PROSCRIBED ORGANISATIONS APPEAL COMMISSION

Appeal No: PC/04/2019
Hearing Date: 29th & 31st July 2020
Date of Judgment: 21 October 2020

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING
MR RICHARD WHITTAM QC
MR PHILIP NELSON CMG

Between

ARUMUGAM & OTHERS

Appellants

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

MS M. LESTER (QC) and MR M. BIRDLING (instructed by **Bindmans LLP**) appeared on behalf of the Appellant.

SIR J. EADIE (QC), Mr B WATSON and MS E WILSDON (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State.

MR A. Mr McCULLOUGH (QC) and MS R. TONEY (instructed by **Special Advocates' Support Office**) appeared as Special Advocates.

Introduction

1. This is our OPEN judgment on the appeal of the Appellants ('the As') against a decision of the Secretary of State dated 8 March 2019 ('the Decision') to refuse their application to remove the Liberation Tigers of Tamil Eelam ('the LTTE') from the list of organisations proscribed under the Terrorism Act 2000 ('the 2000 Act'). There are five As. They are based in the United Kingdom. They are members of the Transnational Government of Tamil Eelam ('the TGTE'). The TGTE is proscribed in Sri Lanka, but is not proscribed in the United Kingdom.

2. The As were represented by Maya Lester QC, Malcolm Birdling and Jacob Rabinowitz. The Special Advocates were Angus McCullough QC and Rachel Toney. The Respondent ('the Secretary of State') was represented by Sir James Eadie QC, Ben Watson and Emily Wilsdon.

The Legal Framework

The Secretary of State's powers

3. It is convenient to summarise the legal framework at the start of this judgment. Section 2(1) of the 2000 Act defines 'terrorism' as the use or threat of action which falls within section 2(2), where the use or threat of action is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public and the purpose of the use or threat is to advance a political, religious, racial or ideological cause. Action falls within section 1(2) if, among other things, it involves serious violence against a person, or serious damage to property, or endangers the life of any person apart from its perpetrator, or creates a serious risk to the health or safety of the public or a section of the public. The use or threat of action within section 1(2) which involves firearms or explosives is terrorism whether or not it is designed to influence government (section 1(3)). 'Action' includes action outside the United Kingdom. References to property and persons include property and persons wherever they are. A reference to the public includes the public of a country other than the United Kingdom. 'The government' includes foreign governments (section 1(4)). A reference to an action taken for the purposes of terrorism includes action taken for the benefit of a proscribed organisation (section 1(5)).

4. Part II of the 2000 Act is headed 'Proscribed Organisations'. An organisation is proscribed for the purposes of the 2000 Act if it is listed in Schedule 2 to the 2000 Act (section 2(1)). The Secretary of State may add an organisation to Schedule 2, or remove one from it (section 3(2)). The Secretary of State may only add an organisation to Schedule 2 if he 'believes that it is concerned in terrorism' (section 3(4)). An organisation is concerned in terrorism if it 'commits or participates in acts of, prepares for, promotes or encourages, or is otherwise concerned in, terrorism (section 3(5)). Section 3(5A-C) explains that promoting and encouraging terrorism includes 'unlawful glorification' of acts of terrorism and being associated with statements unlawfully glorifying terrorism, and explains what is meant by 'unlawful glorification'.

5. It is common ground that there are two stages in any decision by the Secretary of State about proscription. The Secretary of State has first to consider whether he believes that the organisation is concerned in terrorism. That belief must be 'honestly held on reasonable grounds' (the Secretary of State's skeleton argument, paragraph 23). The Secretary of State then has a discretion about whether or not to proscribe the organisation. It appears from Mr Toogood's witness statement that in deciding whether or not to exercise the discretion to continue proscription, the Secretary of State considers all other relevant factors. It appears that, as a matter of policy, those will usually include:

    i. the nature and scale of the organisation's activities,

    ii. the specific threat it poses to the United Kingdom,

    iii. the specific threat it poses to British nationals overseas,

    iv. the extent of the organisation's presence in the United Kingdom, and

    v. the need to support other members of the international community in the global fight against terrorism.

6. In *Lord Alton of Liverpool v Secretary of State for the Home Department* [2008] EWCA Civ 443; [2008] 1 WLR 2341, the Court of Appeal considered an application for permission to appeal against a decision of the Commission which allowed an appeal against a decision refusing to remove an organisation, the PMOI, from

Schedule 2. Although it is a decision on an application for permission to appeal, the Court of Appeal gave permission for its judgment to be cited (judgment, paragraph 58). The Court of Appeal broadly upheld the decision of this Commission, although, because it dismissed the Secretary of State's first ground of appeal, some of the judgment is obiter.

7. It is clear from decision of the Court of Appeal that an issue which the Secretary of State should take into account when considering an application to remove an organisation from Schedule 2 is whether the interference which would result from the continued proscription of the organisation is necessary, justified and proportionate.

8. The As also rely on the decision of this Commission in the *Lord Alton* case for three propositions.

    i. A 'belief' that an organisation 'is concerned in terrorism' is 'a requirement that the decision maker thinks that the organisation is as a matter of fact concerned in terrorism'. That is more than 'a suspicion or fear that it may be concerned in terrorism' (paragraph 105). We think it likely that that passage is drawn from paragraph 229 of the judgment of Laws LJ in *A v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414.

    ii. The test is only met if the organisation currently fits the description (see paragraphs 71 and 124 of this Commission's decision and paragraphs 46 and 37-39 of the decision of the Court of Appeal).

    iii. An organisation must not be proscribed for 'any longer than is absolutely necessary' (paragraph 73).

The knowledge of the Secretary of State

9. An issue which was touched on in submissions is what knowledge the law will impute to a minister, in a case when a minister himself makes a decision, as opposed to a case in which a civil servant, acting under authority delegated by the minister, makes the decision. The Court of Appeal considered this question in *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154. In that case, the claimants challenged two measures prohibiting the sale of a herbal anxiolytic on the

grounds that the minister who exercised the relevant powers did not know that the prohibition was opposed by a leading authority on the subject, Professor Ernst, and that he had explained this in a meta-analysis. The Medicines Commission, a body of experts which advised the Secretary of State, and of which Professor Ernst was a member, had reported the outcome of its discussions to the Secretary of State. It had partly reported Professor Ernst's opposition to the ban, but left out some facts (judgment, paragraphs 51 and 57). The Commission's 'practice of reporting in unitary form the outcome of what may in many cases be close-run debate made it more, not less, appropriate that the minister should know that as distinguished an authority as Professor Ernst had dissented, and on what grounds' (judgment, paragraph 58). Nevertheless, all three members of the court held that the Secretary of State had been given the material which was necessary to enable him to make a properly informed decision.

10. Sedley LJ criticised the Secretary of State's argument in that case as substituting for the *Carltona* doctrine (*Carltona v Commissioners of Works* [1943] 2 All ER 560) 'either a de facto abdication by the lawful decision maker in favour of his or her adviser, or a division of labour in which the person with the knowledge decides nothing and the decision is take by a person without knowledge' (judgment, paragraph 26). In paragraph 37, he said that the practical implication of the argument was that 'contrary to what the English cases take for granted, ministers need to know nothing before reaching a decision so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decision maker'.

11. All three members of the court approved a dictum by Gibbs CJ in the High Court in Australia in *Peko-Wallsend* case, at pages 30-31.

> *'Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by offer of his Department. No complaint could be made if the ...officers...omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring his to attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law'.*

Appeals to this Commission

12. Section 4(1) enables a person to apply to the Secretary of State for an order removing an organisation from Schedule 2. An application may be made by an organisation, or by a person affected by the organisation's proscription. It seems to be common ground that the As are affected by the proscription of the LTTE.

13. Section 5(1) creates this Commission. Section 5(2) creates a right of appeal to this Commission when the Secretary of State refuses an application to remove an organisation from Schedule 2. 'The Commission shall allow an appeal against a refusal to de-proscribe an organisation …if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review' (section 5(3)).

14. We must therefore allow this appeal if we find that decision flawed in accordance with those principles. We must subject the decision to 'intense scrutiny' because it engages fundamental rights (paragraph 46 of the decision of the Court of Appeal in *Lord Alton*). We must give the deference to the views of the Secretary of State which is appropriate in relation to the question which is at issue (see paragraphs 119-121 of this Commission's decision in *Lord Alton*).

15. The Secretary of State draws attention to paragraph 116 of this Commission's decision in *Lord Alton*, which the Court of Appeal (judgment, paragraph 41) (obiter), described as 'essentially correct'. This Commission said:

> *'It is not our function to substitute our view for the decision of the Secretary of State. Ultimately at the First Stage, the question remains whether a reasonable decision maker could have believed that the PMOI 'is concerned in terrorism' on the basis of all the evidence that is now before us. It is our function, however, to scrutinise all of the material before us carefully and to examine its strengths and weaknesses to see if it provides reasonable grounds for the Secretary of State's belief. At the Second Stage we must scrutinise all the material to see if it provides a reasonable basis for the exercise of his discretion'.*

As we understood his submissions, Sir James accepted that this was the right approach in a case in which, for whatever reason, the Secretary of State was not relying, before this Commission, on evidence on which he had relied when taking the decision which is subject to challenge (see paragraphs 26, 28 and 36 of the Secretary of State's OPEN skeleton argument).

16. There was some debate in the oral submissions on the relevance to our task of the decision of the Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 104. We invited the parties' representatives to make written submissions on this decision after the hearing. The As and the Secretary of State made such submissions and we have taken them into account.

17. The appellants in *E* appealed unsuccessfully to adjudicators against the refusal of their asylum claims. They then appealed, again unsuccessfully, to the Immigration Appeal Tribunal ('the IAT'). The IAT at that stage could allow an appeal on questions of fact and law. Between the date of the hearing of each appeal and the date when the decision was promulgated, relevant new evidence became available (independent reports about the conditions in Egypt and Afghanistan, respectively). An appeal to the Court of Appeal was on a point of law only, and the Court of Appeal could only take into account the circumstances at the date of promulgation, whereas the IAT, on an application for permission to appeal against its decision, could direct a re-hearing of the appeal. On the appellants' applications to the IAT for permission to appeal, the IAT held that it could only decide an appeal on the evidence which was before it at the hearing, refused to direct hearings to consider the new evidence, and refused the application for permission to appeal.

18. The Court of Appeal held that a mistake of fact giving rise to unfairness was a separate head of challenge on an appeal on a point of law, at least in statutory contexts where parties shared an interest in co-operating to achieve the right result. For the court to make such a finding, it would have to be shown that the tribunal whose decision was under appeal had made a mistake as to an established fact which was uncontentious and objectively verifiable, including a mistake about what evidence was available, that the appellant was not responsible for the mistake and that the mistake had played a material part in the IAT's reasoning. If the new evidence were admitted, the court would be entitled to consider whether the IAT had made a mistake of fact giving rise to unfairness so as to amount to an error of law. In public law cases, an appellate court would not normally admit new evidence unless the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 were met, but there was a discretion to depart from those principles in exceptional circumstances where the interests of justice required, particularly in asylum cases, where evidence might be hard to find. The IAT had been

seised of the appeal and therefore entitled to admit new evidence until the date of promulgation. The IAT had had power to direct a re-hearing whether or not it found an arguable error of law in its decision. To justify re-opening a final decision in the absence of any error of law, there had to be a risk of serious injustice. The Court of Appeal remitted the case to the IAT.

19. We note that the Secretary of State in this case is in a position which is somewhat similar to that of the IAT between the end of the hearing and promulgation, in that the Secretary of State is under a continuing duty, in this statutory scheme, and whether or not there is an application for de-proscription, to consider, from time to time, whether an organisation should stay on the list in Schedule 2 (see paragraphs 69-73 of this Commission's decision in the *Lord Alton* case). If there is an application to de-proscribe, the Secretary of State must consider all the evidence, not just that relied on by the applicant (ibid, paragraphs 74-75).

The Commission's powers if it allows an appeal

20. If the Commission allows an appeal, it has a discretion to make an order under section 5(4). The effect of such an order is to require the Secretary of State, 'as soon as is reasonably practicable' to take one of two steps, each of which is to remove an organisation from Schedule 2. Each step, in different ways, is subject to the negative resolution procedure, either immediately, or after 40 days have elapsed.

21. The equivalent provisions in the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') which confer a review jurisdiction on the Special Immigration Appeals Commission ('SIAC') enable a person to apply to SIAC to set a decision aside (see, eg section 2D(2) of the 1997 Act). 'In determining whether the decision should be set aside [SIAC] must apply the principles which would be applied in judicial review proceedings' (see, eg, section 2D(3) of the 1997 Act). If SIAC decides to set a decision aside, it 'may make any such order, or give any such relief, as may be made or given in judicial review proceedings' (see, eg, section 2D(4) of the 1997 Act).

The facts

The LTTE

22. Mr Toogood described the background in a witness statement dated 25 September 2019. He was then head of the Counter Terrorism Pursue Unit ('the CTPU') in the Office for Security and Counter Terrorism, which is part of the Home Office. He explained that the LTTE was founded in 1976 by Velupillai Prabhakaran. He led it until he died in 2009. Its aim was to create a state in the North and East of Sri Lanka for the Tamil minority. In pursuit of that aim, it engaged in indiscriminate acts of violence against civilians, infrastructure and government targets in Sri Lanka (and to some extent, overseas). Its violent campaign led to a civil war in Sri Lanka. It used ground, air, and naval forces. It also used suicide bombers. It assassinated several prominent Sri Lankan and Indian politicians, including, in 1991, the Indian Prime Minister, Rajiv Gandhi, and, in 1993, the Sri Lankan Prime Minister, Ranasinghe Premadasa.

23. In May 2009, the Sri Lankan army defeated the LTTE. This had a major effect on the LTTE, reducing its ability to engage in attacks in Sri Lanka. Most of its leaders were captured or killed. According to Mr Toogood, its international network remained largely intact, however. It did not renounce violence after the military defeat, de-commission its arms, or announce that it was disbanding.

24. There have been three earlier applications to remove the LTTE from Schedule 2. They were all refused, the most recent in 2014.

The process leading to the Decision

25. Mr Toogood also described the process by which the Decision was made in his witness statement. The witness statement 'stands as the Respondent's statement of the reasons for the proscription' of the LTTE 'and a summary of the evidence in support of those reasons' (witness statement, paragraph 2). The relevant evidence is exhibited to his statement.

The application

26. By a letter dated 27 November 2018 ('the application'), the As and 9 others applied to the Secretary of State for the LTTE to be removed from the list of proscribed organisations. The application included a description of the impact of proscription on the activities of the TGTE. The Secretary of State had until 10 March 2019 to respond to the application.

The Proscription Review Group ('the PRG')

27. Members of the PRG were told about the application on 19 December 2018. The Home Office asked the PRG to provide any relevant information to the Joint Terrorism Analysis Centre ('JTAC'). A date was set for a meeting of the PRG. Mr Toogood describes the composition of the PRG in paragraph 21 of his witness statement.

The Joint Terrorism Analysis Centre ('JTAC')

28. JTAC analyses and assesses the threat of international and domestic terrorism. It is a distinct organisation. Its Head reports to the Director General of MI5. Its members represent different government departments and agencies. Part of its work is about proscribed organisations. It applies the statutory tests, and in particular, asks whether the organisation in question 'is concerned in terrorism'. It also considers four of the five discretionary factors to which we have already referred (see paragraph 5, above).

29. JTAC was told about the application on 19 December 2018. On 10 January 2019, it was asked to provide a report dealing with all aspects of the statutory test apart from the fifth discretionary factor. JTAC were told that any evidence of terrorist activity should be current (within the last 12-18 months), that any older evidence should be used for historical context only and that they should give an assessment of the credibility of any evidence relied on.

The Foreign and Commonwealth Office ('the FCO')

30. The FCO was separately asked for information relevant to 'the need to support other members of the international community in the global fight against terrorism' (this is referred to as 'the fifth discretionary factor'). The FCO's assessment is also a CLOSED document. It was part of the material which the Secretary of State considered (Annex I).

31. The relevant document is dated 28 January 2018 [sic]. It is headed 'International Relations Discretionary Factor'. Against the heading 'Reasons in favour of de-proscription' it says that the LTTE were a defeated military force on the battlefield in May 2009. Against the heading 'Reasons against de-proscription', the document refers to the LTTE's violent past ('eg involvement in political assassination, killing of

civilians, use of suicide bombers, and recruitment of child soldiers'), which is not 'seriously disputed'. As for international activity, 'arrests do happen from time to time (most recently in Germany in January 2019). In addition LTTE paraphernalia is routinely displayed by LTTE members and supporters outside Sri Lanka including in connection with calls for violence against the Sri Lankan state'.

32. The FCO judged that there would be implications for the United Kingdom in a number of areas of international relations.

33. The document referred to the killing of thousands of people during its decades-long terrorist campaigns including the relatives of serving political leaders, including, in India, where it murdered Rajiv Gandhi in 1991, next to the heading '**Bilateral relations with Sri Lanka and India**' (original emphasis). There would also be a political impact in Sri Lanka. 'A decision on de-proscription would come during the 40th session of the UN Human Rights Council in March, where a major review of Sri Lanka's post-civil war commitments on reconciliation was due'. The Government of Sri Lanka and the majority of the Sri Lankan people would strongly support continued proscription. 'Other considerations' were said to be 'As above'. The document then said 'Our CT [that is, counter-terrorism] credibility with our partners will also be affected. [In June 2018 HMG supported the continued listing of LTTE in the EU CP931 regime on the basis that] the evidence demonstrated an ongoing risk that LTTE is involved in the terrorist activities which justified its initial listing'. The FCO's overall recommendation was 'strongly...that the LTTE should continue to be proscribed'.

The Community Impact Assessment ('CIA')

34. Various organisations were asked to produce a CIA, of, among other things, the impact of de-proscription on the Tamil community in the United Kingdom. This, too was part of the material which the Secretary of State considered. It was dated 5 February 2019 (Annex K). There were 127,000 Sri Lankan-born people in the United Kingdom, according to the 2011 census, most of them Tamils. It was thought that the LTTE was unlikely to have widespread support in the United Kingdom. A minority had a positive view of the LTTE. The extent of support for the LTTE was not known, but a vocal minority regularly demonstrate in support of the LTTE. De-proscription would be likely to be opposed by more of the Sri Lankan community but would be

likely to lead to greater tensions between the two communities of Sri Lankan origin. Some see the LTTE as 'brave freedom fighters' and the Tamils as their natural supporters. De-proscription could be seen as a softening of the government's stance towards extremist groups. Some Indian communities might react negatively to de-proscription as the LTTE operated extensively in Tamil Nadu. The Sri Lankan government was likely to have a negative view of de-proscription.

35. The document referred to the LTTE's 'limited footprint' in the United Kingdom. As a result, 'de-proscription is highly likely to have little negative effect on the CT threat in the United Kingdom'. Police reports showed 'continued yet sporadic activity regarding LTTE'. There were instances of 'public order' [sic] involving the display of proscribed flags and banners and limited social media posts. There was a 'minimal footprint in CT operations'. There were no prisoners who were flagged as linked to the LTTE. There had been only eight references to the LTTE recorded by the Prevent Programme since 2013. Only 28 references to the LTTE had been recorded in the TACT Offenders database since 2001, including people convicted of public order offences. Public demonstrations are not significantly attended.

The British High Commission in Colombo ('the BHC')

36. Also on 5 February 2019 the High Commissioner ('the HC') of the BHC wrote to an official in the FCO (Annex J). He said that in 2017, the Sri Lankans disrupted an attempt to assassinate a moderate Tamil political leader and MP. In 2019, four of the suspects were charged with terrorist offences. The trials were to begin in April 2019. In June 2018 a significant volume of arms and explosives and LTTE paraphernalia were 'interdicted' in north east Sri Lanka.

37. The TGTE, which had made the application, 'would appear to have little ambition to see on-going efforts to advance reconciliation and the prospect of long-term peace in Sri Lanka succeed'. The LTTE had never renounced violence. Both the LTTE and the TGTE reject 'any kind of constructive political track that does not include the demand for independence from Sri Lanka'. The TGTE has rejected violence, but the LTTE had never done so. The As argued that the LTTE's guns and voice had been silenced by the Sri Lankan government's campaign. 'That is quite different from an assertion that the LTTE has renounced violence, which they are of course unable to make'.

38. The HC's view was that no-one doubted that there would be serious implications for the interests of the United Kingdom in a number of areas if there were a decision to de-proscribe. Our reputation in Sri Lanka would suffer. It was difficult to judge whether de-proscription would create a risk that terrorism in Sri Lanka would increase. There would be concerns about the United Kingdom's 'wider CT credibility and influence'. His conclusion was that 'the probable harms and risks of harms arising from de-proscription at this time significantly outweigh any possible benefit'.

JTAC's report

39. JTAC produced its report on 6 February 2019. This is a CLOSED document. It is part of the material which the Secretary of State considered (Annex G). There is now an OPEN summary of it (J/34-37). The report described the historical background in paragraphs 1-9. Since its formation in 1967, the LTTE has claimed responsibility for as many as 200 suicide attacks. Suicide bombings against military and civilian targets became a hallmark. It is considered to have invented the suicide explosive belt, but also used explosive laden vehicles, boats and light aircraft in its campaign. Its international network remained largely intact after its military defeat in 2009, which 'largely destroyed its Sri Lankan based terrorist infrastructure and capability'. Its leaders were mostly killed or captured. It did not renounce violence, or de-commission its arms.

40. It no longer has the leadership structure which oversaw the attacks before 2009. From 2012-2017 there have been a number of reports from a range of sources which 'highlight individuals or groups, which JTAC assesses to be conducting activity indicating the intent to develop some terrorist capability and/or revive the group' (paragraph 5). There is international support in the Tamil diaspora for 'the Tamil separatist movement. This could manifest into a more extreme stance and in the absence...of a political settlement, extremists will highly likely continue to attempt to revive the LTTE'. In 2013, JTAC noted an international presence through various pro-Tamil organisations' (paragraph 7). Examples of activity 'reportedly linked to the LTTE from 2012 to 2016' were given in Annex A (paragraph 8). A notable example was the arrest in June 2015 of a former the LTTE operative by the Indian authorities. The former operative was carrying cyanide capsules, 300g of cyanide, and other equipment.

41. Under the heading 'Does the LTTE prepare for terrorism', the report referred (as a fact, not as a report of an event) to several arrests in June 2018 by Sri Lankan anti-terrorist police of 'LTTE conspirators in possession of explosive devices and the LTTE paraphernalia' (paragraph 10). JTAC's assessment was that 'LTTE-aligned individuals and groups likely prepare for terrorism' (paragraph 11).

42. Under the heading 'Does LTTE participate in acts of terrorism', the report described the June 2018 arrests in more detail, and an incident in November 2018. Paragraphs 12 and 13 described press reporting of the June incident. A random stop and search of a trishaw uncovered two bags and two parcels. These were said to contain one claymore mine, two pressure mines, two hand grenades, 98 rounds of T-56 ammunition, four remote control devices, six electronic detonators, two LTTE military fatigues, three t-shirts with the tiger logo, two LTTE flags, and two large rolls of wire. The press report said that the passengers were 'Aehaambaram' and 'Dinesh'.

43. The trishaw was reported to be on its way to a house 'frequented' by Dinesh. Both he and Aehaambaram were members of the LTTE in 2009. Aehaambaram's sister is reported to have told police that her brother had lost a hand while making an improvised explosive device for the LTTE. She said that two of her brothers and a sister were also LTTE members and had been killed in the war with the armed forces.

44. Open source reporting was said to indicate that in November 2018, two police officers were murdered in Batticaloa. 'A range of pro and anti-Tamil sources' identified two of the people who had been arrested: AKA Kannan, and Rasangayagam Sarvananthan. Many open sources identified Sarvananthan as a former LTTE trainer. He is reported to have surrendered to police and claimed to have been responsible for the two deaths. He was also involved in organising the LTTE commemoration. A single open source indicated that Sri Lankan police were 'opening a line of inquiry which implicated Karuna Amman in ordering the attack'. That is the nom de guerre of a Sri Lankan politician who commanded an LTTE breakaway faction in eastern Sri Lanka (paragraph 15).

45. Paragraph 16 said that JTAC assessed that 'LTTE aligned individuals and groups participate in attempted acts of terrorism. The participation of senior LTTE figures in commemorative events suggests some foreknowledge of gatherings of LTTE supporters'.

46. JTAC considered whether the LTTE promoted or encouraged terrorism in paragraphs 17-19. Open sources indicate that 'pro and rehabilitated LTTE supporters mark specific anniversaries, including Black Tigers day and Malathy. The former is a commemoration of the first suicide operative. The commemorations are well organised. They can attract thousands. These, and recent arrests of people with arms' ammunition and LTTE paraphernalia show that 'LTTE's ideology and brand continues [sic] to encourage individuals to their cause'. Historic commemorations have been attended by senior LTTE figures in uniform. In October 2018, a Sri Lankan Parliamentarian was arrested over a speech which called for the resurgence of the LTTE. Security in the northern province, he claimed, was deteriorating, and its people felt they were better off when the LTTE ran a parallel administration.

47. Their assessment was that 'LTTE's ideology almost certainly continues to inspire individuals to commemorate and prepare for acts of terrorism. Senior LTTE associated figures and politicians have called for the resurgence of LTTE and participate in services commemorating suicide attacks against the Sri Lankan government'.

48. The section under the heading 'Is LTTE otherwise concerned with terrorism' has been redacted. Under the heading 'the nature and scale of the group's activities', the report refers to the continued observance and celebration by 'individuals previously associated with LTTE' of days of commemoration. The Terrorism Situation and Trend Report in 2017 indicated that there were indications that alleged LTTE members were engaged in money laundering. The extent of the organisation's presence in the United Kingdom was considered in paragraphs 22-24. The 200-300,000 Tamils in the United Kingdom included former LTTE members. There is an umbrella organisation of a number of Tamil diaspora organisations in the United Kingdom, the British Tamil Forum, which was founded in 2006. JTAC's assessment was that 'in the absence of a meaningful political settlement on the question of Tamil autonomy, extremists will highly likely continue to attempt to revive LTTE and/or conduct acts of terrorism'.

49. Annex A to the JTAC report, headed 'historical context' described six 'historical incidents of possible significance' from between 2012 and 2017.

i. In 2014, three claimed LTTE operatives were killed in northern Sri Lanka by security forces after a manhunt after the alleged shooting of a police officer by one when he was resisting arrest.

ii. In July 2015, a former LTTE operative was arrested by the Indian authorities carrying 75 cyanide capsules, 300g of cyanide powder and other equipment.

iii. In late March 2016, Sri Lankan authorities recovered a suicide vest, four claymore mines, TNT, two battery packs and 9 mm ammunition. The suicide vest was reported to look new.

iv. In January 2017, an alleged plot to assassinate a moderate MP by four former LTTE members was disrupted by Sri Lankan security forces. It was alleged that they were hired by LTTE supporters overseas. The police were said to have told the magistrates that the men had claymore mines and detonators.

v. In July 2017, the bodyguard of a Tamil High Court Judge was murdered in Jaffna by a former LTTE member.

vi. In August 2017, leaflets were distributed in Tamil communities. They were intended to intimidate people by saying that LTTE had not been completely destroyed and would rise again.

The PRG meeting

50. The PRG met on 8 February 2019. The assessments we have described were circulated before the meeting. The people at the meeting were also shown the letter dated 5 February 2019 from the BHC (see further paragraph 22 of Mr Toogood's witness statement). The agenda is an OPEN document, and there is an OPEN summary of the minutes of that meeting (J/7-10). That document does not list the people who went to the meeting.

51. The OPEN minutes record that JTAC were asked to give a summary of their assessment. JTAC described the history of the LTTE. '[The Chair] then prompted JTAC for evidence on each limb of the statutory test'. JTAC referred to paragraph 9 of the OPEN summary of their assessment. JTAC then referred to the arrests in June

2018 'as evidence to suggest that the entity proscribed as LTTE continued to exist'. JTAC's assessment was that 'the LTTE aligned individuals and groups likely prepare for terrorism'. JTAC said this incident could fall under either of the limbs of the test (paragraph 3.3). The PRG was told that information outside the 12-month period would 'bolster the case if there was also current evidence, but would not necessarily sway the decision if there was nothing more recent could be taken into account but would be given less weight and would not be decisive on its own' (paragraph 3.5).

52. The PRG asked how certain JTAC were that the people involved in the November 2018 murder (see paragraphs 13-14 of the JTAC assessment) were members of the LTTE or acting on its behalf. 'In broad terms' JTAC was 'reasonably confident'. The Chair 'proposed that the PRG conclude that it could be argued that the statutory test was met through the June 2018 incident' (paragraph 3.10).

53. JTAC then summarised its assessment of the first four discretionary factors. The nature and scale of activities included the celebration of anniversaries by former LTTE supporters, some of whom were in the United Kingdom and celebrated commemorative days. The FCO provided a summary of the fifth factor. 'The timing of the decision on deproscription could coincide with the 40th session of the UN Human Rights Council, where a major review of Sri Lanka's post-civil war commitments on reconciliation was due' (paragraph 4.3). The FCO advised that de-proscription was likely to damage the United Kingdom's bilateral relations with Sri Lanka and India. If the LTTE were de-proscribed, 'it would be a matter for the European Council to decide if the LTTE should remain listed under the EU asset freeze'. The Chairman 'concluded that the PRG was in agreement that the statutory test [for proscription] was met and the discretionary factors were not in favour of deproscription' (paragraph 4.6).

The Submission

54. On 22 February 2019, officials made a submission ('the Submission') to the Secretary of State and to the Minister of State for Security and Economic Crime. Mr Toogood described the 11 annexes to the Submission in paragraph 24 of his statement. They did not include the minutes of the PRG meeting, which, according to the Secretary of State's skeleton argument, had not, at that stage, been prepared. We were shown no evidence to this effect.

55. The Submission started with a recommendation that the Secretary of State 'agree to maintain the proscription of the LTTE in accordance with the PRG recommendation, noting the high legal risk associated with maintaining proscription'. It then described the background to the application. Paragraph 4 referred to the meeting of the PRG, which had considered the case for and against proscription, and 'identified risks associated with each of the options'. Paragraph 4 referred to the PRG's meeting: 'Following discussion the [PRG] concluded that the arguments for and against maintaining proscription of the LTTE are finely balanced, but that there are respectable arguments that the evidence set out in the JTAC assessment supports a conclusion that the group is currently concerned in terrorism...The [PRG] further concluded that, if you decide that the statutory test is met, the discretionary factors in favour of maintaining the proscription are compelling'. The Submission then cross-referred to paragraph 19. 'Accordingly the [PRG] concluded that we should recommend that Ministers maintain the proscription'.

56. Paragraphs 7-10 briefly described the history of the LTTE (in accordance with the JTAC report). This was the seventeenth application for de-proscription. Only three groups 'have ever been de-proscribed' (paragraph 11).

57. In paragraph 12, under the heading 'Statutory test', the Submission said that there was one 'particular' incident that could 'support' an 'argument' that LTTE "prepares for terrorism" and 'potentially' that 'LTTE aligned individuals and factions have attempted to "participate and commit acts of terrorism" '. In late June 2018, the Sri Lankan police arrested several 'LTTE conspirators in possession of explosive devices and LTTE paraphernalia'. Paragraph 13 said that proscription should only be maintained where there is current evidence of activity.

58. Paragraph 14 is redacted, as is part of paragraph 15. The OPEN part of paragraph 15 referred to the right of appeal to this Commission, which would scrutinise in detail the relevant OPEN and CLOSED material, and to the decision of the Court of Appeal in the *Alton* case, that a group could not be currently concerned in terrorism on the basis of evidence that was four years' old, and that an 'assessed contingent intention to return to terrorism was not enough'.

59. Paragraph 16 was headed 'Discretionary factors'. It said that 'Given the potentially significant negative impact de-proscription would have on relations with Sri Lanka, if

you were to believe that LTTE is concerned in terrorism, the discretionary factors are weighted strongly in favour of maintaining proscription'. Annexes I and J are said to provide further details.

60. Paragraph 20 described the mixed impact of de-proscription on the Sri Lankan diaspora in the United Kingdom. The author estimated that about 127,000 Sri Lankans, mostly Tamils, lived here. 'De-proscription would be unlikely to evoke strong feelings either way amongst the wider British public'. De-proscription was 'highly unlikely to have a significant effect on the CT threat to the UK' (paragraph 21). In July 2017, the European Court of Justice had annulled the LTTE's then listing under the asset-freezing regime, 'highlighting the absence of evidence post-dating the LTTE's military defeat and concerns about one of the underpinning decisions. The LTTE is now only listed under a more recent 2015 designation, underpinned only by the UK proscription and a French court decision' (paragraph 22).

61. Paragraphs 24 and 25 of the Submission referred to the views of the Independent Reviewer of Terrorism Legislation ('the IRoTL'). He was very critical of what he saw as the Government's dilatory and dismissive approach to applications for de-proscription. If a decision to maintain proscription were overturned on appeal, that would undermine any efforts by the Government to resist future amendments to the legislation. It might be difficult 'credibly [to] reject' recommendations to introduce de-proscription reviews (paragraph 26). A successful challenge to POAC could damage the reputation of the proscription regime and criticism that the Government are not using the powers appropriately (paragraph 35).

The decision letter

62. The second paragraph of the decision dated 8 March 2019 says, 'The Home Secretary has considered the available information which includes data taken from both open sources and sensitive intelligence, as well as advice that reflects consultation across Government, including with intelligence and law enforcement agencies. Whilst I am unable to comment on specific intelligence, I can say that the information includes open source reporting indicating that the LTTE continues to be concerned in terrorism. For example, it has been reported that in June 2018, the Sri Lankan police arrested individuals in the course of transporting explosive devices and LTTE paraphernalia including flags'.

63. The third paragraph continues, 'On the basis of the totality of the information considered, the Home Secretary maintains a reasonable belief that the LTTE is concerned in terrorism as defined in section 3(5) of the Terrorism Act 2000, and has decided that it is appropriate to exercise his discretion to maintain the proscription of the group'.

Other material about the Secretary of State's reasoning

64. In paragraphs 26-33 of the current version of his witness statement, Mr Toogood describes the Secretary of State's reasoning. That description is much fuller than the account in the two documents which formally record the Decision, that is to say, the decision letter, and the letter sent by the Secretary of State to the Prime Minister on 7 March 2019. It has now been significantly extended since the original version of Mr Toogood's witness statement, in part reflecting the outcome of the rule 15 hearing in this case.

65. Mr Toogood says that the Secretary of State believed that the LTTE was concerned in terrorism. He says 'in reaching that view' the Secretary of State gave 'very significant weight to the assessments of JTAC...JTAC's assessments were set out in the JTAC Report'. The Secretary of State was satisfied in the light of all the available information that the statutory test was met (paragraph 28). The last statement is supported by the third paragraph of the decision letter.

66. In the original version of his witness statement, Mr Toogood said, at paragraph 37, that after the notice of appeal was received, GLD did a duty of candour review. That was reflected in an addendum report by JTAC, which is a CLOSED document. He says that the further material considered by JTAC 'is ultimately assessed by JTAC to add some – albeit generally limited – weight to its original assessment'. In paragraph 46 of the later version of his witness statement (undated but served, according to a letter of that date from GLD, on 15 April 2020), Mr Toogood also refers to that further assessment by JTAC after the notice of appeal was received. He also gives its date (11 September 2019).

67. In paragraph 33 of the later version of the witness statement, he said that the original JTAC report referred to the murder in November 2018 of two police officers in Batticaloa. JTAC had since received reporting which cast doubt on the attribution of

that incident to the LTTE. JTAC's current assessment was that there is not enough evidence to attribute this incident directly to the LTTE. This information was first given to the As' OPEN representatives by the Special Advocates in a communication sent to the OPEN representatives on 9 March 2020.

68. One issue we will have to consider is whether, in so far as this material is relevant to the question whether the statutory test is met, this further assessment is relevant to our primary task, which is to consider the Decision applying the principles which apply on an application for judicial review, that is (at least primarily) on the basis of the material which was before the Secretary of State at the time when he made the Decision. The resolution of that issue depends on whether, and if so, how, the reasoning in *E v Secretary of State for the Home Department* applies in this context. This material might, in any event, be relevant to the question what relief would be appropriate if we were to allow this appeal.

The grounds of appeal

69. The As submit that the Decision is flawed for three reasons.

    i. The OPEN materials do not support a belief that the LTTE is, in fact, currently concerned in terrorism.

    ii. The OPEN materials do not support the exercise of the Secretary of State's discretion.

    iii. The continued proscription of the LTTE is an unjustified interference with the article 10 and article 11 rights of those, including the As, who are committed to independence for the Tamils in Sri Lanka.

70. The As further submit that the Secretary of State cannot rely in any respect on any material if the Commission finds, on the balance of probabilities, that it was obtained by torture (see *A (No 2) v Secretary of State for the Home Department* [2005] UKHL 71; [2006] AC 221). We will consider this question in our CLOSED judgment.

The As' submissions

Ground 1

71. The Secretary of State is said to have 'attached very significant weight' to the JTAC assessment (paragraph 26 of Mr Toogood's witness statement). The OPEN summary of the JTAC assessment reports its assessment that 'LTTE aligned individuals and groups participate in attempted acts of terrorism'. That is based on two incidents,

    i. In June 2018, several men are said to have been arrested by the Sri Lankan authorities for possessing explosives and ammunition and LTTE paraphernalia (JTAC assessment, paragraph 12).

    ii. In November 2018, two policemen were murdered in Batticaloa (JTAC assessment, paragraph 14).

72. At its meeting on 8 February 2019, the PRG said that 'it could be argued that the statutory test was met through the June 2018 incident' (minutes, paragraph 3.10). Paragraph 12 of the Advice Document is similarly guarded: it is said that the June incident could 'potentially' 'support an argument' that 'LTTE aligned individuals and factions have attempted to participate [in] and commit acts of terrorism'.

73. The As argue that the JTAC assessment that the LTTE commits or participates in acts of terrorism is flawed by four errors. We have ordered these according to what, in our view, is their relative significance.

    i. It is common ground that one of the two incidents relied on by JTAC should not have been attributed to the LTTE. JTAC now accepts that there is not enough evidence to attribute the murder of the two policemen to the LTTE.

    ii. The June incident is not a reasonable ground for a belief that the LTTE participates in terrorism. The material relied on consists of press reports of arrests. There is no suggestion that any of those arrested was found guilty of any offence. It seems as if all were released on bail. There is no indictment, nearly two years later. The arrests are not a reasonable ground for the relevant belief, or for a belief that those arrested were linked to the LTTE. The OPEN documents show that the Sri Lankan authorities are responsible for serious human rights abuses against Tamils and attribute terrorism to peaceful organisations and people (see the Government Information Document). They are

engaged in an ideological struggle with Tamil separatists (JTAC assessment, paragraph 24). The confidence which JTAC expressed in its assessment of the November incident casts doubt on the reliability of its assessment of the June incident. Ms Lester went further in her oral submissions. She showed us a relevant press report. She suggested that the Secretary of State should personally have given anxious scrutiny to the press report, and that the Decision was flawed because he had not been shown it, or evaluated it for himself; in the alternative, the Secretary of State should have been told that there were doubts about the nature of the incident, which could have been a sting by the Sri Lankan authorities. The PRG should also have been shown the report. The Secretary of State had not even confirmed, when asked, what report he relied on.

iii. The JTAC assessment only refers to 'LTTE aligned individuals and groups' ('factions' in the equivalent passage in the Advice Document). Neither satisfies section 3(5)(a), which requires the organisation itself to commit or to participate in terrorism. The PRG does not appear to have applied its own policy for attributing actions to organisations (OPEN exhibit 2). This is significant because the OPEN materials suggest that the LTTE did not have the capacity to commit these acts. The As rely on various documents which refer to the LTTE as defeated, as lacking infrastructure, capacity, and leaders, and as potentially capable of being revived. A JTAC assessment dated October 2017 said that '[t]here is no indication that LTTE still exists as a cohesive organisation with a recognised leadership structure or communications and directions to its members'. She submitted orally that JTAC had never said expressly that the actors referred in its assessment acted on behalf of the LTTE, nor had the PRG.

iv. The JTAC assessment and the Advice Document refer only to attempted acts of terrorism. Such acts do not satisfy section 3(5), which requires the commission of or participation in acts of terrorism. Ms Lester did not rely on this argument in her oral submissions. She

was right not to. Even if it is right, it cannot, on the facts, undermine a conclusion (if that is otherwise sound) that the LTTE prepares for terrorism. We say no more about this argument.

74. The As contend that the assessment that the LTTE prepares for terrorism is also flawed. JTAC's assessment was that the 'LTTE aligned individuals and groups likely prepare for terrorism'. That is said to be supported by the June incident. The PRG was cautious about this (minutes, paragraph 3.10, Advice Document, paragraph 12). There are two flaws in JTAC's assessment.

    i. The assessment does not suggest that the LTTE itself prepares for terrorism.

    ii. The June incident does not provides reasonable grounds for the relevant belief, for similar reasons to those described in paragraph 73.ii (above).

75. The As submit that there was not enough evidence to support an assessment that the LTTE 'promotes or encourages terrorism'. JTAC's assessment was that 'LTTE's ideology almost certainly continues to inspire individuals to commemorate and prepare for acts of terrorism'. JTAC relied in its assessment on

    i. the commemoration by 'pro and rehabilitated LTTE supporters' and/or 'senior LTTE figures in uniform' of anniversaries celebrating LTTE figures, including suicide bombers (paragraph 17),

    ii. calls by '[s]enior LTTE associated figures and politicians' for the 'resurgence' of the LTTE (paragraphs 18-19) and

    iii. recent 'arrests of individuals with arms/ammunition and LTTE paraphernalia (paragraph 17).

76. The PRG does not seem to have accepted this view (see the OPEN PRG minutes and Advice Document). The general conclusion (see paragraph 75, above) does not satisfy section 3(5)(c) for four reasons.

    i. It is not a conclusion that the LTTE does anything, but rather that its ideology has a certain effect.

ii. A 'close and obvious link' between the organisation and the acts of terrorism is required (*Lord Alton*, CA, paragraph 36). The JTAC assessment does not explain how the commemorative activities are properly to be attributed to the LTTE. In any event, commemorative activities do not 'promote or encourage terrorism'. The PRG recognised that the commemoration of people linked to the LTTE was not the same as the glorification of the LTTE's terrorist activities.

iii. The alleged calls for its resurgence cannot properly be attributed to the LTTE. The JTAC assessment does not do that. Moreover, even if they could, one call referred to by JTAC did not involve the promotion or encouragement of terrorism. The source is a speech given by a Sri Lankan MP calling for a return of LTTE 'governance' because Tamils were better off under the LTTE when 'they ran a parallel administration'.

iv. The reference to recent arrests of people with weapons and LTTE paraphernalia is presumably a reference to the June 2018 incident.

77. The OPEN materials do not suggest that the Secretary of State believed that the LTTE was 'otherwise concerned in terrorism'.

78. The PRG considered that the position was 'finely balanced' but that there were 'respectable arguments that the evidence set out in the JTAC assessment supports the conclusion that the LTTE is currently concerned in terrorism' (Advice Document J/12). Ms Lester submitted orally that it was very unclear what the PRG thought and why. Its minutes were not before the Secretary of State.

79. The As also submit that JTAC's assessment was flawed. There are no reasonable grounds for believing that the LTTE is concerned in terrorism.

80. In her oral submissions, Ms Lester referred us to paragraphs (2), (3), (7) and (8) of the headnote, and paragraphs 311 and 345, of *GJ and others v Secretary of State for the Home Department* [2013] UKUT00319 (IAC), a country guidance case about Sri Lanka. She also referred us to paragraphs 2.4.9 and 2.4.13 of a May 2020 Home Office Country Policy and Information Note, 'Sri Lanka: Tamil Separatism'. It was produced after a fact-finding mission in September 2019. Its purpose is to provide

information 'for Home Office decision makers handling particular types of protection and human rights claims. It is not intended to be an exhaustive survey of a particular subject or theme' (preface, first paragraph). These, she submitted, suggest that the LTTE does not prepare for terrorism. They do not refer to the June 2018 arrests. There is no evidence that the LTTE has reformed or that it is active. The LTTE is a spent force. She further submitted (in reliance on paragraph 334 of this Commission's decision in the *Lord Alton* case), that the preoccupation with the LTTE's failure to renounce violence showed that the statutory test had been turned on its head.

81. All in all, she argued, the Secretary of State's written and oral arguments were an attempt to re-invent the Secretary of State's reasoning in a way that was not supported by the contemporaneous documents.

Ground 2

82. The As also submit that the Secretary of State's consideration of the discretionary factors was flawed. On any view, a decision that the LTTE was concerned in terrorism was finely balanced (as the PRG said). In those circumstances, given the adverse effects of proscription, strong discretionary factors would be required to justify proscription. The As criticise the Secretary of State for not adopting the approach described by the IRoTL (skeleton argument, paragraphs 39 and 40).

83. The As submit that four of the five discretionary criteria were not met. The analysis of the fifth factor was flawed. There was no analysis of the effect of proscription on those affected by it. There was no analysis of proportionality, or of the necessity of proscribing the LTTE, or of the efficacy of that in protecting the British public. There was no evidence in the documents before the Secretary of State that de-proscription of the LTTE would have any negative effect on the global fight against terrorism. The fifth factor does not permit the Secretary of State to take into account the need to keep good relations with a foreign state, a point Ms Lester developed in her oral submissions. The FCO appears also to have feared charges of inconsistency because in June 2018, the Government had supported the continued listing of the LTTE in the EU sanctions regime; it would lose credibility if it were to decide not to continue the listing of the LTTE in Schedule 2.

Ground 3

84. Proscription interferes significantly with article 10 and article 11 rights (see paragraphs 61-64 of As' skeleton argument). The Secretary of State did not analyse the effects of proscription on those who would be affected in and outside the United Kingdom. Pleasing the Governments of India and Sri Lanka is not a legitimate aim. Proscription interferes disproportionately with article 10 and article 11 rights.

The Secretary of State's submissions

85. The Secretary of State submits that we should dismiss all three grounds of appeal.

86. On ground 1, the Secretary of State submits that the 'proper context' is the extensive and unchallenged evidence of the LTTE's longstanding and significant terrorist capacity and activity in Sri Lanka between 1976 and its defeat in 2009. It assassinated a Prime Minister in 1991 and a President in 1993. It invented the suicide belt, and used vehicles, boats and light aircraft laden with explosives. It claimed responsibility for at least 200 suicide attacks.

87. It did not renounce violence or decommission its arms after its defeat, which reduced its ability to conduct attacks in Sri Lanka. More recently, between 2012 and 2017, there were reports from a range of sources, which JTAC referred to, which, in JTAC's assessment, involved people or groups and activities which suggested an intent to 'develop some terrorist capability and/or revive the group'. JTAC referred to six events in Annex A to its report.

88. That was the context in which the current activity was to be considered by the Secretary of State. JTAC referred to one incident in June 2018. The Secretary of State no longer 'places reliance' on the November 2018 incident, also referred to by JTAC (skeleton argument, paragraph 33).

89. The Secretary of State submitted that the question for this Commission was whether there were reasonable grounds for the Secretary of State's decision that the LTTE was 'concerned in terrorism'. The Commission must scrutinise the Decision anxiously 'by reference to the material before the Commission, and therefore excluding such material as may no longer be relied upon: eg the November 2018 incident'. The Secretary of State submitted that the observations of various IRoTLs are irrelevant.

90. Paragraph 33 of the Secretary of State's skeleton argument summarises five factors which are said to form the basis of the Secretary of State's reasonable belief that the LTTE was engaged in terrorism: its history between 1976 and 2009; the fact that it has not, since its military defeat, renounced violence or de-commissioned its arms; the fact that its international network is largely intact; the incidents referred to in Annex A of the JTAC report; and the June 2018 incident. In his oral submission, Sir James referred us to the documents, and reminded us, with some force, of the nature of those incidents.

91. On ground 2, the Secretary of State submits that the test for this Commission is whether it 'is satisfied that the material before it provided a reasonable basis for the Secretary of State's exercise of her [sic] discretion to maintain proscription of the LTTE', on the premise that the Secretary of State held a reasonable belief that the LTTE was concerned in terrorism.

92. We were referred to JTAC's views on two of the five discretionary factors (participation by individuals previously associated with the LTTE in commemorative activities, indications in 2017 that alleged LTTE members were engaged in money-laundering, and JTAC's assessment that if there was no meaningful political settlement on the question of Tamil autonomy 'extremists will highly likely continue to attempt to revive the LTTE and/or conduct acts of terrorism') and the FCO's views on the fifth discretionary factor (there would be an effect on bilateral relations with Sri Lanka and India, a political impact in Sri Lanka; the Government of Sri Lanka and the majority of its people supported proscription; and that any decision on de-proscription would coincide with the 40th session of the UN Human Rights Council). Finally, de-proscription would affect 'our CT credibility with our partners' in the context of the listing of the LTTE under the European CP931 regime, which the United Kingdom supported in June 2018. The Secretary of State also relies on the BHC letter, which says that it would be difficult to judge what implications de-proscription would have for the risk of an increase in terrorist activity in Sri Lanka and that there would be concerns over the United Kingdom's wider CT credibility and influence.

93. The Secretary of State submits that the material before the Secretary of State covered each of the five factors. That material was not limited to material about the fifth

discretionary factor. The effect on the wider Tamil community was taken into account. The Submission correctly described the effect of the five factors as 'compelling'. The Secretary of State properly considered the fifth factor. In his oral submissions, Sir James argued that even if the As were right (which he did not accept), the Secretary of State was entitled to take into account a wider effect on international relations than an effect merely on the fight against terrorism. He accepted, however, that this could not be given great weight.

Discussion

94. Before we consider the parties' arguments, we consider four issues of principle.

    i. What are the reasons for the decision?

    ii. Does section 31(2A) of the 1981 Act apply to this Commission?

    iii. What is the effect of the fact that the Secretary of State no longer relies on the November 2108 incident?

    iv. Is *E v Secretary of State for the Home Department* relevant?

What are the reasons for the decision?

95. A key issue in this case is what the Secretary of State's reasons for refusing the As' application were. Often, in a case in which a decision is challenged on public law grounds, and where the reasons for the decision are contained in a contemporaneous document (or documents) a court is slow to accept, as evidence of the reasons for that decision, a witness statement prepared for the purposes of the litigation which seeks to elaborate on those reasons; see *R v Westminster City Council ex p Ermakov* [1996] 2 All ER 302.

96. In this case, the decision letter sent to the As is very terse. It relies on one incident, in particular (the June 2018 incident). It is clear from the careful language of the decision letter that the June 2018 incident is not the only material relied on. The letter refers to 'specific intelligence', 'the totality of the information considered', and uses the word 'includes'. It is common, when a decision letter is terse, and the decision maker is a government minister, for the court to infer that the reasons for the decision are those set out in the submission in which officials recommend a course of action to the minister, and give reasons for those recommendations, and in any documents

which are attached to the submission, on the basis that it can be assumed that the relevant decision maker is conscientious and can be taken to have read the submission and the accompanying documents. The reasoning in the *Health Foods* case is consistent with such an approach.

97. At the time of the JTAC report, there were two relevant recent incidents which could be said to show that the LTTE 'is concerned in terrorism' (in the wide statutory sense). Those were the incidents in June and November 2018. There is an apparent tension between the approaches in the Submission and in the JTAC report (which is one of the documents which was attached to the Submission). The Submission makes clear that proscription can only be maintained if there is current evidence of terrorist activity (paragraph 13). It refers to the June 2018 incident as 'one particular incident which can support an argument...', whereas the JTAC report refers to the June and November 2018 incidents as supporting such an argument (in summary). Ordinarily, that might lead us to conclude that the Secretary of State must have focussed his consideration on the June 2018 incident.

98. However, that picture is complicated by two passages in Mr Toogood's witness statement we have referred to above. The witness statement 'stands as the Respondent's statement of the reasons for the proscription' of the LTTE 'and a summary of the evidence in support of those reasons' (witness statement, paragraph 2). Mr Toogood says that the Secretary of State was satisfied that the LTTE was concerned in terrorism. He says that 'in reaching that view' the Secretary of State gave 'very significant weight to the assessments of JTAC...'. He does not say that the Secretary of State gave greater weight to the somewhat different approach in the Submission.

99. The As do not submit that we should ignore Mr Toogood's witness statement in so far as it seeks to supplement or further to explain the reasoning of the Secretary of State. Moreover, in the light of later developments (in particular, the withdrawal by JTAC of any reliance on the November 2018 incident) the witness statement is, in some ways, an admission against interest. These two factors suggest to us that this is not a case like *Ermakov*. The As have not questioned Mr Toogood's claimed access to the reasoning process of the Secretary of State, still less sought to cross-examine him about it. In those circumstances, we have no reason to question what he claims to

know about that process, and we can therefore rely on what he says about it. We therefore consider that, notwithstanding the focus of the decision letter and of the Submission, the Secretary of State relied on both the June 2018 incident and the November 2018 incident in deciding that the statutory test was met.

Does section 31(2A) of the 1981 Act apply to this Commission?

100. This Commission's powers to grant relief are considerably narrower than SIAC's. In particular, there is no provision which is equivalent to, for example, section 2D(4) of the 1997 Act. One question which we canvassed during oral argument was whether section 31(2A) of the Senior Courts Act 1981 applies to this Commission. We drew the parties' attention to SIAC's decision in *LA and others v Secretary of State for the Home Department* [2018] UKSIAC 1 SN 63 2015, in which it held that section 31(2A) does not apply to SIAC. We consider that the position for this Commission is a fortiori that which applies in SIAC, because this Commission's powers are narrower. We therefore consider that section 31(2A) of the 1981 Act does not apply to this Commission.

What is the effect of the fact that the Secretary of State no longer relies on the November 2018 incident?

101. It is clear to us that JTAC relied on the November 2018 incident in making its assessment. We do not know what exact weight JTAC gave it in comparison with the June 2018 incident. Taken at face value, however, the November 2018 incident is more potent than the June 2018 incident. It involves an act of terrorism, that is, the murder of two policemen, whereas the June 2018 incident is, at best, a preparatory act. We are therefore unable to say what JTAC's assessment would have been had it not relied on the November 2018 incident. We are told that in September 2019, after the appeal was lodged, JTAC maintained its assessment; but we do not consider that it would be right to give great weight to such an assessment. JTAC's position in this regard is in some ways weaker than that of a public authority which assesses the impact on the equality needs listed in section 149 of the Equality Act 2010 of a decision only after that decision has been challenged, a practice which has been held, on several occasions, to be ineffective to save the relevant decision. It is also true that on 5 June 2020, JTAC provided a two-page OPEN summary of its response to As' evidence. This asserted, 'We maintain our assessment on the June 2018 arrests'. This

appears to be a response, however, to criticisms by the As of the reliability of the press report identified by the As as the source of information about the June 2018 incident. It is not, as we read it, an unambiguous statement that JTAC maintains its assessment that the statutory test is met based on the June 2018 incident. Nor can we say what view the PRG would have taken of matters had JTAC withdrawn reliance on the November 2018 incident. Still less can we be confident what view the Secretary of State, who gave 'very significant weight' to JTAC's assessment, would have reached if JTAC had not referred to and relied on the November 2018 incident. We are certainly not able to say that outcome would inevitably have been the same, had that incident not been referred to in the JTAC report.

Is E v Secretary of State for the Home Department relevant?

102. On one view, *E* should be understood in its factual and legal context. Its true scope, arguably, is therefore very narrow. Once it is understood that the IAT erred in law in misunderstanding the scope of its powers when it was considering an application for permission to appeal to the Court of Appeal, it is easy to understand why the Court of Appeal was able to hold that the IAT should have looked at the evidence which had come to light before it promulgated its decisions in the two appeals, and erred in law in failing to. It is not clear to us that there is any basis in principle to read the decision of the Court of Appeal any more widely than that. We accept, however, that the wider (and strictly obiter) principle articulated by the Court of Appeal has been followed in later cases, to which our attention was drawn by the As in their written submissions.

103. As we have noted above (paragraph 19), there are some similarities between the position of the Secretary of State and that of the IAT. But the Secretary of State's continuing duty to keep proscription under review does not entitle this Commission to allow this appeal because of the withdrawal of reliance on the November 2018 incident after the date of the Decision, and after the appeal was made. A failure to review continuing proscription after withdrawal of reliance on the November 2018 incident could be the subject of a further application for de-proscription; but it is not the subject of the application which has led to this appeal.

104. The question is what, if anything, about the November 2018 incident was an incontestable fact which was in existence when the Decision was made. The only

incontestable fact at that stage was that JTAC had made an assessment of the incident, on which the Secretary of State relied in making the Decision. That fact has never changed. What has changed, rather, is that JTAC have now produced a further assessment, which is that there is not enough evidence to attribute this incident directly to the LTTE. The later assessment is not an incontestable fact which was in existence at the time of the Decision. The position can be tested by contrasting some of the planning cases to which Carnwath LJ referred in his judgment in *E*; for example, where the decision maker made a mistake about whether, at the time of the decision, land was, or was not, in the Green Belt. In *E* the facts were that in both cases, there were new reports relevant to the issue on international protection, which the IAT, which was still seised of the appeals, held that it would not take into account, and which the Court of Appeal held it should consider.

105. It can also be tested by reference to *Cabo Verde v Secretary of State for the Home Department* [2004] EWCA Civ 1726, a case relied on by the As. The IAT had decided that the respondent in that case was entitled to humanitarian protection because of a risk that he would be tortured if he were returned to Angola. That risk was based on his evidence that he had been tortured there between November 2001 and April 2002. Later, the Government of Portugal sought the respondent's extradition to Portugal. That application was based in part on credible evidence that the respondent had been in Portugal, not Angola during January and February 2002. The Court of Appeal decided that this was fresh evidence which suggested that the IAT had been seriously misled, and remitted the case to the IAT for it to consider. The IAT would then have to decide whether that fresh evidence undermined the respondent's claim, or not. This case closely resembles *E*.

106. *Chalfont Saint Peter Parish Council v Chiltern District Council* [2014] EWCA Civ 1393, a further case relied on by the As, does not take matters any further. The Court of Appeal rejected the argument that there was any mistake falling within the scope of *E*. The Court of Appeal held that it was for the planning committee to apply the relevant policy and to decide the extent of the playing fields on the site in question, and that its decision on that question had been open to it on the material before it.

107. If that is wrong, we would accept Sir James's submission that the principle in *E* does not, in any event, apply in jurisdictions like POAC and SIAC in which assessments by the Security Service are regularly relied on. Such assessments are assessments, and, in their nature, may change as a result of new information. We consider that it would be contrary to the public interest for a court to hold that a decision based on a contemporaneous assessment of national security is flawed, applying the principles which apply on an application for judicial review, merely on the ground that, by the time of the hearing, the assessment had been withdrawn or modified.

Is the decision flawed applying the principles of judicial review?

The November 2018 incident

108. As we have recorded, Sir James argues that the Commission should, in reviewing the Decision, leave out of account the material which the Secretary of State has now withdrawn ('proposition 1'). He also submitted that we should now decide whether a reasonable decision maker could have decided that the statutory test was met on the basis of the material which is before us ('proposition 2'). The approach of this Commission in the *Lord Alton* case (with the apparent obiter approval of the Court of Appeal) was to adopt both propositions, in order to ensure that it gave anxious scrutiny to the material. But as we understand that case, it was not a case in which a significant plank of the material on which the Secretary of State relied in making the decision under challenge had been withdrawn by the time of the hearing.

109. We are troubled by this approach, in a case like the current case, and, in any event, because in our judgment it does not properly give effect to section 5(3) of the 2000 Act. Applying judicial review principles, the Secretary of State was entitled to reach the view he did about whether the statutory test was met, based on both incidents, and that that decision cannot now be said to be flawed, applying the principles of judicial review, because the Secretary of State has later withdrawn reliance on the November 2018 incident. If the decision was not flawed on this ground, applying judicial review principles, there can be no question of our deciding what our view of the evidence before us is, and if the decision is otherwise flawed, we should only ask whether, absent the flaw, the decision would inevitably have been the same (a question we have answered, above). We cannot say that it would have, both

because of the Secretary of State's reliance on the November 2018 incident, and because of the inaccurate way in which the PRG's conclusions about the discretionary factors were reported in the Submission (see further, below).

Was the Secretary of State entitled to rely on the expert assessments of JTAC and of the PRG?

110. We reject Ms Lester's submissions that the Secretary of State was not entitled to delegate the assessment of intelligence to two expert bodies, JTAC and the PRG. There is nothing in the *Health Foods* case which supports that approach. We do not consider that the Secretary of State is personally required to evaluate the credibility and effect of the underlying material, such as press reports, nor that officials are required, when preparing a ministerial submission, to describe such an assessment to the Secretary of State. We also reject her argument that the fact that those involved in the June 2018 incident have not been indicted prevents the Secretary of State from forming a reasonable belief that the statutory test was met. As Sir James put it in his oral submissions, proof beyond reasonable doubt is not required. We consider that the reasoning of the House of Lords in *R v Secretary of State for the Home Department ex p Rehman* [2003] 1 AC 153 (which concerned a merits appeal) is helpful by analogy. The position in this case is a fortiori, because we are applying judicial review principles.

111. The corollary of this approach, of course, is that when the views of one of the expert advisory bodies (JTAC or the PRG) are reported to the Secretary of State, we are entitled to assume that he relied on that report of their views.

Was there enough material to entitle the Secretary of State to conclude that relevant incidents could be attributed to the LTTE?

112. We also reject that argument that references to 'LTTE-aligned individuals and groups' or 'factions' is fatal to the Decision. The premise of the phrases is that the people concerned are aligned to an entity, and that that entity is the LTTE. A conclusion that such people are doing things on behalf of LTTE, is given its history, and what they are said to have done, natural enough. The language may not have the precision of some lawyers' words, but its effect, in our judgment, is clear.

Was there enough material to entitle the Secretary of State to conclude that the LTTE promotes or encourages terrorism?

113. We reject Ms Lester's attack on this aspect of the Decision. It is significant, in our judgment, that some of the commemorations described in the materials commemorate suicide bombers (Black Tigers Day and Malathy). It also seems to us that the Secretary of State was entitled to conclude that the materials suggested a degree of co-ordination in these activities which enabled them to be attributed to the LTTE, for reasons similar to those we have given in the previous paragraph.

Was the Secretary of State properly informed about the reasoning of the PRG?

114. A theme of Ms Lester's submissions was that there was doubt about the accuracy with which the PRG's views were communicated to the Secretary of State. We have four concerns about this aspect of the case.

i. We do not understand why the minutes of the PRG meeting were not annexed to the Submission. There was plenty of time in which the minutes could have been prepared before the Submission. This failure has led, it seems to us, to inaccuracies in the way that the PRG's views were reported to the Secretary of State. In addition, as we explain in the CLOSED judgment, we consider that there were inaccuracies in the way in which the author of the Submission reported to the Secretary of State the levels of confidence which JTAC had assigned to the assessments which the author of the Submission judged were relevant.

ii. The recommendation at the head of the Submission reports that the PRG recommended continuing the proscription of the LTTE. The PRG minutes do not record any such recommendation.

iii. The minutes appear to record, without explanation, a shift from the Chair's first proposal 'that the PRG could conclude that it could be argued that the statutory test was met through the June 2018 incident' to 'the Chair concluded that the PRG was in agreement that the statutory test [for proscription] was met and the discretionary factors were not in favour of de-proscription'. The Submission reports an unhappy amalgam of those two formulations.

iv. The Submission inaccurately reports that the PRG concluded that if the statutory test is met, 'the discretionary factors in favour of maintaining the proscription are compelling', and 'the discretionary factors are weighted strongly in favour of maintaining proscription' (cf 'the discretionary factors were not in favour of de-proscription').

115. We are persuaded that the decision is flawed, applying judicial review principles, and giving the Decision the intense scrutiny which is required in this context. The concern we record at paragraph 114(ii), above, is a serious concern. Further, on a fair reading of the OPEN documents, the only discretionary factor of any significance in this case is the fifth. JTAC only referred to minimal evidence on the first factor. According to the OPEN minutes of its discussion, the PRG expressed a lukewarm view about the weight to be given to the discretionary factors. The PRG also made clear (and this was communicated to the Secretary of State) that this was a finely balanced case. In a finely balanced case, it is essential that any summary of the views of an expert body about discretionary factors is scrupulously accurate, for the reasons given in paragraph 111, above. The Submission materially misstated the PRG's views about the discretionary factors in two different ways.

116. In view of this conclusion, and of the dispute about relief, we do not consider it necessary at this stage to decide whether Ms Lester's argument that the Secretary of State's approach to the fifth discretionary factor was, itself, flawed.

Convention rights

117. In view of this conclusion, we do not consider it necessary, either, to say much about the third ground of appeal. As Sir James pointed out in his submissions, the proscription of the LTTE does not have any legal effect on the peaceful activities of the As and of their organisation. As he also pointed out, a premise of a decision to maintain proscription is that the Secretary of State believes that the statutory test is met. We do no more than to express a provisional view that it is hard to see how, if the statutory test is met, and discretionary factors favour proscription, it could be disproportionate to maintain proscription.

Overall conclusion on the merits of the appeal

118. For the reasons given above, we consider that the Decision is flawed. We therefore allow this appeal.

Relief

119. The parties indicated that, if this Commission were to allow the appeal, they would require a further hearing about relief. We will therefore say no more about it in this judgment.

The CLOSED judgment

120. In the *Lord Alton* case the Court of Appeal encouraged this Commission to indicate, in general terms, the relationship between the reasoning in the OPEN and CLOSED judgments. For the reasons given in our CLOSED judgment, the CLOSED material supports our conclusion, based on the OPEN material, that the Decision is flawed. For reasons which are also given in our CLOSED judgment, the CLOSED material does not undermine that conclusion.