SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/7/2014 & SN/8/2014
Hearing date: 12th- 14th June 2018
Date of Judgment: 3rd August 2018

BEFORE:

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE DAWSON
MR R GOLLAND

BETWEEN:

Farooq and Sharif

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ms S Knights QC and Mr E Grieves (instructed by **Birnberg Peirce**) appeared on behalf of the Appellant

Mr R TAM and Ms R DAVIDSON (instructed by **the Treasury Solicitor**) appeared on behalf of the Respondent.

Mr A McCULLOUGH QC and Ms R Toney (instructed by **the Special Advocates' Support Office**) appeared as Special Advocate.

OPEN JUDGMENT:

Introduction

1. This is an application for a review of decisions of Secretary of State for the Home Department ('the Secretary of State') to exclude the Applicants from the United Kingdom. Those decisions were made on 4 February 2016 and served on the Applicants on 5 February 2016. The decisions were based on a letter from the Security Service dated 21 January 2016. In this judgment, we will refer to the Applicants as 'Farooq' and 'Sharif' respectively. We mean no disrespect by this shorthand. We will refer to them collectively as 'the Applicants'.

2. The Applicants were represented in the OPEN hearing by Ms Knights QC and Mr Grieves. The Secretary of State was represented by Mr Tam QC and Ms Davidson. Mr McCullough QC and Ms Toney were the Special Advocates. We are grateful to all counsel for the help they have given us, by providing written arguments, and by their oral submissions.

3. The case has had a long history, as we shall explain. There have been two relevant decisions by the Special Immigration Appeals Commission ('the Commission'). The first concerned appeals in a related case. One appeal (that of Shoaib) succeeded. The other appeals were dismissed (decision of 18 May 2010). The second decision was an application for a statutory review of the Secretary of State's decisions, made on 13 December 2012, to maintain decisions to exclude the Applicants which she had made on 18 December 2009. On 26 November 2015, as the Commission (chaired by Mitting J) explained in its OPEN judgment, it decided to quash the 2012 decisions. The Commission remitted the matter to the Secretary of State. We will consider that decision later in this judgment.

The facts

4. The Applicants are citizens of Pakistan. In 2005, Farooq entered the United Kingdom on a student visa. His leave was later extended until 31 September 2011. On 8 July 2008, Sharif entered the United Kingdom on a student visa which was valid until 31 September 2009. As they explain in their witness statements, they have known each other and been friends since they were children.

5. At the relevant time, they were living at an address at 47 Highgate Street, Liverpool, with Shoaib, Janus Khan and Faisal. During the same period, Naseer and T Rehman were living at an address in Manchester. Faraz, Wahab and Ramzan lived at a second address in Liverpool, 51 Cedar Grove.

6. On 8 April 2009, the Applicants and eight other people were arrested. They were suspected of having committed offences under the Terrorism Act 2006 ('TACT'). In particular, they were suspected of having planned an attack which would lead to many civilian casualties. The Applicants were detained and interviewed by the police between 9 and 18 April 2009. They made no comment in their interviews.

7. On 21 April 2009, the Secretary of State served notice of an intention to make a deportation order on the Applicants. They were detained under the Immigration Act 1971. OPEN national security statements were served on them in the deportation proceedings in July 2009. On 3 September 2009, the Applicants went back to Pakistan voluntarily. On 18 December 2009, they were told that the Secretary of State had personally directed their exclusion from the United Kingdom.

The Commission's OPEN judgment in May 2010

8. In May 2010, the Commission made the decision to which we have already referred. The Commission allowed Shoaib's appeal, and dismissed the appeals of Naseer, T Rehman, Faraz, Wahab and Ramzan. The Commission found, to the criminal standard, that Naseer was an Al Qaeda operative who posed a risk to the national security of the United Kingdom and that in an email of 3 April 2009, he declared to an Al Qaeda associate that he intended to carry out an attack causing many casualties between 15 and 20 April 2009 (judgment, paragraphs 15 and 16). The Commission found that the other unsuccessful appellants were knowing participants in Naseer's plan (judgment, paragraphs 26 and 27). The Commission found that Shoaib was in a different position, and was not (judgment, paragraph 28). We remind ourselves that the appeal to the Commission in 2010 was an appeal on the merits.

9. The principal issues on the appeal was whether it was conducive to the public good to deport or to exclude each appellant (judgment, paragraph 6). The Secretary of State's case was that each appellant was 'party to a plot to carry out a mass-casualty attack in North West England between 15 and 20 April 2009'. The OPEN case was based on a series of emails sent between 30 November 2008 and 3 April 2009 between a Pakistan-registered email account, sana_pakhtana@yahoo.com (the sana account'), and an email account admittedly used by Naseer, humaonion@yahoo.com ('the huma account'). The Security Service's assessment was that the user of the sana account was an Al Qaeda associate and that the emails from the huma account described ingredients for explosives and identified, in general terms, the people who would carry out the attack, and that, in the 3 April 2009 email, Naseer declared his intention to carry out the attack (judgment, paragraph 7).

10. The Commission decided that it was sure that the user of the sana account was an Al Qaeda associate. Naseer admitted setting up the huma account. It was set up in Pakistan on 14 November and the sana account was set up, also in Pakistan, on 30 November 2008. The Commission quoted from the relevant emails in paragraph 10 of its judgment, including from a further account set up by Naseer on 1 January 2009 (chipyparveen@yahoo.com). The Commission recorded Naseer's evidence about the emails in paragraphs 11-13 of its judgment. The Commission rejected that account. It was sure that he was lying (judgment, paragraph 14). It was probable that the emails referred to ingredients of explosives, even though none had been found in the investigation. The Commission could not decide whether Naseer and his associates could have carried out an attack, but it was probable that he had told an Al Qaeda associate that he intended to (judgment, paragraph 15). The Commission was satisfied that Naseer was an Al Qaeda operative and that it was conducive to the public good for him to be deported (judgment, paragraph 16).

11. What threat, if any, was posed by the other appellants depended on whether they were 'knowing parties to Naseer's declared intention (judgment, paragraph 17). Naseer, T Rehman, Wahab and Faraz, but not Shoaib, knew each other before they came to the United Kingdom. Wahab, Faraz and T Rehman were friends. Their other links are described in paragraph 18 of the judgment. Shoaib became a friend of Wahab through playing cricket and, though him, got to know Faraz and Ramzan. Shoaib was a 'diligent student of accountancy at Kaplan'. He had an attendance record of 98% in 2008 and 100% in 2009. He said that he had met Naseer four times. There was no evidence to contradict that claim. There was no evidence that he had met T Rehman.

12. The Commission considered it likely that T Rehman had taken photographs as part of a hostile reconnaissance of potential targets before he left for Pakistan on 16 November 2008. He met Naseer there twice, even though their visits to Pakistan only overlapped 'no more

than four days. Naseer visited 51 Cedar Grove on 30 November 2008, ten days after his return from Pakistan, and on the day that the sana account was created. Both Wahab and Faraz were there. Naseer accessed the sana account from Wahab's computer. In his email of 3 December 2008 to the sana account, Naseer said, 'I went to see my mates in other city and came back last week'. The Commission was satisfied that that was a reference to his visit to 51 Cedar Grove and that ' "mates in other city" at least included Wahab and Faraz' (judgment, paragraph 21). It was an indication that he had seen people who, he intended, should play a part in his plan.

13. There was a party at 51 Cedar Grove on 23 March 2009. The Commission accepted that a number of people went to the party who had nothing to do with the plot; 'Attendance at the party is not, as such, an indicator of participation'. It was not significant that Shoaib took time off work to go to it, or that it was the second time he had met Naseer. It was significant for Naseer, Wahab and Faraz, for reasons explained in the CLOSED judgment (judgment, paragraph 22). It was not a coincidence that the party was the day before T Rehman came back from Pakistan. There was a further meeting on 1 April 2009 in Manchester. For the reasons given in the CLOSED judgment, the Commission thought that it was 'of great significance' (judgment, paragraph 23). Naseer, T Rehman, Wahab, Faraz and Ramzan were there. The Commission found that the purpose of the meeting was connected with the 3 April 2009 email. In the light of the open way in which the Commission expressed itself about the meaning of 'mates in other city' in paragraph 21 of its judgment, it is not clear whether the Commission's reference to 'Naseer's "mates in other city" ' in paragraph 23 of the judgment, is a finding that Naseer's 'mates in other city' were limited to the men who were at the 1 April 2009 meeting. The same reasoning applies to the use of that phrase in paragraph 24 of the judgment.

14. Naseer visited the occupants of 51 Cedar Grove on 4 April 2009. For the reasons given in the CLOSED judgment, the Commission did not see that visit as significant. All that could 'safely be inferred' was that there was time to discuss the plan during Naseer's visit, which lasted until the morning of 6 April 2009. Shoaib arrived, with Wahab and Ramzan on 4 April. They had been playing cricket and there was nothing to show that Shoaib's arrival was not a coincidence. There might have been a short conversation about attack planning in Pashtu, which Shoaib did not speak, during an 'apparently pointless drive' round the Wirral on 5 April. Shoaib drove, and Naseer, Wahab and Faraz were passengers.

15. The Commission was satisfied, for reasons given in the OPEN and CLOSED judgments, that Wahab was a committed Islamist extremist and that he and T Rehman were 'knowing participants in Naseer's plans' (judgment, paragraph 26). Faraz's case was 'in principle' indistinguishable from Wahab's, in spite of his father's evidence and his family background (judgment, paragraph 27). Shoaib, however, was in a different position (judgment, paragraph 28). He was from a settled area of Pakistan, not the troubled North West. He did not know the other appellants before he came to the United Kingdom. He did not speak their first language. He did not go to Manchester College of Professional Studies. He was a genuine student at a respectable college. He gave his evidence in a calm and straightforward way, without bluster or prevarication. There was nothing necessarily suspect about his first three meetings with Naseer. 'His attendance at the party on 23 March gives rise to no greater suspicion than that of other individuals who attended and are not now the object of suspicion'. The Commission was satisfied on the basis of the OPEN and CLOSED materials that he was not a 'knowing party to [Naseer's] plans and that the grounds for suspicion have

largely been dispelled and do not now reach the threshold of reasonable suspicion'. Even on a less stringent test the Commission would not have held that it was conducive to the public good for him to be excluded from the United Kingdom.

The application for reconsideration and the new decision

16. On 1 August 2011, the Applicants, who had not been involved in the 2010 hearing, asked the Secretary of State to reconsider her decision. After an exchange of correspondence, they made an application for judicial review on 9 August 2012. That application was settled on the terms of a consent order dated 4 October 2012. The Secretary of State agreed to make a new decision. She did so on 13 December 2012, on the basis of a letter from the Security Service, dated 22 November 2012. The Applicants made a further application for judicial review. In due course, after delays caused by the procedural changes made by the enactment of the Justice and Security Act 2013, that application was certified in March 2014. The Commission heard and decided an application for a review of the 2012 decision in October 2015.

The 2015 proceedings in the Commission

17. In its OPEN judgment, the Commission referred to two significant mistakes which had been made in the preparation of the Secretary of State's case. The first was that until 29 October 2015, the second day of the hearing, she had not disclosed to the OPEN advocates a redacted version of the 2012 recommendation from the Security Service that the direction be upheld. The second was that the Secretary of State's amended first OPEN statement materially misstated the terms of the letter by including material which was not, or 'almost certainly' was not, taken into account by the author of the recommendation. This meant that the Applicants' representatives wasted time and effort in responding to grounds on which the Secretary of State did not ultimately rely. This was unsatisfactory but caused no injustice, and would not have been a ground for quashing the direction (judgment, paragraph 12).

18. In paragraph 10 of the OPEN judgment the Commission said that a direction to exclude a person from the United Kingdom was normally based on a letter of recommendation from the Security Service. 'It is axiomatic that that letter should not be materially incomplete, inaccurate or misleading. If it is and the error or errors are not corrected before the Secretary of State makes her decision, that decision may well be vitiated. The redacted parts of the letter of recommendation in this case were materially incomplete and in one or more respects inaccurate and misleading. In consequence, the Secretary of State did not have all the relevant information to her to answer the right question correctly. For that reason, and that reason only, her decision must be quashed.'

19. The Applicants gave evidence at the November 2015 hearing over a video link from Karachi. They were cross-examined. The purpose of the evidence was to try to show that 'they do not pose, and have never posed, any threat to the national security of the UK; and in particular, knew nothing of the nefarious activities of Abid Naseer and the inhabitants of 51 Cedar Grove.' The purpose of the cross-examination was to show that their evidence was not reliable and, in certain respects, not credible' (see paragraph 11 of the Commission's judgment).

20. It is convenient here to refer to some material from the transcript of the Applicants' evidence. Farooq said that they would see Wahab and Faraz once or sometimes twice a

week (transcript, p 7:11). They would play cricket or go to a restaurant. He would speak to them on the phone. They would come to the house in Highgate Street. He was asked whether there was 'a kitchen that you spent time in, a sitting room, a dining room, a living room'. His evidence (transcript, p 8) was that as he remembered, there was not any wall in between, so there was a very big room. At least 10 to 15 people could sit in it. He, Shoaib and Shahid did not speak Pashtu or understand it. The other guys 'like Wahab and Faraz and other guys' spoke Pashtu. Whenever they got together, they preferred to speak Pashtu, 'so, since we don't know Pashtu, so we were sitting together separately in a separate part and we were talking most of the time with each other, while they were talking most of the time with each other in their own language'. They visited Cedar Grove once or twice a month, maximum (p 9:36). Wahab and Faraz did not sit on separate sofas speaking Pashtu. They spoke Urdu when Farooq visited because they knew that Farooq did not speak Pashtu (p 10:4). Naseer knew Urdu (p 10:27). Sometimes at the party the Pashtu speakers spoke Urdu (p16:5-7). Faraz was 'a good friend' (p 18:22), as was Wahab (p 18: 25).

21. Sharif had a conversation with Naseer in Urdu (p 32:11; 21). He left the party around 9 pm (p 33:33).

22. The Commission recorded in paragraph 11 of the judgment that both Applicants had given oral evidence and had been cross-examined over a link from Karachi. The Commission described their purpose for giving evidence and that of Mr Hall QC, for cross-examining them. The Commission declined to make any findings about the evidence of the Applicants, '[f]or reasons explained in the CLOSED judgment'. It said that when the Secretary of State made a fresh decision, she would be entitled to take into account the Applicants' evidence, for, and against, them.

23. The Commission rejected the Applicants' argument that it should conclude that they were in the same position as Shoaib and therefore quash the decision on that ground. The Commission rejected that argument '[f]or reasons explained in the CLOSED judgment'.

24. Paragraph 1 of the Commission's order quashed the direction and remitted the matter to the Secretary of State for her to reconsider it. Paragraph 2 postponed the effect of paragraph 1 until 29 January 2016, or the taking of a new decision by the Secretary of State, 'whichever is the sooner'. We note that a minute dated 3 February 2016 from the Special Cases Unit to the Secretary of State, which attached the Security Service's assessment dated 21 January 2016, said that the timing of the decision was '**Urgent** before 5 February 2016 – the quashing of the previous exclusion comes into effect on this date'. We gather that on 28 January 2016 the Commission varied paragraph 2 of its order by consent, with the result that the quashing of the exclusion order was postponed until 6 February 2016.

The Applicants' representations dated 18 January 2016

25. On 18 January 2016, the Applicants provided the Secretary of State with written representations. These were based on the redacted 'updated national security assessment for exclusion review' dated 22 November 2012, but not provided to the Applicants until 22 November 2015, that is, during the hearing before the Commission. The assessment was that links (that is, personal association with Naseer and other members of the network) established that it was likely that the Applicants were involved in the network's activities in the UK. The Applicants relied on the submissions and witness statements produced for the

proceedings in the Commission. In the representations, they said, they would address the 2012 national security assessment.

26. The Applicants argued that they had only met Naseer once, at the 23 March 2009 meeting and that the Commission had found that presence 'cannot sustain an inference that the Applicants were knowing parties to the plot'. Shoaib had met Naseer on three other occasions none of which was a sufficient basis to conclude that he was a knowing party to the plot. Mere association with others was not enough to sustain an inference that the Applicants were knowing parties to the plot, as was clear from the Commission's findings about Shoaib. Other associated individuals were excluded from the plot by the police and the Secretary of State: Janus Khan, Sultan Sher, Shenwari, Haroon and Zia Rehman. The Applicants had not been at any operational meetings. The Applicants had no connection with Naseer before they came to the United Kingdom. He had nothing to do with their travel to the United Kingdom. They did not speak Pashtu.

27. The Secretary of State's case in 2010 was that Shoaib was a link between the plotters and the Applicants. That link could not be sustained because the Commission had found in 2010 that Shoaib did not know about the plot, despite his closer association with Naseer, Faraz and Wahab. The social association between the Applicants and Faraz and Wahab were not enough. That association was not evidence which on balance of probabilities showed that the Applicants knew about the plot. 'There is simply no probative evidential value in attendance at the 23 March party and social association' with Faraz and Wahab. If there were, then others with equally limited associations were just as likely to have been involved. That was unsustainable in the light of the approach taken to others and of the Commission's findings. The Security Service had not analysed properly the Commission's findings 'as to how knowing involvement in the plot may lawfully and properly be inferred from the evidence available'. It would be perverse to conclude that the Applicants 'were knowing participants in the plot'.

28. Paragraph 21 was the final paragraph of the submissions. It said, 'If any new matters are to be relied upon and which are different to those in the November 2012 assessment then fairness does require that they be disclosed to the Appellants before a further decision is made.' We agree with that contention, particularly in the light of the long history of this case, and of the fact that the 2012 national security assessment was not disclosed to the Applicants until 29 October 2015. For this purpose the reason for that failure does not matter. What does matter is that failure. The representations then expressed the hope that the exclusion decision would not be maintained. A further reason for our agreement with that contention is that, to anticipate somewhat, in the event, the OPEN reasons eventually given to the Applicants in August 2016 disclosed a different OPEN case from the OPEN case set out in the 2012 assessment.

The gist of the Security Service's recommendation letter of 21 January 2016

29. We do not have a copy of the letter of 21 January 2016. A gisted version of the Security Service's assessment is set out in Section A of the Secretary of State's first amended statement dated 13 December 2017. The Security Service 'assesse[d] that the SSHD would be justified in excluding FAROOQ and SHARIF from the UK on the grounds that their presence in the UK is not conducive to the public good for reasons of national security'. The gist said that it was a standalone recommendation letter and did not rely on, and should not be read with the recommendation letters written in November 2012 and November 2009. It

is said to 'follow' and to have taken account of, the judgment of the Commission handed down on 25 November 2015, quashing and remitting the earlier decisions. The assessments also took into account the findings and observations of the Commission in the 2010 appeal.

30. Farooq and Sharif were Pakistani nationals with no significant ties the United Kingdom. The Home Office 'will be better sighted' on their past compliance with immigration rules; national security 'may be just one of the concerns should FAROOQ and SHARIF seek to return to the UK'.

31. The gist said that a network of people, assessed to be co-ordinated by Naseer (a Pakistani national), and including the Applicants, had been identified in the UK. Arrests were made under TACT on 8 April 2009. Farooq and Sharif were among those detained. The Secretary of State made a decision to deport the Pathway suspects on grounds of national security. Five, including Naseer, appealed to the Commission. In 2015 Naseer was sentenced to 40 years' imprisonment for providing and conspiring to provide material to support Al Qaeda and conspiring to use a destructive device.

32. The Applicants left the United Kingdom voluntarily in September 2009 before their deportation appeals could be heard. The hearing was in March 2010. The Commission heard appeals against decisions to deport and to exclude (as the case might be). Wahab, Naseer's 'main extremist contact' in the United Kingdom, who lived at 51, Cedar Grove, Liverpool, returned to Pakistan on 22 August 2009. Shoaib, who lived with Farooq and Sharif and others, both at 47, Highgate Street and at 175a Earle Road, Liverpool, returned to Pakistan on 22 August 2009. Faraz, who lived at 51 Cedar Grove, returned to Pakistan on 17 July 2010. T Rehman was a close associate of Naseer. He was found to have many photographs of him and associates in popular shopping areas of Manchester. The Commission found that this indicated 'target selection'. He returned to Pakistan on 10 June 2009. Farooq and Sharif were first excluded from the United Kingdom on 16 December 2009. Unlike the other appellants, neither challenged the exclusion decision.

33. The history of the proceedings was summarised. In a judgment handed down on 18 May 2010, the Commission found that Naseer, Wahab, Faraz and T Rehman had been involved in a plot 'to conduct a mass casualty attack in the UK. However it found that... SHOIAB had not'. Farooq and Sharif's lawyers then asked the Secretary of State to reconsider the exclusion decisions in their cases in the light of the Commission's finding that Shoaib had not been involved in the Pathway plot. The Security Service reviewed their cases. In November 2012 the Security Service gave the Secretary of State an updated national security assessment. On 13 December 2012, the Secretary of State decided to exclude Farooq and Sharif from the United Kingdom. In March 2013, they applied for judicial review of that decision. In due course that application was certified by the Secretary of State, and the Commission heard an application for a review of it between 28 and 30 October 2015.

34. The gist went on 'In the 2015 proceedings, SIAC quashed the SSHD's 2012 exclusion on the grounds that the decision was procedurally flawed. This was due to J Mitting [sic] finding that the content of the Security Service recommendation was materially incomplete and in one or more respects inaccurate and misleading'. The case was remitted to the Secretary of State for a new decision. One of the Pathway suspects, Naseer has since been convicted of terrorism offences in the USA.

35. The Security Service's assessment was that Farooq and Sharif were in contact with the Pathway network and attended a meeting on 23 March at which Naseer and other Pathway SOIs were present. The Security Service had carefully considered the accounts of Farooq and Sharif. They argued that they were in the same position as Shoaib and were not involved in terrorism. The assessment referred to the Commission's evaluation of Shoaib as a witness ('impressive'). It was more likely than not that he was a genuine student of accountancy, at a respectable college. 'For the reasons set out in this letter, and even if that [sic] SIAC was right about SHOAIB, the Security Service continues to assess that FAROOQ and SHARIF and Sharif *may* have been involved in the Pathway plot, and that their contact with NASEER remains of national security concern.' (emphasis supplied).

36. Under the heading, 'Association with the Pathway network', the assessment referred to a decision of a US court which found to the criminal standard that Naseer was a key figure in an Al Qaeda conspiracy to use a bomb to commit mass casualty attacks. That finding effectively endorsed the Commission's findings that on the balance of probability those involved in Pathway were engaged in attack planning. On any view, that activity presented the highest risk to the public. The assessment was that Farooq and Sharif 'may have been involved in the PATHWAY plot. Their contact with NASEER *and other individuals of concern* continues to support the assessment that they should not be permitted to re-enter the UK for reasons of national security' (paragraph 16, our emphasis).

37. Paragraph 17 referred to analysis which showed that Naseer accessed his operational email account (the huma account) from 51 Cedar Grove, Liverpool on 30 November 2008. Two people who lived there, Wahab and Faraz, were later found to have been involved in the Pathway plot; the third person who lived there, Ramzan, left the UK voluntarily and was excluded before the deportation hearing. Farooq and Sharif have accepted that they were in close contact with those at 51 Cedar Grove.

38. The next heading was 'Meeting of 23 March 2009'. The assessment referred to Naseer's visit to 51 Cedar Grove on 23 March 2009. It was assessed that several Liverpool-based associates of Naseer were there at the same time, including Farooq, Sharif and Shoaib. Farooq and Sharif both admitted being at 51 Cedar Grove that evening. There were other meetings between the Pathway suspects in April 2009 at which Farooq and Sharif were not present. 'That does not detract from concerns that FAROOQ and SHARIF were nevertheless in contact with NASEER, and others involved in the PATHWAY plot, during the planning phase.'

39. The gist records that in its OPEN judgment of May 2010, the Commission accepted Shoaib's evidence about the 23 March meeting at 51 Cedar Grove that 'either nothing was said about NASEER's marriage or he could not remember anything being said about it'. The assessment noted that in its 2010 OPEN judgment, the Commission was satisfied, at least on balance of probabilities, that Naseer declared to an Al Qaeda associate that his intention was to carry out an attack to cause mass casualties and that he referred to it in emails as 'the nikah' (that is, the Islamic wedding). In 2010, the Commission found that three of those at the 23 March meeting (Naseer, Wahab, and Faraz) were involved in the Pathway plot. The Commission said in its OPEN judgment in 2015 that 'attendance at the party at 51 Cedar Grove on 23 March 2009 and association with SHOAIB are not, of themselves, grounds for reasonable suspicion about the activities of FAROOQ and SHARIF'. The gist goes on, 'The Security Service notes the words "of themselves" but maintains the assessment that attendance at the party raises concerns about FAROOQ and SHARIF. It remains the assessment of the Security

Service that FAROOQ and SHARIF *may* have been involved in the Pathway plot in some capacity' (our emphasis).

40. 'Information indicates that an unidentified male, assessed to *possibly* be FAROOQ, entered 51 Cedar Grove at around 7.30pm. The unidentified male greeted NASEER outside the property with a 'hug and a handshake'. Two unidentified individuals left Cedar Grove around midnight. The Security Service assesses that FAROOQ is *likely* to have left the property around midnight' (our emphasis). 'Information indicates that a male identified as SHARIF arrived at 51 Cedar Grove at around 6.40pm with an individual assessed to *possibly* be WAHAB in WAHAB's vehicle. Five individuals left the property just after 11pm. The Security Service assesses that SHARIF is *likely* to have been one of these individuals' (our emphasis).

41. In paragraph 22, the gist refers to the visit on 1 April 2009 of three Liverpool-based associates, Ramzan, Wahab, and Faraz, to Manchester, wHere they met Naseer and T Rehman. The Security Service's assessment was that this meeting was 'significant', because of the profile of those who went, and the closeness of the date to 3 April 2009. Nonetheless, the Security Service's assessment was that the fact that Farooq and Sharif did not go did not mean that they were not involved in the Pathway plot. The gist notes that the Commission found that Shoaib's absence from this meeting was significant. It was one of the factors that indicated that he was not 'a knowing party to the plan'. 'But this has to be seen in the light of Shoaib's credibility as a witness and the fact that he was a genuine student at a reputable university'.

42. Paragraph 23 of the gist refers to a 'coded' operational email sent by Naseer on 3 April 2009 to his Al Qaeda contact in Pakistan. It said, 'My mates are fine' and 'we both parties have agreed to conduct the nikah after 15th and before 20th of this month'. Naseer also referred to 'short trips to riverside'. The assessment is that this could mean 'Liverpool', and that his 'mates' being 'fine' could refer to the meetings of 23 March and 1 April. Both meetings were 'important in the chronology of the PATHWAY plot. The fact that FAROOQ and SHARIF were present on 23 March provides *some suppo*rt for the assessment that they *may* also have been involved in the PATHWAY plot' (our emphasis).

43. Paragraph 24 is headed 'Lack of Credibility'. It is said that in their witness statements received in September 2015 and during cross-examination on 28 October 2015, Farooq and Sharif gave their account. The Security Service noted that there were differences between the various versions and between their accounts and intelligence. Further, the Security Service assessed 'more generally that Farooq and Sharif's answers lacked clarity throughout the cross-examination'. There could be 'entirely innocent reasons for this, but, when judged alongside their extremist associations, and the very serious attack planning...in 2008/2009, the Security Service is not reassured that they had no awareness of the plot.'

44. The next section in the gist is headed '23 March 2009 inconsistencies'. It is said that Farooq and Sharif gave two accounts of their movements on 23 March in the 2015 proceedings. The first was given in the witness statements received in September 2015 and the second was given in cross-examination. Farooq said in cross-examination that he left 51 Cedar Grove at 8 or 9pm but in his witness statement he said that 'it wasn't that late [when he left] maybe 10pm-11pm'. Sharif said in cross-examination that he left at around 9 or 9.30 pm. The Security Service's assessment is that Farooq left around midnight or just after and Sharif at around 11pm. The gist continues, 'It is accepted that allowances must be made for the difficulty in remembering timings, especially some years after an event. It may also be the

case that, in order to present the best possible picture to SIAC, FAROOQ and SHARIF had good reason to put distance between themselves and NASEER. It would not necessarily mean that they were involved in the Pathway plot. Nevertheless, given the other discrepancies set out below, and the unconvincing way that FAROOQ and SHARIF gave their evidence overall, the contradictions are a point of note.'

45. In paragraph 26, the gist says that while Farooq was generally unable to remember some of the details about 23 March 2009, he gave a clear account of his departure. He said that when he left, he saw a yellow car which he identified as a police car with a CCTV camera. Because he was worried about his provisional licence or insurance, he wanted someone to drive his car. He described going back into the house, and then leaving with Wahab, who drove him part of the way home. Farooq then dropped Wahab, leaving him to walk back to the party, and drove home. Farooq said that as far as he knew, his only contact with Naseer was at the 23 March party/meeting. However, an unidentified man who was '*possibly*' Farooq greeted Naseer outside the property with a hug and a handshake, which would suggest that the unidentified person knew Naseer. 'The Security Service reiterates that this is a tentative identification and it is possible that the unidentified male was not FAROOQ.'

46. Paragraph 29 of the gist refers to the Security Service's assessment that Farooq had described the layout of 51 Cedar Grove in a way that 'appeared to be designed to put distance between himself and NASEER'. It is said that in cross-examination he 'inferred' [sc implied?] that the 23 March meeting was in a very big room in which 10-15 people could sit'. He also said that Wahab, Faraz, Naseer and others were speaking Pashto and were therefore sitting separately from Farooq and the other Urdu speakers. The floor plans of the house are said to show that the sitting room was a relatively small room and that there were walls between each room. The Security Service accept that it is '*possible*' that Farooq '*may*' have misremembered some of these details (our emphases), 'it is assessed unlikely, as he further stated that he used to visit 51 Cedar Grove "once a month or maybe twice, maximum" '.

47. The Security Service said that while Farooq and Sharif might genuinely have forgotten details about when they left 51 Cedar Grove on 23 March, given the passage of time, 'we assess that [their] accounts around their interactions with other PATHWAY [SOIs] may have been an attempt to distance themselves from NASEER and the PATHWAY network. It does not follow that they had knowledge of the plot, but it does mean that concern about their associations continue to exist, notwithstanding their evidence'.

48. The next section of the assessment is headed 'Possible misuse of student visas'. Farooq, Sharif and Naseer all entered the United Kingdom on student visas. Farooq admitted that he had spent most of his time working, rather than studying. Farooq said that Sharif studied a 'proper accountancy course' at Kaplan College. Sharif's visa was for study at Liverpool College of Management Sciences, but a letter from his solicitors to UKBA dated 1 August 2011 said that he did not in fact study there. The letter said that, instead, he had done a diploma in Accounting and Finance from July to January 2009 from the London College of Accountancy & Technology ('LCAT') and studied for a qualification from the Association of Chartered Certified Accountants at Kaplan Financial in Liverpool. In cross-examination, Sharif admitted that he had lied to his solicitors in 2011 and had never studied at LCAT. Farooq and Sharif may therefore have failed to comply with the terms of their visas. This could give officials a reason to look carefully at any future applications for entry clearance, whether or not there is a decision to exclude them on the grounds of national security.

49. The Security Service's conclusion was that Farooq and Sharif 'are associates of NASEER and *may* have been involved in the PATHWAY plot of 2009 in some capacity. The Security Service further assesses that FAROOQ and SHARIF have not been entirely forthcoming in their accounts of their activities in 2009.' The Secretary of State would be 'justified' in excluding them from the United Kingdom on the grounds that their presence in the United Kingdom is not conducive to the public good for reasons of national security.

The submission to the Secretary of State dated 3 February 2016

50. The redacted submission to the Secretary of State is dated 3 February 2016. The summary refers to the Commission's OPEN and CLOSED judgments of November 2015, which quashed the exclusions of Farooq and Sharif. The quashing would take effect on 5 February. It was 'open' to the Secretary of State to make new exclusion decisions. The Security Service had prepared a fresh recommendation letter 'which sets out the intelligence case for you to consider'. Importantly, the recommendation was an open one. The Security Service did not recommend that the Secretary of State exclude Farooq and Sharif, but rather that the Secretary of State note the assessment and 'consider whether to exclude' them. The Security Service assessment letter of 21 January 2016 and Farooq and Sharif's representations dated 18 January 2016 were attached to the recommendation.

51. Paragraph 1 describes the Applicants' immigration history. They did not comply with the conditions of their visas because they worked illegally. The background is summarised in paragraphs 2-3. Nothing is said about the Commission's reasons for quashing the 2012 decisions.

52. Paragraphs 4-5 refer to the new assessment by the Security Service. It is said to 'take account of the findings made in the SIAC judgments'. The new assessment again relied on material which cannot be disclosed to Farooq and Sharif's representatives, which meant that in order to rely on that evidence in defending the exclusion decision, the decision would need to be certified under section 2C of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') .

53. The assessment was that the Secretary of State '**would be justified in excluding FAROOQ and SHARIF from the UK on the grounds that their presence in the UK is not conducive to the public good for reasons of national security**' (emphasis in the original). The evidence against them is said to be 'their association with other members of the PATHWAY network, notably Abid Naseer, their lack of credibility in explaining events under cross-examination [redacted passage].

54. Any new exclusion decision must be based only on the new recommendation and the recent assessment by the Security Service. The risks associated with not making an exclusion decision could be mitigated, but as a result of the Security Service's assessment that the Secretary of State 'would be justified' (original emphasis) in excluding FAROOQ and SHARIF Special Cases Unit recommend that you take a fresh decision to exclude FAROOQ and SHARIF'. The options 'whether or not to make a new exclusion decision are set out below, taking account of the operational impact of exclusion [redacted passage] and likely costs to the Home Office and presentational issues'.

55. The option of excluding Farooq and Sharif was considered first. The recommendation repeated that the evidence against them 'is their assessed association with members of the PATHWAY network, notably Abid Naseer, their lack of credibility in explaining events under

cross-examination [redacted passage]. It said that the Security Service's letter concluded that 'FAROOQ and SHARIF *may* have been involved in the PATHWAY plot in some capacity' (original emphasis). The recommendation said that the Security Service letter 'sets out in detail the strands of intelligence linking FAROOQ and SHARIF to NASEER and the participants in the 2008 PATHWAY plot, particularly the occupants of 51 Cedar Grove, Liverpool, and the meeting there on 23 March 2009. It also considers evidence against their involvement, such as their absence from the meeting of 1 April 2009 and possible explanations for the intelligence against them.' Paragraph 10 continued, '**The recommendation letter also highlights inconsistencies in FAROOQ and SHARIF'S answers under cross-examination** in comparison to written statements [redacted passage] including timing they left the meeting on 23 March 2009 [redacted passage]. The letter is said to acknowledge that the inconsistencies could be due to the passage of time, or to an attempt to distance themselves from the Pathway network. The recommendation quotes the conclusion of the letter, 'it does not follow that they had knowledge of the plot, but it does mean that the concerns about their associations continue to exist, notwithstanding their evidence'.

56. After some further redacted material, the recommendation says that if Farooq and Sharif were excluded, any visa application would automatically be refused. 'This provides added assurance that any visa application...will be refused'.

57. The operational impact of option B was assessed in paragraphs 18-24. The OPEN parts of that assessment make the point that the consequence of a decision not to make a new exclusion decision would not be that Farooq and Sharif would be able to enter the United Kingdom. They would need to apply for a visa, and this could be refused on credibility grounds. They had failed to comply with the conditions of their student visas. The material in support of that contention is marshalled in paragraph 20. The refusal of an application for a visa would not generate a right of appeal, unless made on human rights grounds. Neither had made an article 8 claim. Refusal could also be considered on the grounds that their presence in the United Kingdom was not conducive to the public good. Exclusion and the refusal of an application for a visa would have the same legal effect, but refusal of a visa application 'does not provide the level of assurance of an exclusion decision'.

58. The representations dated 18 January are considered in paragraph 26. Paragraph 26 says that the Security Service has reviewed these and concluded that '**it [sic] does not alter its assessment...**' (original emphasis). The representations said that Farooq and Sharif had been in employment for the past six years since their return from Pakistan, had lived law-abiding lives and had been 'actively seeking to clear their names to lift the long shadow cast over them by the grave allegations that they were knowing participants in a terrorist plot' [redacted passage]...Special Cases Unit has considered FAROOQ and SHARIF'S representations alongside the Security Service assessment and does not consider that the representations add weight to the case for not excluding FAROOQ and SHARIF'.

59. Under the heading 'Recommendation' the submission says that it is open to the Secretary of State to make a new exclusion decision against Farooq and Sharif. If a new decision is made, the submission recommends that it be certified under section 2C of the 1997 Act. The effect of such a certificate is explained. That explanation is followed by a question '**Do you agree?**' (original emphasis).

60. On 5 February 2016, the Secretary of State wrote to both Applicants in materially identical terms. The letter's purpose was said to be to tell each that, after the most careful

consideration, the Secretary of State had personally directed that he had been excluded from the United Kingdom on the grounds that his presence here would not be conducive to the public good for reasons of national security. 'This assessment takes full account of the judgments handed down by SIAC in November 2015 and of the representations on your behalf dated 18 January 2016.' The letter said that the Secretary of State had 'certified the decision to exclude you under section 2C of the [1997 Act]. The effect of this is that any review of your exclusion may, on application, be undertaken by the Special Immigration Appeals Commission'.

The Applicants' request for reasons for the decisions

61. On 17 February 2016, the Applicants' solicitors wrote to the Secretary of State asking for the reasons for the 5 February decision. The Government Legal Department ('GLD') acknowledged that letter the same day.

The application for a review

62. The Applicants lodged an application for a review in the Commission on 4 March 2016. The grounds of review complained that the reasons for the decision were 'stark' and that they did not permit 'meaningful challenge...such are their paucity'. The Applicants therefore reserved 'the right to amend' their grounds.

63. They nonetheless advanced grounds of challenge. The first was that the Secretary of State had failed to give any or any adequate reasons for the decision. This was 'particularly concerning' given the detailed arguments and evidence at the 2015 hearing. It was said that there was no reason why the Secretary of State could not have disclosed the factual basis for her decision and/or why the Applicants representations were not accepted. 'There is specific prejudice to the Applicants in that the disclosure obligations under Rule 10B(1)(a) and (b) are triggered by the content of the application for review and these grounds'.

64. The decision was said to be irrational and disproportionate and/or in breach of article 8. Detailed reasons were given for those contentions. These grounds of challenge were very similar to the representations made to the Secretary of State in January 2016.

65. The Secretary of State had erred in law in failing to direct herself 'that past facts must be established to the civil standard/and or there must be a sufficiently cogent evidential basis given the gravity of the decision'. She was acting unlawfully in applying unpublished guidance in terrorism cases. If the Secretary of State was relying on further allegations not relied on in the 2015 proceedings, she had failed to give the Applicants a fair opportunity to answer such allegations. That unfairness could not be remedied on a review, because the Commission could not consider any evidence served by the Applicants to counter any such new matters.

Reasons for the decision are provided

66. On 4 August 2016, the Secretary of State wrote to the Applicants' solicitors. The letter said that they had asked for reasons for the decision taken by the Secretary of State on 4 February 2016 and communicated in the letter of 5 February 2016. The letter of 5 February is said to have explained that the reason for the decision is that the presence in the United Kingdom of [the Applicant in question] is not conducive to the public good. The author of the letter says that he/she (the signature is illegible) has set out 'a summary of the open material that supports' that decision. Four matters were relied on.

a. In the case of each Applicant, the assessment was said to be that the Applicant was 'an associate of Abid Naseer...and *may* have been involved in the PATHWAY plot in some capacity'. Naseer's US conviction is referred to, as is his plan to attack a shopping centre in Manchester (the Pathway plot). The US conviction is said to support the Commission's conclusion in 2010 that, on the balance of probabilities, those involved in the Pathway plot were planning an attack.

b. The assessment is said to be that the Applicant in question 'was in contact with the PATHWAY network and attended a meeting on 23 March 2009 at 51 Cedar Grove where...Naseer and other PATHWAY [SOIs] were present'.

c. It is noted that there were other meetings in early April 2009 between 'PATHWAY targets' at which the Applicant was not present. It is said that his absence 'does not detract from 'concerns that ...Sharif was nevertheless an associate of ...Naseer and other involved in the PATHWAY plot, during the planning phase. It is accepted that in 2010 the Commission relied on Shoaib's absence from a meeting on 1 April as one of a number of factors that suggested that he was not 'a knowing party to the plan'. This had to be seen in the light of his credibility as a witness and the fact that he was a genuine student at a reputable university.

d. It is assessed that the Applicant in question 'has not been entirely forthcoming in the account' (or 'accounts') of his activities in 2009, 'which increases concern around his associations at that time'.

    i. 'For example' Sharif is said have given what is assessed to have been 'an unreliable account of movements on 23 March 2009 including being inconsistent about his arrival and departure times'.

    ii. 'For example' Farooq is said to have given

        1. 'an account of the layout of 51 Cedar Grove and of the interaction between individuals during the meeting that appeared to be designed to distance himself from ...Naseer' and

        2. what is assessed to be an 'unreliable account of his movements on 23 March 2009 including being inconsistent about his arrival and departure times'.

67. The August 2016 letter also says that the Secretary of State's decision 'took into account' the Commission's OPEN judgments from November 2015 and the OPEN representations. In both cases, the August 2016 letter referred to the 'arrival and departure' times from Cedar Grove, whereas the gisted recommendation refers to departure times only. Mr Tam submitted that this was an obvious and immaterial mistake, and that the Commission could infer as much from the terms of the gisted recommendation. There was, however, no evidence to that effect and, it follows, no explanation for the inconsistency between the purported exposition of the open material supporting the reason for the decision, given ex post facto (by some margin) and the reasons which can be inferred from the text of the gisted recommendation.

The legal framework

68. It is common ground for the purposes of this appeal that the Secretary of State has a power, derived from the prerogative, to exclude a person from the United Kingdom on the grounds that his presence in the United Kingdom is not conducive to the public good. In paragraphs 24-56 of its OPEN judgment in *T2 v Secretary of State for the Home Department* SN 129/2016 the Commission considered and rejected arguments that the Secretary of State's Policy Guidance ('the Guidance') was required to be in the Immigration Rules HC 395 as amended ('the Rules') and that the Secretary of State had no power to direct, consistently with the statutory scheme, the exclusion of a person from the United Kingdom. The Commission's tentative conclusion in that case was that if the power to direct exclusion was a prerogative power, it was suspended to the extent that the legislative scheme (including the Rules) now provides for such a power (judgment, paragraph 45).

69. There is no appeal on the merits against a decision to exclude in a case like this, but if the Secretary of State certifies that she has relied, wholly, or partly, on information which, in the public interest, she cannot disclose, the person against whom the decision has been made may apply to the Commission for a review of the decision (section 2C of the 1997 Act).

70. There have been many decisions in which the higher courts have considered the exercise of the power to direct exclusion, or to make a deportation order, on the grounds that a person's presence in the United Kingdom is not conducive to the public good. The most significant of these is the decision of the House of Lords in *Rehman v Secretary of State for the Home Department* [2001] UKHL 47; [2003] 1AC 153. *Rehman* was an appeal from the Commission. The appeal which the Commission had decided was a merits appeal, by contrast with the position in this case. At paragraph 26, Lord Slynn said that even though the Commission could review the facts, and the exercise of his discretion by the Secretary of State, the Commission had to give 'due weight to the assessment and conclusions of the Secretary of State, in the light of such factors as Government policy, and his means of being informed of and understanding the problems involved'. He was 'undoubtedly in the best position to judge what national security requires even if his decision is open to review'.

71. The Commission had decided in that case that the Secretary of State had to satisfy it "to a high civil balance of probabilities" that the deportation of the appellant was made out in public good grounds because he had engaged in conduct which endangered the national security of the United Kingdom (paragraph 21, per Lord Slynn).

72. Three members of the Appellate Committee, Lords Slynn, Steyn and Hoffmann, expressly adopted the reasoning of the Court of Appeal in paragraph 44 of the judgment delivered by Lord Woolf MR. Lord Clyde agreed with Lord Hoffmann's reasons. Lord Hutton agreed with Lords Slynn, Steyn and Hoffmann that the appeal should be dismissed on two grounds. The second was that he agreed that the Secretary of State was 'concerned to assess the extent of future risk and that he was entitled to make a decision to deport on the ground that the individual is a danger to national security, viewing the case against him as a whole, although it cannot be proved to a high degree of probability that he carried out any individual act which would justify the conclusion that he is a danger'.

73. In paragraph 44 of the judgment of the Court of Appeal, Lord Woolf had said that in a national security case, the Secretary of State is entitled to make a decision to deport a person 'not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegation and ask whether it has been proved. It

is necessary to examine the case as a whole against an individual and then ask whether on a global approach, that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion...He is not in the same position as a British Citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests...'

74. Lord Slynn said, at paragraph 22, that where 'specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. He [sc the Secretary of State]... is entitled to have regard to all the information in his possession about the actual and potential activities and connections of the person concerned. He is entitled to have regard to precautionary and preventative [sic] principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in the country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion justified, to a "high civil degree of probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion that there should be a deportation for the public good'. At paragraph 23, he said that 'specific acts must be proved, and an assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deport...'

75. Lord Steyn dismissed the appeal for the reasons given by the Court of Appeal, the reasons given by Lord Slynn and 'for my own brief reasons' (paragraph 32). At paragraph 29, he said that the premise of the appellants' submission that the civil standard of proof applied to the Secretary of State and to the Commission was that 'even if the Secretary of State is fully entitled to be satisfied on the materials before him that the person concerned *may* be a real threat to national security, the Secretary of State may not deport him'. He said, 'That cannot be right. The task of the Secretary of State is to evaluate risks in respect of the interests of national security'. He then quoted paragraph 44 of the judgment of the Court of Appeal. He added that 'the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible'.

76. Lord Hoffmann summarised, at paragraphs 46-48, the three errors of law which the Court of Appeal detected in the approach of the Commission. At paragraph 49, he said that on each, the Court of Appeal was right. In paragraph 48, he described the third error. This was that it was wrong to treat the Secretary of State's reasons as 'counts on an indictment and to ask whether each had been established to an appropriate standard of proof...The question was not simply what the appellant had done, but whether the Home Secretary was entitled, on the basis of the case against him as a whole, that his presence in the United Kingdom was a danger to national security. When one is concerned simply with a fact-finding exercise concerning past conduct such as might be undertaken by a jury, the notion of standard of proof is appropriate. But the Home Secretary and the Commission do not only have to form a view about what the appellant has been doing. The final decision is evaluative, looking at the evidence as whole, and predictive, looking to future danger'. He then quoted part of paragraph 44 of the judgment of the Court of Appeal.

77. The Commission's full jurisdiction to decide questions of fact and law had to accommodate 'certain inherent limitations in their power and within the appellate process' (paragraph 49). The Commission was not entitled to differ from the opinion of Secretary of State on the question whether an activity would be contrary to the interests of national security (paragraph 53). The Commission had three important functions. First, the factual basis for the executive's opinion must be established by evidence, although the Commission's ability to differ from the Secretary of State's evaluation might be limited by 'considerations inherent in the appellate process'. Second, the Commission could hold that the Secretary of State's opinion was irrational. Third, an appeal might turn on an issue, such as article 3 risk on return, which is not in the exclusive province of the executive (paragraph 54).

The Guidance

78. At the time of the decisions which are challenged, the Guidance was an unpublished policy, approved on 18 April 2011. It was apparently published (in different terms) in 2017. The 2011 version was not brought to the attention of the Commission in 2015. There are redacted and un-redacted versions of the Guidance.

79. Paragraph 1.10 is headed 'General principles underpinning exclusion'. It is not a power which is to be used routinely. It can significantly affect a person's life. A recommendation to exclude 'should only be put to the Secretary of State if such a decision is 'reasonable' in the context of the evidence, 'consistent' with decisions taken in similar circumstances and is 'proportionate' (that is, there is a rational connection and reasonable balance between the exclusion and the legitimate aim being pursued).

80. Paragraph 1.13 lists some of circumstances in which the power is 'normally' used. These include national security cases. The second section of the Guidance says more about the different types of cases in which the power can be used. There is no OPEN material in this section about national security cases. At paragraph 3.9 is a heading 'Assessing cases – general points'. Paragraph 3.10 says 'Irrespective of the type of exclusion referral any exclusion recommendation made to the Home Secretary has to be properly **evidence based.** It is essential to be able to demonstrate that an exclusion decision is reasonable in the particular circumstances, that it is consistent with decisions taken in similar circumstances and that it is proportionate. There must also be a rational connection between exclusion of the particular individual and the legitimate aim being pursued (eg the Home Secretary's responsibility for safeguarding the security of the British public, preventing the UK from becoming a safe haven for violent extremists and those who would foster hatred in our communities)' (original emphases).

81. Paragraph 3.11 advises that 'As far as possible, evidence should be drawn from open, reliable and credible sources. [Redacted passage] are significantly more time and resource intensive, particularly if an appeal...is certified to be heard by [the Commission] as would be necessary if the evidence involves [redacted passage]'. Paragraph 3.12 says that 'Hearsay is **never** acceptable as evidence, nor is evidence which is indirect, ambiguous, speculative or subjective. There must be evidence of the individual's **direct** involvement in the particular activity eg details of the individual's membership or association with any specific organisation and their position within it, together with information about what exactly the individual has done or said'. Direct quotations from the subject of any decision are said to be particularly important in cases under the 'unacceptable behaviour' policy. 'The assessment should include the impact and degree of harm that the individual's statements

or actions have or would have upon the UK, the communities within the UK or upon UK interests abroad both if the individual is permitted to enter the UK and if he is excluded'.

82. Paragraph 3.14 explains the process. A recommendation to exclude (or not to) is 'processed by means of a submission to the Security Minister and the Home Secretary'. It must set out clearly the facts, any immigration history, an assessment of why exclusion is or is not being recommended, the views of stakeholders, including whether they consent to the recommendation, and any information which might militate against exclusion.

83. It is an established principle of public law that if a decision maker has a policy about how he will exercise a power, he has a duty to publish it, so that a person affected by the exercise of the power could make informed representations. The application of an unpublished policy to the exercise of a power is unlawful (see *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245). The Secretary of State accepted that proposition in that case (see paragraphs 20 and 27 of the judgment of Lord Dyson SCJ), and Lord Dyson explained in detail why he was right to do so. It is also an error of law to depart from a policy unless that departure is adverted to and explained (paragraph 26, ibid). That proposition was also accepted by the Secretary of State.

84. This case is somewhat different from *Lumba*. In *Lumba* the Secretary of State had applied a secret policy to the detention of foreign national prisoners which conflicted with her published policy. Here it seems that the Secretary of State only had one policy, which was not published. The Applicants argue that she has erred in law by failing to follow the unpublished policy. We record that Mr Tam accepted that, in this case, if the Guidance was not followed, the decision was unlawful, even though the Guidance was not a published policy. We will say more about this below, but we record an initial paradox here. The error of law alleged here is not, as in *Lumba*, that the Secretary of State failed to publish the policy she was following in secret, but that she had an unpublished policy and was not following that. If she was not following an unpublished policy, the reasoning which underlies the decision in *Lumba* does not obviously apply, because by failing to publish the policy, she did not deprive anyone of the opportunity to influence any decision which she made. Be that as it may be, Mr Tam, as we have said, accepted that if the Secretary of State did not follow the Guidance, she acted unlawfully.

The grounds of challenge

Ground 1

85. Ground 1 is that the Secretary of State failed to give information to the Applicants before she made the decision so as to enable the Applicants to comment on it. The Applicants rely on the material set out in paragraphs 23-30 of the OPEN national security statement. The Applicants argue that the Secretary of State should have disclosed this material to them before she made the decision and that the Secretary of State has not explained why it was not disclosed. They have therefore been deprived of an opportunity to comment on these points. It is highly material that the Applicants specifically asked, in their representations, for advance disclosure of any new material. A consequence of this procedure is that the Commission does not know (and the Applicants are not able to give evidence to the Commission about) their comments on this material, because this is a review, not an appeal on the merits. This is not a case in which advance disclosure would have frustrated the decision by alerting the Applicants to an imminent decision which they could not otherwise

have anticipated and by thus enabling them to take action to circumvent that decision. It is not an answer to say that the material was revealed in the rule 38 process, as some of it was referred to in the first unamended national security statement (22 September 2007) and in the letter of 4 August 2016. The material disclosed as a result of the rule 38 process was the timing of the Applicants' departures on 23 March 2009 and the 'hug and a handshake'.

86. The Applicants submit that if this ground succeeds, the decision should be quashed. They note that the Secretary of State does not suggest in the OPEN Scott Schedule that if the Applicants succeed on this ground the error would have made no difference to the outcome. In any event, the Applicants submit that the Commission cannot be satisfied that the error would have made no difference because the Secretary of State's case is 'inherently weak' and there is no direct evidence of a risk to national security.

87. The Applicants' OPEN skeleton argument summarises, in paragraphs 22 and 23, the Applicants' explanations of the supposed inconsistencies in their accounts. In short, they say that if these points had been put to them, they would not have taken issue with them given the time that has passed since March 2009.

Ground 2

88. Ground 2 is that the reasons in the decision letter were inadequate. The provision of reasons is important because reasons enable a person to decide whether he should make further representations to the decision maker, or to appeal. Rule 9 of the Special Immigration Appeals Commission (Procedure) Rules 2013 requires an applicant to specify the grounds of appeal, with reasons in support. The effect of rule 10 is that issues on the appeal are generated by the grounds of appeal and by the Secretary of State's response to them. If the decision maker has reasons but does not provide them at the time of the decision, the conduct of an appeal by a would-be appellant is prejudiced. It is not acceptable for reasons to be given nearly six months after a decision and long after an appeal has been lodged.

Grounds 3 and 4

89. Grounds 3 and 4 are that the decisions are irrational and disproportionate. The Applicants note that the case against them has shrunk significantly since 2010, principally because, as originally put, the case depended on Shoaib being a Pathway plotter, and being a link between the Applicants and the Pathway plot. Shoaib lived with the Applicants at 47, Highgate Street. Paragraph 15a of the amended first OPEN national security statement served in 2014 proceedings (1 April 2015) says this

> *'SIAC considered the importance of the 23 March meeting at 51 Cedar Grove in its 2010 judgment. Mr Justice Mitting found that attendance alone at this meeting was not sufficient to indicate involvement in the Pathway plot. In the case of SHOAIB, SIAC accepted his version of events and was satisfied that the grounds for suspicion did not pass the threshold of reasonable suspicion. SIAC also found that they did not regard the fact that SHOAIB took time off work to attend it [the meeting/party] as significant. The Security Service acknowledged that those parts of its original case for recommending that FAROOQ and SHARIF be excluded from the United Kingdom in 2009 would not be found compelling by SIAC and so no longer placed reliance on them.'*

90. The Applicants argue that in its 2015 judgment, at paragraph 3, the Commission recorded a concession by the Secretary of State that attendance on 23 March 2009 'cannot sustain an inference that the Applicants were knowing parties to the plot' (skeleton argument, paragraph 31). What the Commission said was 'Both [that is, the Secretary of State and the Security Service] accept that attendance at the party at 51 Cedar Grove on 23 March 2009 and association with Shoaib are not, of themelves, grounds for reasonable suspicion about the activities of Farooq and Sharif'.

91. The Applicants point out that the Secretary of State initially relied on a trip to Wales, withdrew that reliance during the 2010 proceedings, relied on it again in the 2014 proceedings and withdrew that reliance again. In paragraph 33 of the skeleton argument, they describe the Secretary of State's reliance on the fact that the Applicants made no comment in their police interviews, a further argument which the Secretary of State has abandoned. The Secretary of State now claims that the Applicants 'may have been involved in the Pathway plot in some capacity, which is a less substantial allegation than that made in 2015, when the assessment was that it was "likely that both were involved in the network's UK activities" '. The Applicants point out that paragraph 33 of the OPEN statement records an assessment that the Applicants 'are associates of Naseer' in circumstances where there is no evidence of any continuing association with Naseer (the Applicants' case is that they only met him once, on 23 March 2009). A similar, wrong, point is made in the August 2016 letter.

92. It is argued that the 'mates in other city' referred to by Naseer in his email of 3 April 2009 could not include the Applicants, as consistently with the Commission's reasoning in 2010, those men were the men whom Naseer met on 30 November 2008. They did not include the Applicants. We do not accept this point. Paragraph 21 of the Commission's judgment of 2010 does not in terms exclude the Applicants from that description. Its effect is that when Naseer referred to his 'mates in other city' in the email of 3 December 2008 he sent to the sana account, he was referring to the men he met at 51 Cedar Grove on 30 November 2008, the day he got back to Pakistan. Those men included 'at least Wahab and Faraz'. The Commission did not find, however, in paragraph 21, that 'my mates in other city' was a closed group consisting only of Wahab and Faraz. Nor do we consider that the reference to Naseer's "mates in other city" in paragraph 24 of the judgment indicates a finding about who was or was not one of Naseer's 'mates in other city'.

93. The Applicants argue that the Secretary of State is now trying to revive presence at 51 Cedar Grove on 23 March 2019 as evidence that they might have been involved in the Pathway plot. They draw attention to the fact that the Security Service has accepted that others who were present at 51 Cedar Grove on 23 March 2009, for example, Janus, Haroon, Z Rehman, Sher and Shenwari did not know what the plotters were up to. They also point to the fact that Shoaib had a closer association with Naseer and with Faraz and Khan than did the Applicants, but the Commission found on the balance of probabilities, in paragraph 28 of its 2010 judgment, that Shoaib was not a knowing party to the plot and that the suspicions about him have been largely dispelled (skeleton argument, paragraphs 49, 50).

94. For those and other reasons, the Applicants submit that the decision that the Applicants' presence in the United Kingdom was not conducive to the public good was irrational. They also submit that the Secretary of State was not told of the points in their favour (such as the points we have made above). She was unable to make a rational decision without knowing about those points. She should also have been given their witness statements in the 2015 proceedings in the Commission, or summaries of those.

95. The Applicants deal with the new material in paragraph 53 of their skeleton argument. They submit, for the reasons given there, that the new material adds nothing to the case against them. They further submit that the Secretary of State has not given separate consideration to each case individually and in paragraph 55 and 56, list the factors in Sharif's favour which distinguish his case from Farooq's. The Secretary of State, it is submitted, has failed to engage with those distinctions. Further confusions in the Secretary of State's reasoning are described in paragraphs 58 and 59.

96. Overall, it was irrational to conclude that there was 'cogent' evidence that the Applicants were involved in the Pathway plot. Mere presence at 51 Cedar Grove on 23 March 2009 was not such evidence. If it were, there would have been such evidence in relation to the men referred to in paragraph 95, above, and it would be equally likely that they were involved; yet the Secretary of State has not reached such a view about them.

97. The decision was also disproportionate because it would always be open to the Secretary of State to refuse any visa application, rather than directing their exclusion.

The Secretary of State's submissions

The legal approach

98. Mr Tam relied on *Rehman* (see above), and on the Commission's summary of the reasoning in *Rehman* in paragraph 56 of *YI v Secretary of State for the Home Department* (N/112/2011). *YI*, like *Rehman*, was a merits appeal (against a decision depriving *YI* of his British nationality).

    a. There must be a proper factual basis for the decision.

    b. There is no duty to treat each piece of information as a separate allegation 'which if refuted, one by one, necessitates without more a decision against deprivation'.

    c. The test is whether the person is a 'danger to national security', not whether the person can be proved already to have damaged it.

    d. The Secretary of State is entitled to take a preventive or precautionary approach.

    e. Due deference must be shown to the policy of the executive about national security and the Secretary of State's views must be given considerable weight.

99. Mr Tam submitted, rightly in our judgment, that on a statutory review the Commission has no power to make findings of primary fact about past events. The Commission is concerned, rather, with whether there was evidence to support any findings about past facts which were necessary to the decision of the Secretary of State (or to the assessment on which it is based); see; see *Rehman*, *YI*, and paragraphs 18 and 22 of *T2*.

100. Mr Tam pointed out that the Applicants did not rely on any human rights arguments, and had no connections with the United Kingdom (other than the fact that they had stayed here for a relatively short period). He reminded us of what the Commission had to say about proportionality in paragraph 16 of *T2*. He also referred to paragraphs 74 and 67 of *R (Farrakhan) v Secretary of State for the Home Department* [2001] EWCA Civ 239; [2002] QB 139. The Secretary of State has a wide margin of discretion in exclusion cases, which is 'all important' when a proportionality test is applied.

Ground 1

101. The Secretary of State submitted that the requirements of fairness are flexible, and depend on the context in which the decision in question is made (*R v Home Secretary ex p Doody* [1994] 1 AC 531, 560; *R v Home Secretary ex p Al Fayed* [1998] 1 WLR 763; 776H). Mr Tam referred us to paragraphs 57-58 of the decision of the Commission in *T2 v Secretary of State for the Home Department* (SN/129/2016) in which the Commission accepted the Secretary of State's submission in that case that 'where such a decision is based on considerations of national security, and is certified under section 2C of the 1997 Act, it is not unfair if the material relied on is not disclosed before the decision is made...[The] review in the Commission gives T2 an opportunity to challenge the OPEN statement relied on by the Secretary of State and the Special Advocates the opportunity to challenge the CLOSED material.' The Commission accepted, in that case, that the naturalisation cases relied on by the appellant were distinguishable. We observe that this statement is not an inflexible rule of law. The Commission has not always accepted such a submission. In *ZG v Secretary of State for the Home Department* SN/23/2015 (20 April 2016), the Commission held that there was no good reason why material which was disclosed during the rule 38 process was not disclosed sooner, and quashed the decisions because the process which led to them was unfair. The correct approach in any case will always depend on the facts.

102. Mr Tam submits that the Applicants' arguments about advance notice are 'without merit' because the Secretary of State gave them prior notice of the core of the case against them. The Applicants have known the general nature of the allegations against them since the service in July 2009 of the first OPEN national security statements. Further information was provided in the 2015 proceedings. They made extensive representations. The 'new' material (which concerns their credibility) is not in fact new. They have known since September 2015 that the Secretary of State did not accept the contents of their witness statements (see paragraph 22 of the Secretary of State's skeleton argument of 23 October 2015). Counsel for the Secretary of State submitted in closing that their evidence to the Commission did not dispel, and indeed, might have generated, suspicions, because of their constant efforts to distance themselves from Naseer, both physically, and by asserting that the others were speaking Pashto. Mitting J expressly permitted the Secretary of State to rely on the Applicants' evidence when making any fresh decision. The Applicants could have raised these credibility points in their 2016 representations but chose not to. Finally, the credibility points are addressed fairly in the recommendation letter and in the submission to the Secretary of State (see paragraph 30 of the gisted recommendation and paragraph 10 of the submission). The failure to give advance notice of 'the specific details of the credibility points was not unfair and did not in practice cause any prejudice to the Applicants'. Had the Applicants' statements been before the Secretary of State they would could not have made any difference to her decision.

103. The Secretary of State further submits that any requirement to give advance notice of reasons will apply 'very rarely, if at all' to material disclosed after the rule 38 process. Any common law requirements of fairness must yield to the statutory scheme which specifically contemplates that the Commission may overrule the Secretary of State's objections to disclosure. It would be inconsistent with the statutory scheme if disclosure pursuant to a decision of the Commission after a rule 38 hearing were to give rise to discrete ground of challenge.

Ground 2

104. Mr Tam submitted that there is no general duty to give reasons. Whether there is such a duty depends on the facts (*Doody*). The common law recognises that a decision maker may be entitled to withhold his reasons for a decision on grounds of national security. The requirements of fairness cannot require the Secretary of State to give reasons if to do so would harm national security.

105. Mr Tam submitted that, in the context of the procedure in this case, the Applicants had 'identified no basis on which the service of the OPEN reasons in August 2016...caused them any material prejudice in practice, or otherwise was so unfair as to require the decisions to be set aside'.

Ground 3 (described by Mr Tam in his skeleton argument as 'the Secretary of State was not alerted to material...favourable to the Applicants and did not sufficiently distinguish between the Applicants')

106. The 2010 findings are not a 'straitjacket' for the analysis of the issues in these cases. While the Applicants may have more in common with Shoaib than with the unsuccessful 2010 appellants, there is no logical reason why they could not be in a third category, and yet have been involved in the plot in some way. The Secretary of State was simply required to consider whether there was support for the assessment that they might have been involved in some way. The approach taken in the recommendation letter and in the submission was fair. Relevant findings of the Commission had been identified and a balanced picture had been given. There was no inconsistency between the approach to presence on 23 March in the recommendation letter and the submission and the approach in the Commission's judgments of 2010 and 2015. The point is that presence on its own does not show involvement in the plot. But it does not follow that presence on 23 March taken with another factor or other factors cannot be a cause for concern. This submission disposes also of reliance on Janus, Sher, and others who were present on 23 March but assessed not to be knowing participants in the plot.

107. It is submitted that there was nothing misleading in the use of the present tense in the recommendation letter ('Farooq and Sharif *are* associates of Naseer').

108. The Commission did not in paragraph 21 of its 2010 decision identify all the 'mates in other city' referred to in Naseer's email of 3 December 2008. Nor, when finding that those who attended the meetings on 1 April and 4 April 2009 were 'mates in other city' did the Commission find that those men (that is, T Rehman, Wahab, Faraz and Ramzan, and Wahab, Faraz and Ramzan respectively) constituted all the men who were Naseer's 'mates in other city'. The Commission made no finding about who Naseer intended to include in the word 'mates' in his email of 3 April 2009. In the light of those points, paragraph 23 of the first amended national security statement is not misleading. In other words, none of the Commission's findings forecloses an assessment that the Applicants 'may have been involved in the Pathway plot'. Nor does any of those findings preclude an assessment that the Applicants might have been involved despite not being at the 1 April, 30 November or 4-5 April meetings. The fact that the assessment did not refer to their absence from those other meetings does not make it misleading.

109. Fairness did not require officials to provide the Secretary of State with the Applicant's witness statements. The Secretary of State was given the Applicants' representations, and, we observe, that was their opportunity to influence the Secretary of State's decision. Nor did fairness require officials to tell the Secretary of State that Shoaib

was closer to the occupants of 51 Cedar Grove than they were. We observe that if the Applicants had considered that this was a significant point, it was open to the Applicants to make it in their representations.

110. Mr Tam submitted that the Secretary of State is entitled to weigh up all the national security case, and that credibility assessments are plainly relevant to that exercise. It was not significant that that the reasons letters referred to arrival and departure times, when they should only have referred to departure times. The decision was taken by the Secretary of State personally on the material which was put before her in February 2016. 'The fact that an official made a mistake in preparing the reasons letter is not evidence that the Secretary of State herself relied on an irrelevant consideration'. We observe that this submission accepts that the August 2016 letter was not an accurate statement of the Secretary of State's reasons for the February 2016 decision. He further argued that this type of error is, in any event, immaterial, and should not lead to the quashing of the decision; or relief should be withheld as a matter of discretion, or by applying section 31A of the Senior Courts Act 1981.

111. Mr Tam accepts that the Security Service wrote one letter of recommendation in both cases. That was appropriate because the cases had the same context. The letter made clear, where appropriate, the differences between the cases. Those differences would have been clear to the Secretary of State. The points which are specific to Sharif (see paragraph 56 of the Applicants' skeleton argument) are apparent from the text of the recommendation letter. Fairness did not require that they be spelled out in a separate section of the letter.

Ground 4 (described by Mr Tam as 'rationality and proportionality')

112. The Secretary of State submits that for the reasons relied on in opposition to ground 3, the decision was not irrational. The case on proportionality is that the exclusion decisions have damaged the Applicants' reputations and the Secretary of State has not explained why it was necessary to exclude the Applicants, rather than simply to refuse an application for a visa, if made. The Secretary of State submits that a proportionality review is not appropriate as no Convention rights are engaged and there is no evidence of a significant impact (contrast the facts of *Pham* [2015] UKSC 19; [2015] 1 WLR 1591, which, in any event, was a deprivation case, and in which, in any event, the observations about proportionality are all obiter). Exclusion decisions are private decisions and there is no reason why they should become public or harm the Applicants' reputations. The appropriate standard of review is the *Wednesbury* test. If a proportionality review were appropriate, the decisions were plainly proportionate. The availability of other measures is irrelevant. Decisions about which of the available measures is appropriate in a national security case, and is conducive to the public good are well within the Secretary of State's margin of discretion.

Discussion

113. Five factors have influenced our approach. First, this is not a case in which, when the Secretary of State made the decision in February 2016, she had to take urgent action to reduce an imminent threat to national security. The Applicants were safely in Pakistan. They would have needed a visa to enter the United Kingdom and there is no suggestion that they had applied for one. Second, the key events in this case happened a long time ago. They were fully investigated at the time, and for a period after that. Any investigation required for this decision was archival, not active. Third, the case has a long forensic history. In the

course of that, the Security Service has changed, and diluted, its assessments about the Applicants, to a considerable extent in response to the Commission's 2010 findings about Shoaib. Fourth, it follows that this is not a case in which, unlike some cases in the Commission, the question of what might safely be disclosed without damage to national security was, either approached, cold, for the first time in February 2016, when the decision was made, or subject to a requirement of great urgency (other than such urgency as arose from the Commission's 2015 order; we say more about that, below). That question of disclosure, rather, had been considered by the Secretary of State and by the Commission in the 2009 proceedings (albeit the Applicants were only involved in the initial stages of those proceedings) and in the 2015 proceedings. Fifth, the Secretary of State felt able, before any rule 38 hearing, to give significant OPEN reasons for her decision in August 2016. These five factors make this case unusual.

114. These factors have influenced, in particular, our view of the submissions made about prior disclosure and reasons. We consider prior disclosure first. The authorities show that there is no absolute rule requiring prior disclosure; whether it will be required as a matter of fairness depends on the facts. In our judgment, the Secretary of State and the Security Service had had a long time to think about the Applicants' cases and in which to refine their approach. The Security Service and the Secretary of State knew that they had changed their case against the Applicants significantly; examples are the significance given to the Applicant's alleged links to Shoaib, and, via Shoaib, to the plotters, to the trip to Wales, and to presence on 23 March 2009. The credibility points were completely new, did not all emerge after the rule 38 hearing, and relied not just on alleged inconsistencies as between evidence given by the Applicants at different times, but on alleged inconsistencies between what the Applicants had said, and other, undisclosed, material. The Applicants had specifically asked in their representations to be given the chance to comment on any new material. We consider that, against that background, the Secretary of State should have told the Applicants at least the gist of the modified case against them before she made the decision, in order to give them an opportunity to comment on it. The Secretary of State has not explained why she was able to give the reasons which she did give in August 2016 without risk to national security or why, if she was able to do that in August 2016, she was not able to provide that case for comment before she made the decision in February 2016. Although the facts of each case are different, we get some analogical support for our approach from paragraph 31 of the leading judgment of Lord Sumption in *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700.

115. We do not know whether the need to make a decision before the Commission's 2015 order took effect was a factor which influenced the approach of the Secretary of State. To the extent that it was, we consider that, if the Secretary of State had needed more time, and had explained to the Commission, either, that the time was needed in order to give the Applicants an opportunity to comment on new material, or in order to formulate reasons for the new decision, it is likely the Commission (and the Applicants) would have been sympathetic to an application for an extension of time.

116. This was a finely balanced case on the OPEN material, to put it no higher than that. The submission to the Secretary of State did not recommend exclusion. The recommendation, rather, was that the Secretary of State consider whether to exclude the Applicants. In our judgment this is precisely the sort of case in which informed representations might have tipped the balance in the Applicants' favour. It was therefore

important to give an opportunity to make such representations. We are unable to say, either, that if the Applicants had been given an opportunity to comment on the August 2016 reasons, the Secretary of State would have made the same decision, or that it is highly likely that she would have done so.

117. We turn to reasons. The Secretary of State has not explained why, if she was able to give the Applicants the reasons which she gave in August 2016 without damage to national security, she was not able to give them, equally without such damage, when she made the decision. We have no idea what, if anything, changed between February and August 2016. We are driven to infer that nothing did. We consider that in this respect also, the Secretary of State acted unlawfully. It is true that, very often, an appeal will be lodged with the Commission when an appellant knows very little about the case against him. In cases where the reasons cannot be disclosed in OPEN, that is inevitable. It does not follow that because that has to be the position in some cases, it is acceptable for the Secretary of State not to disclose, when she makes a decision, the reasons which she can disclose without damage to national security. An appellant is entitled to know, when he decides whether or not to appeal, what the OPEN case against him is, and is entitled to get the advice of his OPEN representatives on those reasons.

118. We should make it clear that our reasoning in this case is not based, to any extent, on the fact that further material was disclosed to the Applicants later, as part of the rule 38 process. We do not consider that this was a case in which the Secretary of State was required to predict the view which the Commission might take after a rule 38 hearing, and to disclose material, when she made the decision, which, officials conscientiously believed, would damage national security if disclosed. The normal safeguard against inadequate disclosure which the legislative scheme provides for is the rule 38 process. The premise of that process is that there are cases in which the Commission and the Secretary of State may disagree about the damage to national security which further disclosure would cause. The margins are very fine, and the judgments difficult. The premise of that process is not that the Secretary of State acts unlawfully if his officials take a different view, when a decision is made, from the view ultimately taken by the Commission, after an adversarial hearing in which the CLOSED material is carefully examined by the advocates and by the Commission. That does not mean that there can never be cases, where, on the facts, the Commission decides that material should have been disclosed earlier: see, for example, *ZG v Secretary of State for the Home Department*, to which we have already referred.

119. We turn to the Guidance. It is clearly addressed to officials who draft recommendations to exclude which are submitted to the Secretary of State for him to consider (paragraph 3.14). We record our surprise, first, that the Guidance has only just come to light, and second, that it apparently constrained (it has now been superseded) the Secretary of State's exercise of the exclusion power to the extent that it did. Mr Tam was driven to submit that it cannot mean what it says.

120. It is clear to us that the Guidance is intended to apply to national security cases (see, paragraph 1.13 and the reference to the Commission in paragraph 3.11 of the Guidance). The key passage is in paragraph 3.12, which says, 'Hearsay is **never** acceptable as evidence, nor is evidence which is indirect, ambiguous, speculative or subjective. There must be evidence of the individual's **direct** involvement in the particular activity eg details of the individual's membership or association with any specific organisation and their position within it, together with information about what exactly the individual has done or said'

(original emphasis). We are unable to see how we can ignore the plain words of paragraph 3.12. Paragraph 3.12 expressly prevents an official who is drafting a submission from relying on 'hearsay' evidence. We consider that an assessment by the Security Service is a paradigm example of hearsay evidence.

121. We record Mr Tam's submission that the Guidance does not apply to the Secretary of State himself and that it does not constrain his exercise of the power to exclude. That may be so, but the submission only goes so far. The Guidance plainly applies to those who decide whether, and if so, in what form, any referral about exclusion is to reach the Secretary of State. Had the Guidance been applied, this referral would not have been made in the form in which it was made, because the submission relies on the Security Service assessment, which is hearsay evidence.

122. We record Ms Knights' acceptance, in her oral submissions, that the effect of *Rehman* is that a different standard of evidence and assessment applies in national security cases from the standard of evidence and assessment which applies in other types of case. This leads us to ask ourselves whether, in the light of the decision in *Rehman*, and the way in which that decision has been interpreted by the Commission, the Guidance is so irrational that we can ignore it. We do not feel able to do that, and Mr Tam did not invite us to. We do record our concern, however, that officials considered it appropriate to adopt a policy which expressly applies to national security cases and which so significantly restricts the Secretary of State's ability to rely on materials, and to make assessments, of the kinds referred to by the Appellate Committee in *Rehman*. On the basis of the principles we have referred to above, we consider that the Secretary of State's officials erred in law in referring the submission in these cases to her, because, without explanation, they departed from Guidance which, on its face, applies to national security cases. We repeat that Mr Tam accepted that if the Guidance applied, and was not followed, that was an error of law. It cannot be said that if this error had not occurred, the decision would have been the same, or that it is highly likely that it would have been the same. If this error had not been made, the decision would not have been made at all, because a submission would not have been made to the Secretary of State.

123. These conclusions make it unnecessary for us to consider grounds 3 and 4. We consider that the less we say about these grounds, the better. We nonetheless record our concern about the reference in the August reasons to 'arrival' times when 'arrival' times are not referred to in the materials which were before the Secretary of State. It is crucial, when officials purport to explain a decision which has already been made, that they do so accurately. This inconsistency casts doubt on the relationship between the decision and the later reasons, but we do not have to explore the consequences of that inconsistency, save to say that we could not hold that those reasons make good the failure to give reasons at the time of the decision; both because of the effect of that inconsistency and because they came too late to affect the grounds of appeal which were lodged with the Commission.

Conclusion

124. For these reasons, which are wholly independent of the reasons given in our CLOSED judgment, we quash the decisions. This is not a case in which, either, it is inevitable, or highly likely, that the outcome would have been the same, or substantially the same, if the errors we have identified had not been made. Nothing in our CLOSED judgment undermines these reasons. In our CLOSED judgment we give further reasons for quashing the decisions.