An Order of the High Court is in force that nothing should be published that would or might tend to (i) identify the respondent as being subject to a temporary exclusion order; or (ii) identify the address at which the respondent is residing; or (iii) identify the respondent's wife and/or children.

[2024] UKSC 26
On appeal from: [2022] EWCA Civ 1541

JUDGMENT

QX (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Hamblen
Lord Burrows
Lord Stephens
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
5 August 2024

Heard on 12 and 13 March 2024

Appellant
Robin Tam KC
Steven Gray
(Instructed by Government Legal Department)

Respondent
Dan Squires KC
Darryl Hutcheon
Rosalind Comyn
(Instructed by ITN Solicitors)

LORD REED (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Burrows, Lord Stephens, Lady Rose and Lady Simler agree):

1. Introduction

1. The principal question in this appeal is whether the right to a fair hearing, as guaranteed by article 6(1) of the European Convention on Human Rights ("the Convention") and implemented in our domestic law by the Human Rights Act 1998 ("the Human Rights Act"), applies to an application under section 11 of the Counter-Terrorism and Security Act 2015 ("the 2015 Act") for the review of the Secretary of State's decisions relating to the imposition of a temporary exclusion order ("TEO") on the claimant, QX.

2. The background facts

2. The claimant is a British citizen. He lived in Syria between 2014 and 2018. On 26 November 2018 the High Court granted an application by the Secretary of State under section 3 of the 2015 Act for permission to impose a temporary exclusion order on him. As permitted by section 3, the application was considered in his absence, without his having been notified or having an opportunity of making representations to the court.

3. In support of the application the Secretary of State relied on a witness statement by the head of the Special Cases Unit at the Home Office's Office for Security and Counter Terrorism. In the statement, the witness stated that the claimant had travelled to Syria, and that it was reasonably suspected that he was, or had been, aligned with an al-Qaeda aligned group. This allegation has been referred to in these proceedings as "the Syria allegation". It was said that the choice that the claimant had made to travel to an active warzone, and to align with others bound by similar extremist beliefs, demonstrated the highest level of commitment to the Islamist extremist cause. As he was reasonably suspected to have been involved in terrorism-related activity, and taking account of the risk that those aligned with an al-Qaeda aligned group posed to national security, the Secretary of State was satisfied that imposing the order was the most appropriate and proportionate way of managing the circumstances in which the claimant could return to the United Kingdom and of requiring the claimant to comply with measures designed to protect the public in the United Kingdom from a risk of terrorism, if he returned. Those measures were:

> (1) An obligation for the claimant to notify the police of his places of residence and any change in his places of residence.

(2) An obligation for the claimant to report to a named police station, initially on a daily basis.

(3) An obligation for the claimant to attend appointments with specified persons as notified in writing. He could be required to meet with a mentor twice a week for two hours at a time on each occasion to help support rehabilitation and re-integration into the community.

4. The order imposed by the Secretary of State stated that it had been imposed because the following conditions were met:

> "A. The Secretary of State reasonably suspects that you are, or have been, involved in **terrorism-related activity outside the United Kingdom.** Namely, it is assessed that you travelled to Syria and aligned with an al Qaeda-aligned group;
>
> B. The Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on you;
>
> C. The Secretary of State reasonably considers that you are outside the United Kingdom;
>
> D. You have the right of abode in the United Kingdom; and
>
> E. The court has given the Secretary of State permission to impose on you a temporary exclusion order under section 3 of the Counter-Terrorism and Security Act 2015." (Emphasis in original.)

5. Notice of the imposition of the order was given to the claimant on the same date by sending an email to his legal representatives. The order then came into force, in accordance with section 4 of the 2015 Act. On 4 January 2019 the Secretary of State issued to the claimant a permit to return to the United Kingdom, in accordance with section 7, since the claimant was facing deportation from Turkey to the United Kingdom. This permitted him to return on a specified flight from Istanbul to Manchester on 9 January 2019.

6. On his arrival at Manchester Airport, the claimant was served with a copy of the order, and also with a notice of obligations imposed by the Secretary of State under section 9 of the 2015 Act. The obligations imposed by the notice were varied in some respects from time to time by subsequent notices, but in general terms remained the same. They fell into the three categories anticipated in the application for the order, and had been agreed at the TEO Liaison Group meeting which preceded that application (as explained in para 26 below):

(1) First, the claimant was required to notify the police of his intended place of residence, and to notify the police of any change of residence.

(2) Secondly, he was required to report to a specified police station at a specified time every day. That obligation has been referred to in these proceedings as "the reporting obligation". Its purpose, as explained by the Secretary of State, was to reduce the risk that the claimant would abscond, and to support attempts to locate him in the event that he did abscond; to reduce his ability to engage in terrorism-related activity and to assist rehabilitation; and to provide general reassurance as to his location at frequent points throughout the week, which assisted in mitigating the risk to national security that he was assessed to pose.

(3) Thirdly, he was required to attend sessions for four hours each week with a mentor from the Home Office's Desistance and Disengagement Programme ("the appointments obligation"). The appointments obligation was replaced, with effect from 4 October 2019, by an obligation to attend sessions for two hours a week with a mentor and two hours a week with a theologian. The Secretary of State maintains that the appointments were considered necessary to support the claimant's reintegration into United Kingdom society, to reduce his ability to engage in terrorism-related activity, to provide an opportunity to understand his mindset, and to provide general reassurance as to his location at frequent points throughout the week, which assisted in mitigating the risk to national security that he was assessed to pose.

7. The temporary exclusion order expired on 25 November 2020, and the obligations then came to an end.

8. On 24 March 2021 the claimant was convicted of three counts of breaching the reporting obligation, contrary to section 10(3) of the 2015 Act. The counts related to his missing three appointments to report at the specified police station. He was sentenced on the basis that he had forgotten about these appointments, and received a suspended sentence of 42 days' imprisonment.

3. The legislative framework

(1) The Counter-Terrorism and Security Act 2015

9. Section 2(1) of the 2015 Act defines a temporary exclusion order as an order which requires an individual not to return to the United Kingdom unless—

> "(a) the return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or
>
> (b) the return is the result of the individual's deportation to the United Kingdom."

10. Under section 2(2), the Secretary of State may impose a temporary exclusion order if conditions A to E are met. Those conditions are set out in subsections (3) to (7):

> "(3) Condition A is that the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom.
>
> (4) Condition B is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the individual.
>
> (5) Condition C is that the Secretary of State reasonably considers that the individual is outside the United Kingdom.
>
> (6) Condition D is that the individual has the right of abode in the United Kingdom.
>
> (7) Condition E is that—
>
> > (a) the court gives the Secretary of State permission under section 3, or

> (b) the Secretary of State reasonably considers that the urgency of the case requires a temporary exclusion order to be imposed without obtaining such permission."

Pursuant to section 2(8), during the period that a temporary exclusion order is in force, the Secretary of State must keep under review whether condition B is met.

11. In order to satisfy condition E, the Secretary of State must obtain the permission of the court under section 3, except where that is precluded by the urgency of the case. Under section 3, the function of the court on an application for permission is to determine whether the decisions of the Secretary of State that conditions A to D are met are obviously flawed. In determining the application, the court must apply the principles applicable on an application for judicial review. Unless the decisions are obviously flawed, the court must give permission. As explained earlier, the court may consider the application in the absence of the individual in question, and without that person having been notified of the application or given an opportunity of making any representations to the court.

12. A temporary exclusion order comes into force when the Secretary of State gives notice of it to the individual on whom it is imposed: section 4(1). It remains in force for a period of two years unless revoked or otherwise brought to an end earlier: section 4(3). When the order comes into force, any British passport held by the excluded individual is invalidated: section 4(9).

13. Under section 5, an individual who is subject to a temporary exclusion order can be issued with a permit to return: that is to say, a document giving that individual permission to return to the United Kingdom. The permission may be made subject to a requirement that the individual comply with conditions specified in the permit to return. A permit to return must state the time at which, or period of time during which, the individual is permitted to arrive on return to the United Kingdom, the manner in which the individual is permitted to return to the United Kingdom, and the place where the individual is permitted to arrive on return to the United Kingdom.

14. Under section 6, if an individual applies for a permit to return, the Secretary of State must issue one within a reasonable period after the application is made (subject to exceptions which are not material to this case), and the return time specified in the permit must fall within a reasonable period after the application is made. Under section 7, a permit to return must be issued where an individual is to be deported to the United Kingdom.

15. Section 9(1) enables the Secretary of State, by notice, to impose any or all of the "permitted obligations" on "an individual who—(a) is subject to a temporary exclusion order, and (b) has returned to the United Kingdom". The "permitted obligations" are defined by section 9(2) as follows:

> "(a) any obligation of a kind that may be imposed (on an individual subject to a TPIM notice) under these provisions of Schedule 1 to the Terrorism Prevention and Investigation Measures Act 2011—
>
> (i) paragraph 10 (reporting to police station);
>
> (ii) paragraph 10A (attendance at appointments etc);
>
> (b) an obligation to notify the police, in such manner as a notice under this section may require, of—
>
> (i) the individual's place (or places) of residence, and
>
> (ii) any change in the individual's place (or places) of residence."

Section 9(3) provides that a notice under the section comes into force when given to the individual, and remains in force until the temporary exclusion order ends (unless the notice is revoked or otherwise brought to an end earlier). The obligations imposed may be varied or revoked by issuing a further notice: section 9(4).

16. Section 10(1) makes it an offence for an individual who is subject to a temporary exclusion order to return to the United Kingdom in contravention of the order, without reasonable excuse. Section 10(3) makes it an offence for an individual who is subject to an obligation imposed under section 9 to fail to comply with the obligation, without reasonable excuse. A person guilty of an offence under section 10 is liable to a sentence of up to five years' imprisonment or to a fine, or to both.

17. Under section 11(2), an individual who is subject to a temporary exclusion order and is in the United Kingdom may apply to the court to review any of the following decisions of the Secretary of State:

> "(a) a decision that any of the following conditions was met in relation to the imposition of the temporary exclusion order—
>
> (i) condition A;
>
> (ii) condition B;
>
> (iii) condition C;
>
> (iv) condition D;
>
> (b) a decision to impose the temporary exclusion order;
>
> (c) a decision that condition B continues to be met;
>
> (d) a decision to impose any of the permitted obligations on the individual by a notice under section 9."

On such a review, the court must apply the principles applicable on an application for judicial review, pursuant to section 11(3). On a review under section 11(2)(a) to (c) (referred to in these proceedings as an "imposition review"), the court has the power to quash the temporary exclusion order or to give directions to the Secretary of State for, or in relation to, its revocation. On a review under section 11(2)(d) (referred to as an "obligations review"), the court has the power to quash the obligation in question or to give directions to the Secretary of State for, or in relation to, the variation of the notice under section 9 in so far as it relates to that obligation. If the obligation in question is the only one imposed by the notice, the court can quash the notice or give directions to the Secretary of State for, or in relation to, its revocation.

18. Schedule 3 makes provision about proceedings relating to temporary exclusion orders. Paragraph 2(1) requires a person making rules of court relating to such proceedings to have regard to the need to secure:

> "(a) that the decisions that are the subject of the proceedings are properly reviewed, and
>
> (b) that disclosures of information are not made where they would be contrary to the public interest."

19. Paragraph 3(1) provides that rules of court relating to such proceedings must secure that the Secretary of State is required to disclose (a) material on which he relies, (b) material which adversely affects his case, and (c) material which supports the case of another party to the proceedings.

20. Paragraph 3 is subject to paragraph 4, which provides, in short, that rules of court relating to such proceedings must secure that the Secretary of State can apply to the court for permission not to disclose material other than to the court and any person appointed as a special advocate, and that the court is required to give permission for the material not to be disclosed if it considers that disclosure would be contrary to the public interest. The rules must secure that, if the court grants the Secretary of State permission not to disclose material, it must consider requiring the Secretary of State to provide to every party to the proceedings (and their legal representatives) a summary of the material which does not itself contain material the disclosure of which would be contrary to the public interest. Paragraph 4(2) provides that rules of court must secure that provision to the effect mentioned in paragraph 4(3) applies in cases where the Secretary of State:

> "(a) does not receive the permission of the relevant court to withhold material, but elects not to disclose it, or
>
> (b) is required to provide a party to the proceedings with a summary of material that is withheld, but elects not to provide the summary."

The implication is that the Secretary of State can elect not to disclose material even where permission not to disclose it has been withheld by the court, and that the Secretary of State can elect not to provide a summary even where the court has required the Secretary of State to provide one.

21. However, in that event paragraph 4(3) applies. It provides that the court must be authorised:

> "(a) if it considers that the material or anything that is required to be summarised might adversely affect the Secretary of State's case or support the case of a party to the proceedings, to direct that the Secretary of State—
>
> (i) is not to rely on such points in the Secretary of State's case, or

(ii) is to make such concessions or take such other steps as the court may specify, or

(b) in any other case, to ensure that the Secretary of State does not rely on the material or (as the case may be) on that which is required to be summarised."

22. Paragraph 5(1) provides that nothing in paragraphs 2 to 4, or in rules of court made under those paragraphs, is to be read as requiring the court to act in a manner which is inconsistent with article 6 of the Convention.

(2) Part 88 of the Civil Procedure Rules

23. Rules of court giving effect to the procedural scheme authorised by Schedule 3 have been made for the High Court and Court of Appeal of England and Wales and are set out in Part 88 of the Civil Procedure Rules ("CPR"). In particular, CPR 88.2(2) requires the court to ensure that information is not disclosed contrary to the public interest. Subject to that duty, CPR 88.2(3) requires the court to satisfy itself that the material available to it enables it properly to determine proceedings. CPR 88.26 requires the Secretary of State to make a reasonable search for "relevant material", defined as the material described in paragraph 3(1)(a) to (c) of Schedule 3 to the 2015 Act (see para 19 above), and to file and serve that material. CPR 88.27 enables the Secretary of State to apply to the court for permission to withhold "closed material" (defined as relevant material that the Secretary of State objects to disclosing to another party to the proceedings on the grounds that its disclosure is contrary to the public interest) from another party to the proceedings (or their legal representative).

24. CPR 88.28 deals with the court's consideration of the Secretary of State's application for permission to withhold closed material under CPR 88.27. In particular, CPR 88.28(8) provides that the court must give permission to the Secretary of State to withhold sensitive material where it considers that disclosure of that material would be contrary to the public interest. CPR 88.28(6) provides that where the court gives permission to the Secretary of State to withhold sensitive material, it must consider whether to direct the Secretary of State to serve a summary of that material on the other party and their legal representative, but ensure that any such summary does not contain material the disclosure of which would be contrary to the public interest.

25. CPR 88.28(7) reflects paragraph 4(3) of Schedule 3 to the 2015 Act (see para 21 above) and provides:

> "Where the court has not given permission to the Secretary of State to withhold sensitive material from, or has directed the Secretary of State to serve a summary of that material on, the relevant party and the relevant party's legal representative—
>
> > (a) the Secretary of State shall not be required to serve that material or summary; but
> >
> > (b) if the Secretary of State does not do so, at a hearing on notice the court may—
> >
> > > (i) if it considers that the material or anything that is required to be summarised might be of assistance to the relevant party in relation to a matter under consideration by the court, direct that the matter is withdrawn from its consideration or that the Secretary of State makes such concessions or takes such other steps as the court may direct; and
> > >
> > > (ii) in any other case, direct that the Secretary of State must not rely in the proceedings on that material or (as the case may be) on what is required to be summarised."

4. The administrative framework

26. According to evidence submitted on behalf of the Secretary of State, the case for imposing a temporary exclusion order, including any proposed in-country obligations, is considered prior to and at a TEO Liaison Group meeting, involving the Home Office Special Cases Unit, government departments, the Security Service and the police. The Special Cases Unit recommends obligations for ministerial agreement once it is satisfied that they are necessary and proportionate to the aims of the order, which are to protect the United Kingdom public from a risk of terrorism. Ministers then receive a submission in which their agreement is sought for the imposition of both the order and the obligations. Once imposed, all temporary exclusion orders are reviewed at quarterly meetings chaired by the head of the Special Cases Unit and attended by representatives of the Security Service, counter-terrorism police and the Home Office Prevent Delivery Unit. The purpose of the meetings is to review all temporary exclusion orders that have been imposed, in order to ensure that each order continues to be necessary and proportionate to protect the public in the United Kingdom from the risk of terrorism posed by the subject of an order, and to ensure that any obligations imposed under

section 9 of the 2015 Act remain necessary and proportionate in the light of all assessments and information available at the time of the review. The Secretary of State's evidence is that the claimant's case was considered in accordance with this procedure.

5. The present proceedings

(1) The proceedings in the High Court: Farbey J's first judgment

27. In November 2019 the claimant applied to the High Court under section 11(2)(d) of the 2015 Act for review of the Secretary of State's decision under section 9 to impose the reporting obligation and the appointments obligation. The decision was said to violate his rights under article 8 of the Convention, as given effect in domestic law by the Human Rights Act, on the basis that the obligations were neither necessary nor proportionate. In the period since then—approaching five years—the court has been unable to deal with the substance of that or any other issue, as the parties have contested questions of disclosure.

28. The Secretary of State applied under CPR 88.27 for permission to withhold closed material from the claimant and his legal representatives. Following a hearing in December 2019, an order was made that the first day of any hearing of that application should be directed to the relevant principles of disclosure. Those matters were discussed at a hearing in March 2020, and in written submissions subsequently filed at the invitation of the court. Farbey J then determined a number of issues: [2020] EWHC 1221 (Admin); [2021] QB 315. In her judgment, she concluded that:

> (1) The imposition of a temporary exclusion order qualifies a British citizen's right of abode set out in sections 1(1) and 2(1) of the Immigration Act 1971 ("the 1971 Act"), as it constitutes a "let or hindrance", within the meaning of section 1(1), on an individual's freedom to come and go into and from the United Kingdom (para 55).
>
> (2) That qualification of the right of abode falls within "the hard core of public-authority prerogatives" (citing *Ferrazzini v Italy* (2001) 34 EHRR 45, para 29 and *Maaouia v France* (2000) 33 EHRR 42) which do not attract the procedural guarantees of article 6(1) of the Convention (paras 56–57).
>
> (3) However, obligations which are imposed on a person subject to a temporary exclusion order under section 9 of the 2015 Act are distinct from the underlying order. They do not control a person's right of abode, and do not fall within the hard core of public authority prerogatives. As a result, article 6(1) is

not precluded from applying to a review of obligations imposed under a temporary exclusion order (paras 58–68).

(4) On the facts of the present case, the reporting obligation and the appointments obligation are sufficiently intrusive interferences with the claimant's right to respect for his private life to fall within the scope of article 8 of the Convention (para 73).

(5) The hearing of the obligations review sought by the claimant will accordingly involve the determination of his rights under article 8 as given effect in domestic law. Those are "civil rights" within the meaning of article 6(1). Article 6(1) accordingly applies to the proceedings (paras 77–78).

(6) In the circumstances of the present case, any application by the Secretary of State for permission to withhold material from the claimant has to be determined in accordance with the principles governing the disclosure required by article 6(1) as established in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269 ("*AF (No 3)*") (paras 82–84). These principles were summarised by Lord Phillips at para 59 of his speech in that case, in the context of persons made subject to control orders under the Prevention of Terrorism Act 2005 ("the 2005 Act"):

> "… the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists of purely general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

29. Farbey J also considered (at paras 85–86) whether the disclosure given by the Secretary of State complied with the principles set out in *AF (No 3).* In relation to the Syria allegation, the claimant had the information set out in the temporary exclusion order (see para 4 above). He was able to give instructions as to whether he had ever travelled to Syria and as to the purpose of his travel, and thus not merely to deny but to refute the allegation. His counsel, with the assistance of the special advocates, would be able to address the court on whether the section 9 obligations were necessary and

proportionate to impose on a person aligned with al-Qaeda. To that extent, the proceedings would comply with article 6(1).

30. However, the closed material contained further, more specific information. It appears that the judge was here referring to an allegation concerning the claimant's conduct after his return to the United Kingdom ("the UK allegation"). If the Secretary of State continued to rely on this material, the claimant's article 6 rights could be violated. Farbey J had given further reasons for this conclusion in a closed judgment. It was however too soon to make a definitive ruling whether article 6(1) had been breached. That was better considered closer to or at the substantive hearing, when the Secretary of State's finalised position would be known.

31. In her order, dated 15 May 2020, Farbey J granted a declaration that:

> "1. For the purposes of article 6(1) of the [Convention], the present proceedings will determine the claimant's 'civil rights and obligations'.
>
> 2. In determining any application in the present proceedings under rule 88.27 CPR by the defendant for permission to withhold CLOSED material from the claimant, the principles identified in *AF (No 3)* are to be applied."

32. The Secretary of State did not appeal against Farbey J's order. The issues (1) whether the obligations review involves a determination of the claimant's "civil rights" within the meaning of article 6(1), and (2) whether the principles of disclosure established in *AF (No 3)* apply to that review, are not the subject of the present appeal.

(2) Farbey J's second judgment

33. The Secretary of State then provided some further information, adding, in relation to the Syria allegation, that it was assessed that the claimant had held a significant leadership role in an al-Qaeda aligned group while in Syria. Following a closed hearing under CPR 88.28 in June 2020, at which the special advocates argued that the proceedings breached article 6, Farbey J declined to rule on that question in the absence of the claimant and his legal representatives, and ordered that any further submissions on the question should be incorporated into the parties' skeleton arguments for the review hearing. She also ordered that those arguments should address the appropriate stage at which the question whether there would be a breach of article 6 should be determined. The review hearing took place on 21 July 2020 and was, in effect, a further preliminary hearing concerned with the adequacy of disclosure.

34. Following the hearing, Farbey J issued a second judgment: [2020] EWHC 2508 (Admin). She concluded (at para 40) that she was presently satisfied that the proceedings would be compatible with article 6, but that she would review her decision at the close of the evidence. In her judgment, she recorded that both parties accepted that a claimant could not, in the course of an obligations review, challenge the Secretary of State's decisions that conditions A and B were met in relation to the imposition of the temporary exclusion order, ie that the Secretary of State reasonably suspected that the claimant was, or had been, involved in terrorism-related activity outside the United Kingdom, and reasonably considered that it was necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the claimant. She considered that the claimant could, however, challenge those aspects of the national security case that were relevant to the Secretary of State's assessment that the obligations remained necessary and proportionate despite the passing of time or the claimant's changed personal situation (para 25). She also considered the question whether the information provided to the claimant about the UK allegation was too broad and vague to enable him to give effective instructions, contrary to the test in *AF (No 3)*. She concluded that as matters stood, the UK allegation was too broad on its own to sustain the section 9 obligations compatibly with article 6 (para 33). However, taking it out of the equation, the Secretary of State's case was capable of supporting the necessity and proportionality of the section 9 obligations imposed on the claimant and was not bound to fail (paras 34–39). Farbey J therefore concluded that the substantive review of the reporting obligation and the appointments obligation imposed on the claimant should proceed.

(3) Farbey J's third judgment

35. Following the completion of police inquiries into his alleged activities in Syria, the claimant was informed that no action was to be taken against him. He was then allowed to amend his application so as also to seek review of the Secretary of State's decision to impose the temporary exclusion order and to maintain it in force (ie that condition B continued to be met), under section 11(2)(b) and (c) of the 2015 Act. The grounds on which review of the imposition of the order is sought include challenges under section 11(2)(a) to the Secretary of State's decisions that conditions A and B were met in relation to the imposition of the order.

36. Although the temporary exclusion order expired on 25 November 2020, and was therefore no longer in force by the time of the amendment of the application in June 2021, the claimant retained an interest in challenging the imposition of the order because of his conviction for failing to comply with the reporting obligation (see para 8 above). It is agreed between the parties that if the claimant obtains an order quashing the decision to impose the temporary exclusion order and/or the decision to impose the reporting obligation, he will be entitled to appeal against his conviction, and the Court of Appeal will be required to quash it in accordance with Schedule 4 to the 2015 Act.

37. Following the amendment, further issues relating to disclosure were considered by Farbey J at another hearing in November and December 2021. One issue was whether the material provided to the claimant in relation to the Syria allegation was sufficient to satisfy the disclosure requirements of article 6(1) and, in particular, the principles established in *AF (No 3)*. The information regarding the Syria allegation which had been provided to the claimant by that stage was that it was assessed that he had travelled to Syria and aligned with an al-Qaeda aligned group that engaged in violent conflict, and it was assessed that during his time in Syria he held a significant leadership role in that group. Neither of the parties asked the judge to review the article 6(1) compliance of the disclosure concerning the UK allegation, which they agreed should be decided at the final hearing.

38. By this stage, the claimant had given an account in a witness statement of the activities in which he was involved in Syria. According to that account, he had founded two companies, one providing adult education and the other providing infrastructure, such as water wells, using renewable energy. He had travelled inside Syria to help internally displaced people. He had become integrated into Syrian society. In response, the Secretary of State did not dispute that the claimant was involved in teaching and in establishing education establishments and other business ventures in Syria, but did not accept that these had been the sole purpose of his activities there. Against that background, the claimant maintained that he had not been provided with sufficient disclosure of the Secretary of State's case to respond to the allegations against him other than by describing, as he had done, his activities in Syria. He complained that he did not know with which group he was alleged to have "aligned", what he was alleged to have done, or when and with whom he was alleged to have done it.

39. In her judgment ([2022] EWHC 836 (Admin)), Farbey J began by noting that the Secretary of State had taken the measures in question—the imposition and maintenance in force of the temporary exclusion order and the obligations—because of the Syria allegation. In relation to the period following the claimant's return to the United Kingdom, the Secretary of State also sought to justify the measures on the basis of the UK allegation (para 2).

40. Farbey J distinguished between, on the one hand, the review under section 11(2)(a), (b) and (c) of the decisions that conditions A and B were met in relation to the imposition of the temporary exclusion order, the decision to impose the order, and the decision that condition B continued to be met (that is to say, the imposition review); and on the other hand, the review under section 11(2)(d) of the decision to impose the reporting obligation and the appointments obligation under section 9 (that is to say, the obligations review) (paras 24–25). It had been accepted that the decisions that conditions A and B were met in relation to the imposition of the order, and that condition B continued to be met, could not be challenged in the review under section 11(2)(d) of the decision to impose permitted obligations. She did not understand that position to have changed. However, that did not mean that no part of the national

security case could be challenged in a review of obligations. The necessity and proportionality of imposing any particular obligation on any particular person could be affected by the nature and seriousness of what, from a national security perspective, he had done to cause the temporary exclusion order to be imposed in the first place. There was no bar to a claimant challenging those aspects of the national security case that were relevant to the Secretary of State's assessment that the section 9 obligations were necessary and proportionate. In that regard, Farbey J referred to the passage in her second judgment ([2020] EWHC 2508 (Admin), para 25) in which she had said that the claimant could challenge those aspects of the national security case that were relevant to the Secretary of State's assessment that the obligations remained necessary and proportionate despite the passing of time or the claimant's changed personal situation (see para 34 above). It followed that there could be an evidential or factual overlap between, on the one hand, a review of the imposition of the order and of the decision that conditions A and B were met in relation to its imposition, and, on the other hand, a review of the imposition of the section 9 obligations. In the present case, the Syria allegation might be part of the context both of the decision to impose the order (and, therefore, to decide that conditions A and B were met in relation to its imposition), and of an assessment of the necessity and proportionality of the section 9 obligations (paras 26–29).

41. In Farbey J's view, that overlap did not mean that the court must follow the same procedures in carrying out the different aspects of the section 11 review. Consistently with her first judgment ([2021] QB 315, para 68) (see para 28 above), she concluded that article 6(1) of the Convention applied to the obligations review. On the other hand, consistently with the view expressed obiter in that judgment (paras 55–56), she considered that it did not apply to the review of the decision to impose the temporary exclusion order, under section 11(2)(b). Applying the same reasoning, article 6(1) did not apply to a review of the decisions that conditions A and B were met in relation to the imposition of the order, under section 11(2)(a). Nor did it apply to a review of whether condition B continued to be met, under section 11(2)(c), since the issue in such a review was whether there was a continuing necessity for a temporary exclusion order to be imposed. It followed that the disclosure requirement set out in *AF (No 3)* applied to the obligations review but not to the imposition review.

42. Applying that approach to the facts of the case, it followed that the claimant was not entitled to further information about the Syria allegation for the purposes of the imposition review. In relation to the obligations review, Farbey J had held in her second judgment ([2020] EWHC 2508 (Admin), para 40) (see para 34 above) that, at that stage, the proceedings did not violate article 6, but that she would review their compatibility with article 6 at the close of the evidence. In her third judgment, she noted that neither party had invited her to depart from that ruling. However, she held that fairness required the national security case to be tested by way of oral evidence to the extent that it was relevant to the review under section 11(2)(d). She therefore ordered the Secretary of State to file a witness statement from a person able to speak to the national security

case, and to make the witness available for cross-examination on matters relevant to the section 11(2)(d) review ([2022] EWHC 836 (Admin), paras 79, 85 and 86).

43. In her order, dated 7 April 2022, Farbey J granted a declaration that (inter alia):

> "1. The court's review of whether conditions A and B as set out in sections 2(3) and 2(4) of the Counter-Terrorism and Security Act 2015 were met when the temporary exclusion order was imposed on [the claimant], and whether condition B continued to be met throughout the currency of the order, do not engage article 6 [of the Convention].
>
> 2. The claimant is not entitled to '*AF (No. 3)*' disclosure on 'the Syria allegation' (as defined in paragraph 2 of the judgment); on whether conditions A and B were met in relation to the imposition of the temporary exclusion order; nor in relation to whether condition B continued to be met throughout the currency of the temporary exclusion order."

44. In relation to the second part of that order, the declaration that the claimant was not entitled to disclosure in accordance with *AF (No 3)* in relation to the Syria allegation can only have been intended to apply in respect of the imposition review: as Farbey J said in her third judgment, para 58, "[i]n so far as the Syria allegation underpins a statutory review relating to the imposition of the [temporary exclusion order], the claimant is not entitled to *AF (No 3)* disclosure because article 6 does not apply". She had already held (in her first judgment, paras 82–86) that disclosure in accordance with *AF (No 3)* was necessary in relation to the Syria allegation for the purposes of the obligations review (see paras 28(6), 29 and 31 above), and she reiterated that position in her third judgment (see para 41 above). She granted both parties permission to appeal.

(4) The proceedings in the Court of Appeal

45. The Court of Appeal (Coulson, Nugee and Elisabeth Laing LJJ) held that Farbey J erred in holding that article 6(1) did not apply to the imposition review. The claimant's appeal on that issue was therefore allowed: [2022] EWCA Civ 1541; [2023] KB 472, paras 119, 127. The Secretary of State's cross-appeal against the order to file a witness statement and to make the witness available for cross-examination was also allowed, on the basis that the order was beyond the judge's powers (para 128). The latter issue is not the subject of the present appeal. The potential implications of the absence of such evidence for the fairness of the obligations review, and therefore for its compatibility with article 6, is not a matter which has been considered in this appeal.

46. In her judgment on the claimant's appeal in relation to the application of article 6 to the imposition review, with which the other members of the court agreed, Elisabeth Laing LJ identified two principal questions (para 4). The first was whether the court was bound by the judgments in *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20; [2012] 1 WLR 1604 ("*Pomiechowski*") to hold that the right to enter, remain in and leave the United Kingdom is a civil right for the purposes of article 6(1), with the consequence that article 6(1) applies to the decisions in issue. The second question was whether the imposition review would in any event be directly decisive of the claimant's civil rights within the meaning of article 6(1), with the consequence that article 6(1) applied.

47. In relation to the first of these questions, Elisabeth Laing LJ saw force in counsel for the Secretary of State's criticism of the reasoning in *Pomiechowski* at paras 31–32, discussed below, but also saw force in the claimant's submission that the court was bound by that reasoning (para 117). However, she found it unnecessary to decide the point, as the answer to the second question was clearer. Although the making of a temporary exclusion order, in isolation, might well be an act which fell within "the hard core of public-authority prerogatives", that was only the starting point. If a challenge to the order succeeded, in a case where section 9 obligations had been imposed which admittedly interfered with article 8 rights, then the quashing of the order would also result in the quashing of the obligations. The design of the statutory scheme therefore meant that a challenge to the making of the order was (potentially at least) decisive for any article 8 rights with which any obligations interfered. It was accepted that article 8 rights, as given effect under the Human Rights Act, were civil rights. Thus, an application for a review of the Secretary of State's decision that any of the conditions was met, or of the decision to impose an order, would be decisive, one way or another, of the claimant's civil rights. Article 6(1) therefore applied to such a challenge, and the claimant was accordingly entitled to a level of disclosure which complied with article 6 but could depend on the degree of interference with article 8 rights which the obligations involved. Farbey J had held that the applicable standard was disclosure complying with *AF (No 3),* and the Secretary of State had not cross-appealed against that conclusion (paras 118–119).

(5) The present appeal

48. This court granted the Secretary of State permission to appeal. The agreed issue in the appeal is whether the Court of Appeal was correct to conclude that article 6(1) of the Convention applies to the claimant's application under section 11 of the 2015 Act for a review of the Secretary of State's decision that condition A and condition B were met when the temporary exclusion order was imposed on the claimant, and of the decision of the Secretary of State that condition B continued to be met during the currency of the order. Although Farbey J considered closed material at various stages of the proceedings before her, this court, like the Court of Appeal, has only considered

open material and open submissions. Neither party suggested that it was necessary for this court to consider any closed material.

6. Three preliminary points

(1) What did Farbey J decide?

49. Before turning to the issue in the appeal, three preliminary matters call for comment. The first concerns another matter in dispute between the parties. As explained at para 47 above, the Court of Appeal, having held that article 6(1) applied to the imposition review, went on to state that Farbey J "held that the applicable standard was disclosure complying with *AF (No 3),* and the Secretary of State has not cross-appealed against that conclusion" (para 119).

50. The Secretary of State maintains that that was a misunderstanding of the procedural position. Farbey J had decided that *AF (No 3)* applied to the obligations review, but she had taken no decision as to the applicability of *AF (No 3)* to the imposition review, which she had held to fall outside the scope of article 6(1) altogether. The Court of Appeal itself decided, in the declaration which it granted, only that article 6(1) applied to the imposition review, without determining the standard of disclosure. The claimant, on the other hand, maintains that Farbey J and the Court of Appeal have decided that, to the extent that article 6(1) applies, *AF (No 3)* also applies.

51. We can deal with this matter shortly, and should do so in order to avoid an unnecessary prolongation of this already protracted case. The Court of Appeal did not itself decide that *AF (No 3)* applied to the imposition review: no such decision can be found in the order which it made, and the judgment of Elisabeth Laing LJ merely records, as I have noted, that Farbey J had held the applicable standard to be disclosure complying with *AF (No 3)*. Farbey J herself made no decision that the *AF (No 3)* standard of disclosure applied to the imposition review. On the contrary, because she held that article 6(1) was not engaged, she concluded that the *AF (No 3)* standard did not apply to the imposition review, and so ordered (see para 43 above).

52. Since *AF (No 3)* is now accepted to set the applicable standard in the obligations review, by reason of the intrusiveness of the obligations in question upon the claimant's right to respect for his private life, one can readily understand the argument that the same standard should also apply in the imposition review, if article 6(1) applies to that review because it is potentially decisive of precisely the same obligations. However, there has been no judicial decision to that effect in these proceedings. If there is a contrary argument, it remains open to the Secretary of State to advance it at the appropriate time.

(2) The common law right to a fair trial

53. The second matter that calls for comment is that this appeal arises because of counsel's reliance on the right to a fair hearing guaranteed by article 6(1) of the Convention, to the exclusion of the right to a fair trial under our domestic law. The fundamental importance of that domestic right should not, however, be disregarded. The object of all legal proceedings, including a review under section 11 of the 2015 Act, is to do justice according to law. As Lady Hale observed in *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] 1 AC 440 ("*MB*"), para 57, doing justice means not only arriving at a just result but arriving at it in a just manner. As she went on to say (ibid), the essential ingredients of a fair trial can vary according to the subject matter and nature of the proceedings. But the right to a fair trial is fundamental under our domestic law, as the House of Lords emphasised in *MB* (eg at paras 29–30, 34, 57 and 91) and in *AF (No 3)* [2010] 2 AC 269 (eg at paras 83 and 96), and does not depend on the categorisation of the rights or interests at stake in the proceedings as "civil rights or obligations" within the meaning of article 6(1).

(3) Securing fairness in a review under section 11 of the 2015 Act

54. Although it was not discussed in the parties' submissions, it is necessary to understand how article 6(1) operates in relation to reviews under section 11 of the 2015 Act, in cases where it is applicable.

55. It is to be noted at the outset that the scheme of the 2015 Act does not require a fair hearing at the stage when the temporary exclusion order is imposed, or at the stage when permitted obligations are imposed, even if the obligations interfere with the civil rights of the individual concerned. Although section 2 requires the Secretary of State to obtain the court's permission to impose the order (unless he or she reasonably considers that the urgency of the case precludes doing so: section 2(7)), and it is only where an order has been imposed that permitted obligations can also be imposed (section 9(1)(a)), section 3(3) of the 2015 Act allows the court to consider the application for permission without the individual affected being notified or heard. That is not incompatible with article 6(1), where it is applicable, provided the individual's right to a fair hearing is otherwise protected. That protection is provided by the individual's right to apply to the court to review the decisions of the Secretary of State, under section 11.

56. Questions of fairness in relation to the disclosure of evidence can arise for consideration by the court, in a review under section 11, at two stages. The first stage is when the court holds a hearing (in the High Court or Court of Appeal of England and Wales, under CPR 88.28(2)) to consider an application by the Secretary of State for permission to withhold material from the other party and his or her legal representatives. What fairness then requires depends on the circumstances.

57. So far as article 6(1) is concerned, the first question is whether it applies to the review in question, in the circumstances of the case. By the time of the review, the nature of any obligations imposed will of course be known. It will therefore be possible to determine whether article 6(1) applies to a review of the decision to impose those obligations. It will also be possible to determine whether article 6(1) applies to a review of the decision to impose the order (or to decide that conditions A and B were met in relation to its imposition). That is the question with which this appeal is concerned.

58. Where article 6(1) applies to the review, and the court decides to grant the Secretary of State's application, it is then required (by CPR 88.28(6)) to consider whether to direct the Secretary of State to serve a summary of the material. In order to comply with article 6(1), the court will have to give such a direction where the provision of a summary is necessary in order for the proceedings to be fair. That is the implication of *AF (No 3)*. Compliance with article 6(1) will also be the overriding consideration when considering how much information the summary should contain, in accordance with paragraph 5(1) of Schedule 3 to the 2015 Act (see para 22 above).

59. The second stage arises if either the court has refused the Secretary of State permission to withhold the material but he or she has declined to serve it, or the court has directed the Secretary of State to serve a summary but he or she has declined to do so, as is permitted by the 2015 Act and the relevant rules of court (see paras 20 and 25 above). The court then has to decide whether to exercise the powers referred to in paragraph 4(3) of Schedule 3 to the 2015 Act (para 21 above) and set out in CPR 88.28(7) (para 25 above), by directing that the matter to which the material relates should be withdrawn from its consideration, or that the Secretary of State must not rely on the material or on what was required to be summarised. It is important not to overlook the potential significance of the second stage in securing a fair trial.

7. The application of article 6(1) of the Convention

(1) Introduction

60. Article 6 of the Convention guarantees the right of access to justice, with the necessary safeguards to ensure the fairness of the hearing. It is a key human right, not only because access to justice is a pillar of the rule of law, but also because it is the means by which a wide range of other human rights are made enforceable. As the European Court of Human Rights ("the European court") has said, in a democratic society the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of article 6(1) would not correspond to the aim and the purpose of that provision: *Delcourt v Belgium* (1970) 1 EHRR 355, para 25. In principle, as the court stated in another judgment, the rule of law implies (among other things) that an interference by the executive authorities with an individual's rights should be subject to

an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure: *Klass v Germany* (1978) 2 EHRR 214, para 55.

61. Article 6(1) applies to "the determination of … civil rights and obligations or of any criminal charge". Each of those concepts is recognised as having an autonomous meaning which is not dependent upon the characterisation given to them by the domestic legal system. So far as the determination of civil rights and obligations is concerned, certain proceedings clearly fall within the scope of the provision. For example, litigation between private individuals in the civil courts will normally do so. What may be less certain is whether proceedings other than those normally disposed of in the civil courts, or issues which fall outside the ambit of private law, also involve the "determination" of "civil rights and obligations". A progressive broadening of the scope of these concepts is apparent in the case law of the European court, but this has tended to develop from case to case without the articulation of sharp-edged definitions or principles. As Lord Dyson observed in *R (G) v Governors of X School* [2011] UKSC 30; [2012] 1 AC 167, para 67, the European court "adopts a pragmatic context-sensitive approach", with the result that it "is not possible to classify all the cases into neat hermetically-sealed categories".

62. Although the European court has not laid down clear tests for deciding whether proceedings involve the determination of civil rights or obligations, it can be said in broad terms that three conditions must be satisfied: (i) there must be a legal dispute (the French version of the Convention refers to *contestations*); (ii) a civil right or obligation must be in issue; and (iii) the outcome of the dispute must be directly decisive for the right or obligation concerned. Each of those conditions needs to be greatly expanded in order to reflect the case law of the European court more fully. Nevertheless, they encapsulate succinctly the issues that need to be considered. In the present case, there is undoubtedly a legal dispute. It is the second and third conditions which are in question.

(2) Is the right of abode a "civil right"?

63. It is logical to begin with the question whether the review of a decision to impose a temporary exclusion order involves the determination of a civil right, so as to attract the protection of the procedural guarantees set out in article 6(1), because of the effect of the order upon the individual's right of abode in the United Kingdom. The answer turns, in the first place, on the question whether the right of abode is a "civil right" within the meaning of article 6(1). In answering that question, it is necessary to consider the judgments in *Pomiechowski* [2012] 1 WLR 1604.

64. The case of *Pomiechowski* concerned section 26(4) of the Extradition Act 2003 ("the 2003 Act"), which requires that notice of an appeal against a judge's decision to

order extradition must be given within seven days starting with the date when the order is made. One of the appellants, Mr Halligen, was a British citizen. This court held that section 3 of the Human Rights Act required section 26(4) of the 2003 Act to be read, in the case of a British citizen, as enabling a court to extend the time for giving notice. An essential step in the reasoning which led to that conclusion was that, as a British citizen, Mr Halligen had a "civil right" to enter and remain in the United Kingdom as and when he pleased. Proceedings under the 2003 Act involved a "determination" of that civil right, to which article 6(1) applied.

65. In his judgment, with which Lord Phillips, Lord Kerr and Lord Wilson agreed, Lord Mance referred to a number of decisions of the European Commission on Human Rights ("the Commission") and judgments of the European court in cases concerned with the entry, stay and deportation of aliens, including *Maaouia v* France 33 EHRR 42 (see para 28(2) above) and *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25. He set out his understanding of the effect of the European case law at para 31:

> "This examination of Strasbourg case-law shows that the Commission and court have stood firm against any suggestion that extradition as such involves the determination of a criminal charge or entitles the person affected to the procedural guarantees provided in the determination of such a charge under article 6(1) or 6(3). The cases involved are all also cases involving the extradition of aliens. The last two decisions [*Maaouia v France* and *Mamatkulov and Askarov v Turkey*] emphasise that proceedings for the extradition of aliens do not involve the determination of any civil rights within the meaning of article 6(1). By the same token they underline a potential difference in this respect between aliens and citizens."

66. Developing the distinction between extradition proceedings involving aliens and those involving citizens, under reference to both domestic and international law, Lord Mance continued (ibid):

> "Both in international law and at common law British citizens enjoy a common law right to come and remain within the jurisdiction, and Mr Halligen is such a citizen. *Blackstone* (*Commentaries on the Laws of England*, 15th ed (1809), vol 1, p 137) stated: 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' This passage was cited and approved by Lord Hoffmann in *R (Bancoult) v*

> *Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, para 43. In *R v Bhagwan* [1972] AC 60, 77G Lord Diplock spoke of 'the common law rights of British subjects … to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm'. In *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, para 22, the European Court of Justice recognised that: 'it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between member states, that a state is precluded from refusing its own nationals the right of entry or residence.' The principle is the necessary corollary of a state's right (subject to obligations undertaken by eg the Geneva Refugee Convention and the European Convention on Human Rights) to refuse aliens permission to enter or stay in its territory."

67. Lord Mance derived from those considerations the conclusion which he set out at para 32:

> "In these circumstances, Mr Halligen enjoyed a common (or 'civil') law right to enter and remain in the United Kingdom as and when he pleased."

He referred to the right of abode as a common law right on two further occasions (ibid).

68. Lord Mance went on to consider whether proceedings under the 2003 Act involved the determination of that civil right, and concluded that they did. It followed that the proceedings against Mr Halligen fell within the scope of article 6(1).

69. Lady Hale gave a concurring judgment in which she agreed with the reasons given by Lord Mance, although she would have preferred to decide the appeals on another basis. She added (para 49):

> "The right of a person to enter and remain in the country of which he is a national is the most fundamental right of citizenship. The United Kingdom has signed but not ratified Protocol No 4 to the [Convention], article 3 of which makes this right crystal clear. But, as Lord Mance JSC has demonstrated, it has been part of United Kingdom law for centuries. It is perhaps more questionable whether it counts as

> a ‘civil right’ for the purpose of the right to a fair hearing in article 6(1) of the Convention. As originally conceived, this did not apply to the rights enforceable only in public law. But that limitation has been steadily eroded: see the jurisprudence discussed by Lord Hope of Craighead DPSC in *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39, paras 28–49. And in any event, this right is not like a claim to a social security benefit (which is a ‘civil right’) or to a social service (which currently is not), for these can only be enforced as provided for by the statute or by judicial review. Should the need arise, this right could be claimed in ordinary civil proceedings against a person who was denying it.”

70. In the present appeal, counsel for the Secretary of State submitted that Lord Mance had been mistaken in treating the right of a British citizen to enter and remain in the United Kingdom as a common law right. The right which existed at common law was, it was argued, abolished by the 1971 Act and replaced by a statutory right. Consequently, authorities which predated the 1971 Act, such as *Blackstone* and *R v Bhagwan* [1972] AC 60*,* were no longer relevant.

71. The common law has long recognised the right of abode of British subjects. As *Blackstone* stated, “every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law”: *Commentaries on the Laws of England*, 15th ed (1809), Book 1, Ch 1, p 136. In *R v Bhagwan,* decided shortly before the enactment of the 1971 Act, Lord Diplock, in a speech with which the other members of the House of Lords agreed, referred to “the common law rights of British subjects … to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm” (p 77).

72. The 1971 Act altered that position to the extent that it defined the persons entitled to the right of abode by reference to their citizenship rather than their status as British subjects. Section 1(1) of the 1971 Act provides:

> “All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.”

Section 2 defines the categories of person who have the right of abode in the United Kingdom. In the version currently in force, headed "Statement of right of abode in United Kingdom", section 2(1) provides:

> "(1) A person is under this Act to have the right of abode in the United Kingdom if—(a) he is a British citizen".

Section 2(1)(b) confers the right of abode on certain Commonwealth citizens. The absolute nature of the right of abode of British citizens is reflected in section 2A, which enables the Secretary of State to remove from a specified person a right of abode in the United Kingdom which he has under section 2(1)(b), if that is thought to be conducive to the public good. The scope of that power is confined to persons having a right of abode under section 2(1)(b). It therefore has no application to British citizens.

73. The submission on behalf of the Secretary of State that the effect of the 1971 Act was to abolish the common law right of abode and to replace it with a right of a purely statutory character faces serious difficulties. The case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453 ("*Bancoult*") was not directly concerned with the 1971 Act, but contains some dicta which are in point. Lord Hoffmann cited Blackstone's discussion of the right of abode and said that "[t]hat remains the law of England today" (para 44). He went on to state (ibid) that "[a]t common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long he pleases". He added (para 45) that the right of abode is an important right, and that general or ambiguous words in legislation will not readily be construed as intended to remove such a right. The 1971 Act contains no words which purport to abolish the common law right or imply that it has been abolished.

74. In the same case, Lord Mance described the common law right as fundamental and constitutional (para 151). He continued (ibid):

> "In respect of persons who were British citizens by virtue of their connection with a part of the Commonwealth other than the United Kingdom, that right was from 1962 onwards made subject progressively to statutory qualifications: see *R v Bhagwan* and *R v Governor of Pentonville Prison, Ex p Azam* [1974] AC 18. Thus, from 1973 when the Immigration Act 1971 came into force, all Commonwealth citizens entering the United Kingdom without leave were liable to prosecution. But the common law right to enter and remain within the United Kingdom remains unchanged in respect of those with British

> citizenship based on their connection with the United Kingdom."

This passage expressly considers the impact of the 1971 Act on the common law right of abode, and treats it as having imposed a qualification upon the persons entitled to the right, but as having otherwise left the common law right unaltered.

75. The matter was considered again in *Pomiechowski.* Considered in the light of his judgment in *Bancoult,* Lord Mance's description in *Pomiechowski* [2012] 1 WLR 1604, para 32 of the right of abode as a common law right (see para 67 above) cannot be regarded as being per incuriam. Furthermore, as explained earlier, all the members of this court agreed with his reasoning. I am not persuaded that Lord Mance was in error.

76. Counsel for the Secretary of State also submitted that the dicta in *Pomiechowski* were in any event irrelevant, on the basis that the present case is concerned with entry into the United Kingdom, whereas *Pomiechowski* was concerned with removal from the United Kingdom. I am not persuaded that such a distinction can be drawn. The right of abode entails both a right to enter the United Kingdom and a right to remain here. That is the position under the common law, as the passages cited above from *Blackstone* and *R v Bhagwan* make clear. It is also the position under the 1971 Act, as is apparent from the terms of section 1(1). Lord Mance had both aspects of the right clearly in mind in *Pomiechowski*. He spoke of the "common law right to come and remain within the jurisdiction" (para 31) and of Mr Halligen's "right to enter and remain in the United Kingdom as and when he pleased" (para 32), and cited (at para 31) Lord Diplock's reference in *R v Bhagwan* to "the common law rights of British subjects … to enter the United Kingdom when and where they please". Lady Hale similarly spoke of the "right of a person to enter and remain in the country of which he is a national" (para 49).

77. Nevertheless, I am respectfully compelled to agree with counsel for the Secretary of State that Lord Mance and Lady Hale went further than was justified by the European case law in treating Mr Halligen's extradition as engaging a civil right within the meaning of article 6(1). As explained above, the expression "civil right", as it is used in the Convention, is an "autonomous concept": that is to say, it has a meaning which is specific to that context and is not synonymous with its meaning in the domestic legal systems of the contracting parties. Whether the right of abode takes the form under our domestic law of a common law right or a statutory right is not critical to its status as a "civil right" within the meaning of article 6(1). If Lord Mance considered that a common law right was necessarily a "civil right", as para 32 of his judgment might be thought to suggest (see para 67 above), then I respectfully disagree. Many civil rights are derived from legislation. Indeed, that is the norm under the law of the contracting parties which have civilian legal systems. Nor does classification under the Convention necessarily depend on the mode of enforcement of the right under the domestic legal system, as para 49 of Lady Hale's judgment would appear to suggest (see para 69

above). The issue turns on the substantive nature of the right rather than on its source in the domestic legal system or the procedure by which it is enforced.

78. The most reliable guide to the autonomous meaning of the expression "civil right" is the case law of the European court. That is doubtless why Lord Mance put an analysis of that case law at the forefront of his discussion of the question. Unfortunately, a number of relevant authorities were not cited to the court in that case.

79. As Lord Mance explained, cases such as *Maaouia v France* and *Mamatkulov and Askarov v Turkey* establish that proceedings concerned with the entry, stay and deportation of aliens do not involve the determination of their civil rights. However, it does not follow that the position is different where proceedings are concerned with the similar treatment of citizens. The case of *Peñafiel Salgado v Spain* (Application No 65964/01) (unreported), 16 April 2002, concerned Spanish proceedings relating to the extradition of an Ecuadorian national. It was therefore another case concerning the deportation of an alien. However, the court expressed its reasoning in terms which applied to extradition generally:

> "la procédure d'extradition ne porte pas contestation sur les droits et obligations de caractère civil du requérant, ni sur le bien-fondé d'une accusation en matière pénale dirigée contre lui au sens de l'article 6 de la Convention".

80. The case of *Monedero Angora v Spain* (Application No 41138/05) Reports of Decisions and Judgments 2008, 7 October 2008, concerned the extradition of a Spanish national from Spain to France under a European arrest warrant. It was therefore a case concerned with the extradition of a citizen. Repeating what had been said in *Peñafiel Salgado v Spain,* the court held, at p 5, that "the extradition procedure does not involve the determination of the applicant's civil rights and obligations or of a criminal charge against him within the meaning of article 6 of the Convention". That decision is inconsistent with the majority reasoning in *Pomiechowski.*

81. The case of *West v Hungary* (Application No 5380/12) (unreported), 25 June 2019, concerned the extradition of an alien. However, the court repeated in general terms that "extradition proceedings, including the procedure for executing a European arrest warrant, do not involve the determination of the applicant's civil rights and obligations or of a criminal charge against him within the meaning of article 6 of the Convention" (para 65).

82. It is also relevant to note the case of *Smirnov v Russia* (Application No 14085/04) (unreported), 6 July 2006, which concerned a Russian national who was refused a Russian passport on the basis that he could not establish his Russian

citizenship. The question arose whether article 6(1) applied to the proceedings in which he sought to establish his Russian citizenship. The court held, at p 7, that article 6(1) had no application: "neither a right to citizenship nor a right to a passport is a civil right, given that it is not of a pecuniary or otherwise of a private character". That conclusion was consistent with earlier decisions of the Commission, such as *Peltonen v Finland* (Application No 19583/92) (unreported), 20 February 1995.

83. The reasoning of the Grand Chamber of the European court in *Maaouia v France,* on which Lord Mance relied in *Pomiechowski,* attached considerable weight to the need to construe article 6(1) in the light of the entire Convention system, including the Protocols. As Lord Mance noted ([2012] 1 WLR 1604, para 29), the Grand Chamber pointed out that article 1 of Protocol No 7 contains procedural guarantees applicable to the expulsion of aliens. Having regard to the Preamble and the explanatory report to that instrument, it was clear that member states had not intended such proceedings to be included within the scope of article 6(1) (paras 36–37).

84. However, similar reasoning also applied in *Pomiechowski,* and applies in the present context. Article 3 of Protocol No 4, to which Lady Hale referred at para 49 (see para 69 above), provides:

> "1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.
>
> 2. No one shall be deprived of the right to enter the territory of the state of which he is a national."

The Preamble to the Protocol states that the signatory governments (including the government of the United Kingdom) were "resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention". Section 1 of the Convention includes article 6. Furthermore, the explanatory report to the Protocol states that the background to the Protocol was a recommendation of the Consultative Assembly of the Council of Europe that such a Protocol should be drafted "in order to protect certain civil and political rights not covered by the original Convention". The implication is that the member states did not intend that proceedings concerning the right of individuals to enter the country of which they are nationals should fall within the scope of article 6(1).

85. It is not possible for this court to predict how the case law of the European court may develop in the future. However, against the background which I have described (including, in particular, the decision in *Monedero Angora v Spain*, and the implications of article 3 of Protocol No 4, by parity of reasoning with *Maaouia v France*), it is

reasonable to conclude that the European court would not regard the right of abode in the United Kingdom as a civil right within the meaning of article 6(1). Applying the approach to the application of the Human Rights Act explained in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, paras 54–59, this court should therefore conclude that proceedings concerned with that right do not fall within the ambit of that article.

86. Disagreement with the reasoning which led the majority of this court to the conclusion which they reached in relation to Mr Halligen's appeal in *Pomiechowski* does not entail that the decision was wrong. This court has not been addressed on that question, and should express no view upon it. Lady Hale advanced alternative reasoning in support of the decision. Whether the decision can be supported on those or other grounds will have to await a case in which the question arises for decision.

(3) Does a challenge to the imposition of a temporary exclusion order otherwise involve the "determination" of a "civil right"?

(i) The relevant principles

87. It is common ground between the parties that the reporting and appointments obligations imposed upon the claimant in the present case were sufficiently intrusive to constitute interferences with his rights under article 8 of the Convention, as given effect in domestic law by the Human Rights Act. It is also common ground that those rights are "civil rights" within the meaning of article 6(1). Since the review of the decision to impose those obligations will determine whether the interference with those rights was lawful, and will therefore be decisive of the claimant's civil rights, it is undisputed that article 6(1) applies to the obligations review in this case.

88. The question which arises is whether, as the Court of Appeal held, the review of the decision to impose the temporary exclusion order (and the review of the related decisions that conditions A and B were met, and that condition B continued to be met, in relation to the imposition of the order) will also determine whether the interference with the claimant's civil rights resulting from the reporting and appointments obligations was lawful, and will therefore also be decisive of the claimant's civil rights.

89. It is important to make clear that the question is not whether article 6(1) always applies to the review of a decision to impose a temporary exclusion order (or to the review of the related decisions that the necessary conditions were and continued to be met). Nor is the question whether article 6(1) applies to such a review whenever obligations have been imposed under section 9 of the 2015 Act. The question is whether article 6(1) applies to an imposition review in circumstances where obligations have been imposed under section 9 which interfere with an individual's "civil rights".

90. The Court of Appeal's conclusion that article 6(1) applies in those circumstances was based on the fact that the validity of the temporary exclusion order is a condition precedent to the imposition of the obligations in question. As explained earlier (at para 15 above), obligations can be imposed under section 9(1) only on "an individual who—(a) is subject to a temporary exclusion order". On a review of the decision to impose the order under section 11, the court applies the principles applicable on an application for judicial review: section 11(3). The review is therefore one of the lawfulness of the decision. If the decision is quashed on a review under section 11, it follows that there was no lawful basis for the imposition of the obligations. Accordingly, it was accepted on behalf of the Secretary of State that a quashing of a temporary exclusion order must result in the quashing of the obligations.

91. The Secretary of State's argument that article 6(1) does not apply rests on the fact that, if the review results in the decision to impose the temporary exclusion order being upheld, the obligations imposed under section 9 will be unaffected by that outcome. As counsel for the Secretary of State put their argument, a quashing of a temporary exclusion order must result in the quashing of the obligations, but the reverse is not true. Accordingly, again as counsel for the Secretary of State put it, an imposition review is only "potentially" decisive of any article 8 rights interfered with by subsequent obligations. That is clearly correct, but the question is whether being potentially decisive is enough to engage article 6(1).

92. As explained earlier, proceedings must lead to a "determination" of civil rights or obligations in order for article 6(1) to apply. Where there are two distinct sets of proceedings, only one of which is immediately concerned with civil rights, it is clear that article 6(1) can apply to both sets of proceedings, provided they are sufficiently closely linked. The point was first established in the case law of the European court in *Deumeland v Germany* (1986) 8 EHRR 448, which concerned a complaint that proceedings before the German courts had violated the reasonable time guarantee in article 6(1). The question arose whether proceedings before the Constitutional Court should be taken into account in the computation of time. The Constitutional Court had no jurisdiction to rule on the merits of the applicant's case, but he had referred the proceedings to that court for it to consider various complaints which he had made about the proceedings before the ordinary courts. The European court, sitting in plenary, held that article 6(1) applied to the proceedings before the Constitutional Court, because "although it had no jurisdiction to rule on the merits, its decision was capable of affecting the outcome of the claim" (para 77). That approach has been followed in subsequent cases.

93. The point is illustrated by the case of *Ruiz-Mateos v Spain* (1993) 16 EHRR 505, which concerned the legislative expropriation of the applicants' shares in a group of companies. The applicants instituted civil proceedings for the restitution of the shares. Questions as to the constitutionality of the legislation were also referred to the Spanish Constitutional Court. Article 6(1) was held to apply to the proceedings concerning the

constitutionality of the legislation as well as to the proceedings for the restitution of the shares. The European court, sitting in plenary, stated (para 35) that "proceedings in a Constitutional Court are to be taken into account for calculating the relevant period [for the 'reasonable time' guarantee under article 6(1)] where the result of such proceedings is capable of affecting the outcome of the dispute before the ordinary courts". On the facts of the case, it concluded (para 59):

> "The court observes that there was indeed a close link between the subject matter of the two types of proceedings. The annulment, by the Constitutional Court, of the contested provisions would have led the civil courts to allow the claims of the Ruiz-Mateos family. In the present case, the civil and the constitutional proceedings even appeared so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants' rights."

As Lord Dyson commented in *R (G) v Governors of X School* [2012] 1 AC 167, para 53, it is as if the proceedings before the Constitutional Court and the civil court were all part of the same proceedings.

94. That reasoning has been followed in subsequent cases concerned with constitutional challenges which are closely linked to other proceedings in which civil rights are directly at stake. For example, the case of *Lizarraga v Spain* (2004) 45 EHRR 45 concerned a government decision to construct a dam which would result in the flooding of the village where the applicants lived. An association of villagers, including the applicants, brought legal proceedings to challenge the decision on grounds of administrative law, in which it succeeded before the Spanish Supreme Court. In the meantime, the legislature enacted legislation which, it was argued, enabled the project to proceed notwithstanding the Supreme Court's decision. Further proceedings then took place to determine the effect of the Supreme Court's decision in the light of the legislation. These resulted in the reference of questions to the Spanish Constitutional Court. The association was unable to take part in the proceedings before that court, and the applicants subsequently complained of a violation of their rights under article 6(1). The European court accepted that article 6(1) applied to the proceedings before the Constitutional Court, stating (para 47):

> "While the proceedings before the Constitutional Court ostensibly bore the hallmark of public-law proceedings, they were nonetheless decisive for the final outcome of the proceedings brought by the applicants in the ordinary courts to have the dam project set aside. In the instant case, the administrative and constitutional proceedings even appeared

> so interrelated that to have dealt with them separately would have been artificial and would have considerably weakened the protection afforded in respect of the applicants' rights."

95. These cases and others were considered by this court in *R (G) v Governors of X School* [2012] 1 AC 167. That case again concerned two sets of proceedings: first, disciplinary proceedings before the governors of a school, in which the claimant was accused of forming an inappropriate relationship with a child while working at the school as a teaching assistant; and secondly, an investigation by the Independent Safeguarding Authority ("the ISA"), which could include the claimant in the statutory list of persons barred from working with children generally. The claimant was refused legal representation at the disciplinary hearing before the school governors, and the allegation against him was found to be proved. He was then dismissed from his employment by the school. The school reported the circumstances to the Secretary of State, who referred the case to the ISA for its consideration. The claimant argued that article 6(1) applied to the disciplinary proceedings, and had been breached by the refusal to allow him legal representation.

96. It was common ground that the claimant's right to practise his profession as a teaching assistant and to work with children was a civil right within the meaning of article 6(1). It was also accepted that this right would be directly determined by a decision of the ISA. The claimant's argument was that the disciplinary proceedings would have such a powerful influence on the ISA proceedings that article 6(1) was engaged in both sets of proceedings. The question therefore arose as to the type of connection which was required between proceedings in which an individual's civil rights were not being explicitly determined, and proceedings in which they were, for article 6(1) to apply to the former proceedings as well as the latter.

97. Lord Dyson analysed the European case law in a judgment with which Lord Hope, Lord Walker, Lord Brown and, in relation to that analysis, Lord Kerr agreed. It is unnecessary to repeat Lord Dyson's conclusions in full, but the first principle which he articulated is relevant to the present case (para 64):

> "First, it is clear that it is a sufficient condition for the application of article 6(1) in proceedings A that a decision in those proceedings will be truly dispositive of a civil right which is the subject of determination in proceedings B."

Lord Dyson cited *Ruiz-Mateos v Spain* and *Lizarraga v Spain* as examples of the application of this principle.

98. The third principle identified by Lord Dyson, which concerns the closeness of the link between the relevant proceedings, is also material (para 66):

> "How close does the link have to be for article 6(1) to apply? In *Balmer-Schafroth* 25 EHRR 598, the court said that there had to be a 'sufficiently close' link. That begs the question: does the link have to be sufficient to be dispositive of the decision or is it enough that it is likely to have some influence on it? In *Ruiz-Mateos* 16 EHRR 505, the court said that the test was whether the decision of the constitutional court was capable of affecting the outcome of the proceedings in which the civil rights were to be determined. In most cases where a constitutional question which arises in the course of a civil dispute is referred to a constitutional court, the decision of that court is likely to be capable of being determinative of the dispute. *Ruiz-Mateos* was one such case."

99. Lord Dyson summarised the effect of the European case law as follows (para 68):

> "Thus, in deciding whether article 6(1) applies, the [European court] takes into account a number of factors including (i) whether the decision in proceedings A is capable of being dispositive of the determination of civil rights in proceedings B or at least causing irreversible prejudice, in effect, by partially determining the outcome of proceedings B; (ii) how close the link is between the two sets of proceedings; (iii) whether the object of the two proceedings is the same; and (iv) whether there are any policy reasons for holding that article 6(1) should not apply in proceedings A."

100. Lord Dyson approved the Court of Appeal's test of asking, where an individual was subject to two or more sets of proceedings, or two or more phases of a single proceeding, and a civil right or obligation enjoyed or owed by him would be determined in one of them, whether the outcome of the other proceedings would have a "substantial influence or effect" on the determination of the civil right or obligation (para 69, citing Laws LJ in the Court of Appeal [2010] EWCA Civ 1; [2010] 1 WLR 2218, para 37). Lord Dyson stated (ibid):

> "In my view, this is a useful formulation. It captures the idea of the outcome of proceedings A being capable of playing a 'major part in the civil right's determination' in proceedings

> B. That is what fairness requires. Anything less would be 'excessively formalist' (see para 87 of the Commission's opinion in *Ruiz-Mateos* 16 EHRR 505) and would give too much weight to the fact that the two sets of proceedings are, as a matter of form, separate. The focus should be on the substance of the matter. The court should always keep in mind the importance of ensuring that the guarantees afforded by article 6(1) are not illusory. It is clearly established that, where a decision in proceedings A is dispositive of proceedings B, article 6(1) applies in proceedings A as well as in proceedings B. That is what the right to a fair hearing in proceedings B requires. Why does fairness not require the same where the decision in proceedings A, although it is not strictly determinative, is likely to have a major influence on the outcome in proceedings B? As a matter of substance, there is not much difference between (i) an outcome of proceedings A which has a major influence on the result in proceedings B and (ii) an outcome of proceedings A which is dispositive of the result in proceedings B. In each case, the civil right of the person concerned is greatly affected by what occurs in proceedings A. If there is to be a difference in the application of article 6(1) between the two cases, it needs to be justified. There may be policy reasons (such as those referred to in [*Fayed v United Kingdom* (1994) 18 EHRR 393]) based on the nature of the body charged with proceedings A which justify a different approach. But absent such policy reasons, it is difficult to see why article 6(1) should not apply in both cases."

101. Applying that approach to the facts, the court held (by a majority) that article 6(1) did not apply to the disciplinary proceedings, notwithstanding the link between the outcome of those proceedings and the ISA investigation. That was because the ISA "is required to make its own findings of fact and bring its own independent judgment to bear as to their seriousness and significance before deciding whether it is appropriate to place the person on the barred list" (para 79), and "[there] is no reason to suppose that the ISA will be influenced profoundly (or at all) by the school's opinion of how the primary facts should be viewed" (para 83).

102. That decision reflects the fact that article 6(1) is concerned to secure fairness as a matter of substance. On the view of the facts which was taken by the majority of the court, the claimant would not be prejudiced in the ISA proceedings, where his civil rights were at stake, by what happened in the disciplinary proceedings. Although his conduct towards the child would be considered in both sets of proceedings, the ISA would reach its own conclusion, without being influenced substantially (or indeed at all)

by the earlier disciplinary proceedings before the school governors. The claimant's right to a fair hearing could therefore be fully secured by the ISA proceedings alone.

(ii) Application to the present case

103. It is necessary next to apply the principles established by the European court and summarised by Lord Dyson to the facts of the present case. It is apparent from the terms of section 2(2) of the 2015 Act (see para 10 above) that the purpose of a temporary exclusion order is to protect members of the public in the United Kingdom from a risk of terrorism. However, the effects of the order—leaving out of account any obligations which may be imposed—will ordinarily be insufficient to achieve that objective. The order controls the timing and manner of individuals' return to the United Kingdom, but does not of itself restrict their conduct once they are in the United Kingdom, other than by invalidating their passports and thereby limiting their ability to leave the United Kingdom. The means by which the order protects members of the public in the United Kingdom from a risk of terrorism, ordinarily if not invariably, is by enabling the Secretary of State to impose suitable obligations under section 9. The application made to the court under section 3, for permission to impose the order, can normally be expected to justify its imposition on the basis that the obligations to be imposed under section 9 are necessary for the protection of the public, as the application did in the present case.

104. Accordingly, although the decision to impose the order and the decision to impose obligations are conceptually distinguishable, and are made under different provisions of the legislation, in practice they cannot ordinarily be clearly separated. In reality, the order and the obligations are in most if not all cases effectively the two component parts of a single mechanism. That is reflected in the fact that obligations only endure for as long as the order remains in force (section 9(3)), and fall in the event that the order is quashed on a review under section 11(2).

105. The inter-connectedness of the order and the obligations, apparent from the legislation itself, is reflected in the administrative procedures through which the order and the obligations come to be imposed. As explained in para 26 above, the TEO Liaison Group considers the case for imposing a temporary exclusion order together with the appropriate obligations. Ministers then receive a submission making recommendations in relation to both the order and the obligations for their agreement. The quarterly reviews that take place during the currency of the order consider the continuing necessity and proportionality of both the order and the obligations in order to protect the public in the United Kingdom from the risk of terrorism.

106. The close connection between the order and the obligations is also reflected in the inextricable linkage of the imposition review and the obligations review. Although

section 11(2) of the 2015 Act distinguishes between, on the one hand, a review of (a) a decision that any of conditions A to D was met, (b) a decision to impose the order, and (c) a decision that condition B continues to be met (ie that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the individual), and, on the other hand, (d) a decision to impose obligations, in reality these reviews are less distinct than the legislation might at first sight be thought to suggest.

107. That can be seen, first, in the fact that the most obvious reason for applying for a review under section 11(2)(a) of whether conditions A to D were met, or for a review under section 11(2)(b) of the imposition of a temporary exclusion order, or for a review under section 11(2(c) of whether condition B has continued to be met, is in order to obtain the termination of the obligations imposed under section 9. That is because it will generally be those obligations (and those obligations alone) which impose a significant restriction on the individual's activities. For that reason, it is reasonable to expect that a review under section 11(2)(a), (b) or (c) is likely to go together with a review under section 11(2)(d).

108. In addition, the most obvious reason why individuals would want to challenge the decision to impose obligations or to maintain them in force is that they deny having been involved in terrorism-related activities, and consequently dispute the Secretary of State's position that he had reasonable grounds to suspect that they had been involved in terrorism-related activity outside the United Kingdom, or reasonably considered that it was necessary to impose the order, or to maintain it in force, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism. If the question whether conditions A and B were met cannot be determined in an obligations review under section 11(2)(d), as is common ground between the parties to this appeal, it would (for that very reason, as well as the reason explained in the preceding paragraph) be reasonable to expect that such a review will ordinarily be accompanied by a review under section 11(2)(a), (b) and (c) (or one or more of those provisions). There is thus likely to be, in most cases, a substantive overlap between a review relating to the imposition of the order and a review relating to the imposition of the obligations.

109. The present case illustrates these points. The claimant's only interest in challenging the imposition of the order, and the decisions that the conditions were met, is to secure the quashing of the obligations, as explained in para 36 above. He seeks the review of the decision to impose and maintain the order, and the decision to impose and maintain the obligations, on one and the same ground:

> "[The claimant] has not engaged in terrorism-related activity outside the United Kingdom and it is not reasonable to suspect

> that he engaged in such activity. Further and alternatively, any activity in which [the claimant] has engaged did not render it necessary and proportionate to impose a [temporary exclusion order] upon him or to have maintained the [order] until 25 November 2020. The national security case against [the claimant] is … that [the claimant] 'held a significant leadership role in an al-Qaeda aligned group during his time in Syria'. As set out in [the claimant]'s fourth witness statement, that allegation is denied. [The claimant] has never been a member of, or aligned with, any 'al-Qaeda aligned group' let alone held a significant role in such a group, and he explains the nature of his activities in Syria between 2013 and 2018." (Claimant's amended application for review)

The claimant also challenges the imposition of the obligations on the ground that they were unnecessary and disproportionate in any event.

110. An overlap between the substance of the imposition review and the obligations review is likely to be reflected in an overlap in the relevant evidence. That is again illustrated by the present case. The claimant challenges the Syria allegation in both the imposition review and the obligations review. It is common ground that he is entitled to do so, and that there is therefore an overlap between the evidence relevant to both reviews.

111. Where there is a substantive and evidential overlap, there is also likely to be a procedural overlap. Given the legal and evidential linkage between the imposition review and the obligations review, it is likely to be sensible for them to be heard at the same time by the same judge. In the present case, for example, Farbey J and the Court of Appeal dealt with the preliminary issues together; and Farbey J contemplated that the remaining issues in the reviews would be heard together by herself.

112. Nevertheless, the distinction between the imposition review and the obligations review remains significant. It is only in the imposition review that the court will consider and decide whether conditions A and B were met in relation to the imposition of the temporary exclusion order, and whether condition B continued to be met: that is to say, whether the Secretary of State reasonably suspected that the claimant was, or had been, involved in terrorism-related activity outside the United Kingdom, and reasonably considered that it was necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the claimant. Although both parties accept that the national security case is also open to challenge in the obligations review, as part of the review of the Secretary of State's assessment that the obligations were and remained necessary and proportionate, the questions whether conditions A and B were met, and whether

condition B continued to be met, will have been finally determined in the imposition review. If those matters have been determined in the Secretary of State's favour, that will in most cases mean that a large part, at least, of the justification for imposing the obligations has been established, and cannot be examined afresh.

113. Considering next the application of article 6(1) in this context, Farbey J held in her first judgment ([2021] QB 315, para 68) that article 6(1) applies to the obligations review, because the obligations imposed interfered with the claimant's article 8 rights, and that the claimant is accordingly entitled to disclosure of information relevant to the Syria allegation, in accordance with the principles set out in *AF (No 3),* for the purposes of that review (see paras 28(6) and 31 above). That decision is not challenged.

114. In considering whether article 6(1) also applies to the imposition review, and the related reviews of whether the relevant conditions were met, the submissions of counsel for the Secretary of State are illuminating. As they explain in a note submitted during the hearing:

> "it should not be assumed that if *AF (No 3)* disclosure regarding the Syria allegation is given to [the claimant] in the obligations review, *AF (No 3)* disclosure concerning the Syria allegation is therefore also being given in the imposition review, even if the terms of the open disclosure are the same in both reviews. This is because the closed national security material concerning the Syria allegation may not necessarily be the same in both the imposition review and the obligations review. Depending on the content of the closed national security material, it is possible that the same form of open words would be sufficient disclosure to satisfy *AF (No 3)* in the obligations review, but would not be sufficient to satisfy *AF (No 3)* in the imposition review. This is why the [Secretary of State's] acceptance of [the claimant's] entitlement to *AF (No 3)* disclosure concerning national security matters in the obligations review is not a concession that [the claimant] is entitled to *AF (No 3)* disclosure of the Syria allegation in the imposition review."

115. The implication is that if article 6(1) does not apply to the imposition review, it will be possible for the Secretary of State to rely on different evidence (in closed proceedings) in relation to the Syria allegation in that review from the evidence adduced in the obligations review, where open disclosure will be necessary in accordance with *AF (No 3).* On this basis, counsel go on to state that a decision as to whether article 6(1) applies to the claimant's imposition review could affect the content of the closed material on which the Secretary of State relies in that review.

116. Accordingly, if article 6(1) does not apply to the imposition review, then it is likely that evidence relied on to establish that the Secretary of State reasonably suspected that the claimant was, or had been, involved in terrorism-related activity outside the United Kingdom, and reasonably considered that it was and continued to be necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the claimant, will not be disclosed to the individual affected. That evidence will have been relied on to justify the imposition of the order—a primary object of which is to enable the obligations to be imposed, and which must be obtained on a proper basis if the obligations are to be validly imposed. The Secretary of State will obtain the benefit of that evidence in defending the imposition of the order, thereby sustaining the legal basis of the obligations, but the evidence will not be disclosed to the individual and he or she will not have a fair opportunity to challenge or explain it.

117. This situation differs from the circumstances of *R (G) v Governors of X School,* where the outcome of the disciplinary proceedings before the governors would not influence the outcome of the independent ISA investigation, with the result that the claimant's article 6(1) rights were fully secured by the procedure followed by the ISA, notwithstanding the absence of fair trial guarantees at the earlier stage of the disciplinary proceedings (see para 101 above). In contrast, in the present case, if the Secretary of State's submission is accepted, and if the temporary exclusion order is upheld in the imposition review, the claimant will be unable to challenge in the obligations review the findings which were made in the imposition review. The court will not undertake the obligations review with a clean slate, considering in the light of the evidence before it, and nothing else, whether the Secretary of State's decision to impose the obligations, and to maintain their imposition, was or was not sustainable. Instead, it will have to consider the imposition of the obligations on the basis, established in the imposition review, that the Secretary of State reasonably suspected that the claimant was, or had been, involved in terrorism-related activity outside the United Kingdom, and reasonably considered that it was and continued to be necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed. Any challenge which the claimant may make to the imposition of the obligations will be considered against the background of those findings, made on the basis of evidence which he has not had a fair opportunity to challenge.

118. In those circumstances, it can be said, in the language used in *R (G) v Governors of X School,* that the outcome of the imposition review will have a substantial influence or effect on the determination of the claimant's civil rights. More simply, it can be said that the claimant is not in substance being given a fair opportunity to challenge the basis on which the obligations were imposed.

119. The contrary argument of the Secretary of State, based on the separate treatment under section 11 of the 2015 Act of the review of the imposition of the temporary

exclusion order, on the one hand, and the review of the permitted obligations, on the other hand, gives too much weight to matters of form. As has been explained at paras 106–112 and 116–117 above, although the two reviews can be distinguished, they are inextricably linked. In the words used by the European court in *Ruiz Mateos* 16 EHRR 505, para 59 (see para 93 above), they are "so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants' rights."

120. As Lord Dyson said in *R (G) v Governors of X School* [2012] 1 AC 167, para 69, the focus should be on the substance of the matter. As a matter of substance, where (1) the permitted obligations result in an interference with civil rights, (2) the validity of those obligations depends on the validity of the order which enabled them to be imposed, and (3) evidence may be adduced at the imposition review in justification of the decision to impose the order which the individual will not have a fair opportunity to rebut or explain at the obligations review, but which will influence or affect the outcome of that review, it follows that the article 6(1) rights of the affected individual cannot be fully guaranteed by disclosure of the evidence relied on at the obligations review alone. In those circumstances, article 6(1) must also apply to the imposition review.

8. Conclusion

121. For all these reasons, I would dismiss the Secretary of State's appeal. It follows that disclosure of the evidence relied on in support of the Syria allegation must be given, as required by article 6(1) of the Convention, at the hearing of the imposition review as well as in the obligations review where, as here, the obligations imposed by the temporary exclusion order are sufficiently intrusive to engage the claimant's civil rights.