Neutral Citation Number: [2022] EWHC 405 (QB)

Case No: QB-2020-004359

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

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Between :

THE COMMISSIONER OF POLICE FOR THE METROPOLIS — **Claimant**

- and -

MR ADEL ABDEL BARY — **Defendant**

- -
- -

Mr Tom Little QC (instructed by Metropolitan Police DLS) for the **Claimant**
Mr Tim James-Matthews (instructed by Birnberg Peirce) for the **Defendant**

Hearing date: **2nd February 2022**

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am 25th February 2022.

Mrs Justice Collins Rice:

Introduction

1. The Metropolitan Police Commissioner applies under the Counter-Terrorism Act 2008 ('the 2008 Act') for a statutory Notification Order in respect of the Defendant, Mr Bary. Mr Bary challenges the application.

The legislative scheme

2. Notification Orders were introduced as part of the scheme set out in Part 4 of the 2008 Act. The scheme is explained at section 40:

> (1) This Part imposes notification requirements on persons dealt with in respect of certain offences—
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> (a)sections 41 to 43 specify the offences to which this Part applies;
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> (b)sections 44 to 46 make provision as to the sentences or orders triggering the notification requirements;
>
> (c)sections 47 to 52 contain the notification requirements; and
>
> (d)section 53 makes provision as to the period for which the requirements apply.
>
> (2) This Part also provides for—
>
> (a)orders applying the notification requirements to persons dealt with outside the United Kingdom for corresponding foreign offences (see section 57 and Schedule 4),
>
> (b)orders imposing restrictions on travel outside the United Kingdom on persons subject to the notification requirements (see section 58 and Schedule 5), and
>
> (c)warrants authorising entry and search of premises notified under this Part or where a person to whom the notification requirements apply resides or may be found.

3. The next sections set out certain terrorism offences and other offences having a terrorist connection. A person convicted of such an offence in the UK, and receiving a specified sentence, becomes automatically subject to 'notification requirements'. These require the 'initial notification' to the police of a suite of personal information: name(s), address(es), date of birth, contact details, information about identification documents, details of motor vehicles, certain bank and other financial details, and

details of any travel plans (including departure from and return to the UK). Notification must be made in person at a local police station and the police may take fingerprints and photographs to verify identity. Later changes to the details must also be notified. Provision is then made for periodic (annual) re-notification. The total duration of the requirements is prescribed by reference to the nature and length of the triggering sentence.

4. Failure without reasonable excuse to comply with the notification requirements is a criminal offence. The police can seek a magistrate's warrant to enter and search the premises of someone subject to notification requirements if necessary for the purpose of '*assessing the risks posed by the person*', using reasonable force if necessary. It is a condition for obtaining a warrant that on at least two occasions a constable has sought entry to the premises to search them for that purpose and has been unable to gain entry. A warrant may authorise multiple, or unlimited, entries.

5. Section 57 and Schedule 4 make provision for 'Notification Orders', applying the notification requirements to persons dealt with outside the UK for a corresponding foreign offence. An application for a Notification Order has to be made by a chief police officer to the High Court. The Schedule sets out what constitutes a 'corresponding foreign offence'.

6. By paragraph 3 of Schedule 4, there are three conditions for making a Notification Order: (i) the person has been convicted of a corresponding foreign offence and received a sentence equivalent to a UK triggering sentence (this condition is not met if there was a '*flagrant denial of the person's right to a fair trial*'); (ii) the sentence was imposed after the commencement of Part 4, or certain other conditions as to the service of the sentence are fulfilled; and (iii) the period for which the notification requirements would apply in respect of the offence has not expired.

7. By paragraph 6 of Schedule 4, if, on an application for a Notification Order, '*it is proved*' that these three conditions are met, '*the court must make the order*'.

Factual background

8. Mr Bary is 61. He was born and raised in Egypt. In the 1980s, then a practising lawyer in Cairo, he became active in opposing the government of President Mubarak. He joined Egyptian Islamic Jihad, a group seeking to replace the government with an Islamic state. He was implicated in the assassination of former President Sadat, imprisoned and tortured. He was tried and convicted in absentia by an Egyptian military court and sentenced to death in 1995 in relation to a bomb plot, and again in 1999 for being an EIJ media agent.

9. Meanwhile, Mr Bary had come to the UK and applied in 1991 for asylum. He was granted refugee status in 1993 and given indefinite leave to remain here in 1997. In 1996, while living in London, he founded the International Office for the Defence of the Egyptian People (IODEP), an organisation with stated aims relating to the promotion of human rights and political change in Egypt.

10. On 7th August 1998, a co-ordinated terrorist atrocity was committed in two African capital cities. Vehicle-borne IEDs were detonated at the US embassies in Dar-es-

Salaam (Tanzania) and Nairobi (Kenya), killing 265 people, injuring more than 5,000, and causing mass destruction.

11. Shortly afterwards, Mr Bary and others were arrested in the UK by counter-terrorism officers. They searched the IODEP offices and found two documents: one, dated 4th August, threatening retaliation against the US for arresting EIJ members, and one, dated 7th August, claiming responsibility for the US embassy bombings carried out that day. A nine-month investigation by UK authorities into Mr Bary and seven associates concluded in June 1999 by deciding there was insufficient evidence to charge him with any terrorism-related offences under the UK legislation in force at the time.

12. On 11th July 1999, Mr Bary was arrested in the UK following a US extradition request in connection with the embassy bombings. He remained in prison in the UK during an unsuccessful appeal process and was extradited to the US on 6th October 2012, along with three other Egyptian nationals with UK refugee status and IODEP connections: Khalid Al-Fawwaz, Anas Al-Liby and Ibrahim Eidarous (who died before being extradited).

13. On 19th September 2014, Mr Bary pleaded guilty in the US to three charges relating to the documents found at the IODEP offices, and conspiracy:

> *Count 1*: conspiring from at least in or about February 1998, up to and including at least in or about July 1999, with at least one other person to make a threat concerning an attempt to be made to kill, injure and intimidate an individual and unlawfully damage and destroy any building, vehicle and other real or personal property by means of an explosive through the use of the mail, telephone, telegraph or other instrument of foreign commerce, in violation of Title 18, United States Code, sections 844(n) and (e)
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> *Count 2*: wilfully and knowingly making a threat, in or about August 1998, concerning an attempt to be made to kill, injure and intimidate an individual and unlawfully to damage or destroy a building, vehicle and other real or personal property by means of an explosive through the use of mail, telephone, telegraph or instrument of foreign commerce, in violation of Title 18, United States Code, section 844(e)
>
> *Count 3*: wilfully and knowingly conspiring from at least in or about 1996, up to and including at least in or about July 1999, to commit a crime against the United States, to wit with others murdering nationals of the United States while such nationals were outside the United States, in violation of Title 18, United States Code, section 371 and 2332(a)(1).

14. A judge explored the basis of Mr Bary's plea at a hearing. Mr Bary made a statement in his own words accepting he had agreed with others, including Ayman Al-Zawahiri (Osama bin Laden's successor as head of Al-Qaeda), to send the 'threat fax' of 4th August 1998, and that he made calls and sent messages claiming responsibility for the

7th August atrocities and threatening to commit similar atrocities if demands were not met. He accepted he had conspired with Al Zawahiri and Eidarous to kill Americans, military and civilian, anywhere in the world. He acted as a go-between, passing messages between the media and his co-conspirators, including Osama bin Laden and Ayman Al-Zawahiri. He said he was pleading because he was guilty as charged: he had done all of this knowingly and of his own free will.

15. He was sentenced to 25 years' imprisonment, the maximum available on these counts. The sentencing judge rejected '*a spirited effort to portray Mr Bary as a peaceful man, a man who never personally engaged in violence and who indeed ... abhorred violence*' as being inconsistent with his plea. He considered it '*enormously generous*' of the US authorities to accept his plea when the indictment contained extensive further counts some of which carried a mandatory life sentence. (The prosecution had accepted that Mr Bary had not personally participated in the embassy bombings themselves; he had pleaded to post-event conduct only.) The judge noted '*it is not very likely that you in future will pose a danger to society once you are released, especially given your age and your physical and mental condition*' but was not prepared to mitigate the sentence on that ground given the countervailing aggravations. He considered '*this was as serious a crime against American citizens as I can imagine*' so the sentence should be served in the US.

16. Mr Bary was released from prison in October 2020 by judicial process, some three weeks before his due release date (time spent in prison in the UK having been taken into account). The state conceded Mr Bary had 'extraordinary and compelling reasons' to be released early: the risks presented by the covid pandemic to someone '*well above the threshold for obesity*', of '*somewhat advanced age*' and '*with existing respiratory illness*' of a fatal outcome. The judge released him so that, if he contracted covid, '*he could spend his last days or hours with his family rather than in a jail cell*'.

17. Mr Bary returned to the UK on 9th December 2020. He is not subject to any post-sentence licence conditions. But the Home Secretary is reviewing his immigration status and he has been subject to immigration bail conditions and, more recently, restricted leave to remain.

Grounds of challenge

18. It is not disputed that all three conditions in paragraph 3 of Schedule 4 to the Act are met, and that on the face of it I am mandated to make a Notification Order in the terms requested, to last for a period of 30 years. Mr Bary, however, opposes making the Order, on two grounds.

19. First, he says that although the *Court* is given no discretion, the *Commissioner* had a discretion to decide whether or not to bring this application in the first place. That is subject to judicial review on ordinary public law grounds. He says the Commissioner's exercise of discretion on the facts of this case is unlawful. She failed to discharge the duty of proper enquiry required by *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014*. She was required by law to carry out a properly-informed risk assessment to determine Mr Bary's present risk to the safety of the community, and to obtain further information to do that – but failed to do so.

20. Second, he says making a Notification Order would be an unnecessary and disproportionate interference with his right to respect for his private, family and home life under Article 8 ECHR.

Analysis

(i) The public law challenge

(a) The Commissioner's discretion

21. On the face of it, a challenge to the Commissioner for bringing this application does not fit easily into the scheme of the legislation. Notification requirements are automatic in the case of UK convictions. The only reasons appearing in the legislation to explain why they are not automatic in the case of foreign convictions – and therefore the only role expressly given to the Court on an application for a Notification Order – is the need to check that the foreign offence is 'corresponding' (and there is a statutory presumption of correspondence), and the sentence 'equivalent', to the domestic triggers, and that there has been no 'flagrant denial' of the right to a fair trial by the foreign court. None of that is challenged here. The scheme of the legislation, given the international character of terrorism (as demonstrated in this case), might therefore be thought to raise an expectation that notification requirements would follow quasi-automatically.

22. So focusing instead on the Commissioner's 'discretion' to bring the application in the first place raises a preliminary question about collateral challenge, and fit with the legislative scheme. On what basis would the Commissioner *not* make an application if it appeared to her that the statutory conditions were fulfilled? On what basis can the Court refuse to make an Order when it has satisfied itself that they are?

23. The Court had to grapple with these questions on what appears to be the only previous occasion a Commissioner's s.57 application has been contested at trial. In *Commissioner of Police for the Metropolis v Ahsan* *[2016] 1 WLR 654* there was a live issue about whether a 'corresponding foreign offence' had been committed. Cranston J concluded it had. There was a second ground of challenge – to the Commissioner's discretion in bringing the application. He said this, at paragraph 37 of his judgment:

> A chief police officer has discretion to apply for an order. That is recognised in the explanatory notes to the 2008 Act, which at paragraph 158 refer to provisions setting out the circumstances in which 'the police may apply for a notification order and the procedure to be followed in England and Wales'. Since there is a discretion, its exercise should be open to challenge on public law. There is a strong legislative steer that, where there has been a corresponding foreign conviction and the requisite sentence has been imposed, an application should be made. Consequently, the circumstances in which a public law challenge will be successfully mounted will be exceptional. None the less judicial review is possible.

24. The Act does not say the Commissioner 'must' make an application, therefore, the Court concluded, judicial review of a decision to do so cannot be ruled out (although collateral judicial review *proceedings* should not be entertained – any public law challenge should be considered at the hearing of the application, as now). The Commissioner's application is not a '*purely formal process*' which does not need to take account of '*exceptional facts*'.

25. The public law challenge in *Ahsan* was an alleged failure to take into account relevant considerations. Cranston J rejected it on the basis that none of the matters raised was '*so obviously material that a failure to consider them would be contrary to the legislative intent*', or, to put it another way, it was not irrational (*Wednesbury* unreasonable) for the Commissioner to leave them out of account. The '*legislative steer in the 2008 Act*' was '*strongly in favour of an application being made*'.

26. Mr Bary suggests there is a basis, within the legislative scheme itself, for understanding the Commissioner's discretion to be risk-based. UK judges sentencing terrorism cases must address the issue of future risk; that guarantees correlation between sentence, risk, and notification requirements. That cannot be taken for granted in a foreign sentencing case. So the Commissioner should in exercising her discretion address herself generally to risk.

27. I cannot find that in the legislation. All the scheme requires of a foreign court is 'correspondence' in the definition of offences and 'equivalence' in sentence – essentially matters of law (and hence ultimately for a court to determine). Absent 'flagrant denial' of a fair trial, no other enquiry into the substance or procedure of foreign judicial decision-making is envisaged. There is no invitation to either the Commissioner or the Court to go behind it or make further enquiry. Nor is post-sentence enquiry invited.

28. *Ahsan* does not suggest the 'legislative steer' is just one factor guiding a *general* or *risk-based* discretion. The Act does not unambiguously create a discretion at all. What paragraph 4 of Schedule 4 says is that '*an application for a notification order in respect of a person may only be made by a chief officer of police*'. The 'may only' is a limiting factor, restricting who may apply. The explanatory notes do say 'may' not 'must', but do not point to anything other than the tests set out in the Act itself (the only further example given is one relating to the relevant geographical jurisdiction of a chief police officer). The legislation, subject to the qualification in *Ahsan*, indicates that (unless exceptional facts are present) the Commissioner will proceed with an application where it appears to her that the *duty* imposed on the High Court to make an Order is engaged. It could be considered irrational, and contrary to legislative purpose, were she *not* to. Her discretion is narrow. It turns on an evaluation of whether a case is exceptional.

(b) The Tameside duty

29. The public law challenge in this case is based on the *Tameside* duty to make proper inquiry. That is itself a test of irrationality: it is a duty to make such inquiry as would in all the circumstances be irrational for the decision-maker not to make. Where a discretion is conferred by statute, the scope of the duty takes the statute as its starting point. The Divisional Court in *Plantagenet Alliance v Secretary of State for Justice [2014] EWHC 1662 (QB)* framed the test as follows (paragraph 139):

> Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same?

30. The statutory context, and the nature of the decision-making discretion, is key to the extent of the duty of inquiry. Following *Ahsan*, if it appears to the Commissioner that the conditions for making an Order are present, she will expect to make an application unless the case before her is exceptional. So the decision on which the *Tameside* duty bites was whether Mr Bary's case was exceptional.

31. In both dimensions – the standard of irrationality and the test of exceptionality – the bar for a successful challenge on this ground is a high one. For a fuller modern statement of the *Tameside* duty, I am directed to the guidance of the Court of Appeal in *Balajigari & Ors v SSHD [2019] 1 WLR 4647* at paragraph 70. The duty is not a matter of procedural fairness to the individual but a requirement for a decision-maker to be sufficiently informed to arrive at a rational conclusion. The obligation on the decision-maker is only to take such steps to inform herself as is reasonable. Subject to a *Wednesbury* challenge it is for the decision-maker not the reviewing court to decide on the manner and intensity of the inquiry to be undertaken. The court should interfere only if no reasonable decision-maker could be satisfied on the inquiries made that they possessed the information necessary for the decision. The court should look at the material before the decision-maker and intervene only if no reasonable decision-maker could be satisfied on that material that it possessed the information necessary for its decision. The wider the discretion, the more extensive the duty of proper inquiry – and vice versa.

32. The discretion here is narrow. The Commissioner will make an application unless a case is exceptional. It is impossible to be prescriptive about what might make a case exceptional – that itself is a matter for evaluation. In *Ahsan*, exceptionality was found in a disproportionate interference with human rights, and I consider the present case through that lens below. (It may be that ECHR compliance occupies the largest part of the Commissioner's decision-making about whether or not to apply for a Notification Order. But proportionality is ultimately a decision for a court rather than a matter of 'rational inquiry' for the Commissioner: it is not obvious what a *Tameside* challenge adds there.)

33. Aside from human rights issues then, some guidance about exceptionality in this statutory scheme appears in the decision of the Court of Appeal in *Irfan v SSHD [2013] QB 885*. This was a case about notification requirements imposed automatically following domestic conviction, so not wholly on point about the Commissioner's discretion in a foreign conviction case. But the Court approved an analysis that '*there may be 'some wholly exceptional cases' where a terrorist offender can be said to pose no significant risk for the future*'. That formulation was also noted in *Ahsan*. The *Tameside* challenge in this case makes an argument that the case is at least potentially exceptional on the ground of the low risk posed now by Mr

Bary, and that the Commissioner's decision to bring this application was insufficiently informed by inquiry into that issue to be rational.

(c) The Commissioner's decision

34. I turn then to the materials before the Commissioner. Her decision to apply for a Notification Order was made on the basis of a police report dated 4th December 2020. This set out the history and background of Mr Bary's offending. It gave a brief account of his detention in the UK and the US, noting there was no suggestion he had engaged in terrorism-related activity or posed significant risk during his time in US custody. It set out his family circumstances.

35. The report recorded that anti-terrorism officers had held a risk assessment interview (remotely) with Mr Bary accompanied by his lawyer, on 25th November 2020, shortly before his return to the UK. Mr Bary said he just wanted to get back to family life in the UK with his wife and children; he said he was '*an old man, not in the best of health*' and was '*no threat*'. He said he had friends who had supported him through his imprisonment but declined to name them. He understood others could encourage him to engage in criminal acts based on his history and past connections, but he did not intend to do so or put himself in such positions. He knew he could receive threats and a negative reaction from some elements of society and the media, but again, did not intend to engage.

36. The report included a short section on 'risk':

> Bary has had previous and significant involvement with EIJ and AQ. This reveals at the very least a long-standing association with others holding radical beliefs. In addition and importantly there is the US conviction for serious terrorist related offending. Although there is no adverse reporting from the US, since his time in custody, Bary's current mind-set and extremist ideology is largely unknown and untested. Given his US conviction and the involvement with EIJ and AQ it is assessed by SO15 that he does pose a risk to the security of the UK, even if the extent of that risk is difficult to quantify.
>
> From the recent initial risk interview … Bary has commented that he has no desire to re-offend or re-engage upon return to the UK and wishes to re-build his family relationships, posing no threat to the UK. Although initially positive, this commitment is untested and would require assessment over time following release and reintegration in the community. Accordingly Bary's commitment to desist and disengage are also untested. Whilst the [US sentencing] Judge in 2015 thought that it was not very likely that Bary would pose a risk to society he did not state that there was no risk.

37. The Commissioner also had before her documentation from the US plea, sentencing and early release hearings.

38. Mr Bary says this is not enough. He says it is inherent in the legislative purpose of the Act, which is to protect the public from the risk posed by terrorist offenders, that the risk of future offending is '*so obviously material*' that it must form part of any rational exercise of the Commissioner's discretion. Any rational risk assessment must be properly informed, including by the Commissioner making attempts in good faith to acquaint herself with relevant information. He says she has obviously not done so. Mr Bary's current mindset and extremist ideology are '*largely unknown and untested*'. His commitment to leading a law-abiding life is '*untested*'. The Commissioner's information is on its own account incomplete. There are analytical tools available for conducting just such assessments. The Commissioner failed to obtain information from the US prison service about Mr Bary's (lack of) radicalisation. She did not review the information available from the original nine-month UK investigation which resulted in a decision not to prosecute. She relied on a bare one-hour interview with Mr Bary. There is no reason she could not have undertaken a risk assessment to supply the deficiencies in her knowledge about the risk he posed. It was irrational for her to proceed without it.

(d) Consideration

39. Applying the ***Tameside*** duty to the Commissioner's decision-making engages the conundrum of establishing a negative – that a case is *not* exceptional. But for a rational decision-maker within this legislative scheme that is a limited function. The question she needed to address her mind to was: might this be a 'wholly exceptional' case where Mr Bary could be concluded to pose no material risk for the future? A rational decision-maker will be alert to signs of exceptionality. If, on a fair and reasonable overview of the case, the question genuinely arose, then the ***Tameside*** duty would indicate how she ought to pursue an answer to it. But it did not require her to speculate about exceptionality, or take exhaustive steps to satisfy herself to some exacting standard that the case was *not* exceptional.

40. Here, the Commissioner took as her starting point the nature and quality of the offending itself. That is in accordance with the statutory scheme, which also takes that as its starting point: it is where the 'strong legislative steer' comes from. Mr Bary's convictions may not have been at the most horrific end of what is on any basis a horrifying spectrum – there was no actual instrumentality in bringing about mass murder – but it was conduct involving active support for and close co-operation with the controlling minds and perpetrators of mass murder, and the spreading of propaganda in the immediate aftermath of gross terrorist atrocity.

41. This is exactly the kind of offending for which the legislative scheme was devised. The Commissioner was therefore entitled, if not required, by the scheme to proceed on the basis that some special feature of the history of the offending or, more likely, some major development since conviction, would be the sort of pointers to exceptionality she needed to be alert to.

42. The police report she had before her appears a fair, if high-level, overview of the history of the case, and I did not hear it suggested otherwise. It indicated no particular areas of concern in Mr Bary's prison record. The Commissioner was entitled to proceed without further inquiry into that. It would not have been irrational to conclude without more that Mr Bary's security classification and conduct in prison were unlikely to be capable of establishing exceptionality - that he posed *no*

significant risk *in the community*. An unexceptional prison record is not itself a sign of an exceptional case for not pursuing an application for a Notification Order.

43. The Commissioner had before her material about Mr Bary's current personal circumstances. It was not irrational to note without further inquiry that being 61 and not in the best of physical health and fitness did not itself suggest the case might be exceptional (I deal with the question of his mental health below): it did not amount to elimination for practical purposes of the risk of further offending of the sort for which he had been convicted – conspiring with others and handling communications. She was entitled to note in this connection that he had maintained connections with pre-sentence friends he declined to name. She was entitled to note his less than definitive response to being questioned about his intentions regarding visiting Egypt. None of this pointed to an exceptional case for not applying for an Order.

44. It was not irrational to proceed on the basis that tools for assessing the radicalisation of terror suspects and offenders were not capable by themselves of demonstrating the exceptional elimination of radicalisation from a proven, convicted, long-term radical. It was not irrational to note without further inquiry Mr Bary's declared intention to lead a law-abiding life – not least given his continuing insistence on an inherently peaceable mindset of the sort robustly rejected at his US judicial hearings, and the limited evidence offered of real insight and change. She was entitled to note his strong sense of injustice. These were not indicators of an exceptional case.

45. It is not contended on a Tameside challenge that there was information before the Commissioner which she failed properly to take into account, but that there were investigations irrationally omitted. It was not in my view irrational to conclude on the all the materials she had, considered in the round, that there was no indication, or potential line of inquiry, pointing to anything about his offending or any major development since, capable of setting Mr Bary's case apart from the notification scheme, or that his case was anything other than unexceptional.

46. The scheme of the Act – and the *Tameside* duty – does not import a requirement to undertake a detailed assessment or quantification of the risk an offender *does* pose. As the report noted, absent some obvious or unusual factor, it is rational to proceed on the basis that further predictive inquiry is unlikely to be capable of establishing exceptionality. It is a context in which even a relatively low risk of catastrophic outcome is of concern, and the most relevant and accurate test for calibrating risk – free behaviour in the community – cannot for that reason be attempted. That, after all, is the whole point of the notification requirements. (Mr Bary had in any event been subject to immigration bail conditions, which limited the extent to which the Commissioner could rely on his conduct in the community since release.)

47. I am satisfied a rational decision-maker, *in this statutory context*, could take the decision that this was not an exceptional case on the materials the Commissioner had before her without further inquiry. Mr Bary had a long-standing association with extreme radicals, including the leadership of EIJ and AQ. There was no sign he had irrevocably repudiated those links or become incapable of further engagement in terror of the sort he had demonstrated in the past. His mindset, attachment to extremist ideology, and commitment to law-abiding life in the community were, *given his offending history*, issues of major – *known*, if not precisely calibrated – concern and

there were no indicators of exceptional change. It was the *change* rather than the mindset which was 'untested' (and largely, absent some special factor, untestable).

48. This is not a case in which no reasonable decision maker could be satisfied on the materials available that they possessed the information necessary to proceed on the basis that the case was not exceptional. There was no question 'so obviously material' raised by that material and nothing obviously missing. I am unpersuaded in all these circumstances of the challenge to the Commissioner's application on public law grounds.

(ii) The human rights challenge

(a) The legal framework

49. It is not disputed that a Notification Order engages, or interferes with, Art.8 rights. It clearly does so, simply in relation to the provision of private information to the police. *Irfan* is authority for that, and the extent of the interference has only increased since that case was decided: further categories of information have been added to the list. Failure to comply attracts criminal sanctions. There is also the requirement to attend the police station and the exposure to fingerprinting, to home visits announced and unannounced, and to the possibility of a search warrant in the event of failure to co-operate with police entry into the home.

50. It is not however suggested in the present challenge that the scheme itself inherently lacks proportionality. *Irfan* is again Court of Appeal authority for that, in particular by limiting the ratio of the case of *F (a child) v Secretary of State for Justice [2011] 1 AC 331* (a case about reporting requirements under the then regime applying to convicted sex offenders) to requirements of *indefinite* duration. The Court approved an analysis of terrorism offending as being in a special category: '*If anything calls for a precautionary approach, it is counter-terrorism*'. The uniquely terrible outcomes, the international dimension, and the uniquely complex and unpredictable drivers of offending, set against the '*relatively moderate intrusion caused by the interference with the private lives of convicted terrorists*' add up to a regime which, judged in the round, was held on the whole necessary, proportionate, and beneficial to society. 'Relatively moderate' is certainly a more accurate description of the updated notification requirements than 'light touch', but they are in essence transparency requirements rather than restrictions.

51. However, proportionality must also be considered on a case-by-case basis. It is also about Mr Bary's personal circumstances and the impact of the notification requirements on *him*. I must consider whether the general balance of the scheme holds good for him, or whether, as in *Ahsan*'s case, the effect on him personally and on his home life would be so disproportionate to the statutory purpose of a Notification Order, that it would be wrong to make it.

52. *Ahsan*'s analysis of the Commissioner's discretion is relevant here. A court mandated by legislation to make a Notification Order is constrained by sections 3 and 4 of the Human Rights Act 1998 in the extent to which it can decline to do so. The Commissioner, however, is not expressly mandated, and she must therefore consider her discretion as limited by proper human rights considerations. And it is the task of the Court on a human rights challenge to enforce those limits by making its own

decision on proportionality. That is the logic of *Ahsan*, and the basis on which the Court found in that case that the Commissioner's application was flawed and it would be wrong to grant it.

53. I must make an equivalent assessment here. The familiar test established by the authorities requires consideration of four things: (i) whether the objective of the Notification Order is sufficiently important to justify the limitation of Mr Bary's protected right, (ii) whether the Order is rationally connected to the objective, (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the Order's effects on Mr Bary's rights against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In essence, the question at step four is whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure.

54. There is in the present case no real dispute about the satisfaction of the first three questions, at least in general terms – it is the 'stand back' assessment at step four which is in issue. But I set out the test in full because it is necessary not to lose sight of the weightiness of the public interest considerations set on one side of the balance, or the fact that the alternative to a Notification Order in this case is no form of licence condition or information provision at all and the reliance by the police on their general powers.

(b) The medical evidence

55. On the other side of the balance, Mr Bary places expert evidence relating to his mental health. Both he and the Commissioner have obtained doctor's reports about this and the experts have conferred.

56. The experts agree Mr Bary has mental health problems, associated with his experience of imprisonment and torture in Egypt, and then imprisonment successively in the UK and US. He has anxiety symptoms, depressive symptoms, and symptoms directly associated with trauma. They do not agree about the precise diagnosis, but I do not understand anything to turn on that. They broadly agree on the severity of the problems: his depressive state is of moderate severity, and his overall problems are either moderate or severe and persistent.

57. The experts say this about the potential effects of a Notification Order:

> We agree that his PTSD symptoms may increase following the imposition of the new Notification Order and that quantifying this is difficult. We agree that the specific requirements of most concern to him are those which would allow the police to enter his or his family's homes. We also agree that his sense of injustice is important in understanding why requirements may pose a risk to his mental health. There is a subtle difference in our opinions in that Dr MacManus's opinion is that it is likely that his PTSD symptoms may increase. Dr Latham's opinion is that it is likely that his anxiety and PTSD symptoms will worsen.

> We agree that it is possible that his risk of self-harm and suicide may increase. There is again a difference in emphasis. Dr MacManus's opinion is that this risk is likely to increase.

58. The experts agree Mr Bary should be offered treatment for his mental health problems: specialist trauma-focused treatment (psychological and pharmacological) and other treatment (pharmacological and psychosocial) to assist in managing his anxiety, depression and adjustment following release from prison and return home. They say this about the potential effects of such treatment:

> We agree that, if Mr Bary continues to feel the threat and reminders of previous traumas that he has described in response to the proposed Notification Requirements, specialist trauma-focused therapy which involves processing of traumatic memories may be less or only partially successful. However, such therapy is usually delivered in combination with emotion regulation and PTSD symptom reduction work, as well as medication if the severity of symptoms warrants it. These additional approaches could be helpful in reducing the intensity of his current PTSD symptoms aside from the success of the actual trauma processing. Such treatment could possibly lead to an improvement in his symptoms or at least an improvement in his ability to cope with them and reduce the impact of the proposed Notification Order.
>
> We agree that this and the other treatment described should be undertaken. This treatment could possibly lead to an improvement in his mental health symptoms, a reduction in the risk of suicide, as well as ongoing monitoring of that risk, and improve his resilience to the impact of the proposed Notification Order.
>
> We disagree in our opinions as to the likely extent of the effect of treatment on the impact of the Notification Order although agree that it is impossible to be certain either way. Dr MacManus's opinion is that treatment is likely to be more effective in ameliorating these risks given the absence of consistent treatment to date, and that being engaged with mental health services would allow ongoing monitoring of these risks allowing steps to be taken should his risk be assessed to have increased.

59. There appears to be no clear medical evidence about the effect on Mr Bary's mental health of the immigration bail conditions to which he has been subject. These included an electronic monitoring tag, a curfew between 10pm and 8am, weekly reporting to the police station and a prohibition on work and study. From Dr MacManus's underlying report (she is the Commissioner's expert) it appears Mr Bary's enforced lack of work and weekly police station reporting were relevant factors in his mental condition when examined. She also reports concern about the lack of mental health treatment Mr Bary is currently accessing in the community and speculates on his present motivation, in light of this litigation, to get better. Dr

Latham (Mr Bary's expert) also notes the enforced lack of work as a current problem, but that the monitoring is not intrusive.

(c) The management evidence

60. I have been provided with a witness statement from the police officer who would, if the Notification Order were made, be responsible at senior management level for the management of Mr Bary's case. He says the notification requirements would be '*handled sensitively to his own situation*' and within what is intended as a constructive relationship. He describes the efforts that would be made to establish rapport and understanding with Mr Bary and support him in the process of monitoring his progress and evolving risk profile. Home visits would be at a frequency 'proportionate' to the developing picture, and, in the officer's experience, help promote the rapport and engagement aimed for.

(d) Consideration

61. I have no evidence from Mr Bary himself about the likely impact of the notification requirements on him.

62. I start therefore by taking into account one fact about the application of the notification regime to Mr Bary which is notable. Although the Court of Appeal has made a significant distinction in law between a scheme of unlimited duration, and one of fixed, albeit lengthy, duration, that distinction is of limited practical effect in the case of a man in his early sixties, not in particularly good physical health, facing a 30-year order. That order is not subject to formal review or the possibility of revocation or discharge. I approach the consideration of proportionality bearing in mind that Mr Bary faces a lifetime of notification requirements if the Order is made.

63. I take into account what the experts say about Mr Bary's mental health. The mental health impact of the notification requirements was determinative in Ahsan's case. As Cranston J observed, '*Article 8 protects the physical and psychological integrity of a person and there is an interference with article 8 rights if steps are taken which undermine the individual's mental stability*'. The mental health impact of the Order is plainly an interference with an individual's rights over and above the interference it represents with privacy and autonomy in general, and must be considered carefully in the light of the detailed information available about the particular individual's mental health.

64. The mental health information before the Court in Ahsan's case was stark: there was undisputed expert evidence of serious detrimental consequences. That included that '*the notification requirements are likely to have a 'severe adverse impact' on Mr Ahsan's mental health and are likely to lead to the development of a 'severe depressive illness' and an accompanying 'high risk of attempted suicide'*'.

65. The medical evidence in the present case, even at its highest, does not go nearly so far. There is some shading apparent in the probability assessment of worsening symptoms of *any* sort ('*symptoms may increase*' or are likely to do so but '*quantifying this is difficult*'). And the prognosis as to the most severe of the possible adverse consequences risked is clearly some way short of that in Ahsan's case: '*it is possible that his risk of self-harm and suicide may increase*' but, it would appear, from a less

than acute baseline (Dr MacManus noted that Mr Bary denied any suicidal ideation since returning to the UK and when asked if he might consider ending his life if the Order were made said he was not sure what he would do; Dr Latham reports him as saying he was not currently suicidal but worried that the situation might push him to that, and later clarified his view that '*worsening depression, worsening PTSD and stress are all risk factors for completed suicide. If his mental health worsens, his risk of suicide likely increases. I have deliberately avoided a categorical opinion on suicide risk but described it in relative terms*').

66. I note the complexity of the relationship between the immigration restrictions and the proposed notification requirements – on the one hand the work/study restrictions and weekly reporting of the former potentially reducing the consequences that can be attributed to the latter, but on the other potentially having to consider their *cumulative* impact. I note also the possibilities available for the therapeutic management of both Mr Bary's *existing* mental health problems and the risk of deterioration – necessarily cautiously expressed, but nevertheless to be taken into account.

67. *Ahsan* confirms that a degree of subjectivity must be taken into account. I note Mr Bary's reported perception that the notification requirements would be subjectively arduous for him. I note also the particular difficulties reported with the prospect of unannounced home visits and of warranted police entry to the premises should he withhold consent to that.

68. The Commissioner impresses on me – and I accept – that the police would themselves be constrained by law to manage notification requirements lawfully and proportionately in a way that respects Mr Bary's human rights – as indeed would any magistrate applied to for a warrant. Although, once put in place, the information essentials of the regime – including annual re-notification – are non-negotiable, the police must keep the situation under review and have choices to make about matters like home visits which must be made mindfully of proportionality; that includes having an informed care about the impact of their choices on Mr Bary's health. They also have choices about how they communicate with him and foster the relationship of rapport that is in any event necessary for the operational effectiveness of the regime and the avoidance of escalating measures. These are important safeguards. I am inclined in all the circumstances to place more weight on them than Cranston J did in *Ahsan*, even allowing for the necessary element of subjectivity, because unlike him I have some relevant management evidence before me from an experienced officer familiar with Mr Bary's case.

69. Proportionality turns on the individual facts of individual cases. A 30-year order without review is, I accept, a daunting prospect for Mr Bary. Parliament has decided that it is in principle proportionate to his offending, and I have to be satisfied also that it is not disproportionate to the man.

70. I cannot proceed on a basis (accepted on the different facts of *Ahsan*) that Mr Bary poses *no* threat to society. The evidence before me does not establish that. The following points respond to his suggestions to the contrary. A 'precautionary' starting point is established by the authorities in a national security case. Mr Bary's index offending and the facts of his past involvement at the most senior levels of global terrorism are powerful and enduring baseline indicators of risk. He has spent most of the intervening years in prison or latterly under restriction in the community, and if

there is little evidence of activist risk in that period, then, first, it is obvious that the effects of restriction and surveillance in suppressing evidence of risk must be allowed for, and second, equally obviously, small evidence of major risk is not major evidence of small risk. The fact that Mr Bary was not prosecuted in the UK in 1999 appears to have been to a significant degree attributable to the state of the legislation at the time rather than a reliable acknowledgment of the negligibility of his risk to the public. I attach little weight to the US sentencing judge's observations about it being 'not very likely' that Mr Bary would be a danger to society on release, since that was plainly not a considered assessment based on submissions and evidence but part of a brief rejection of a case for mitigation on this ground *even at its highest*. I accept that risk may *in general* decrease with age (and infirmity) but I have no relevant evidence about the effects of these factors in diminishing the risk Mr Bary would otherwise pose to national security: the doctors were not asked to address it and I have no evidence from Mr Bary at all.

71. I accept the medical evidence of the risk of a worsening of his mental health problems. I do not, on balance, consider it to be either of sufficient magnitude and severity in combination, or sufficiently unmanageable, to be inconsistent with proportionality. I am persuaded there is sufficient evidence before me that a combination of available therapeutic treatment, sensitive and professional management by the police along the lines testified to, and choices that Mr Bary could reasonably and realistically be expected to make in his own interests, place the making of a Notification Order in this case on the right side of proportionality.

72. I have not lost sight of what this Order must be proportionate *to*. I have reminded myself of the guidance given by Maurice Kay LJ in *Irfan* at paragraphs 13 and 14. The public interest considerations underlying the scheme of notification requirements in the case of terrorist offenders is weighty indeed. The context is one in which it is proper to accord considerable respect to the scheme Parliament has devised and the balance of proportionality which it reflects. It is important not to lose sight of the limitations of the notification requirements: the baseline of intrusion is '*relatively* moderate' and subject to legal safeguards albeit short of complete discharge. The additional risks particular to Mr Bary are not negligible and must give pause for thought and care. The risks to the public of not making the order in this case are not negligible either. I am not persuaded on the facts of the case and the evidence before me that the former must be regarded as disproportionate to the latter.

73. I cannot in these circumstances accept the argument that the Commissioner's application is flawed so that it would be wrong for me to grant it. I must therefore, according to the scheme of the Act, do so. But in reaching that conclusion I emphasise that it remains the responsibility of the Metropolitan Police to make the choices available to them in the management of this Order consistently with maintaining a proper balance between the public interest and Mr Bary's legally protected rights, as the situation continues to evolve.

Conclusion

74. The Commissioner's application for a Notification Order is granted.

ORDER

UPON the Claimant's application for a Notification Order, pursuant to section 57 of, and Schedule 4 to, the Counter-Terrorism Act 2008,

AND UPON considering the written evidence filed on behalf of the Claimant and Defendant,

AND UPON hearing from Mr Tom Little QC for the Claimant, and Mr Tim James-Matthews for the Defendant,

AND UPON the Defendant's application for permission to appeal,

IT IS ORDERED THAT:

Notification Order

1. The conditions for making a Notification Order pursuant to section 57 of and Schedule 4 of the Counter-Terrorism Act 2008 being satisfied, such an order is made and the notification requirements are hereby applied to the Defendant which require him to provide by 4pm three days after the date consequential upon the terms of paragraph 13 below the following information to the Metropolitan Police Service:
    i. date of birth;
    ii. national insurance number;
    iii. name on the date on which the person was dealt with in respect of the offence (where the person used one or more other names on that date, each of those names);
    iv. home address on that date;
    v. all contact details on that date;
    vi. name on the date on which notification is made (where the person uses one or more other names on that date, each of those names);
    vii. home address on the date on which notification is made;
    viii. all contact details on the date on which notification is made;
    ix. address of any other premises in the United Kingdom at which, at the time the notification is made, the person regularly resides or stays;
    x. identifying information of any motor vehicle of which the person is the registered keeper, or which the person has a right to use (whether routinely or on specific occasions or for specific purposes), on the date on which notification is made;
    xi. the financial information specified in paragraph 1 of Schedule 3A;
    xii. the information about identification documents specified in paragraph 2 of Schedule 3A;
    xiii. any prescribed information.

2. In addition to the matters set out at paragraph 1 above, the Defendant must notify the Metropolitan Police Service before the end of the period of three days beginning with the day on which the event in question occurs (a) of any change to his name or home address as previously notified, (b) if he resides or stays at a premises in the United Kingdom which has

not been notified to the Police previously for period of 7 days or for two or more periods (in any 12 month period) that taken together amount to at least 7 days, (c) of any change to his contact details, including ceasing to use contact details previously notified, (d) if he becomes the registered keeper of, or acquires a right to use, a motor vehicle the identifying information of which has not previously been notified to the police, or if there is a change in the identifying information of a motor vehicle he has previously notified, or if he ceases to be the registered keeper of a vehicle previously notified, and (e) of any change to his financial information or identification documents in accordance with Section 48A of the Counter-Terrorism Act 2008.

3. The Defendant must provide the Metropolitan Police Service with annual renotification of the information in paragraphs 1 and 2 above, starting from one year of the date referred to in paragraph 1 above, in accordance with Section 49 of the Counter-Terrorism Act 2008.

4. The Defendant must notify the Metropolitan Police not less than 7 days before he travels outside of the United Kingdom of the following matters:
    i. the date of his departure;
    ii. the country or countries to which he will be travelling;
    iii. the point of arrival in the country or countries;
    iv. the name of the carrier he intends to use to leave the United Kingdom and to return to the United Kingdom;
    v. the name of any carrier he intends to use to travel between countries while outside the United Kingdom;
    vi. the address or other place at which he intends to stay for his first night outside the United Kingdom;
    vii. where the Defendant intends to return to the United Kingdom on a particular date, that date, and
    viii. where the Defendant intends to return to the United Kingdom at a particular point of arrival, that point of arrival.

5. Upon the Defendant's return to the United Kingdom and within three days of that return he must provide the date of his return and the point of arrival in the United Kingdom, unless that information was already provided in accordance with paragraph 4(g) and (h), and they transpired to be the correct date and/or point of arrival.

6. Where the Defendant has notified the Metropolitan Police in accordance with paragraph 4, but (a) the information does not contain all the required information or (b) at any time prior to the date of his intended departure, the information so notified becomes inaccurate, then he must notify the Metropolitan Police of the remaining required information or the changes to the required information as the case may be, not less than 12 hours before the date of his intended departure.

7. When providing the information listed at paragraphs 4 and 5 above the Defendant must also provide his name, home address and date of birth.

8. The Defendant must provide the information specified in paragraph 1 above, and the notification of information specified in paragraphs 2-4 above, at a police station in accordance with Section 50 of the Counter-Terrorism Act 2008.

9. The notification period is 30 years.

Service

10. Service of this order, for the purposes of paragraph 8(c) of Schedule 4 to the Counter-Terrorism Act 2008 shall be effected by personal service of a sealed copy of the order on the Defendant by the Claimant.

Permission to Appeal

11. Permission to appeal is refused.

12. The deadline for the Defendant to file any Notice of Appeal with the Court of Appeal shall be extended to 4pm on the day 21 days after the date on which the Defendant's application for funding in respect of the appeal is determined by the Legal Aid Agency.

13. Paragraphs 1 to 10 of this Order shall not take effect until the expiry of 21 days from the date of this Order, or on the determination of any application for a stay of this Order by the Court of Appeal (provided that any such application is made to the Court of Appeal within 21 days of the date of this Order), whichever is later.

Costs

14. There is to be no order as to costs, save that there is to be a detailed assessment of the Defendant's publicly funded costs of defending the claim.

BY THE COURT:

DATED: