Neutral Citation Number: [2022] EWCA Civ 1541

Case No: CA-2022-000828

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Honourable Mrs Justice Farbey
PTA/10/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2022

Before:

LORD JUSTICE COULSON
LORD JUSTICE NUGEE
and
LADY JUSTICE ELISABETH LAING

- -

Between:

QX	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Dan Squires KC and Darryl Hutcheon (instructed by **ITN Solicitors**) for the **Appellant**
Robin Tam KC and Steven Gray (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 1 and 2 November 2022

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Approved Judgment

This judgment was handed down remotely at 11 am on 22 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This appeal concerns provisions of the Counter-terrorism and Security Act 2015 ('the 2015 Act') which give the Secretary of State power to impose, and the court power to review, a temporary exclusion order ('TEO'). There have been three preliminary hearings in the proceedings in this case. Farbey J ('the Judge') has handed down three judgments on such issues, which I will refer to, in sequence, as 'judgment 1', 'judgment 2' and 'judgment 3'.

2. The Appellant ('A') is a British citizen. He appeals, with the permission of the Judge, against an order made by her for the reasons given in a judgment handed down on 7 April 2022 ('judgment 3'). The Respondent ('the Secretary of State') cross-appeals, also with the permission of the Judge. On this appeal, A has been represented by Mr Squires KC and Mr Hutcheon, and the Secretary of State by Mr Tam KC and Mr Gray. I thank counsel for their written and oral submissions. The Judge has considered CLOSED material and submissions at various stages of the proceedings. This Court, however, has only considered OPEN material and OPEN submissions.

3. Paragraph references are to the paragraphs in the Judge's judgments, as the case may be, or, if I am referring to an authority, in that authority, unless I say otherwise.

The issues on this appeal

4. There are two main issues on this appeal. The Secretary of State's cross-appeal raises a third. A fourth was canvassed by the Secretary of State in argument, but abandoned at a late stage of the hearing, as I will explain.
    i. Ground i. of the appeal argues that the Judge erred in law in holding that A was not entitled to disclosure of the kind described in *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28; [2012] 2 AC 269 ('*AF(No 3)')* in relation to his challenge to Conditions A and B (see further, paragraph 41, below). That depends on whether article 6.1 of the European Convention on Human Rights ('the ECHR') applies to those two challenges. That depends, in part, on two further questions.
        1. Is this Court bound by paragraphs 31 and 32 of *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 220; [2020] 1 WLR 1604?
        2. Would a decision on the challenges to Conditions A and B in any event be decisive for A's civil rights?
        3. A further question is whether A is precluded from raising this issue on this appeal because the Judge decided it in judgment 1 and he did not appeal then.
    ii. Ground ii. argues that the Judge erred in law in deciding that A was not entitled to cross-examine the Secretary of State's witness on A's challenge to Conditions A and B. The answer to this question depends in part on whether this Court is bound by the reasoning in *MB v Secretary of State for the Home Department* [2006] EWCA Civ 1140; [2007] QB 415 and in *AL v Secretary of State for the Home Department* [2018] EWCA Civ 278.

iii. Did the Judge err in law in ordering the Secretary of State to tender a witness for cross-examination on other aspects of A's challenge? Coulson LJ has written a short judgment dealing with this discrete issue. I agree with it.

5. The fourth issue is whether ground i. of this appeal is academic because A has already had disclosure complying with *AF (No 3)* in relation to his challenge to Conditions A and B. A has submitted throughout that he has not had such disclosure and that this ground of appeal is not academic. In her skeleton argument, the Secretary of State, while not putting this point at the forefront of her submissions, nevertheless submitted that one answer to this ground of appeal was that it was academic. Late in the morning of the second day of the hearing, while Mr Squires was making his submissions in reply (on his appeal), Mr Tam interrupted those submissions to indicate that the Secretary of State disclaimed the argument that this part of the appeal was academic.

6. This Court must, however, reach its own view on this issue, independently of the parties' arguments, and so I must also consider this issue (cf *Ainsbury v Millington* [1987] 1 WLR 379). It is both logical and convenient for me to address it before the two main legal issues which I intend to consider. Its resolution depends on the complicated procedural history of this case. I will therefore describe that history in some detail. Before I do so, I will briefly summarise the facts, and both the current statutory scheme, and one of its predecessors, as it is difficult to make sense of the procedural history and of the parties' arguments without some understanding of those schemes.

7. For the reasons which I give in this judgment, I have reached three conclusions.
   i. Ground i. is not academic. The Judge has not already decided the relevant question.
   ii. It is unnecessary for me to express a view on the effect of paragraphs 31 and 32 of *Pomiechowski* in this context. For the reasons I give below, a decision on the validity of the TEO would be a decisive determination in relation to A's article 8 rights. Article 6.1 therefore applies to it, and A is entitled, in his challenge to Conditions A and B (see paragraph 41, below) to disclosure complying with *AF (No 3)*.
   iii. This Court is not bound by this Court's interpretation of the similar, but not identical, provisions of the Prevention of Terrorism Act 2005 ('the 2005 Act') when it interprets the relevant provisions of the 2015 Act. The Judge was right not to order cross-examination of a national security witness on A's review of the Secretary of State's decisions that Conditions A and B were met.

The facts in outline

8. A went to Syria in 2013. He married in 2014, and he and his wife had two children. In his fourth and fifth witness statements in these proceedings, he gave an account of what he had done in Syria (see paragraphs 92 and 93, below). He and his wife later decided to return to the United Kingdom. On 26 November 2018, the Secretary of State applied to the High Court for permission to impose a TEO on A. The Secretary of State alleged that A had engaged in terrorism-related activity ('TRA') in Syria between 2013 and 2018 by aligning with an al-Qaeda-aligned group ('the Syria allegation': see further,

paragraph 58, below). I will refer to al-Qaeda as 'AQ'. The High Court gave that permission. The Secretary of State imposed a TEO the same day. At that stage, A and his family had been detained in Turkey pending their deportation to the United Kingdom.

9. A returned to the United Kingdom with his family on 9 January 2019 in accordance with a permit to return issued by the Secretary of State. He was served with the TEO and with a notice of the obligations which it imposed. Those included obligations (a) within specified hours to report once a day to a named police station, and (b) to attend two two-hour appointments a week ('the obligations').

The relevant statutory schemes

Control orders

10. Section 1(1) of the 2005 Act gave the Secretary of State power to make a control order, defined in section 1(1) as an order against an individual ('I') 'that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism'. Section 1(2) distinguished between derogating and non-derogating control orders, that is, between orders which did, and did not, impose obligations which were incompatible with I's rights under article 5 of the ECHR. The former could only be made by the court on the application of the Secretary of State. The latter could be made by the Secretary of State. The obligations which could be imposed on I were obligations which the Secretary of State, or the court, as the case might be, considered 'necessary for purposes connected with preventing or restricting involvement in terrorism-related activity' (section 1(3)). 'Involvement in terrorism-related activity' ('TRA') was defined in section 1(9). Section 1(4) listed 16 examples of the types of obligation which could be imposed. Some, such as the obligations to give access to his home and to allow it to be searched, to allow things to be removed from it, to permit the monitoring of his movements and communications, and to comply with demands to provide information, for example about his movements, were very intrusive.

11. Section 2 made further provision about the power of the Secretary of State to make a non-derogating control order (section 2(3)). The Secretary of State could make such an order if 'he (a) *ha[d] reasonable grounds for suspecting* that the individual is or has been involved in [TRA]' and (b) considered 'that it is *necessary* [for stated purposes] to make a control order imposing obligations on [I]' (section 2(2)) (my emphasis). A non-derogating control order lasted for 12 months and could be renewed on further occasions (section 2(4)).

12. Section 3 was headed 'Supervision by the court of making of non-derogating control order'. Section 3(1) required the Secretary of State to get the permission of the court before making a non-derogating control order unless the circumstances were urgent. The function of the court on an application for permission was to consider whether *the decision of the Secretary of State* to *make the order* was '*obviously flawed*' (section 3(2)(a) (my emphasis). The court could consider such an application ex parte (section 3(5)). If the court gave permission, it had to give directions 'for a hearing in relation to the order as soon as reasonably practicable after it [was] made' (section 3(2)(c)). Those directions were required to include arrangements for I to be given an opportunity to make representations about the directions already given, and any further directions (section 3(7)).

13. On a hearing pursuant to directions given under section 3(2)(c), 'the function of the court [was] to determine whether any of the following *decisions* of the Secretary of State [was] *flawed*'. Those were the decisions that the requirements of section 2(1)(a) and (b) were met and his decisions to impose each of the obligations imposed by the control order (section 3(10)). In determining 'the matters mentioned in [section 3(10)] the court must apply *the principles applicable on an application for judicial review*' (section 3(11)) (my emphases).

14. Section 4 dealt with the role of a court in relation to a derogating control order. In paragraphs 13 and 14 of *MB* this Court quoted section 4(3) and (7). It is unnecessary to say more about them than that they made it clear that the role of the court in relation to a derogating control order was different from its role in relation to a non-derogating control order, and required it to make certain decisions for itself, rather than reviewing decisions of the Secretary of State. Section 7(1) gave I, while a non-derogating control order was in force, and when he considered that there had been a change in circumstances, a right to apply to the Secretary of State for the revocation or modification of the control order. Section 7(2) gave the Secretary of State, at any time, and whether or not I applied to him, power to revoke a non-derogating control order or change the obligations imposed by it. I or the Secretary of State could apply to the court, at any time, for a derogating control order to be revoked or its obligations modified (section 7(4)). Section 7(5) and (6) described the powers of the court on such an application.

15. Section 11(1) was an ouster clause. It provided that control order decisions and derogation matters were not to be challenged in any legal proceedings other than in the court or on appeal. Section 11(2) provided that 'the court' was 'the appropriate tribunal' for the purposes of section 7 of the Human Rights Act 1998 ('the HRA') 'in relation to proceedings all or any part of which call a control order decision or derogation matter into question'. 'Control order proceedings' were defined in section 11(6), 'control order decision' in section 11(7), and 'derogation matter' in section 11(8). 'The court' was defined, as (unless I's principal place of residence was in Scotland or Northern Ireland), the High Court in England and Wales (section 15).

Decisions concerning the standard of review and disclosure which applied to control orders

MB v Secretary of State for the Home Department (Court of Appeal)

16. The appellant in *MB* was the Secretary of State. The Secretary of State had applied to the court under section 3(1)(a) of the 2005 Act for permission to make a non-derogating control order against MB. MB was a British citizen. He was single and lived with his adult sister. The obligations imposed by the control order are listed in paragraph 22 of the judgment of this Court. They included an obligation to let police officers and other authorised persons into his home at any time to check that he was there and that he was complying with the obligations, and to permit them to search his home, remove things, and take his photograph. The court gave permission and made directions for a hearing. At the hearing, Sullivan J (as he then was) accepted the Secretary of State's submission, with which the Special Advocates agreed, that it was not possible to serve a summary of the CLOSED material which would comply with CPR r 76.29(6) (see further, paragraph 18, below), in other words, that it would be contrary to the public interest to disclose such a summary. He ordered the control order to stay in force but made a

declaration, pursuant to section 4(1) of the HRA, that the procedures under section 3 were incompatible with the appellant's right to a fair trial under article 6.1 of the ECHR.

17. On appeal, the Secretary of State argued that, contrary to the Judge's view, judicial review was sufficiently flexible to enable the court to ensure that it had full jurisdiction over the decision in question, that the court was not confined to looking at evidence which was before the Secretary of State, that the availability of the special advocates provided appropriate safeguards and that the judge had erred in making a declaration of incompatibility without considering, under section 3 of the HRA, whether it was possible to read and give effect to the 2005 Act in a way which was compatible with the requirements of article 6.1. The respondent argued that a full merits review was necessary and that a section 3 reading of the 2005 Act was not available to achieve that result.

18. Schedule 1 to the 2005 Act authorised the making of procedure rules governing the disclosure of information to I. Rules were duly made (CPR Part 76). Lord Phillips MR, giving the judgment of this Court, summarised the provisions of Schedule 1 and of those rules in paragraph 18. I note that they were broadly similar to Part 3 of the 2015 Act and to the current version of CPR Part 88, respectively. This Court said that it was plain that the justification for the obligations in the control order lay in the CLOSED material. The Special Advocates agreed with the Secretary of State that it would not be possible to serve a summary of the CLOSED material on the respondent without disclosing information which it would be contrary to the public interest to disclose (paragraph 27). Sullivan J agreed (paragraph 28).

19. Sullivan J had also held that he had no option but to keep the control order in force having made a declaration of incompatibility; the 2005 Act did not give the respondent a fair hearing in the determination of his article 8 rights (paragraph 30). This Court identified four strands in Sullivan J's reasoning: (1) the court's only function was to consider, at the time when the Secretary of State made his decision, and by reference to the material which was before the Secretary of State, whether his decision was flawed; (2) the function of the court was to review the decision of the Secretary of State, not to form its own view of the merits of that decision; (3) the court was to apply a particularly low standard of proof; and (4) the court made its decision based on evidence about which the respondent knew nothing (paragraph 31). In paragraph 35, Lord Phillips said that it was arguable that by giving a remedy in civil proceedings for infringement of Convention rights, the HRA had converted those into civil rights. He recorded that the Secretary of State did not accept that analysis, but 'rightly submitted' that it was not necessary for this Court to decide that question, and had conceded that the control order adversely affected MB's civil rights, with the consequence that the proceedings did involve a determination of his civil rights and obligations.

20. This Court held that Sullivan J had erred in law in making the declaration under section 4(1). First, it referred to section 3 of the HRA and held that section 11(2) of the 2005 Act required the court to give effect to the respondent's Convention rights having regard to the state of affairs at the date of the court's decision. This Court referred to *Wilson v First County Trust (No 2)* [2004] 1 AC 816, paragraph 24. I observe that paragraph 24 is not a statement of the law, but a summary of a judgment of this Court in the *Wilson* case, with which Lord Nicholls disagreed (paragraph 25 of *Wilson*), and which the House of Lords overturned. Lord Phillips deduced that 'section 3(10)…cannot be read

so as restrict the court when considering human rights issues to a consideration of whether, when the Secretary of State made his decision, he had reasonable grounds to do so' (paragraph 40). It was common ground that the control order was an interference with the respondent's article 8 rights, so Sullivan J should have considered 'the validity of the control order having regard to the position as it was at the time when he made his decision' (paragraph 41).

21. This Court acknowledged that in a case in which there were no Convention rights at issue, section 3(10) could be construed as restricting the court's review to the question whether, when he took the relevant decision, the Secretary of State had reasonable grounds for doing so. 'That indeed, is the natural meaning of the wording which speaks of determining whether any of the decisions of the Secretary of State was *flawed*' (original emphasis). But there were cogent reasons for not interpreting section 3(10) in that way.

22. It would be unsatisfactory to give section 3(10) different meanings depending on whether or not there was an interference with a Convention right. Second, if section 3(10) only permitted the court to ask whether the Secretary of State's decision was properly reached when he made it, 'it will not, as article 6 requires' enable I to 'have a fair review of his civil rights as they are at the time the review is carried out' (paragraph 43). Third, it was implicit from section 7, and would be implicit in any event, that it was the duty of the Secretary of State to keep the control order under review to ensure that its restrictions' interference with civil and Convention rights were not greater than necessary. 'A purposive approach to section 3(10) must enable the court to consider whether the continuing decision of the Secretary of State to keep the order in force is flawed' (paragraph 44). This Court considered that 'section 3(10) can and should be "read down" so as to require the court to consider whether the decision was flawed when the court made its determination' (paragraph 46).

23. Sullivan J had considered that article 6 required a full merits review of the justification for the control order and that section 3(10)) did not permit that. This Court disagreed. When read with section 11(2), section 3(10) did not restrict the court to a standard of review which did not satisfy the requirements of article 6. On an application for judicial review, a court had all the powers it needed, including to hear oral evidence and cross-examination, 'to enable it to substitute its own judgment for that of the decision maker, if that is what article 6 requires' (paragraph 48).

24. In view of that conclusion 'it [was] not necessary in order to determine this appeal' for this Court to 'express a view as to the standard of review that is required when considering the decisions of the Secretary of State to make a non-derogating control order' (paragraph 49). It seems that in this paragraph, Lord Phillips meant by that phrase whether or not the standards of the criminal limb of article 6 applied (see paragraphs 50-53), rather than how the court should approach a review under the civil limb of article 6 (see the reference to 'the standard of review' in paragraph 60).

25. Lord Phillips then recorded the respondent's submission that article 6 could only be satisfied if the court made its own independent assessment of whether the requirements for making a control order were met. The Secretary of State's response was that his decision was governed by public law and that article 6 was only engaged because the decision incidentally had the effect of determining the respondent's Convention rights,

that the Secretary of State was the decision maker and the court's role was to review the lawfulness of his decision, giving the Secretary of State substantial deference, as this was a national security case (paragraph 55).

26. There were two elements to the Secretary of State's decision. He had to have reasonable grounds for suspecting that I had been involved in TRA and he must consider that it was necessary, for specified reasons, to make the control order. The first 'involves an assessment of fact'. The second required a 'value judgment' about what was necessary to protect the public. The fact that involvement in TRA was likely to be a serious criminal offence 'of itself' suggested that when reviewing the Secretary of State's decision to make a control order 'the court must make up its own mind …whether there are reasonable grounds for the necessary suspicion' (paragraph 58). The European Court of Human Rights ('the ECtHR') was familiar with the test of reasonable suspicion. Lord Phillips quoted a passage from *Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157, paragraph 32; 'Having a reasonable suspicion presupposes the existence of facts or information which would reasonably satisfy an objective observer that the person concerned may have committed the offence' (paragraph 59).

27. Lord Phillips then said 'Whether there are reasonable grounds for suspicion is an objective question of fact'. He could not see how the court could review the decision of the Secretary of State 'without itself deciding whether the facts relied on by the Secretary of State amount to reasonable grounds for suspecting' that I has been involved in TRA (paragraph 60). He accepted that the court should pay 'a degree of deference' to the Secretary of State's assessment that measures were necessary to protect the public (paragraphs 64 and 65).

28. This Court considered the standard of proof ('reasonable suspicion') in paragraphs 66-68. It concluded that in considering whether there were reasonable grounds for suspicion, the court might have to consider 'a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on the balance of probability and some of which are based on no more than circumstances giving rise to suspicion'. The court had to consider whether that 'matrix amounts to reasonable suspicion'. That was different from deciding whether facts had been proved. The procedure for deciding whether there are reasonable grounds for suspicion had to be fair to satisfy article 6 (paragraph 67).

29. This Court then considered the use of CLOSED material (paragraphs 68-78).

30. In paragraph 79, Lord Phillips said that 'The critical issue of fact in this case is whether there are reasonable grounds for suspecting' that the respondent was involved in TRA. The next question was whether article 6 required 'an absolute standard of fairness', or whether some derogation was permitted in the interests of national security. This Court had held that it was permitted (in *A v Secretary of State for the Home Department* [2004] QB 335, paragraph 57, and in *A v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414, paragraphs 51-51 and 235; both decisions had been overruled on appeal, but not on that issue). I note that *A (No 2)* related to an appeal to the Special Immigration Appeals Commission ('SIAC') under section 25 of the Anti-Terrorism Crime and Security Act 2005. On such an appeal, SIAC was obliged to cancel a certificate made under section 21 in two cases. One was if it considered that there were

no reasonable grounds for the belief which was the foundation of the certificate. Lord Phillips said that *AF (No 2)* was binding (paragraph 80). Article 6 could not automatically require disclosure of the grounds for suspicion (paragraph 85). The use of special advocates provided adequate safeguards (paragraph 86). At paragraph 87, Lord Phillips said that this Court had 'unravelled each of the four strands of the judge's reasoning and found that they do not support his conclusion. The judge was in error in holding that the provisions for a review by the court of a non-derogating control order by the Secretary of State do not comply with the requirements of article 6'. The appeal was allowed, and the case remitted for 'the validity of the order to be reconsidered, adopting an approach that accords with this judgment' (paragraph 88).

MB v Secretary of State for the Home Department (House of Lords) [2008] 1 AC 440

31. MB appealed to the House of Lords. The Secretary of State did not cross-appeal. MB's appeal was joined with that of AF. There were three relevant issues: whether (1) the control orders did, or did not, come within the ambit of article 5; (2) whether the control orders attracted the protections of the criminal limb of article 6, and (3) whether the proceedings, in particular because of the lack of disclosure to I, were compatible with article 6. In paragraph 15, Lord Bingham noted a concession by the Secretary of State that control order proceedings were within the civil limb of article 6 because 'they are in their effect decisive for civil rights, in some respects at least'.

32. The House of Lords held that the non-derogating control orders were not within the ambit of article 5 and did not amount to the determination of a criminal charge. The majority held that the use of the special advocate procedure might not in every case be compatible with article 6. The cases were remitted to the Administrative Court for it to consider them in the light of the majority's decision that paragraph 4(3)(d) of the Schedule to the 2005 Act and CPR Part 76.29(8) should be read and given effect with the addition of 'except where to do so would be incompatible with [I's] right to a fair trial' (per Baroness Hale of Richmond at paragraph 72).

33. The House of Lords did not directly address the meaning and effect of section 3(10), but it is clear from a reading of the judgments of the majority that they did not disagree with this Court's analysis of section 3(10). What they disagreed with, rather, was this Court's view that its interpretation of section 3(10), coupled with the involvement of special advocates, would always make the proceedings comply with article 6.1. Their view, rather, seems to have been that the proceedings as a whole had to be fair, and that this Court's interpretation of section 3(10), coupled with the involvement of special advocates would not necessarily be enough to secure compliance with article 6.1 in a case where some disclosure of grounds for the Secretary of State's decision was necessary.

AF (No 3)

34. Lord Phillips also gave the leading speech in *Secretary of State for the Home Department v AF (No3)* [2009] UKHL 28; [2010] 2 AC 269. The House of Lords, allowing an appeal from a decision of this Court, held that it was bound by the decision of the Grand Chamber of the ECtHR in *A v the United Kingdom* (2009) 49 EHRR 625 to hold that, in order to comply with article 6, I had to be given enough information about the allegations against him to enable him to give effective instructions to his special advocate (paragraph 59), in order to comply with the criminal standard of

fairness (paragraph 57). Where the OPEN case consists 'of purely general assertions and the case against the controlee is based solely or decisively on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be' (paragraphs 57 and 59). That was so despite the fact that *A v United Kingdom* concerned article 5, and *AF (No 3)* did not (paragraph 57).

AL v Secretary of State for the Home Department

35. In 2006 Collins J gave permission for a control order to be made against the appellant in *AL v Secretary of State for the Home Department* [2018] EWCA Civ 278. Ouseley J upheld the lawfulness of the control order in 2007. It was renewed in 2007. That renewal was never challenged. In December 2007, the appellant appealed against the order of Ouseley J. The appeal was stayed pending the decision of the House of Lords in *AF (No 3)*. Permission to appeal was granted and the appeal was allowed by consent on 8 July 2010. The merits were not considered. The case was remitted to the Administrative Court. The 2005 Act was repealed with savings in December 2011. The savings provisions said that the repeal did not prevent or otherwise affect the holding of any hearing in relation to the imposition of a control order but limited the court's power to deciding whether it, or any renewal, or any obligation imposed by it, should be quashed. The Court did not retain its former power to revoke a control order.

36. On the remittal, Collins J held that he should have regard to the facts as they were when he, the judge, made his order, relying on the decision of this Court in *MB*. He considered the findings of Ouseley J in the light of further disclosure and the appellant's three subsequent witness statements. He agreed that he should not vary any of Ouseley J's findings which were favourable to the appellant. He had in mind paragraph 46 of the decision of the Court of Appeal in *MB*. However, by contrast with *MB,* the control order in this case had been made nearly 10 years before the hearing. Parliament had assumed that the relevant hearing would happen as soon as possible after the control order was imposed. The original decision to impose the control order could not be flawed 'simply because at the time when the court hears the s.3(10) application the order is shown to be unnecessary'. AL was released from custody in 2011, having served a sentence of imprisonment for criminal offences. It had not been suggested that, since then, he had been involved in any TRA. It would be 'absurd if, as one reading of *MB* might indicate, that meant I had to quash the order'. Collins J considered that paragraph 46 was not 'entirely happily phrased'. It must mean that the court would consider all the evidence whether or not it was known to the applicant.

37. On the appeal, A argued that Collins J had failed to follow the approach set out in *MB*. He had, instead, reviewed the control order in accordance with *Wednesbury* principles. He should have decided for himself whether there were reasonable grounds for suspicion. This Court held that the Judge had correctly described both the question which section 3(10) required him to ask, that is, whether the making of the control order was flawed, and the approach which he should take, that is, to look at all the evidence which was now available, even if it was not available to the Secretary of State at the time, and then 'to decide for himself whether, at that time, there had been reasonable grounds for suspecting that the appellant had been involved in [TRA].

38. As Collins J had done, this Court considered that 'some gloss' had to be put on paragraph 46 of the judgment of this Court in *MB* (see paragraph 22, above). *MB* was

decided when the 2005 Act was still in force. This Court agreed with Collins J that it would be 'absurd' to quash the control order in 2016 merely because, by that time, the control order had become unnecessary. 'All that is required by *MB* is that, in considering whether the making of the control order in December 2006 was flawed, the court must look at all the evidence now available, even if it was not available to the Secretary of State at the time' (paragraph 31). It was clear that the Judge had recognised that he had to 'make his own assessment of as to whether all the evidence now available showed that there had been reasonable grounds for suspecting that the appellant had been involved in' TRA (paragraph 32). The Judge had done that, and had made findings of fact of his own: 'He was not simply reviewing the Secretary of State's decision and determining whether the Secretary of State had reasonable grounds of suspicion at the time, nor was he deferring to the Secretary of State…' (paragraph 33).

TPIMs

39. Mr Tam submitted that the relevant provisions of the Terrorism Prevention and Investigation Measures Act 2011 ('the 2011 Act'), which govern TPIMs, are not relevant to the arguments on this appeal. His point was that the language of section 3(1) of the 2011 Act has changed three times since it came into force, and such authority as there is concerns statutory language which differs significantly both from the language of section 11 of the 2015 Act and from section 3(1) of the 2011 Act as originally enacted, and from the current version of section 3(1) (which reinstates the original version). Condition A was initially met and would now be met if the Secretary of State 'reasonably believe[d]' that I was or had been 'involved in' TRA. During the intervening period, Condition A was met if the Secretary of State was 'satisfied on the balance of probability'. Partly for that reason, but more significantly, because the only relevant authority by which this Court might be bound concerns control orders, I do not consider that it is necessary to say anything about the 2011 Act.

Temporary exclusion orders

40. 'TEO' is defined in section 2(1) of the 2015 Act. It is an order which requires a person ('P') not to return to the United Kingdom unless the return is in accordance with a permit issued to him by the Secretary of State before he begins to return, or the return is the result of P's deportation to the United Kingdom.

41. Section 2(2) of the 2015 Act gives the Secretary of State power to impose a TEO on P if five conditions are met. The emphases in paragraphs i., ii. and iii. are mine.

    i. The Secretary of State *reasonably suspects* that P is, or has been, involved in TRA outside the United Kingdom (Condition A).
    ii. The Secretary of State *reasonably considers* that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism for a TEO to be imposed on P (Condition B). While the TEO is in force, the Secretary of State must keep under review whether condition B is met (section 2(8)).
    iii. The Secretary of State *reasonably considers* that P is outside the United Kingdom (Condition C)
    iv. P has a right of abode in the United Kingdom (Condition D).
    v. Other than in urgent cases, the court gives the Secretary of State permission under section 3 of the 2015 Act (Condition E).

42. Section 3 provides for the procedure for making a TEO. If the Secretary of State makes 'the relevant decisions', that is, if she decides that Conditions A to D are met in relation to P, the Secretary of State may apply to the court for permission to impose a TEO on P (section 3(1) read with section 3(10)). The court's function on such an application is to decide whether the relevant decisions are 'obviously flawed' (section 3(2)). The court may consider the application without any notice to P (section 3(3)). In deciding the application, the court 'must apply the principles which are applicable on an application for judicial review' (section 3(5)). If any of the relevant decisions is obviously flawed, the court may not give permission (section 3(6)). If not, the court must give permission (section 3(7)).

43. The Secretary of State must give notice of a TEO to the person on whom it is imposed (section 4(1)). The notice must explain how P can apply, under section 6, for a permit to return (section 4(2)). A TEO comes into force when the Secretary of State gives notice of it to P and it expires after two years unless it is 'revoked or otherwise brought to an end' before that (section 4(3)). The Secretary of State may revoke a TEO (section 3(4)). If she does so, she must give P notice of that revocation, and it ceases to be in force from the date when notice is given (section 4(5) and (6)). Its validity is not affected by P's arrival in, or departure from, the United Kingdom (section 4(7)). When a TEO comes into force, any British passport held by P is invalidated (section 4(9)). While it is in force, the issue of a British passport to P while he is outside the United Kingdom is not valid (section 4(10)). 'British passport' is defined in section 4(11).

44. Section 5 is headed 'Permit to return'. A permit to return is a document which gives P permission to return to the United Kingdom (section 5(1)). That permission may be subject to conditions (section 5(2)). If P fails to comply with a condition, the permission is invalidated (section 5(3)). The permit must specify the time at which, or period within which, P is permitted to arrive on return to the United Kingdom, the way in which he is permitted to return and where he is permitted to arrive (section 5(4)) (see further section 5(5) and (6)). The Secretary of State may not issue a permit otherwise than in accordance with section 6 or 7 (section 5(7)). Subject to section 6(3), it is for the Secretary of State to decide the terms of a permit to return (section 5(8)).

45. If P applies for a permit to return, section 6(1) requires the Secretary of State to issue it within a reasonable time. The Secretary of State may refuse to issue a permit to return if the Secretary of State has required P to attend an interview with a police constable or an immigration officer at a specific time and place and P has failed to do so (section 6(2)). An application for such a permit is not valid unless made in accordance with the procedure specified by the Secretary of State (section 6(4)).

46. If the Secretary of State considers that P 'is to be deported' to the United Kingdom, she must issue a permit to return to him (section 7(1)). She may issue a permit to return to P if she considers that, because of the urgency of the situation, it is expedient to issue one even though P has not applied for one and she is not obliged by section 7(1) to issue one (section 7(2)).

47. Section 8(1) gives the Secretary of State power to vary a permit to return. The Secretary of State may only revoke a permit to return in the circumstances specified in section 8(2)(a)-(e). The last such case is where the Secretary of State considers that the permit has been obtained by misrepresentation.

48. Section 9 is headed 'Obligations after return to the United Kingdom'. Section 9(1) gives the Secretary of State power, by notice, to impose all or any of 'the permitted obligations' on P if he is subject to a TEO and has returned to the United Kingdom. The term 'permitted obligations' is defined in section 9(2) by reference to those obligations which may be imposed on a person who is subject to a TPIM notice pursuant to the paragraphs of Schedule 1 to the 2011 Act, and which are listed in section 9(2) of the 2015 Act. Those are, only, an obligation to report to a police station, an obligation to attend appointments, and an obligation to notify the police of P's address and of any change of address. A notice under section 9 comes into force when it is given to P and stays in force until the TEO ends (section 9(3)).

49. Section 10 creates two offences. One is committed by P if without reasonable excuse, he does not comply with an obligation (section 10(3)). Section 10(5) provides for the maximum sentences for those offences. Section 10(6) limits the court's power to impose certain penalties for those offences.

50. If P is in the United Kingdom, he may apply to the court for 'a *review of a decision*' (a) that any of Conditions A-D was met, (b) to impose the TEO, (c) that Condition B continues to be met, and (d) to impose the permitted obligations on P by a notice under section 9 (section 11(1) and (2)). On such a review, '*the court must apply the principles applicable on an application for judicial review'* (my emphases).

51. The court's powers on a review under section 11 are exhaustively stated in section 11(4)-(9). If the review is a review of a decision described in (a)-(c) of the previous paragraph, the court may only quash the TEO or give the Secretary of State directions for, or in relation to, the revocation of the TEO (section 11(4)). If the court does not exercise either power, it must decide that the TEO continues in force (section 11(5)).

52. On a review of a decision described in (d) of the last but one paragraph, the court may quash the permitted obligation in question, and, if that is the only obligation imposed by the notice under section 9, quash 'the notice', or give directions to the Secretary of State for, or in relation to, the variation of the notice in so far as it relates to the permitted obligation, or, if that is the only permitted obligation imposed by the notice, the revocation of the notice (section 11(6)). If the court does not exercise any of the powers conferred by section 11(6) it must decide that the notice under section 9 continues in force (section 11(7)). If it exercises its power to quash the permitted obligation in question, or to vary the notice in so far as it relates to the obligation, it must decide that the notice under section 9 is to continue in force subject to the exercise of that power (section 11(8)). Section 11(9) provides that the power to quash a TEO, a permitted obligation, or a section 9 notice includes a power to stay the quashing order for a specified time, or pending an appeal or further appeal (section 11(9)). An appeal against 'a determination of the court on a review under this section may only be made on a question of law' (section 11(10)).

53. Section 12(2) enacts Schedule 4, which makes provision 'about appeals against convictions in cases where a [TEO], a notice under section 9, or a permitted obligation is quashed'. Paragraph 1(1) provides that if P is convicted of an offence under section 10(1) or 10(3) he may appeal against the conviction if the TEO is quashed and he could not have been convicted if the quashing had occurred before the proceedings for the

offence were brought. Paragraph 1(2) provides that if a person is convicted of an offence under section 10(3), he may appeal against the conviction if a notice under section 9, or a permitted obligation imposed by such a notice, is quashed, and he could not have been convicted had the quashing occurred before the proceedings for the offence were brought.

54. Section 12(1) also enacts Schedule 3, which makes provision about proceedings relating to TEOs. Paragraph 3(1) provides that rules of court about TEO proceedings must secure that the Secretary of State is required to disclose material on which the Secretary of State relies, material which adversely affects her case, and material which supports the case of another party to the proceedings. Paragraph 3 is subject to paragraph 4 (paragraph 3(2)). Paragraph 4 provides, in short, that rules of court about TEO proceedings must secure that the Secretary of State can apply to the court for permission not to disclose relevant material other than to the court and any person appointed as a special advocate, and that the court is required to give permission for the material not to be disclosed if it considers that disclosure would be contrary to the public interest. The rules must secure that the court must consider requiring the Secretary of State to provide a summary of the relevant material, but that the court is required to ensure that the summary does not contain material disclosure of which would be contrary to the public interest. Paragraph 5 is headed 'Article 6 rights'. Paragraph 5(1) provides that nothing in paragraphs 2 to 4, or in rules of court made under those paragraphs, is to be read as requiring the court to 'act in a manner which is inconsistent with' article 6 of the ECHR. Paragraph 10 provides for the appointment by the appropriate law officer of a special advocate. Nothing in Schedule 4 is to be read as restricting the application of sections 6-14 of the Justice and Security Act 2013 "('closed material proceedings')".

55. Section 13(1) gives the Secretary of State power to make regulations about giving notices under sections 4 and 9. Section 13(3) gives the Secretary of State power to make regulations 'providing for legislation relating to passports or other identity documents (whenever passed or made) to apply (with or without modifications) to permits to return'.

The procedural history

A's application for a review

56. On 8 November 2019, while it was still in force, A applied for a review of the TEO. At that stage, he did not challenge the imposition of the TEO: he only challenged the obligations which were imposed on him by a section 9 notice (see further, paragraph 9, above). Nor, at that stage, did he respond to the Syria allegation.

The hearing in March 2020

57. There was a preliminary hearing on 17-18 March 2020. The Judge heard submissions on four issues (judgment 1, paragraph 2). Only three are relevant to this appeal.
    i. Did article 6 of the ECHR apply to a review, under section 11(2)(d) of the 2015 Act, of a decision by the Secretary of State to impose, by a notice under section 9, two types of obligations on A?
    ii. If so, was A was entitled to the level of disclosure described by the House of Lords in *AF (No 3)*?

iii. If so, had the disclosure by the Secretary of State complied with those principles?

Judgment 1

58. The Judge's decision on those issues is in judgment 1. She recorded, in paragraph 3, that she had heard submissions in OPEN about all those issues, and, in CLOSED, about the third issue. She summarised the facts in paragraphs 5-15. In paragraph 16, she quoted the Secretary of State's assessment that A had travelled to Syria and aligned with a group that was aligned to AQ, and her assessment about what voluntary travel to Syria and such alignment shows about a person's 'high level of commitment to the ideology and aims of [AQ]' and knowledge of the attacks AQ has carried out. The assessment was also that such a person would be 'subject to radicalisation and desensitised to violence, so this ideological commitment is likely to remain, or even grow stronger'. She quoted, in paragraph 17, further material from the assessment about the ways in which the threat from such people might materialise. This is 'the Syria allegation'. The Secretary of State's assessment was that A posed a significant terrorism-related risk to members of the public and that a TEO was necessary and proportionate to manage, understand and mitigate the risk he posed.

59. The Judge summarised the relevant statutory provisions in paragraphs 18-25. She then described the CLOSED material procedure provided for by Schedule 3 to the 2015 Act and in CPR 88 (paragraphs 26-30).

60. In paragraphs 31 and 32, she referred to the incidents of the right of abode in the United Kingdom which is conferred by section 1(1) of the Immigration Act 1971 ('the 1971 Act'). A person who has a right of abode is 'free to live in, and to come and go into and from the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may otherwise be lawfully imposed on any person'. Those who do not have that right need permission to enter or to remain in the United Kingdom (section 1(2) of the 1971 Act).

61. She then considered article 6.1 of the ECHR (paragraphs 33-48). It provides

> *'In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.*

62. The concept 'civil rights and obligations' is not to be interpreted only by reference to national law. It has an autonomous meaning (*Ferrazzini v Italy* (2002) 34 EHRR 45). She noted a shift by the ECtHR in the direction of applying article 6.1 to cases which 'might not initially appear to concern a civil right' but which have 'direct and significant repercussions on a private right' (*De Tommaso v Italy* (2017) 65 EHRR 19, paragraph 151). Procedures which are classified domestically as part of public law can come within the civil aspect of article 6.1 if 'the outcome was decisive for private rights and obligations' (*Ferrazzini*, paragraph 27). There are areas of public law which cannot be seen as involving 'civil rights and obligations', such as obligations to pay tax. Powers of taxation are part of the 'hard core of public-authority prerogatives' and do

not engage article 6. She also referred to *Maaouia v France* (2001) 33 EHRR 42, which concerned the expulsion of an alien (paragraph 36).

63. The Judge noted, in paragraph 37, that, in *MB*, in the context of control orders, the Secretary of State had conceded in the House of Lords that the proceedings were within the civil aspect of article 6.1 because they were at least in some respects decisive for civil rights (paragraph 15 of *MB*). That concession was maintained in *AF (No 3)* which 'became the leading authority on whether the procedure that resulted in the making of a control order and the Secretary of State's reliance on closed material in a closed hearing satisfied the right to a fair hearing guaranteed by article 6(1)'. She quoted paragraph 57 of the speech of Lord Phillips in that case, referring to the decision of the ECtHR in *A v United Kingdom*. He had accepted that *A v United Kingdom* was a detention case, but nevertheless considered that its reasoning also applied to non-derogating control orders. She also quoted paragraph 59 for the test which applies.

64. In paragraphs 39-44 she considered a decision of Collins J, *Secretary of State for the Home Department v BC and BB* [2009] EWHC 2926 (Admin). Collins J rejected an argument that the obligations imposed by the control orders in that case were 'too light' to engage Convention rights. Collins J noted the concessions by the Secretary of State in *MB* and in *AF (No 3)* (see the previous paragraph). He held that the control orders interfered with the applicants' article 8 rights, and that article 8 rights are 'civil rights' for the purposes of article 6.1. The Judge concluded that she was bound to follow this reasoning (paragraph 44). She also did 'not understand the Secretary of State to argue to the contrary' (paragraph 76). I also observe that neither party to this appeal has suggested that this Court should depart from that reasoning.

65. In paragraphs 46-48, she considered further authorities on disclosure. She concluded that they showed that the level of disclosure required depended on the nature of interference at issue. 'Where fundamental rights are severely restricted by actions of the executive, the rule of law requires a greater degree of disclosure than in cases where an individual seeks damages for discrimination' (paragraph 48).

66. She summarised the parties' submissions in paragraphs 49-54. A submitted that the proceedings engaged article 6.1 because they would determine A's civil rights and obligations. The obligations interfered with A's article 8 rights. The proceedings would decide whether or not the obligations were necessary, and, therefore, would be decisive for A's civil rights. The obligations interfered with A's 'virtual liberty' (cf paragraph 27 of *Tariq v Secretary of State for the Home Department* [2011] UKHL 35; [2012] 1 AC 452 per Lord Mance).

67. The Secretary of State submitted that the admission of British citizens to the United Kingdom and the conditions on which they could take up their right of abode are public law matters within the 'hard core of public-authority prerogatives' and article 8 was not engaged. In any event, the proceedings were not 'determinative of [A's] civil right in the sense required by the case law'. If article 6 did apply, it did not follow that *AF (No 3)* applied (see *Tariq*). A was not imprisoned, actually, or virtually. The obligations were very different from those in *AF (No 3)*.

68. She held, in paragraphs 55-56, that the imposition of the TEO fell within the 'hard core of public-authority prerogatives'. It did not follow that the post-return obligations 'are immigration measures raising questions of state prerogative'. The Secretary of State's submission that the obligations were legally equivalent to controls on entry did 'not withstand scrutiny'. The analogies suggested by the Secretary of State did not work (paragraph 58-68). She rejected the argument that the TEO and the obligations were an indivisible whole, noting, for example, that 'the distinctions which the Secretary of State drew between a challenge to the imposition of the TEO and a challenge to the section 9 obligation are legally irrelevant' (paragraph 70) and that the obligations required 'separate executive action under section 9' (paragraph 65).

69. The Secretary of State further submitted that if there was no challenge to the imposition of the TEO, civil rights and obligations were not engaged in the proceedings for a review (paragraph 69). She considered that the question was 'not the formal nature of the proceedings, or the fact that [A] has chosen not to undertake a root and branch assault on the TEO, or that he challenges only two of the three obligations' (paragraph 70). She referred to a decision of Mitting J in *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin); [2010] 1 All ER 847, paragraph 8. He refused to distinguish between an appeal against a modification of a control order and a review of the need for the same obligation. Both challenges involved 'the same apparent interference with the same civil right'. She considered that the obligations did amount to an interference with A's article 8 rights. A had been charged with three breaches of the obligations. The interference was not incidental, but 'direct and material' (paragraph 73). The Judge declined to decide the broader question whether section 9 obligations would always engage a person's private life (paragraph 75).

70. She held, in paragraphs 76-78, that the proceedings would determine whether the obligations were necessary and lawful, and therefore, whether they would continue or not. There was a dispute about article 8 rights which would be decided by the court; and that decision of the court would be a determination of A's civil rights. Article 6.1 therefore applied to the proceedings. In paragraphs 79-81 she considered the effect of paragraph 5(1) of Schedule 3 to the 2015 Act. Two authorities expressed different views on that question. She tended to think that paragraph 5(1) did not show that Parliament intended article 6.1 to apply, but rather that paragraph 5(1) indicated that article 6.1 might apply; but she did not need to decide that point.

71. The next issue she considered was what disclosure was required. She held that the restrictions in this case were comparable with those which had been described by Lord Mance as amounting to 'virtual imprisonment', and thus that *AF (No 3)* applied (paragraph 82). In paragraph 85 she considered whether A was able to give instructions to his solicitor or to his special advocates on the issues. She held that he was able to give instructions about whether he had ever travelled to Syria and the purpose of his travel. He could give sufficient instructions 'not merely to deny but to refute those allegations'. Arguments could be made about the necessity and proportionality of imposing the obligations on a person aligned to AQ. 'To this extent, the proceedings would comply with article 6(1)'.

72. In paragraph 86, she said that 'the closed material contains some further, more specific information which may have an impact on whether the nature and extent of the present obligations is necessary and proportionate'. Mr Tam was asked about this in his oral

submissions in this Court. He told this Court that the Judge was here referring to what have been called 'the United Kingdom allegation' which, I understand, concerns A's alleged conduct after his return to the United Kingdom. If the Secretary of State continued to rely on this material, A's article 6 rights could be breached. She had given further reasons why in her CLOSED judgment. She said that it was too soon for her to rule definitively whether article 6.1 had been breached. That was best done closer to, or at, the substantive hearing, when, in the light of that CLOSED judgment, the Secretary of State's position was known. She ordered the Secretary of State to clarify her case in writing.

73. The court's order dated 15 May 2020 recited that there had been a dispute about whether article 6.1 applied, and if it did, whether *AF (No 3)* also applied, and that there had been a CLOSED hearing on 18 March 2020, that the court had received further written submissions in accordance with the order dated 30 March 2020 and that there had been a case management order dated 5 May 2020. The order declared that for the purposes of article 6.1, 'the present proceedings' would determine A's civil rights and obligations and that the principles in *AF (No 3)* applied to any application for permission to withhold CLOSED material. In a note to the parties appended to the order the Judge required the parties to agree a draft direction to the Secretary of State.

74. In an amended OPEN response dated 5 June 2020 the Secretary of State repeated the Syria allegation. She added that it was assessed that A had held a significant leadership role in the group during his time in Syria.

75. The Judge made a further order dated 1 July 2020, after a CLOSED hearing on 19 June 2020. The parties were ordered to put any further submissions on article 6 in their skeleton arguments for the final hearing. If any issue about article 6 was raised, the skeleton arguments should also address the stage of the proceedings at which the issue should be decided. A note to the order required the parties to consider whether the article 6 point should be decided as a further preliminary point at the start of the substantive hearing, or whether it should be decided at the end of the OPEN hearing.

The hearing in July 2020

76. There was a further OPEN hearing on 21 July 2020. The Judge heard submissions about whether 'the present proceedings breach [A's] right to a fair trial…'.

Judgment 2

77. The Judge made a decision on that issue in judgment 2, which she handed down in September 2020. In paragraphs 1-6, she described the background. In paragraph 4, she said that she had not yet decided whether the material which the Secretary of State had provided met the test in *AF (No 3)*, because she could not decide that question until the Secretary of State had decided whether or not to give more disclosure to A in accordance with orders she had made at a CLOSED hearing, and until the Secretary of State had clarified her case in writing.

78. She referred to a further CLOSED hearing on 19 June 2020. The Special Advocates asked her to hold that the proceedings breached article 6. She had declined to hear argument on that issue in the absence of A. She had therefore directed a further OPEN hearing. Both the parties asked her to hear further article 6 arguments at the start of the

review hearing. Having heard argument, she decided that she 'was presently satisfied that the proceedings would be compatible with article 6 but that [she] would actively review [her] decision at the close of the evidence'. Judgment 2 gave her reasons for that decision (paragraph 6).

79. She summarised the Secretary of State's case in paragraph 7-14, by reference to the Secretary of State's OPEN case against A. She then summarised A's case. It was impossible for him to respond to the vague allegation about activities in the United Kingdom which had only been disclosed to him on 5 June 2020 (paragraph 16).

80. She summarised the legal framework in paragraphs 21-28. In paragraph 25, she recorded that both parties accepted that, on a review of section 9 obligations, A was not permitted to challenge the Secretary of State's assessment of whether he is or was involved in TRA outside the United Kingdom (Condition A) or the Secretary of State's assessment that it was necessary to impose the TEO (Condition B). Those conditions could only be challenged in a review of the TEO. There was, however, no bar to a challenge to 'those aspects of the national security case that are relevant to the Secretary of State's assessment that the section 9 obligations remain necessary and proportionate despite the passing of time, or the claimant's changed personal situation'.

81. The approach of Mitting J in *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin) was instructive. He held that the claimant had not had *AF (No 3)* disclosure, and that the Secretary of State could not rely on anything other than the OPEN material without breaching article 6. The OPEN material did not support the allegation against the claimant, and he gave him relief. Mitting J had been willing to consider, before his grant of relief, whether the OPEN material could support the decision. The Judge decided to do the same. There were sound policy reasons why the court, having found that a single allegation was not sufficiently particularised to comply with *AF (No 3)*, should nevertheless consider the rest of the OPEN material to see if it could support the Secretary of State's case.

82. In paragraphs 29-32 she recorded the parties' submissions on whether A had had enough disclosure. A submitted that the case for continuing the obligations despite the changes in A's situation rested on the United Kingdom allegation and A did not know what that was. The Secretary of State submitted that the disclosure complied with article 6.

83. In paragraph 33, the Judge said she would take the broad United Kingdom allegation 'out of the equation'. It was too broad to sustain the obligations compatibly with article 6. She said she would consider, instead, whether the rest of the Secretary of State's case could sustain the obligations compatibly with article 6. She did not accept that, without the United Kingdom allegation, the case was bound to fail (paragraph 34). She described the Secretary of State's OPEN case in paragraphs 34-35. It might not ultimately succeed, but she was not concerned with its merits. The Secretary of State was entitled to put such a case, and A could give instructions and refute it. There was no breach of article 6 (paragraph 35).

84. The Special Advocates might be right that if the United Kingdom allegation were taken out of the case, the decision would be vulnerable, if judicial review principles were applied to it. That was a question for the substantive review hearing. There were real

issues for the court to determine (paragraph 37). She disagreed with A's submission that he could not rebut the general material in the security statement. 'The submission that [A] is unable, and should not be expected, to deal with the suggestion that he may have an ongoing violent and dangerous outlook is unreal' (paragraph 38). The proceedings did not, at that stage, breach article 6, but the Judge would keep that question under review. The court would ensure that the Secretary of State did not rely solely or decisively on CLOSED allegations. The Judge would review whether proceedings were compatible with article 6 at the close of the evidence (paragraph 40).

85. In a postscript to judgment 2, the Judge said that A's skeleton argument for the review hearing said that A did not seek to challenge the national security case, while wishing to suggest that he was no longer a threat to national security. The Judge said 'The wisdom of not requesting a national security witness is not clear'. There was also a brief CLOSED judgment (paragraph 42).

A's conviction

86. On 24 March 2021, A was convicted of three counts of breaching the reporting obligation and sentenced to 42 days' imprisonment. The sentence was suspended for six months.

A amends his grounds of challenge

87. At a case management hearing on 10 May 2021, A asked for permission to amend his grounds of challenge in order to respond to the Syria allegation, to which he had not yet responded, and to challenge the imposition and maintenance of the TEO. The Secretary of State consented to that application. A served amended grounds and a fourth witness statement. The TEO had by then expired, but A wished and still wishes to challenge its imposition. If it were quashed, he explained, he would be in a position to apply for leave to appeal against his convictions. The Judge observed (judgment 3, paragraph 10) that as the TEO and its obligations had expired, the 'sole purpose' of the proceedings was to enable A to appeal against his conviction.

The hearing in November

88. The final hearing of A's application for a review was listed for 30 November 2021. The Secretary of State indicated, before the hearing, that she was not intending to call a national security witness. The Judge heard submissions on the question whether the Secretary of State should, nevertheless, be required to call such a witness, and whether further disclosure of the Syrian allegation was required.

Judgment 3

89. Judgment 3 was handed down after the hearing in late November and early December 2021. The Judge recorded that A had now amended his grounds. She described the background to the 'preliminary issues which have now arisen'. The Secretary of State had always been willing to tender two witnesses from the Home Office for cross-examination. They were to give evidence about the necessity and proportionality of the obligations. The Secretary of State's position was that she was not willing to call a national security witness to give evidence about the national security case which justified the imposition of the TEO. After some to-ing and fro-ing, A had applied for a

direction under CPR Part 3.1(2)(m) that a national security witness provide a witness statement and attend the final hearing.

90. The Judge heard that application in OPEN and CLOSED sessions. She also heard OPEN and CLOSED submissions about whether the OPEN material about the Syria allegation provided to A met the disclosure requirements of article 6. She had ruled in September 2020 (in judgment 2) that the proceedings did not breach article 6 but that she would review the article 6 issues at the close of the evidence. A argued that the situation had changed because he was now challenging the TEO and that she should not await oral evidence about the Syria allegation. Neither side asked her to review the article 6 compliance of 'the UK allegation' which they agreed should await the final hearing (paragraph 8).

91. A's case at the November 2021 hearing was that he had not engaged in any TRA outside the United Kingdom and that it was not reasonable to suspect that he had done. He denied any connection with AQ (paragraph 11). Any activity in which he did engage did not justify the imposition of a TEO. Both sets of obligations breached his article 8 rights. He had not been given enough information about the Syria allegation to enable him to respond to it.

92. In his fourth witness statement, A gave an account of his time in Turkey and Syria between 2013 and 2018. In short, he had been travelling between the United Kingdom, Turkey and Syria and teaching reading, writing and Islam. He married in 2014. He and his wife then moved to Syria for four years. He founded two companies. One provided adult education and the other provided infrastructure such as wells using renewable energy. He stayed in areas where there was no conflict. He and his wife decided to return to the United Kingdom in 2017 because it would be better for their two young children and for other personal reasons. They could not get safely into Turkey until September 2018. They were detained by Turkish police on 16 October 2018.

93. A said that he was not violent. He had never fired a gun, done anything violent or had any training. He did not know, because of the limited disclosure, whether the Secretary of State had misinterpreted any of his activities (paragraph 16). In a fifth witness statement he responded to the Secretary of State's evidence that the areas in which he claimed to have spent time were areas where there was fighting. He said that he had travelled inside Syria to help internally displaced people. He therefore got to know where the fighting was. He had become integrated into Syrian society, which enabled him to avoid areas of conflict. He was always 30-80 km away from any fighting (paragraph 17).

94. At the hearing the Secretary of State maintained the Syria allegation. A continued to say that he could not respond to it because it was not detailed enough. The Secretary of State also maintained the United Kingdom allegation. A continued to say that its lack of detail meant that he could not address it (paragraph 19).

95. The Judge summarised the legal framework in paragraphs 20-25. In paragraph 26 she recorded that A had accepted that he could not, in a review of section 9 obligations, challenge the Secretary of State's decisions that Conditions A and B were met. She did not understand that he had changed that position. She had held as much in judgment 2. It did not follow that no part of the national security case could be challenged in a

section 9 review. The necessity and proportionality of obligations are affected by what it is that he is alleged to have done and which led to the imposition of the TEO. The national security case is or may be part of the context. A claimant can challenge 'those aspects of the national security case that are relevant to the Secretary of State's assessment that the section 9 obligations are necessary and proportionate' (paragraph 28). There could therefore be 'an evidential or factual overlap' between a review of the imposition of the TEO and a review of the obligations. But this did not mean that the court 'must apply the same procedures when carrying out what are different elements of its review function. Different aspects of a section 11 review may give rise to different procedural rights if that is what is required to achieve fairness and compatibility' with Convention rights (paragraph 29).

96. The Judge considered that the statutory scheme showed that Parliament had given the function of making the relevant decisions to the Secretary of State and not to the court. The court would not generally reconsider the facts for itself, but would review the lawfulness of the Secretary of State's factual analysis 'in accordance with the scheme of the 2015 Act and the conventional principles of judicial review' (paragraph 30). In cases involving national security, the court must give the Secretary of State 'a large margin of judgment' (paragraph 31). She considered the decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765. She quoted paragraphs 60 and 62 of Lord Reed's judgment in *Begum*, in which he cited passages from the speech of Lord Hoffmann in *Rehman* [2003] 1 AC 153 (paragraphs 57 and 62). Even if the High Court preferred a different view of the facts, the institutional competence of the Secretary of State was a sound constitutional reason for judicial restraint. The fact that the Secretary of State is democratically accountable was a further reason for restraint.

97. In paragraphs 40 and 41 she referred to judgment 1. She had held that the TEO qualified A's right of abode and that it was not a civil right protected by article 6. 'It follows that, in matters touching on the imposition of the TEO, I have already decided that article 6 of the Convention was not engaged' (paragraph 41). She had also held that article 6.1 applied to the obligations and that A was entitled to *AF (No 3)* disclosure about them. She also referred to paragraph 48 of the decision of this Court in *MB* (see paragraph 22, above).

98. She summarised the submissions in paragraphs 44-53. A submitted that the Syria allegation did not satisfy *AF (No 3)*. He did not have enough information to give effective instructions to the Special Advocates. He did not know what group he had 'aligned with' or when, or what he was supposed to have done, when, or with whom. Without evidence from a national security witness, the proceedings would breach article 6. There were no proper witness statements. The Secretary of State's case was not evidenced and the material in national security statements should be excluded. There would then be no evidence that Condition A was met and the TEO should be quashed.

99. The Secretary of State submitted that A's case on article 6 had already been considered in judgments 1 and 2. CPR Part 3.1(2)(m) did not give the court power to direct the Secretary of State to produce a witness statement or tender a witness for cross-examination. The Secretary of State had complied with her duty of candour. There was

no need for a live witness to be cross-examined. If the court ordered that, it would distract someone from operational work.

100. The Special Advocates supported A's submissions in CLOSED. They indicated the areas on which they might wish to cross-examine a national security witness (paragraph 53).

101. In paragraphs 54-58 the Judge considered whether article 6 applied to the imposition of the TEO. She had already decided, in judgment 1, that it did not. Fairness did not require the court to permit a party to 're-run points of law'. That would be inimical to finality (paragraphs 54-56). But, in any event 'More importantly, I have been provided with no sound reason to revisit my conclusions'. A had made no submissions which 'would suggest that the May 2020 conclusions of law were wrong'. She therefore declined to depart from those conclusions in judgment 1. Neither article 6 nor *AF (No 3)* applied to A's new ground of challenge; 'In so far as the Syria allegation underpins a statutory review relating to the imposition of a TEO, [A] is not entitled to *AF (No 3)* disclosure because article 6 does not apply' (paragraph 58).

102. In paragraph 59, she said that Condition A was not in issue before the recent amendment but that the amendment had no effect on disclosure. Condition B, on the other hand, could play a dual role in a review. It is both reviewable in the context of a review of the imposition of the TEO (a review of a decision that Condition B was met when the TEO was imposed) and in the context of a review under section 11(2(c) (a review of a decision that Condition B 'continues to be met'). In the former context it did not attract the protection of article 6. In the latter context, the Secretary of State would have to provide updating evidence. But a review of whether Condition B continued to be met was a review of the continuing necessity for the TEO 'to be imposed on' P, and, it followed, the updating evidence did not engage article 6 (paragraph 62). A's amendments to his case had no legal effect on the extent of the disclosure to which he was entitled. A was in the same position as he had been when the Judge handed down judgment 2.

103. In paragraph 64 the Judge rejected A's submission that the national security statements should be rejected just because they were not signed witness statements. That would be a 'triumph of form over substance with no practical advantage to [A]'.

104. In paragraph 65 she rejected the Secretary of State's submission that she had no power to give case management directions about witnesses. She again referred to paragraph 48 of *MB* and held that she had all the powers which she needed in order to comply with article 6. She also rejected the Secretary of State's submission that any effect on operational resources was relevant to the exercise of her discretion (paragraph 66).

105. In paragraphs 67-78 the Judge considered whether she should exercise the discretion to hear oral evidence and cross-examination in the review proceedings of Condition A. She held that she should not, as it was not the court's function to adjudicate between A's account of his activities in Syria and the assessment of the Secretary of State. That would exceed the court's function on an application for judicial review (paragraph 76). Similar considerations applied to the review of Condition B. She would not be reaching her own view, but would be reviewing the material on which the Secretary of State had based her decision. She was not therefore bound to hear from a Security Service witness

on matters relating to the TEO or to its continuation. The absence of oral evidence would not lead to an unfair result on those parts of the review (paragraph 78).

106. The Judge then considered the review of the obligations (paragraphs 79-89). She had held, in judgment 1, that article 6 applied to that review. In judgment 2, she had held that, at that stage, the review proceedings did not breach article 6, but that she would review their compatibility with article 6 at the close of the evidence. Neither side had asked her to change that ruling (paragraph 79). A accepted that the challenge to the obligations was a challenge to the Secretary of State's judgment about necessity and proportionality. He accepted that the court's role was to review the Secretary of State's decisions, rather than to substitute its own view.

107. Nevertheless, having listed what she regarded as relevant factors in paragraphs 82-84, including that the necessary deference to the Secretary of State's assessment was 'high', the Judge held that 'fairness requires the national security case to be tested by way of oral evidence to the extent that it is part of the context of, and relevant to, the necessity and proportionality of the section 9 obligations. I say more about why I have reached this conclusion …in a brief CLOSED judgment' (paragraph 85). She would therefore order the Secretary of State to file a witness statement and said that she would permit cross-examination on the issues of necessity and proportionality but not on the reasons for the imposition of the TEO (paragraphs 87 and 88).

Submissions

108. A submitted that the Judge erred in holding that article 6 does not apply to the review of whether Conditions A and B were met when the TEO was imposed and whether Condition B continued to be met throughout the currency of the TEO, with the consequences for disclosure which flowed from that. A had several arguments, but it is only necessary for me to consider three of them.

    i. The Judge was bound by *Pomiechowski* (see paragraph 4.i.1., above) to hold that the right to enter, remain in and leave the United Kingdom is a civil right for the purposes of article 6.1.
    ii. Whether or not she was so bound, a challenge to Conditions A and B would be directly decisive of his civil rights.
    iii. The Syria allegation was relevant not only to whether Conditions A and B were met initially (and in the case of Condition B, to whether it continued to be met) but also to the necessity for the obligations.

109. Mr Tam submitted that Parliament has now put the right of abode on a statutory footing, by enacting section 1 of the 1971 Act. In *Pomiechowski* Lord Mance was mistaken in describing that right as a common law right. Mr Tam's primary submission was that a TEO and an order for extradition are different measures with different effects, and Lord Mance's reasoning about an order for extradition does not apply to a TEO. In any event, he submitted that a right of abode and any measures affecting that right were part of the 'hard core of public-authority prerogatives' referred to in *Ferrazzini*, as the Judge had rightly held. They were not 'civil rights' for the purposes of article 6.1, and did not attract the protection of article 6.

110. Mr Squires submitted that the Judge erred in holding that it was not the Court's role to reach its own view on whether Condition A was met, and so to limit the cross-

examination of the national security witness accordingly. That approach is inconsistent with the decisions of this Court in *MB*, and *AL v Secretary of State for the Home Department* [2018] EWCA Civ 278, which concerned materially similar legislation. Mr Tam submitted that the language of the relevant provisions of the 2015 Act was significantly different from the language of the 2005 Act and that, for that reason, *MB* and *AL* do not bind this Court to interpret the 2015 Act in the same way as this Court interpreted the 2005 Act.

Discussion

Is the appeal academic because the Judge has already decided that A has had, in his challenge to the TEO, disclosure complying with article 6.1?

111. One of the issues which the Judge had to decide in judgment 1 was whether A had had, in relation to his challenge to the obligations, disclosure complying with *AF (No 3)*. The review was a dispute which would result in determination of A's civil rights. Article 6.1 therefore applied to it. The level of disclosure must comply with *AF (No 3)*. A could give instructions to his lawyers about whether he had travelled to Syria and why, so as 'not merely to deny but to refute those allegations'. He could also give instructions about the necessity for and proportionality of the obligations. To that extent, she held, the proceedings would comply with article 6.1. She then referred to the United Kingdom allegation. It was best to postpone a ruling about the United Kingdom allegation until closer to, or at, the substantive hearing. She did not have to decide whether article 6 would apply to a review of the decisions that Conditions A and B were met, but expressed her view that it would not.

112. The Judge had not yet decided, by the time of judgment 2, whether the Secretary of State had complied with *AF (No 3)*. A could not (on his pleaded case) challenge the decision of the Secretary of State that Conditions A and B were met. A could, however, challenge the national security case to the extent that it was relevant to the necessity and proportionality of the obligations. The United Kingdom allegation was too broad to sustain the obligations compatibly with article 6, but the Secretary of State's case was not bound to fail without it. A could give instructions and refute that case. Whether the case would fail on its merits was for the substantive hearing. The proceedings did not, at that stage, breach article 6, but she would review that question at the end of the evidence.

113. In judgment 3 the Judge refused to re-visit her conclusion (in judgment 1) that article 6 did not apply to the review of the Secretary of State's decisions that Conditions A and B were met, partly on the grounds of finality and partly because she had heard no argument to suggest that that conclusion was wrong. I accept the submission of Mr Squires that the Judge could not have addressed, in judgments 1 or 2, the question whether A had had disclosure complying with *AF (No 3)* in relation to a challenge to the decisions that Conditions A and B were met, because A was not making such a challenge then. It is significant that the Judge had recorded, in judgment 1 and in judgment 2, that A accepted that he could not, in a review of the obligations, challenge the Secretary of State's assessment that he was involved in TRA outside the United Kingdom (see paragraphs 80 and 95, above). Moreover, the Judge's focus was different. She asked herself in judgments 2 and 3 not whether A had had disclosure complying with *AF (No 3)*, but (provisionally) whether, at each stage, the proceedings were compatible with article 6, which is not the same question. I also accept his further

submission that the Judge did not, in any event, decide, in judgment 3, that A had had disclosure complying with *AF (No 3)*. She decided, instead, that he was not entitled to such disclosure in his challenge to the decisions that Conditions A and B were met, because that challenge would not involve a determination of his civil rights and obligations.

114. For those reasons, I accept A's submission that the appeal on ground i. is not academic.

Ground i.

Should A be prevented from challenging the Judge's view that article 6 did not apply to the imposition of the TEO?

115. The Judge expressed a view about whether article 6 applied to the imposition of the TEO in paragraphs 55-56 of judgment 1. Whether it did so was not, at that stage, an issue in the proceedings, because A was not then challenging the imposition of the TEO. That view was not essential to her reasoning on the issues which she did have to decide. It was not reflected in the order she made, and A had no opportunity to challenge it at that stage. She repeated that view in paragraphs 54-58 of judgment 3. The fact that the Judge expressed an obiter view on this issue in judgment 1, and A did not challenge it then, is no bar to his challenging that view in this appeal. His case is that he was given no opportunity to argue otherwise. Whether or not that is so, he is entitled to challenge it on this appeal.

Is A entitled to disclosure complying with AF (No 3) in his challenge to Conditions A and B?

116. *Pomiechowski* was an extradition case. Section 26(4) of the Extradition Act 2003 ('the 2003 Act') provides that there is an absolute statutory time limit for appealing in an extradition case. Mr Halligen was one of the four appellants. Unlike the others, he was a British citizen. The Supreme Court held that section 3 of the HRA required section 26(4) of the 2003 Act to be read (only in the case of a British citizen) as enabling a court to extend the time for appealing. An essential step in the reasoning which led to the conclusion that the court had power to extend the time limit was that as a British citizen Mr Halligen had a 'common law or civil right to enter and remain in the United Kingdom as and when he pleased'. Proceedings under the 2003 Act involved a determination of that civil right, to which article 6.1 applied. The Supreme Court did not refer to the 1971 Act, which puts that common law right on statutory footing, but that omission does not undermine Lord Mance's reasoning in paragraphs 31-32 of *Pomiechowski*.

117. I see the force of Mr Tam's argument that, even if the ECtHR has significantly expanded the concept of 'civil right', so that it now includes, for example, social security benefits, there is no case in which it has extended it to include the right to come and go from one's country of citizenship. Mr Tam submitted that an order for extradition is not the same as a TEO. That submission is right, so far as it goes, but that difference is not a sufficient reason for distinguishing between an order for extradition and a TEO. Both measures are a significant interference with a person's right of abode and with his right to come and go from the United Kingdom as he pleases. That being so, there is considerable force in A's submission that this court is bound by the relevant step in the Supreme Court's reasoning in paragraphs 31-32 of *Pomiechowski*.

118. It is not necessary for me to decide this point, however. In judgment 3, the Judge referred to the decision of Collins J in *Secretary of State for the Home Department v BC and BB* that the HRA made Convention rights into civil rights. The Secretary of State had not argued otherwise. I consider that that approach is right in principle.

119. The making of a TEO, in isolation, may well be an act which falls 'within the hard-core of public-authority prerogatives'. But that is only the starting point. If a challenge to the making of a TEO succeeds, then, in a case like this one, where obligations have also been imposed which admittedly interfere with article 8 rights, the quashing of the TEO will also result in the quashing of the obligations. If there were any doubt about that, it is resolved by paragraph 1(1) of Schedule 4 to the 2015 Act (see paragraph 53, above). The submission of the Secretary of State which the Judge recorded in judgment 1 relies on this logic (see paragraph 69, above), as does the logic of the decision of Mitting J, *BM*, to which she referred. In some respects, of course, the TEO and any obligations imposed by a section 9 notice are legally distinct: but the obligations cannot survive if the TEO is quashed. The design of the statutory scheme therefore means that a challenge to the making of a TEO is necessarily (potentially at least) decisive for any article 8 rights (that is, civil rights), with which any obligations interfere. Thus, an application for a review of the Secretary of State's decision that any of the Conditions is met, or to the obligations imposed by a TEO, would be decisive, one way or another, for A's article 8 rights. If the challenge were to succeed, the obligations, which, it is agreed, are an interference with A's article 8 rights, would fall with the TEO. Article 6.1 therefore applies to such a challenge, and A would therefore be entitled to a level of disclosure which complies with article 6, but which could depend on the degree of interference involved. The Judge held that the applicable standard was disclosure complying with *AF (No 3)*, and the Secretary of State has not cross-appealed against that conclusion.

Ground ii.

Did the Judge err in law in not ordering cross-examination of a national security witness on the question whether Conditions A and B were met?

120. Whether or not the Judge should have ordered cross-examination of a national security witness on these questions depends on whether the Judge was going to take her own view about the national security case, or going to review the Secretary of State's assessment. I must consider whether the reasoning in *MB* binds this Court to conclude that the Judge had to decide the national security issues for herself. When enacting the 2015 Act, Parliament must be assumed both to have been aware of the terms and effect of the 2005 Act and of how the courts had interpreted the 2005 Act, and to have intended, if the terms and effect of the 2015 Act are relevantly similar, to achieve the same result. An important question, therefore, is whether there is a material difference between the relevant provisions and effect of the 2005 and the 2015 Acts.

121. The first point to note is that the obligations which could be imposed by a non-derogating control order were much more onerous than those which can be imposed under a TEO (compare paragraph 10, above, with paragraph 48). It is clear from some of the authorities on control orders that the obligations attached to some non-derogating control orders did verge on imprisonment, involving such measures as 14-hour curfews. Indeed some 'non-derogating' control orders were quashed on the grounds that the obligations they imposed did, in substance, amount to imprisonment and could only lawfully have been attached

to derogating control orders. Perhaps confusingly, the obligations imposed by TPIMs and TEOs have been described as amounting to 'virtual imprisonment'.

122. The second point is that the language and effect of the provisions are not the same. In summary, section 2 of the 2005 Act provided that the Secretary of State could make a non-derogating control order if he had reasonable grounds for suspecting that I had been involved in TRA (section 2(1)(a)). The Secretary of State had to get the court's permission to make a control order. If permission was given, the court had to order a hearing 'in relation to the order' as soon as possible. On such a hearing the function of the court was to determine whether the decision of the Secretary of State that the requirements of section 2(1)(a) were met was 'flawed', 'applying the principles applicable on an application for judicial review'. By contrast, the Secretary of State has power to make a TEO if, among other things, she reasonably suspects that P has engaged in TRA. The court reviews that decision only if asked to do so by P. On such a review, it must apply the principles applicable on an application for judicial review. In *MB* this Court held that, in order to comply with article 6, the relevant provisions should be read, in accordance with section 3 of the HRA, so as to provide, in effect, for the court to decide, for itself, on the material before it, and as a fact, whether there were reasonable grounds for suspecting that I was involved in TRA.

123. I do not consider that the reasoning in *MB* governs this Court's interpretation of the 2015 Act. There are six linked reasons why.

    i. Control orders were significantly more intrusive interferences with article 8 rights than are TEOs. Some came very close to detention; a good deal closer than the interferences which can be produced by TEOs (see paragraph 119, above).
    ii. Both statutes require the court to give permission before an order can be made. A recognition of that difference in seriousness, however, is the provision in the 2005 Act for automatic supervision by the court; there is no equivalent for TEOs.
    iii. So while both measures involved or involve interferences with Convention rights, the statutory context is significantly different.
    iv. This Court's reasoning in *MB* did not turn on, or reflect, the actual words used by Parliament. It turned, instead, to a significant extent, on the court's view that a section 3 reading of the 2005 Act was possible, on what this court saw as the inherent flexibility of judicial review, and on the way in which it considered that judicial review could be adapted in each case so as to comply with the requirements of article 6. This Court interpreted the relevant provisions in a way which, as it acknowledged, differed from their ordinary meaning, in order to achieve a result which it saw as producing compliance with article 6.1 in MB's case.
    v. This Court's understanding of the meaning of 'the principles applicable on an application for judicial review' in the context of the 2005 Act cannot stand, in the context of the 2015 Act, with the later reasoning of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission*. I say more about this point in the next two paragraphs.
    vi. There are, of course, great similarities between the words of the relevant provisions of the two Acts. But in the 2015 Act Parliament has chosen not to use the phrase 'reasonable grounds', on which this Court in *MB* placed considerable emphasis (see paragraphs 26 and 27, above). The

focus, more obviously, is the Secretary of State's state of mind: 'reasonably suspects'.

124. *Begum* concerned the powers of the Special Immigration Appeals Commission ('SIAC') on an 'appeal' under section 2B of the Special Immigration Appeals Commission Act 1997 against a decision to make an order depriving the respondent of her British citizenship. The Supreme Court held that this right of appeal did not, in context, entitle SIAC to re-take the discretionary decision to make an order depriving a person of her citizenship. Parliament had conferred the relevant discretion to make a deprivation decision on the Secretary of State, not on SIAC. That discretion must be exercised by the Secretary of State and by no-one else. SIAC could review the exercise of that discretion (judgment of Lord Reed, paragraph 66). He continued, in paragraph 67: '…appellate courts and tribunals cannot generally decide how a statutory discretion conferred on the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of a statutory provision authorising them to do so…'. SIAC's jurisdiction was limited to considering whether or not the Secretary of State had acted unlawfully; for example by making a decision which was *Wednesbury* unreasonable, or by misdirecting herself in law. He had earlier pointed out, as the Judge in this case recognised, that the court's approach to national security assessments by the Secretary of State is also governed by the reasoning in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 (paragraphs 51-62). *Rehman* does not appear to have been cited to this Court in *MB.*

125. The position in this case is a fortiori that reasoning. The Judge in this case will not decide an appeal, but will 'review' various decisions of the Secretary of State 'exercising the principles which are applicable on an application for judicial review'. As in section 40 of the British Nationality Act 1981, the decision maker designated by Parliament in the 2015 Act is clearly the Secretary of State, not the court. The Judge's role will be to review the decisions of the Secretary of State; for example, that Condition A was met. The Judge will not make those decisions for herself. It is not 'possible', in the words of section 3(1) of the HRA, to read section 11(2) and (3) of the 2015 Act in any other way.

126. It is trite also that the court does not make a decision on the merits on an application for judicial review (unless it is considering, for example, proportionality in the context of a qualified right). Moreover, to the extent that the court is reviewing a national security assessment, it is also bound by *Rehman*. There can, therefore, be no cross-examination of a national security witness on a review of the Secretary of State's decisions that Conditions A and B were met. The Judge was right so to hold (judgment 3, paragraphs 67-78).

Conclusions

127. For these reasons, I have reached three conclusions.
    i. The appeal on ground i. is not academic.
    ii. The Judge erred in law in holding that A was not entitled, in his challenge to the Secretary of State's decision that Conditions A and B were met, to disclosure in accordance with *AF (No 3)*. I would therefore allow the appeal on ground i.

iii. The Judge was right to refuse to order cross-examination of the Secretary of State's witness on the question whether Conditions A and B were met. I would therefore dismiss ground ii.

128. As I have already indicated, I also agree with Coulson LJ's reasons for allowing the Secretary of State's cross-appeal.

Lord Justice Nugee:

129. I agree that the appeal should be disposed of in the way proposed by Elisabeth Laing LJ for the reasons that she gives. I also agree that the cross-appeal should be allowed for the reasons given by Coulson LJ.

Lord Justice Coulson

130. I agree that, for the reasons given by Elisabeth Laing LJ, ground i. of the appeal should be allowed and ground ii. dismissed.

131. I turn to the cross-appeal. At paragraph 3 of her order, the judge ordered:

> *"The Defendant shall file and serve a witness statement from a person able to speak to the national security case. The maker of the statement should be available for cross-examination at the final hearing of the Claimant's review."*

132. On behalf of SSHD, Mr Tam KC submitted that this order should be quashed. He put his submission in two ways. First, he said that the judge had no power to make an order requiring one party to file and serve a witness statement from X, in circumstances where that party did not wish to call X as a witness. Secondly he said that, if the court did have the power, it should not have been exercised in this way in this case.

133. The starting proposition must be this: in civil litigation, a court has no general power to order one party to call, as a witness on the substantive issues, a person whom that party does not wish to call. Party autonomy is paramount: see *Zuckerman on Civil Procedure: Principles of Practice, 4th Edn.*, at 11.11. As Professor Zuckerman goes on to note at 11.12: "*parties to a dispute are autonomous in procedure. They are free to choose whether to litigate, what to litigate and what evidence to call in support of their respective allegations".* They are free to choose which evidence to include and which evidence to leave out. That is a decision with which the court cannot interfere, even if the evidence in question is regarded as significant: see *Zuckerman* at [11.15].

134. Party autonomy extends to all aspects of civil litigation: for example, there is no requirement for a claimant to plead all the claims he could arguably advance (see Dyson LJ in *Khiaban v Beard* [2003] EWCA Civ 358). And in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, the House of Lords accepted that the principle of party autonomy meant that material facts may be withheld from the scrutiny of the court. Lord Fraser said:

> "In an adversarial system such as exists in the United Kingdom, a party is free to withhold information that would help his case if he

> wishes-perhaps for reasons of delicacy or personal privacy. He cannot be compelled to disclose it against his will" (at 434D)

This and related passages in *Air Canada* have recently been cited with approval by the Supreme Court in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24 at [242]. I acknowledge that somewhat different principles may apply to public authorities when they defend applications for judicial review.

135. Thus, if a party to civil litigation does not wish to call X, the court cannot compel that party to do otherwise. That may have adverse consequences for the party in question, but that is a risk it has chosen to run in adversarial litigation.

136. If the other side considers that the evidence of X is crucial, it can issue a witness summons under CPR Part 34 and call X itself. Of course, that is not always a safe course because, in civil litigation, the party calling X cannot cross-examine him or her; his evidence would have to be adduced by way of examination-in-chief in the conventional way. It is for that reason that a party in a similar position to QX in this case does not regularly use Part 34 and will instead submit that, without the evidence of X, the other side's case must fail.

137. An entirely different situation arises if a party has provided a witness statement from X but does not wish to tender him or her for cross-examination. In those circumstances, if the court considers that the evidence of X is important and cannot be dealt with satisfactorily other than by way of oral evidence, then (even in judicial review proceedings) the court will order that witness to be tendered for cross-examination: see *R(PG) v London Borough of Ealing and Ors* [2002] EWHC 250 (Admin) at [20]. That is, of course, a very different thing from ordering X to provide a witness statement in the first place.

138. In support of the suggestion that the court has the power to order a party to call a witness, Mr Squires KC relied on the decision of Thirlwall J (as she then was) in *XYZ v Various* [2013] EWHC 3643 (QB); [2014] 2 Costs LO 197. In that case, Thirlwall J exercised her power under CPR 3.1(2)(m) - that the court may "take any…step or make any other order…for the purposes of managing the case and furthering the overriding objective…" - to order the lead defendant in group litigation to explain its financial position to the claimants. Thirlwall J accepted that the defendant's financial position was not a matter in dispute in the proceedings, but she said that the financial position of the lead defendant impacted significantly upon the directions and timetable leading up to the trial, and that the order that she proposed to make was necessary for the purpose of managing the case and furthering the overriding objective.

139. Mr Squires suggested that *XYZ* justified the order that the judge made here. I disagree. *XYZ* was a very different case on its facts, concerned as it was with the age-old problem of a defendant who does not wish to disclose its financial (or insurance) position, usually for tactical reasons. The application was only successful in *XYZ* because the defendant's financial position had a significant impact upon the management of the case up to the trial.

140. In the present case, the risk that QX presents to national security is a critical substantive issue between the parties. It has nothing to do with case management or furthering the overriding objective. Rule 3.1(2)(m) was therefore irrelevant, because the order made

by the judge in this case was not required for case management purposes. It went to a substantive issue between the parties. On the face of it therefore, the judge's decision was not supported by *XYZ*.

141. No other authority was relied on in support of the judge's order. I have explained why, in my view, it is contrary to general principle.

142. It is also worth exploring briefly why the judge in the present case made what, on the face of it, was the surprising order requiring SSHD to tender a witness on a particular subject. The root of the problem can, I think, be found in the nature of the material presently put forward by SSHD in this case which, Mr Tam said, was common in national security cases. Pursuant to CPR Part 88 (the part of the CPR brought in and concerned with proceedings under the 2015 Act), "the court may receive evidence that would not, but for this rule, be admissible in a court of law" (see r.88.25(4)). Mr Tam's proposition that this may include material other than conventional witness statements derives some limited support from the wording of r.88.12(c)(vii) and r.88.14(2).

143. In the present case, what the SSHD relies on as evidence in respect of national security matters are two "statements". These are unsigned and undated. They address the risk QX presents to national security. Such statements would not be evidence in the normal way because they are unattributed. They could, however, be admissible under r.88.25(4), but only if the judge expressly agreed to "receive" them as such. I do not agree with Mr Tam that the rule somehow automatically allows such material as evidence in a TEO review. What is admissible or not, even under the particular regime of a TEO review, must always be a matter for the judge.

144. Here the judge permitted reliance on the two statements, even though they were unattributed: see [64] of her judgment. She then went on to decide that the statements were not, or may not be, enough: see [80]-[86]. That last paragraph concludes with her order as to the filing and service of a witness statement.

145. In my view, the judge considered the issues in the wrong order. She had first to decide whether the unattributed statements were admissible *in that form* pursuant to r.88.25(4). If she concluded that they were, then that was the end of it: they could be relied on by the SSHD without more. Of course, if the lack of attribution or other deficiencies stemming from the generalised nature of the statements created a difficulty for the SSHD in the review itself, that was a matter for the SSHD.

146. If the judge decided that the statements were not admissible in that form, then she had a choice. On the one hand, she could simply have ruled the statements out of account altogether. On the other, by way of proactive case-management, the judge could have suggested to the SSHD that they would be admissible if they were the subject of a short witness statement, with that witness then being tendered for cross-examination. It would then have been for the SSHD to decide whether to accept or reject that suggestion. The judge could not order it, but a strongly-worded suggestion might have achieved the same result.

147. It seems to me that following that sequence is logical and fair. It properly protects both the SSHD and the appellant, and it allows the judge to remain as the neutral arbiter of the material each side chose to rely on. Simply ordering the SSHD to call a witness,

whether she wanted to or not, was beyond the judge's powers. I would therefore allow the cross-appeal.