusion are given in our CLOSED judgment.

Indirect discrimination

83. The Applicant submits that the Guidance is indirectly discriminatory because it permits the Secretary of State to exclude an individual on the basis of an "extremist mindset" alone, without also requiring evidence of terrorist related activity or incitement of such activity, which puts Salafists and/or those who follow a conservative interpretation of Islam at a particular disadvantage when compared with persons who do not have those protected characteristics. The 2015 Extremism Definition is, the Applicant submits, more likely to apply to Salafists and/or those following a conservative interpretation of Islam than other religious groups. The approach is incapable of justification because it catches those, such as D9, who do not pose any risk to national security.

84. In relation to the approach to the question at section 19(2)(d) of the EA 2010, whether the measure is a proportionate means of achieving a legitimate aim, Mr Vaughan drew our attention to *R (Independent Workers Union of Great Britain) v Mayor of London* [2020] EWCA Civ 1046, [2020] 4 WLR 112, Simler LJ at [37]-[38] and Singh LJ at [94]-[95].

85. This ground was raised provisionally in the Applicant's grounds (see paragraph 3 above). In his oral submissions Mr Vaughan deferred to the Special Advocates on what could properly be said, having regard to the CLOSED material, in support of this ground.

86. The Secretary of State submits, first, the exclusion decision was made on the basis that D9 was assessed to pose a risk to national security in light of his extremist mindset. The assessment that D9 has an Islamist extremist mindset was not, in and of itself, the ground for the decision to exclude him; that decision was taken on national security grounds. Secondly, the Secretary of State's discretion to exclude individuals from the UK is a broad one. The Guidance simply provides examples of the type of cases where exclusion might be appropriate. Thirdly, the 2015 Extremism Definition is not focused on any particular religion or belief. It covers, for example, not only Islamist extremists but also right-wing extremists. There are no statistics before the Commission in support of the contention that the 2015 Extremism Definition places Salafists and/or those who follow a conservative interpretation of Islam at a particular disadvantage and the Secretary of State submits there is no basis for the Commission to reach such a conclusion. In any event, the Secretary of State submits that any incidental difference that may arise is objectively justified as Islamist extremism poses a very significant threat to the safety of the United Kingdom and decisions such as that to exclude D9 are based on the particular threat to national security posed by a specific individual.

87. In our judgment, even if the EA 2010 applies, the allegation of indirect discrimination is not made out. We have seen no evidence that Salafists or those who follow a conservative interpretation of Islam are more likely to be the subject of exclusion or other similar action by the Secretary of State than those who follow any other interpretation of Islam or other religion or belief (including those with no religion or belief). There is no basis on which we could properly assume that there is a differential impact adversely affecting Salafists or those who follow a conservative interpretation of Islam.

88. As we have rejected the indirect discrimination claim both on the basis that the statutory provisions relied on do not apply and because, even if they do, s.19(2)(b) is not met on the evidence before us, we consider it unnecessary to address s.19(2)(d).

Section 192 of the Equality Act 2010

89. If we had found that the EA 2010 applies and that in making the exclusion decision the Secretary of State discriminated against D9, whether directly or indirectly, the Secretary of State submits s.192 EA 2010 has the effect that the exclusion decision does not contravene the EA 2010 because the exclusion decision was made "for the purpose of safeguarding national security" and it was proportionate to exclude D9 for that purpose.

90. Mr Vaughan submits that proportionality in the context of s.192 should be assessed applying the same test as applies under s.19(2)(b), as described by Simler LJ in the *Independent Workers Union* case. The Secretary of State reserved her position as to whether that is the correct approach to be taken in the context of s.192.

91. We consider it unnecessary to address s.192 in circumstances where we have rejected grounds 3 and 4 both on the basis that the EA 2010 does not apply and that the claims of direct and/or indirect discrimination are not made out on the facts.

Ground 5: Article 8 of the ECHR

92. The Applicant contends that the exclusion decision breaches his right to private and family life given his long lawful residence in the UK and the fact that his earnings as a market trader in the UK were his source of income to provide for his family in Afghanistan. In his witness statement, D9 states:

> "There is also an economic crisis in Afghanistan now and people are struggling to get basic food and drink. I am desperate to be able to return to the UK so that I can earn money to send back to my family in Afghanistan so they can survive. I spent 20 years of my life in the UK, it was the place I made my home after I was forced to flee Afghanistan. I miss my friends, the market and the life that I had lived peacefully with my neighbours for the past 20 years."

93. The Applicant submits the decision is not in accordance with law. The first basis for this submission is that it was taken in breach of common law principles of fairness, an argument that for the reasons we have already given we reject. The second basis on which it is contended that the exclusion decision is not in accordance with law is by virtue of an alleged failure to take account of and treat as a primary consideration the best interests of the Applicant's six children in Afghanistan, who depend on their father's income which is said to be predominantly derived from lawful self-employment in the UK. The Applicant acknowledges that s.55 of the Borders Citizenship and Immigration Act 2009 applies only to children in the UK, and his children are all in Afghanistan. Nonetheless he relies on the Guidance in which the Secretary of State has said that she will apply the "spirit" of the duty to the welfare of children outside the UK (see paragraph 14 above).

94. The Applicant also submits that the exclusion decision does not pursue a legitimate aim and that it is disproportionate having regard to, among other matters, the availability of alternative means to manage any risk posed by the Applicant within the UK (such as monitoring or imposing a TPIM).

95. The Secretary of State' s primary submission is that the exclusion decision did not engage the rights to private or family life of D9 or his family because they were outside the jurisdiction of the United Kingdom for the purposes of the ECHR when the decision was made. The Secretary of State relies on *R (S1, T1, U1 & V1) v Secretary of State for the Home Department* [2016] EWCA Civ 560, Burnett LJ at [102], citing *Khan v UK* (App.No. 11987/11, 28 January 2014). The Applicant seeks to distinguish *S1* on the basis that his link to the UK is qualitatively different to that of the claimants in that case who had chosen to live in Pakistan, whereas through his long period of living in the UK D9 had established a private life here.

96. In any event, the Secretary of State submits if article 8 was engaged, there was no breach. The legitimate aim pursued was to protect national security. As D9 was outside the UK when the exclusion decision was made, article 8 could only be breached if there was a positive obligation on the UK to facilitate D9's entry into the UK: *Tanda-Muzinga v France* (App.No.2260/10, 10 July 2014). The Secretary of State submits there was no such positive obligation in circumstances where D9's wife and six children were all in Afghanistan and he had chosen to spend lengthy periods of time in Afghanistan over recent years, including having been in Afghanistan for a year when the exclusion decision was made, and had seemingly managed

without his income derived from operating as a market trader in the UK during those periods. In any event, the weight to be given to his and his family's interest in him being able to earn in the UK is relatively slight when balanced against the public interest in protecting national security.

97. In our view, this ground must fail both on the ground that D9 was not within the jurisdiction of the United Kingdom for the purposes of article 1 of the ECHR when the exclusion decision was made, and so cannot rely on article 8, and even if he could rely on article 8, it is manifest that the exclusion decision did not breach that Convention right.

98. In *S1* Burnett LJ described the decision of the Fourth Section in *Khan v United Kingdom* (Admissibility) (11987/11) (2014) 58 EHRR SE15 as providing "powerful support" for the conclusion that the appellants in S1 were not within the jurisdiction of the United Kingdom for the purposes of article 1 of the ECHR. In *Khan* the applicant, a national of Pakistan, came to the United Kingdom on a student visa. Before his visa expired he was arrested, along with four other Pakistan nationals, in connection with an alleged conspiracy to carry out a terrorist attack. No charges were brought but all were served with notices of intention to deport. Mr Khan left the United Kingdom voluntarily before his leave to remain had expired. In consequence the notice of intention to deport was withdrawn. He was made the subject of an exclusion order and his leave to remain was cancelled. In the context of his challenge to the exclusion order before the Commission, he asked for a direction facilitating his return to the United Kingdom on article 3 grounds which was refused. As Burnett LJ stated at [96]-[97]:

> "[The Strasbourg Court] continued:
>
> > '26. Moreover, and contrary to the applicant's submission, there is no principled reason to distinguish, on the one hand, someone who was in the jurisdiction of the Contracting State but voluntarily left that jurisdiction and, on the other, someone who was never in the jurisdiction of that State. Nor is there any support in the Court's case-law for the applicant's argument that the State's obligations under Article 3 require it to take this article into account when making adverse decisions against individuals, even when those individuals are not within the jurisdiction.'
>
> In rejecting the arguments on jurisdiction, the court next noted that the positive obligation under art.8 was concerned with reuniting family members with others living in the Contracting State. The focus was on the art.8 rights of the person who was within the jurisdiction ([27])."

99. The Court of Appeal applied *Khan* in *S1*, a case in which four members of the same family who were dual British and Pakistani nationals, living in Pakistan, had been deprived of their British citizenship and were not allowed to return to the United Kingdom to prosecute their appeals before the Commission.

100. In our judgment, it follows from *S1* and *Khan* that D9 was not within the jurisdiction of the United Kingdom for the purposes of article 1 when the exclusion decision was made. He was in the same position as Mr Khan: having been in the United Kingdom with leave to remain, he left the United Kingdom voluntarily to go to his country of nationality, and while there a decision to exclude him and to cancel his leave was taken. The length of time for which D9

had lived in the United Kingdom would be relevant in determining whether there was a breach of article 8, if that right were engaged, but it does not alter the analysis of whether the applicant was within the jurisdiction when the exclusion decision was made.

101. In any event, it is plain that the exclusion decision did not breach article 8. That decision pursued the legitimate aim of protecting national security. We agree with the Secretary of State that the weight to be given to D9's right to private and family life in the United Kingdom was heavily outweighed by the public interest in protecting national security, in circumstances where D9 had no family in the United Kingdom, his wife and six children were all living in Afghanistan, he spent several months a year in Afghanistan and, at the time of the exclusion decision had been out of the United Kingdom for a year. The exclusion decision did not separate D9 from his children: quite the contrary. There is nothing to indicate that the decision was contrary to the best interests of his children in Afghanistan.

Conclusion

102. For the reasons we have given above, and in our CLOSED judgment, this application for review is dismissed.