Case No: JR-2024-MAN-000026

IN THE UPPER TRIBUNAL AT MANCHESTER
(IMMIGRATION AND ASYLUM CHAMBER)

Manchester Civil Justice Centre

JUDGMENT DATE 18 FEBRUARY 2025

Before:

HHJ STEPHEN DAVIES SITTING AS AN UPPER TRIBUNAL JUDGE

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Between:

THE KING
on the application of
MENATALLA HASSAN GABER HASSAN ELWAN

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Adrian Berry
(instructed by Irwin Mitchell Solicitors), for the applicant

Robin Tam KC & Will Hays
(instructed by the Government Legal Department) for the respondent

Hearing date: 17 January 2025
Draft judgment date: 23 January 2025

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J U D G M E N T

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Judge Stephen Davies:

Introduction and summary

1. The Applicant, Dr Elwan, is an Egyptian national and medical doctor, now 34 years old, who from 2016 until the date of the decisions under challenge made on 24/11/23 (**the decision letters**[1]), has been lawfully present in the UK. At the time of the decision letter she was working for an NHS trust in Liverpool, with leave to remain (**LTR**) as a skilled worker until mid 2027 and with an outstanding application for indefinite leave to remain (**ILR**) based on 5 years' residence in the UK. Until 7/10/23 there was nothing known about her of any concern to the Respondent (**the SSHD**).

2. As the SSHD said in the decision letter: "On 7th October 2023, Hamas, an organisation proscribed under the Terrorism Act 2000, entered Israel and committed acts of terrorist violence which included the murder of over 1,000 innocent Israeli civilians and the kidnap of over 200 hostages."

3. On 7/10/23, the same day of that attack, Dr Elwan posted three posts on her X (until July 2023 known as Twitter) account.

4. The SSHD was alerted to and disturbed by their content. After considering representations made by Dr Elwan they[2] produced a lengthy and detailed decision letter which concluded as follows: "For the reasons set out above, the Secretary of State is satisfied that your continued presence in the UK would not be conducive to the public good. This is because you made public posts which supported an act of terrorism which is considered to be conduct which is non-conducive to the public good within the meaning of the policy, which also engages the criteria for extremism or unacceptable behaviour. The Secretary of State is also satisfied that this decision does not breach your ECHR rights under Article 8 and Article 10. Your permission to stay is cancelled with immediate effect".

5. In the other decision letter the SSHD refused her application for ILR on the same basis and for the same reasons.

6. Following an unsuccessful administrative review of the ILR application and an exchange of pre-action correspondence Dr Elwan issued the instant judicial review

[1] There were two separate decision letters, one cancelling her LTR and one refusing her ILR. The first contained the detailed reasons and, hence, is referred to as the decision letter, save where necessary to differentiate between them.

[2] As at the date of the decision the SSHD was James Cleverley, who had replaced Suella Braverman as such on 13 November 2023, whereas the current SSHD is Yvette Cooper. To avoid confusion, and reflecting the fact that the decision was the work of the Home Office as a body and not just the SSHD as an individual, I shall refer to the SSHD as "they".

proceedings in the Upper Tribunal in Manchester. She also issued an appeal in the First-Tier Tribunal against the decision to terminate her LTR. That appeal has been stayed pending the determination of this judicial review. Permission to bring this claim was granted by HHJ Sephton KC, sitting as an Upper Tribunal Judge, at a hearing on 20 June 2024.

7. Dr Elwan argues that the SSHD acted unlawfully in making these immigration decisions, both at common law and by reference to her right of freedom of expression as a protected right under Article 10 of the European Convention on Human Rights (**the ECHR**).

8. Dr Elwan accepts that it is not for the Upper Tribunal to reach its own view as to what decision it would have made about her UK immigration status. Rather, the target of the Tribunal's attention is the SSHD's decision and decision-making process. Did they act lawfully and consistently with the ECHR? Dr Elwan contends that they did not, whereas the SSHD contends that they did.

9. I have been assisted by excellent submissions by counsel for Dr Elwan and by leading and junior counsel for the SSHD.

10. I have found this a difficult case, because in my view it lies on the borderline of when the court should properly interfere with a decision of the executive in a case such as this. In the end, however, I have decided that the claim for judicial review should fail as regards the decision to refuse ILR, but succeed as regards the decision to cancel her LTR on the basis that immediate cancellation of her leave was not reasonable or proportionate, whether at common law or under the ECHR.

Dr Elwan's posts on X (Twitter)

11. Dr Elwan made the following posts on her X account.

12. First in time: "If it was ur home, u would stay and fight. You wouldn't just run away [smiling face emoji]." (Posted at 6:52pm on 7/10/23.)

13. This post included a seven second video showing individuals fleeing what I am satisfied Dr Elwan knew, as would any reasonably well-informed reader of the post on that day, the attack by Hamas carried out at the music festival in Israel earlier that day.

14. Second in time: "Israel was never a country. They illegally occupied Palestine. Would u support Russia invading Ukraine? Israel kill Palestinians everyday, didn't see anyone caring :) Also there are no civilians in Israel." (Posted at 9:47pm on 7/10/23.)

15. Third and last in time: "Just take all the Israelis to UK away from terrorist Palestine [emojis] a win for everyone, no?" (Posted at 9:50pm, 07/10/23, in response to a tweet by Rishi Sunak, the then UK Prime Minister, referring to "this morning's attacks by Hamas terrorists against Israeli citizens" and stating that "Israel has an absolute right to defend itself".)

The meaning(s) conveyed by the posts

16. I should begin by considering the meaning(s) conveyed by the posts as they would appear to a typical reasonably minded and reasonably well-informed reader of the posts. It may be that this is different to the meaning(s) intended by Dr Elwan, albeit that her intention in making the posts might well also be relevant to the SSHD's overall decision. It is also likely that there would have been many unreasonable and/or ill-informed readers of the posts who might read the posts entirely differently. That is particularly because posts on X are inherently liable to be made, read and re-posted without time for considered reflection. In paragraph 18 of the decision letter the SSHD made a similar point. Nonetheless, when making their decision, the starting point for the SSHD should be, and was, the meaning as reasonably understood by reasonable readers.

17. The essential submission for Dr Elwan is that her postings do not incite, justify or glorify terrorist violence, nor foster hatred which might lead to inter-community violence in the UK, nor otherwise can they be classed as extremism or unacceptable behaviour. Instead, it is submitted, they fall within the ambit of the protection afforded to freedom of expression of political speech both at common law and under the ECHR.

18. In his decision letter the SSHD's primary conclusion (paragraph 20) was that "collectively the posts seek to justify or express support for the terrorist violence committed by Hamas against Israeli civilians on 7th October 2023", and that: "Whether or not each post would, if viewed in isolation, be a legitimate expression of free speech, when they are viewed together, they have the meaning attributed to them by the Secretary of State". In paragraph 39 the SSHD repeated this conclusion but also, in the alternative, considered the position on the basis that "individual elements of the X posts do contain certain matters that amount to a legitimate expression of opinion (e.g. the reference to the illegal occupation of Palestine)".

19. In my judgment the SSHD was right to accept, albeit as an alternative, that the posts contained more than one statement. I am satisfied that some of the statements made were legitimate expressions of opinion. It is obvious that nonetheless they are statements with which many people might disagree, even vehemently. However, that is not the question. They do not amount to statements of justification or support for the terrorist attacks on civilians committed by Hamas on 7/10/23. Nonetheless, I am also satisfied that within the posts there are other statements which do, on a fair reading, amount to statements of support, justification and indeed glorification of that terrorist violence.

20. Without over-complicating matters, in my judgment statements which are supportive of what might broadly described as the Palestinian political cause, including what are bitterly contested assertions as to Israel's right to exist, such as is espoused by Hamas, may be described as expressions of political opinion. Such statements are to be distinguished from statements which support, justify or glorify terrorist violence committed in support of the Palestinian political cause, including the Hamas attack on Israeli citizens of 7/10/23.

21. In her letter of claim it was argued on behalf of Dr Elwan that "as regards the [first][3] tweet, the video clip does not show a Hamas attack as such but rather civilians running away from something". That was a hopeless argument. It cannot be disputed that the video does show civilians running away. Nor can it sensibly be disputed that the "something" from which they were running was the Hamas attack of the very same day on the music festival. That would have been obvious to the average reasonably minded and reasonably well-informed reader. Given the timing of the post, any attempt to suggest otherwise does not withstand scrutiny. This post therefore plainly did support, justify and even glorify terrorist violence by Hamas against Israeli citizens.

22. There was some debate at the hearing as to whether or not Mr Robertson's witness statement, insofar as it referred to and exhibited a recently made assessment by his department about what the video in fact showed, and confirmed that it was almost certain that it did show the Hamas attack on the music festival, was admissible. In my judgment there is no need to become distracted by this argument. That is because it is obvious anyway even without the need for such evidence, given the timing and content of the post, with its inclusion of the video, and the close temporal coincidence between the reporting of the Hamas attack, including the reporting of the attack on the music festival, and the post. However, if necessary I also accept Mr Tam's submission that this evidence ought to be admitted anyway given that Dr Elwan's position has been less than clear on this particular point. Insofar as Mr Berry submitted that it was wrong for the SSHD to adduce evidence of this post-decision conclusion, I am satisfied that the evidence is admissible on the basis that it merely confirms that the SSHD's contemporaneous conclusion was not only one which they could rationally hold but, if relevant, was also plainly right.

23. In my judgment this is the worst of the three posts. The combination of the re-posting of the video, the barely-concealed sneer of cowardice against unarmed civilians seeking to flee the attack, and the smiling face emoji clearly expressing Dr Elwan's satisfaction at what had happened, convey the clear message that the attack by Hamas on unarmed Israeli citizens within Israel was a matter for celebration and, thus, amounted to expressions of support and justification for, and indeed glorification of, Hamas terrorist violence.

24. As to the second post, it was argued for Dr Elwan in her letter of claim that it did not identify Hamas and that the focus was on the wider context of the Israel / Palestinian dispute and a condemnation of the lack of reaction to Israeli killings of Palestinians. I accept that this is true as regards the first four sentences. But the timing of the post, following on from the first post also visible on Dr Elwan's X page, as well as the content of the last sentence, shows clearly in my judgment that its subject is also, in part, the Hamas attack. The clear message of the last sentence is that no-one should care about the Israeli citizens killed in the Hamas attack, because no-one living in Israel could be considered as a citizen as opposed to a member of an illegally occupying army. In my judgment this also supports, justifies and even glorifies terrorist violence by Hamas against Israeli citizens.

[3] There has been some confusion in the correspondence as regards the order of the posts, but it was common ground at the hearing that the order is as stated in this judgment.

25. As regards the third tweet, in her letter of claim it was argued by Dr Elwan that it was an ironic comment in response to the tweet by the Prime Minister "on the way that Palestinians generally are sometimes treated as if all were terrorists for whom relocation is a solution". I accept that the post does have this meaning. But in my judgment it is not its only meaning. It also conveys the message that if a result of the Hamas attack was that Israeli citizens would be permitted to and would emigrate to the UK, that would be a "win" for the terrorist violence by Hamas against Israeli citizens which is, thus, supported and even glorified.

26. Finally, in the letter of claim it was argued that "the intemperate nature of the tweets reflects the degree of polarisation on the issue, as well as the nature of Twitter as a blunt instrument for very short political comments". This may well be true. However, it does not justify, excuse or even mitigate posting comments in the immediate aftermath of the Hamas attack which support, justify and glorify its terrorist violence against citizens. I thus have no hesitation in rejecting the argument that "the tweets are not support for terrorism but protected political speech of a strong, partisan nature that comment on the wider political context", insofar as that is said to apply to the posts in their entirety.

27. Nonetheless, it is true that the posts include statements of political comment which do not cross the line into seeking to justify, support or glorify terrorist violence by Hamas. It is also doubtless true that one could identify far more egregious examples of material which far more explicitly justify, support and glorify terrorist violence by Hamas and by others. It is also true that the three posts occurred over a short time period (three hours in the space of one day), were not repeated and were removed within a further short time period (which, Dr Elwan has said, and Mr Tam accepts the SSHD cannot gainsay, happened before the posts were publicised by the Daily Mail and then other media outlets). All of this is relevant, I accept, to an overall assessment of the nature and seriousness of Dr Elwan's conduct in posting these tweets.

The Immigration Rules and the suitability guidance

28. Before I turn to the decision making process and the decision letter, it is helpful to set out the relevant provisions of the Immigration Act 1971, the Immigration Rules and the suitability guidance against which this happened.

29. A decision to cancel leave is made in the exercise of immigration control under ss. 3 and 4 of the *Immigration Act* 1971.

30. The SSHD's policy as to when they propose to exercise that power to cancel leave is set out in the *Immigration Rules*.

31. Paragraph 9.3.1 of the Immigration Rules states that: "An application for entry clearance, permission to enter or permission to stay must be refused where the applicant's presence in the UK is not conducive to the public good because of their

conduct, character, associations or other reasons (including convictions which do not fall within the criminality grounds)".

32. Paragraph 9.3.2 states that: "Entry clearance or permission held by a person must be cancelled where the person's presence in the UK is not conducive to the public good".

33. Thus, once it has been determined that the person's presence in the UK is not conducive to the public good, the refusal or cancellation of permission must be refused, i.e. there is no further discretion within the Immigration Rules.

34. The relevant Home Office guidance to its caseworkers is entitled: "Suitability: non-conducive grounds for refusal or cancellation of entry clearance or permission (v 2.0, 10 November 2021)" (**the suitability guidance**). It extends over 14 pages and, as relevant to this case, includes the following guidance:

    a. "Non-conducive to the public good means that it is undesirable to admit the person to the UK, based on their character, conduct, or associations because they pose a threat to UK society. This applies to conduct both in the UK and overseas.

       The test is intentionally broad in nature so that it can be applied proportionately on a case-by-case basis, depending on the nature of the behaviour and circumstances of the individual. What may be appropriate action in one scenario may not be appropriate in another. All decisions must be reasonable, proportionate and evidence-based.

       You must be able to show on a balance of probabilities that a decision to refuse is based on sufficiently reliable information. You must consider each case on its individual merits." (p. 4/14)

    b. "A person's presence may be non-conducive to the public good for a range of reasons – for example because of reprehensible behaviour falling short of a conviction, or because their identity, travel history or other circumstances means that their presence in the UK poses a threat to UK society. A person does not need to have a criminal conviction to be refused admission on non-conducive grounds.

       Many types of offending or reprehensible behaviour can mean that an individual's presence in the UK would not be conducive to the public good, and many factors will weigh into this such as: (a) the nature and seriousness of the behaviour; (b) The level of difficulty we could experience in the UK as a result of admitting the person with that behaviour;)c) The frequency of the behaviour; (d) The other relevant circumstances pertaining to that individual.

       Other examples of situations where a person's presence may be non-conducive to the public good include the following: (a) the person is a threat to national security, including involvement in terrorism and

> membership of proscribed organisations; (b) the person has engaged in extremism or other unacceptable behaviour; (c) the person has committed serious criminality; (d) the person is associated with individuals involved in terrorism, extremism, war crimes or criminality: (e) admitting the person to the UK could unfavourably affect the conduct of foreign policy between the UK and elsewhere; (f) there is reliable information that the person has been involved in war crimes or crimes against humanity – it is not necessary for them to have been charged or convicted; (g) the person is the subject of an international travel ban imposed by the United Nations (UN) Security Council or the European Union (EU), or an immigration designation (travel ban) made under the Sanctions and Anti-Money Laundering Act 2018; (h) the person has committed immigration offences; (i) if admitted to the UK the person is likely to incite public disorder.
>
> This list is not exhaustive. In all cases, you must consider what threat the person poses to the UK public. You should balance factors in the individual's favour against negative factors to reach a reasonable and proportionate decision." (page 5)

35. The suitability guidance then provided guidance of each of the examples given above. In relation to Extremism and unacceptable behaviour it stated, having referred to the Counter-Extremism Strategy published in October 2015, and as relevant:

> "Unacceptable behaviour covers any non-UK national whether in the UK or abroad who uses any means or medium including: (a) writing, producing, publishing or distributing material … to express views which: (a) incite, justify or glorify terrorist violence in furtherance of particular beliefs; (b) (ii) seek to provoke others to terrorist accounts; (iii) foment other serious criminal activity or seek to provoke others to serious criminal accounts; (iv) foster hatred which might lead to inter-community violence in the UK.
>
> The list of unacceptable behaviours is indicative rather than exhaustive." (p. 6/14)

The decision making process

36. I deal with this in some detail, because of the importance of understanding the evidence base behind the SSHD's decision in the context of the rationality, reasonableness and proportionality challenges. The contemporaneous internal documents are exhibited to the witness statement of James Robertson, Deputy Head of the Home Office's Special Cases Unit (**SCU**).

37. Mr Robertson explained that: "SCU's remit includes considering the cancellation of leave for foreign nationals where there is credible evidence of association with extremism. It is one of a small number of teams which consider non-conducive decisions".

38. On 16/10/23 the SCU commissioned a "rapid scoping assessment" from two internal sections, known as Homeland Security Analysis and Insight (**HSAI**) and the Research, Information and Communications Unit (**RICU**), in relation to: (a) whether or not Dr Elwan had made other statements or had friends or associates who might be considered terrorists or otherwise non-conducive to the public good; and (b) whether or not there was evidence of impact over the community or to suggest she has or influenced others with these comments, or any adverse impacts on community tensions if her visa was cancelled.

39. They also commissioned an assessment from the National Community Tension Team (**NCTT**) (within Counter Terrorism Policing Headquarters) for an assessment on the potential impact of her public comments on communities and the potential impact on communities if her visa was revoked due to her comments.

40. It appears that this case had come to ministerial attention as a result of reporting in national newspapers, particularly the Daily Mail, which had discovered Dr Elwan's position as a doctor working in the NHS in Liverpool. As reported in summary to the NCCT in the attachment to the email from SCU (and as set out in full the decision letter itself at paragraph 24), on 10/10/23 the online edition of the Mail had reported a statement given by The Campaign Against Antisemitism which read (in full) as follows:

> "These despicable comments demonstrate, at a minimum, a lack of empathy unworthy of an employee of the NHS, and we shall be submitting a complaint to her regulator,' they said. 'But, at worst, rhetoric such as this fuels anti-Semitism in the UK, and we will also be exploring legal options. ' They added that such attitudes could make Jewish patients and staff feel unsafe in the NHS. 'The NHS has a responsibility to ensure that its patients, who are among the most vulnerable in society, feel safe,' 'How can a Jewish person entrust their care to NHS doctors, nurses and other frontline medical workers who espouse repugnant views such as these? 'Surely it is obvious that NHS staff, too, must be allowed to work in an environment free of people who defend the murder of innocent civilians, Jewish or otherwise.' The spokesman added that NHS staff who express such views should face an immediate sanction from their employer. 'It flies in the face of the oaths that they have taken, and it should go without saying that anyone who expresses such language must immediately be suspended by the NHS and be investigated,' they said."

41. The RICU found nothing of significance online in relation either to Dr Elwan or to her posts. They noted that many of her posts had been removed from X so that it was "challenging" to decipher the level of engagement they generated online. They also noted that most responses to her comments were dated around 9/10/23 with very low levels of discussion after that date (save a report on X that "the British non-governmental organisation, The Campaign Against Antisemitism, has called for Dr Elwan to be suspended by the NHS and investigated by the UK's medical regulator").

42. The HSAI also found nothing of significance and, in particular, no further public social media accounts affiliated with her and no evidence of any public affiliation with any prominent groups of extremist concern.

43. The NCCT's assessment has commanded more attention before me. Firstly, it reported that it had not identified any police force reporting concerning Dr Elwan. It also stated that the third tweet was almost certain to be "very negatively viewed by the Jewish community".

44. Secondly, it stated: "If it is perceived nothing is done by authorities in addressing the issue, it will lead to an increase in both anti-UK government and anti-police sentiment, as well as increased concern that it would embolden individuals into escalating their activities in targeting the community".

45. Thirdly, and finally, it stated that it was "highly likely the majority of the Muslim community will be supportive of measures being taken to respond against extremist rhetoric which considers Israel's right to exist invalid" but also that "due to the emotiveness of the subject, it is also likely there will be sections of the Muslim community who are concerned about the wider ramifications of speaking out in support for the Palestinian people and how they are perceived".

46. The meaning of the second comment is disputed. Mr Berry's submission is that this was only an assessment of the likely view of the Jewish community as to the ramifications of no action being taken to address the subject matter of the third tweet. Mr Tam submitted that this was too narrow a reading, and that it recorded the NCCT's assessment of the likely consequences of the posts as a whole.

47. I am conscious of the danger of taking an overly legalistic analysis of a report produced at speed by an organisation such as the NCCT. However, if one reads the request and the reply together, it is difficult to read this as anything more than the NCCT's assessment of the likely view of the Jewish community if no action was taken to address the opinions expressed in the third post. That was no doubt informed at least in part by the views attributed to The Campaign against Anti-Semitism as referred to in paragraph 40 above. Nonetheless, it is difficult to read this as an assessment by the NCCT itself that the posts, when read together, were likely, if not addressed, to cause community tension within the UK, let alone lead to targeting, violent or otherwise, of the Jewish community by those opposed to Israel or, more generally, to inter-community violence or public disorder.

48. I therefore accept Mr Berry's submission that these assessments did not provide any positive support for cancelling her LTR or refusing her ILR application on the basis of any impact on inter-community tensions, public disorder or violence other than by reference to the perception of the Jewish community identified in the NCCT assessment. This is not, I emphasise, to write off or downplay this perception, only to make clear that this was not stated by the NCCT as being its own perception.

49. On 18/10/23 the SCU made a written recommendation that a "minded to cancel permission" letter be sent to Dr Elwan, giving her an opportunity to comment prior

to a decision being made, and that "full advice" would be provided by SCU once it had received and considered any representations received. The SCU faithfully summarised the views expressed by RICU and HSAI, although their summary of the NCTT assessment may have given the impression – wrongly in my view - that it had itself perceived that government inaction would lead to the consequences reported and discussed above.

50. The SSHD followed the recommendation, with the minded-to letter being sent on 20/10/23. It said that "you have made multiple statements which could be construed as support for Hamas, a proscribed organisation, following the attack launched by Hamas in Israel on 7th October 2023" but also noted that "this is not to suggest everything you have said can be construed as pro-Hamas sentiment instead of a legitimate exercise of free speech". It said that "your views could be construed as support for Hamas and therefore your presence in the UK is not conducive to the public good".

51. Dr Elwan's detailed response was drafted by her solicitors and attached legal representations drafted with the assistance of counsel. The primary submission was that "the comments being complained of by the Home Office were NOT in support of any terrorist group, including Hamas, but were mere statements of opinion protected under Article 10 of the European Convention of Human Rights". I do not accept this, since I have already concluded that the posts did, in part, express support and justification for, and glorification of, the Hamas terrorist attack on civilians.

52. However, she also claimed that: (a) she did not have any intention of stating support for Hamas as a terrorist group, nor did she do so; (b) the posts had been exaggerated by the Daily Mail; (c) she did not agree with the killing of any man, woman or child, whether Jewish or Palestinian, in the course of the conflict.

53. The letter also gave details as to Dr Elwan's personal circumstances noting, and this is not disputed, that she "was a person of good character, had never breached UK immigration laws, nor committed any criminal offences in the UK or abroad and, having taken a form of the Hippocratic Oath as a doctor, she has vowed her career to preserving life and not to harm others". Nor was it disputed that cancelling her LTR would have damaging and long-reaching effects for her life and her career in the UK, or that being forced to return to Egypt, where only her sister now resides, would sever her support system in the UK, in the form of her close friends who she now considered akin to family. References from colleagues were enclosed, and it was noted that she had never had a complaint made against her.

54. The SCU then provided a further report to the SSHD dated 14/11/23 in which it advised, having carefully considered the representations provided by Dr Elwan, that the evidence reached the threshold to cancel on the basis that her presence was not conducive to the public good. It thus recommended that Dr Elwan's LTR be cancelled and her ILR application refused.

55. It was concluded at paragraph (5) that "in the context of the immediate aftermath of the Hamas attacks, [Dr Elwan's] comments are considered to support a terrorist

attack and likely to cause community tensions within the UK". It was also concluded at paragraph (9) that Dr Elwan's comments can "foster hatred which might lead to inter-community violence".

56. I am satisfied that the conclusion that the comments support a terrorist attack was amply justified. As to the remainder, the only obvious evidence base for the second and third conclusions was the comment attributed to The Campaign Against Anti-Semitism and reported (albeit without direct attribution) by the NCCT.

57. Mr Tam has emphasised that also attached to the report, in addition to the assessments from HSAI, RICU and NCCTT, was an "information to note document" dated 30/10/23. This was produced by SCU as an update of the ongoing management of SCU immigration cases. It contains nothing of direct relevance, but Mr Tam referred to paragraphs 35 and 36, showing that there had been feedback through the Department of Levelling Up, Housing and Communities from two community groups, one Jewish and one Muslim. He did so to support his submission that the SSHD was entitled to rely on their own expertise and evidence and that of SCU, all feeding in through various sources, and not just the three specific units asked to provide specific assessments.

58. Given Mr Robertson's description of the SCU's role it is clear that it did have expertise in this area, so that in arriving at an opinion and recommendation it was not limited to the information provided by the three units and would include information being fed in from other government departments as well as comments such as those attributed to the Campaign Against Anti-Semitism.

59. It must follow, in my judgment, that these specific assessments did have at least some evidential basis and that the SCU was entitled to and had rationally concluded that the reported likely perception of the Jewish community was solidly based.

60. I will have to consider the implications of this once I have reviewed the decision letters, which is the next section of this judgment.

The decision letters

61. By his first decision letter the SSHD cancelled Dr Elwan's LTR. It is a lengthy and detailed decision, with the reasons running to 43 paragraphs over 12 pages. I will concentrate on the important content and not repeat material already referred to.

62. In paragraphs 11 and 12 the SSHD stated that the posts supported accounts of terrorist violence and as a result her presence in the UK is not conducive to the public good. They added: "Although it is not necessary to show that the behaviour falls within a particular category, the closest match is, as you anticipated in your representations, the category relating to extremism and unacceptable behaviour. The Secretary of State considers that your conduct falls into that category".

63. Given my judgment as to the meaning of these posts in this respect, and given the terms of the suitability guidance, I am satisfied that the SSHD was entitled to reach

the conclusion that Dr Elwan's conduct in this respect was capable of falling into the categories of conduct which could result in a conclusion that her presence in the UK was not conducive to the public good.

64. At paragraph 13, they added: "These posts demonstrate views which seek to justify terrorist violence and/or foster hatred which might lead to inter-community violence". For the reasons already given, I am satisfied that the first point was obviously right and that there was a sufficient evidential basis for the second conclusion to be a rational and reasonable one.

65. In paragraph 16 the SSHD noted, correctly in the light of the suitability guidance and the case-law referred to below, that "many factors weigh in the consideration of whether a person's presence in the UK may be non-conducive to the public good. The case law confirms that the question of what is non-conducive to the public good involves a broad judgement to be made by the relevant person charged with making such decisions, namely the Secretary of State".

66. In paragraph 18 and elsewhere the SSHD accepted that "the Israel-Palestine conflict arouses legitimate debate. Rigorous public debate and a forthright exchange of views is important and safeguarded in a liberal democracy".

67. In paragraph 19 they noted the positive points made in Dr Elwan's favour in her representations but also noted, rightly at this time, that she "had not expressed any regret for having made these posts, nor have you acknowledged or conceded that anything that you said was inappropriate". In paragraph 25 they also noted, rightly at this time, that Dr Elwan had not retracted the views expressed.

68. The conclusion at paragraph 20 was that "the Secretary of State is satisfied that viewed collectively the posts seek to justify or express support for the terrorist violence committed by Hamas against Israeli civilians on 7th October 2023 … Whether or not each post would if viewed in isolation be a legitimate expression of free speech, when they are viewed together, they have the meaning attributed to them by the Secretary of State. None of what you have said, including the historical context of the Israeli-Palestinian conflict, dislodges that conclusion". As I have said, that cannot be faulted in my judgment as a decision.

69. Paragraph 21 continued: "Your posts, which were available to be seen by the general public, are in opposition to fundamental British values, specifically mutual respect and tolerance and, if unaddressed, statements of this kind have the potential to incite violence and anti-Semitic views. As such, this is reprehensible behaviour within the meaning of the policy guidance. Further, your statements are considered to amount to extremist or unacceptable behaviour, in accordance with the specific category contained in the policy guidance. It is considered that your posts meet the relevant criteria on the basis they seek to justify terrorist violence and / or foster hatred which might lead to inter-community violence. In summary, taken as a whole the evidence leads the Secretary of State to the view that your presence in the United Kingdom is not conducive to the public good".

70. As to the conclusion that "if unaddressed, statements of this kind have the potential to incite violence and anti-Semitic views" and the further conclusion that the posts seek to foster hatred which might lead to inter-community violence" I accept, as I have said, that there was a sufficient evidential basis for this and that they are conclusions which the SSHD, advised by the SCU, could rationally and reasonably arrive at.

71. The SSHD then addressed further specific points set out in the representations made by Dr Elwan. I will not set them all out, but note in particular the following.

72. In paragraphs 25 and 26 the SSHD addressed Dr Elwan's status as a doctor working in the NHS and noted, in a way which cannot be criticised, that this cut both ways, since her "position as a neurology registrar in the NHS" gave her "a platform and places her in a position of trust" and, whilst they acknowledged the services performed by her as a doctor in the NHS, they also stated that this did not mean that she should not be held to account in the same way as anyone else issued a visa in the UK.

73. In paragraph 27 they acknowledged that Dr Elwan had only made three posts, but also – and rightly - noted that they were open to the public, widely disseminated, and not (then) retracted or revised (paragraph 27).

74. They addressed Dr Elwan's representations under Article 8 ECHR (respect for private and family life) and concluded that any interference with those rights was amply justified (paragraph 31).

75. Thay also addressed Dr Elwan's representations under Article 10 ECHR (freedom of expression) at paragraphs 32 to 42. They expressed themselves satisfied that the interference was justified under Article 10.2 as being prescribed by law and necessary in a democratic society in the interests of public safety and the prevention of disorder or crime. They were satisfied that "paying careful [attention] to your individual interests and the general interest, including the interests of the UK Jewish and Muslim communities of the UK the balance firmly lands on the interest in the withdrawal of your leave to remain". They concluded that there was no adequate lesser sanction.

The applicable legal principles

76. It is unnecessary to over-lengthen this judgment by extensive reference to legal principles which are not in dispute, as opposed to their application to the particular facts of this individual case.

77. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, at § 8, Lord Slynn considered that the expression 'conducive to the public good' was not expressly defined or limited, and that the matter was "plainly in the first instance and primarily one for the discretion of the Secretary of State". It involves an evaluative judgment after an assessment of the facts.

78. Mr Berry submits that the *Rehman* case and others like it should be treated with caution because they concerned 'national security' (not in issue here), an area in which the Government's assessments of risks to the same are particularly hard to disturb, being the product of specialist expertise and democratic responsibility. Whilst Mr Tam accepts that the instant case is not a national security case, he submits that nonetheless the principle is still applicable, namely that whether someone's presence is "conducive to the public good" is a decision likely to be based on all sorts of considerations which are more suitable to be judged by the executive branch of government than the judicial branch.

79. Broadly speaking I agree with Mr Tam's submission. However, I must also bear in mind that the deference which the court will give to the decision-maker is to be calibrated by reference to the particular considerations which apply in the individual case. Additionally, as referred to in *R(Lord Carlile and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, the particular expertise which the court has in relation to assessing the importance of fundamental rights should be borne in mind in cases where they arise – such as the present.

80. Turning to freedom of expression, it is not in dispute that the common law recognises the fundamental right to freedom of expression, so that: (a) it is a right available to all within the UK, regardless of their legal status; (b) it may only be restricted where there is a compelling need to do so; and (c) the right may only be removed by clear and unambiguous provision. Mr Berry cited as authority for these propositions, which are not controversial, *English Public Law* (ed. Professor David Feldman, OUP, Oxford 2004, Chapter 9 Political Rights, chapter author Professor Feldman, at paragraph 9.07.

81. Turning to the ECHR, ss. 1 and 6 of and Schedule 1 to the HRA make it unlawful for a public authority to act in a way incompatible with a Convention right. Among the rights so protected is Article 10 of the (Freedom of Expression), which provides that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

82. Although Article 17 states that: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth

herein or at their limitation to a greater extent than is provided for in the Convention", Mr Tam rightly accepted that given the words of this article, applying as they do only to activity "aimed at the destruction" of the other ECHR rights, it could not be prayed in aid by the SSHD in this case.

83. It was common ground as between Mr Berry and Mr Tam that whilst Article 10 protects all freedom of expression, regardless of its content or status, the right conferred by Article 10.1 was qualified by the restrictions in Article 10.2.

84. It is not submitted by Mr Berry that paragraph 9.3.2 of the Immigration Rules or the suitability guidance in themselves offend against the constitutional right to freedom of expression or against Article 10. That is not surprising, given the carefully calibrated exercise in judgment required by the suitability guidance.

85. The most helpful authority from the domestic courts in the immigration context is to be found in the judgment the Court of Appeal in *Naik v Secretary of State for the Home Department* [2011] EWCA Civ 1546. In his decision Gross LJ set out the applicable principles thus:

> "83. (1) Principle and authority: As it seems to me, the legal framework for determining this issue is furnished by the principles or propositions which follow.
>
> 84. First, the State has the right to control the entry of non-nationals into its territory. This is hornbook law and requires no elaboration.
>
> 85. Secondly, where immigration control overlaps with or results in the engagement of Art. 10 rights of freedom of expression (as it does or as must be assumed here), such control must be exercised consistently with the State's Convention obligations...
>
> 86. Thirdly, Art. 10 rights of freedom of expression are of the first importance. These rights are not, however, absolute or unqualified, as Art 10.2 makes clear. The importance of rights of freedom of expression in a democracy requires no reiteration here. Likewise, the wording of Art. 10.2 speaks for itself.
>
> 87. Fourthly, resolution of any tension between the important interests of immigration control and freedom of expression is achieved by way of Art. 10.2. The application of the provisions of Art. 10.2 will determine whether or not the interference with freedom of expression is justified. The exceptions contained in Art. 10.2 must be construed strictly and the need for any restrictions must be convincingly established. This approach to the construction of Art. 10 is justified both by the structure of the Article and its context; it is moreover well-established in English authority and finds an echo in the Strasbourg jurisprudence cited to us: see, for example, *Surek v Turkey* (1999) 7 BHRC 339, at [57] et seq.; *Cox v Turkey* [2010] Imm AR 4, at [38] – [40]. Manifestly too, freedom of expression, if it is to have meaning, cannot be

> confined to those expressing palatable views; a degree of robustness is a healthy attribute of a democratic society.
>
> 88. Fifthly, decisions of the SSHD to refuse entry to this country to an alien on national security or public order grounds are entitled to great weight and must, by their nature, enjoy a wide margin of appreciation (or discretion). Let it be accepted that such decisions, when resulting in the engagement of Art. 10, warrant the most careful scrutiny on the part of the Court; crucially, even so, the decision-maker is the SSHD not the Court. As Carnwath LJ expressed it (at [62] above), the Court is not substituting its own view for that of the SSHD. The Court's task remains one of review…"

86. I was also referred to the judgment of Lord Sumption JSC on the substantive issue in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [20] where, discussing the overlapping requirements of rationality and proportionality as applied to decisions engaging the human rights of applicants, he said that "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them".

87. To similar effect are the observations of Lords Sumption and Neuberger and Lady Hale in the immigration context in *R(Lord Carlile and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, where it was also emphasised that the final decision is for the court or tribunal and not the government. As Lady Hale said: "it is ultimately a task for the court, but a court which is properly humble about its own capacities". However, as she also said: "The court has a particular expertise in assessing the importance of fundamental rights and protecting individuals against the over-mighty power of the state or the majority [whereas] the government has much greater expertise in assessing risks to national security or the safety of people for whom we are responsible".

88. I should also say that it was not disputed on behalf of Dr Elwan that the attacks on Israeli civilians by Hamas on 7/10/23 amounted to terrorism. In his skeleton argument Mr Berry referred to terrorism as the use of violence against civilian or state targets for political ends. Given the status of Hamas as a proscribed organisation by the UK government and given the definition of terrorism in the Terrorism Act 2000, that concession was plainly correct.

Discussion and decision

89. In the light of my core finding as to the meaning conveyed by the posts, namely that they supported, justified and even glorified the Hamas terrorist attack of 7/10/23 on Israeli civilians, and in the light of my further finding that the SSHD

was rationally and reasonably entitled to conclude that the posts were likely to cause community tensions within the UK and foster hatred which might lead to inter-community violence, I am satisfied that the SSHD was rationally entitled to reach the conclusion in principle that the posts were capable of crossing the line into conduct which was not conducive to the public good.

90. I do accept that those parts of the posts which amounted to expressions of political opinion, no matter how insensitive they might have been in the context of being posted on the very same day as the Hamas terrorist attack, fall firmly within the freedom of expression protected by the common law, by Article 10.1 ECHR and by a proper application of the suitability guidance.

91. However, I am unable to accept that the remainder in themselves attract the same protection. On the contrary, on a proper application of Article 10.2, the SSHD would in principle be justified in invoking the provisions of the Immigration Rules and the suitability guidance in relation to those elements of the posts, on the basis that such action is necessary in a democratic society, in the interests of public safety, for the prevention of disorder and crime and to protect the rights of others, even though it would restrict the exercise of Dr Elwan's right to freedom of expression in those respects.

92. In reaching this decision I am particularly influenced by the following factors.

a. The content and the timing of the offending parts of the posts was shocking and inexcusable and, frankly, involved gloating in the success of the Hamas terrorist attack against Israeli civilians.

b. The posts, albeit only three in number and posted in a short timeline, attracted a considerable degree of publicity, which was not surprising given Dr Elwan's professional position. Whilst she did not intend that the posts be picked up by the media in the way that they were, she ought to have clearly recognised the shocking insensitivity of posting this material, given her role as a professionally qualified practising medical doctor, and the risk that if her position as a doctor working in the NHS was discovered it would result in media publicity. Whilst the publicity burned itself out in a relatively short period of time, it was still considerable for the few days it subsisted.

c. Although the posts were taken down and the X account made private, there was no public apology or retraction on Dr Elwan's X page or elsewhere. The content of Dr Elwan's response to the minded-to letter was disturbing in its failure to acknowledge the inexcusability of these parts of the posts. It is true that she did make it clear that it was not her intention to express support for the terrorist attacks or for any death in the Israel / Palestine conflict, but there was no real attempt to explain or to demonstrate insight into just how appalling these sections of her posts were.

93. I do acknowledge that subsequently, on 7 December 2023, she wrote to the SSHD – in a letter plainly drafted by her lawyers - expressing regret and confirming that she did not support Hamas or its actions and had taken the tweets down and made

her account private before the Daily Mail article was published. However, she still did not express any public regret or confirmation that she did not support the terrorist violence against civilians on 7/10/23, whether by posting on X or otherwise. Instead, she gave what I regard as an unconvincing explanation that "if I were to have made a public apology, I believe this would have caused further backlash as tensions and opinions surrounding the conflict are still rife". Further, as Mr Tam noted, this arrived too late to be taken into account by the SSHD in their decisions. As he also notes, even now Dr Elwan has chosen not to make a witness statement in these proceedings which apologises, expresses regret or provides unambiguous confirmation that she does not support the terrorist activities of Hamas carried out on 7/10/23.

94. All of these points provide powerful support for the overall conclusion that the SSHD's decision was rational, reasonable and proportionate.

95. Nonetheless, it is equally true that there are powerful mitigating factors. The postings were few and short lived, and it is entirely possible that if her position as a doctor had not been discovered and publicised by media reporting they might never have come to public attention. Also, as already indicated, it is not disputed that Dr Elwan has never committed any criminal offences in the UK or abroad, has never breached UK immigration laws, nor has she ever been the subject of any criminal or professional investigation. She is a person of positive good character, as exemplified by the references provided with her pre-decision representations. It is accepted that she has made and continues to make a valuable contribution to UK society through her work as at NHS doctor.

96. That apart, her personal circumstances are of little weight in this assessment, by reference to her private life as engaged by Article 8 ECHR. I accept that for all of the following perfectly good reasons, as stated in her pre-decision representations, Dr Elwan would far prefer to remain in the UK. Although she has no family ties in the UK, and in particular there are no children whose best interests would need to be considered, she does have close friends in the UK, where she has lived since 2016 and would like to make the UK her permanent home. Her parents live in Kuwait, which she says she is unable to visit, let alone settle in, as an Egyptian citizen, and her brother lives in Germany, which she would also be unable to settle in. Her sister does live in Egypt, but has her own married life there. She would, I accept, find it difficult in many ways to re-adjust to life in Egypt after 9 years continuous absence, if that was where she had to relocate if removed from the UK, and I accept it would harm her professional career if she had to return and retrain as a doctor there. However, none of these factors are sufficiently compelling to carry great weight in my judgment when I am considering the overall conduciveness assessment.

97. In my view the most cogent arguments advanced by Mr Berry are these. First, the limited and transitory nature of the posts. Second, the fact that the offending parts of the posts should be weighed against the fact that they were made in the context of posts which also contained genuine and protected political comment. Third, the fact that although the suitability guidance is widely expressed, in the absence of any previous history of Dr Elwan having involvement in or expressing support for

terrorism or, more generally, conduct which could encourage inter-community hatred or disorder or violence, it would be disproportionate for her to have her LTR revoked as a result solely of these posts.

98. These are powerful submissions. Of less weight in my view was Mr Berry's further submission that the true sanctioning authority for Dr Elwan's conduct ought to be either her employer or the General Medical Council. As Mr Tam submitted, the fact that Dr Elwan's employer might (or might not) choose to take action against Dr Elwan for these postings is of little if any relevance whatsoever to the SSHD's decision in relation to their entirely separate question whether or not to revoke Dr Elwan's LTR or refuse her ILR application. The same would be true of any argument that the SSHD ought to leave it to the General Medical Council to bring regulatory proceedings against Dr Elwan under the *Medical Act* 1983.

99. During the hearing I raised the question of whether there was some reasonable lesser alternative sanction, which is plainly a very material consideration, both under the suitability guidance and the proportionality assessment required under the ECHR. In particular, I enquired whether or not the SSHD ought to have considered, as an intermediate position, refusing the application for ILR but not revoking the current LTR.

100. The immediate difficulty with that option, as Mr Tam submitted, and as I have already noted, is that under the Immigration Rules once the SSHD has made an overall determination that Dr Elwan's presence in the UK is not conducive to the public good, both refusal of ILR and revocation of LTR are mandatory.

101. It is also pertinent to observe that once ILR is granted it would be very difficult, if not impossible on my reading of the Immigration Rules and the guidance, to revoke that indefinite leave if Dr Elwan was subsequently to engage in further conduct of a similar nature. The same, of course, does not hold true of any decision not to cancel Dr Elwan's current LTR. The SSHD can make any further decision on any further application to extend the LTR on the basis of all relevant factors as they exist at that time, including those relevant to these offending posts.

102. In my view, this "all or nothing" approach can be seen from the facts of this case to be a lacuna in the suitability guidance, since it does not expressly permit the decision maker to reach a different decision about whether the person's presence within the UK is, or is not, conducive to the public good depending on whether the consequence of that decision is to refuse an application for leave to enter, to refuse an application for ILR, or to cancel an existing LTR (and, if so, the nature and remaining duration of that LTR). Instead, it requires the decision maker to consider all relevant factors and then to make a binary decision whether or not the person's presence is or is not conducive to the public good, which must apply regardless of the circumstances in which the question is being asked and the consequences of that decision as made at that time.

103. Whilst in the vast majority of cases this would not lead to a different result, in this case in my judgment it would. That is because on the facts of this case I am satisfied that the SSHD was perfectly entitled to conclude that Dr Elwan's posts,

coupled with all other relevant factors, would justify a refusal of her extant application for ILR, especially because – as I have said - if she was granted ILR that would prevent the SSHD from revoking that ILR if she was to make similar posts in the future. I am also satisfied that for the same reasons this was a proportionate decision under the ECHR.

104. It follows in my judgment the result of the balancing exercise undertaken by the SSHD in relation to the application for ILR resulted in a decision which, overall, was rational, in accordance with the suitability guidance, reasonable and proportionate.

105. In contrast, however, I am not satisfied that the SSHD was also entitled to reach the same conclusion in relation to the cancellation of her existing LTR with skilled worker status which, as at the date of the decision, had over two and a half years to run. In my judgment that would not have been a reasonable or a proportionate decision. To be balanced against the factors identified above, the SSHD also needed to have proper regard to the short-lived and one-off nature of that conduct, in the context of a lengthy and overwhelmingly positive and otherwise blameless length of permitted leave within the UK. Also, even though Dr Elwan did not make a full or public retraction or apology, she had taken down the posts even before the media publicity occurred. It is clearly possible to imagine far more egregious posts having been posted by persons not subject to immigration control on that day. The posts, read overall, did include protected expressions of political opinion. The SSHD also had to consider the consequences to Dr Elwan and indeed, to the wider community of immediate cancellation, requiring her to leave her existing post.

106. In my judgment, the reasonable and proportionate reaction in the circumstances would have been to conclude that Dr Elwan should be allowed to remain in the UK under the existing LTR, on the basis that: (a) she would receive a clear warning that her posts were unacceptable and were not all protected under Article 10.1; (b) if she was to engage in any further conduct which justified the conclusion that her presence was not conducive to the public good, she should be under no illusions as to the likely outcome; and (c) the SSHD would be entitled to make a decision in relation to any further application for further LTR or for ILR which took the matters in the posts into account as part of the overall determination.

107. This alternative option does not appear even to have been considered by the SSHD, no doubt because of the all or nothing approach mandated by the suitability guidance. In my judgment, however, not even considering the alternative option of different decisions in relation to the different decisions before them, presumably as a result of an unarticulated assumption that it was not possible to do so by reference to the suitability guidance, was an error of law, a failure to have regard to material considerations, and a failure to follow the requirement to consider whether there were lesser more proportionate alternative courses separately in relation to both decisions. That option ought to have been considered on the particular facts of this case, even though it had not been raised expressly by Dr Elwan.

108. If it had it been considered, it cannot be said in my judgment that the only reasonable and proportionate decision would have been to cancel her existing LTR as well as refusing her ILR application.

109. I have considered carefully whether it is both proper and appropriate to reach this split decision in a case such as this. Having done so, I am still satisfied that it is. There is no basis in law or on the facts for an all or nothing decision, and the different consequences of the different decisions are plainly extremely relevant factors.

110. Finally, and for completeness, I should record that at the hearing Mr Berry suggested that an alternative reasonable and proportionate lesser sanction would have been for the SSHD simply to decide to take no decision for the time being, either on cancelling the existing LTR or allowing the application for ILR, to see how Dr Elwan conducted herself subsequently. However, as Mr Tam submitted, it could hardly be a principled approach to say that the SSHD was positively required to decide not to make a decision or to act otherwise than in accordance with the Immigration Rules. The question of for how long the SSHD could wait would itself cause difficulty and uncertainty. Finally, this was not only not something which Dr Elwan had ever suggested might be appropriate but also something which she had never suggested might even be acceptable to her.

Conclusion

111. In the circumstances the claim for judicial review fails in relation to the application for ILR but succeeds in relation to the cancellation of the LTR.

112. In my judgment, the appropriate course is for me to quash the decision to cancel the LTR and for the SSHD to take the decision afresh. I do not consider that it would be proper for me to substitute my own view, even by reference to the proportionality assessment under the ECHR. That is because under the democratic principle it remains a decision which should be re-taken by the SSHD, albeit on the basis of a proper self-direction to weigh up all material considerations as they exist at the time of the decision and by reference to the consequences of the particular decision in question.

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