Neutral Citation Number: [2020] EWHC 1221 (Admin)

Case No: QX (PTA/10/2019)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 May 2020

Before :

MRS JUSTICE FARBEY

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Between :

QX	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Mr Dan Squires QC & Ms Joanna Buckley (instructed by **ITN Solicitors**) for the **Claimant**
Mr Robin Tam QC & Mr Steven Gray (instructed by the **Government Legal Department**) for the **Defendant**
Special Advocates: Ms Shaheen Rahman QC & Ms Rachel Toney (instructed by the **Special Advocates' Support Office**)

Hearing dates: 17 & 18 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MRS JUSTICE FARBEY:

Introduction

1. The claimant (who is subject to an anonymity order and who shall be known only as QX) applies under section 11(2)(d) of the Counter-Terrorism and Security Act 2015 (the 2015 Act) for a review of two obligations imposed on him after his return to the United Kingdom under a Temporary Exclusion Order (TEO). The obligations are that:

   i. He must report daily to a named police station between specified hours; and;

   ii. He must each week attend a two-hour appointment with a mentor from the Home Office Desistance and Disengagement Programme (DDP) and a two-hour appointment with a theologian.

   A third obligation – that he must notify the police within 72 hours of a change of place of residence – is not challenged.

2. At a preliminary hearing, I heard submissions on four issues:

   i. Whether article 6(1) of the European Convention on Human Rights (the Convention) applies to a review under section 11(2)(d);

   ii. If so, whether QX is entitled to the level of disclosure in cases that fall within the principles set down by *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269;

   iii. If so, whether the level of disclosure which the Secretary of State has already provided to QX meets the *AF (No 3)* test; and

   iv. Whether QX should be provided with certain specific material relating to the mentoring and theological sessions. QX submits that the material will assist his argument that the sessions serve no useful purpose such that his attendance cannot be regarded as a necessary and proportionate obligation.

3. I heard submissions in open court on all issues from Mr Dan Squires QC with Ms Joanna Buckley on behalf of QX and Mr Steven Gray on behalf of the Secretary of State. I heard submissions in closed session on the third and fourth issues. During the closed session, I heard submissions from Mr Gray and from the special advocates (Ms Shaheen Rahman QC with Ms Rachel Toney). I also had the benefit of a written Note from Mr Squires and Ms Buckley which I considered in closed with the special advocates' assistance.

4. In a Note to the parties dated 30 March 2020, I directed further submissions on the interaction of the various statutory provisions that are key to this judgment. The parties provided helpful written submissions (Mr Robin Tam QC, who did not appear at the hearing, taking the reins for the Secretary of State due to Mr Gray's illness). I have considered those submissions as well as everything that was said at the hearing.

Factual background

5. QX is a British national. He is married with three children who are all of toddler age. In October 2018, he and his wife were arrested in Istanbul. On 26 November 2018, the Secretary of State applied to this court for permission to impose a TEO on QX for two

years on grounds of national security. Permission was granted by Ouseley J on the same day. Notice of the order was at that stage served on QX's solicitors.

6. The order required QX not to return to the United Kingdom other than in accordance with a permit to return or as the result of being deported. His passport would be invalidated (in accordance with section 4(9) of the 2015 Act) and he would be guilty of an offence if he were to return to the United Kingdom in breach of the TEO.

7. The TEO had a section dealing with what would happen after QX returned to the United Kingdom. This section stated that the Secretary of State might impose "permitted obligations" on him. If such obligations were to be imposed, QX would be given notice of the obligations after his return. The notice would remain in force until the TEO ended or until the notice was revoked or replaced. The obligations under the notice were capable of being varied.

8. On 9 January 2019, QX was deported from Turkey and returned to the United Kingdom under the terms of a permit to return. On arrival, he was served with a copy of the TEO and (at the same time) with an initial Notice of Obligations. The obligations included a requirement to give 72 hours' notice to the police of any change in his place of residence, as well as requirements to report daily to a police station and to attend appointments with a DDP mentor. On 16 January 2019, a fresh Notice of Obligations was served which gave details of the mentor appointments. QX was required to attend appointments twice a week for two-hour sessions.

9. QX has for a substantial period refused to engage with mentoring sessions. He has been a party to proceedings in the Family Court and subject to criminal investigation. He has expressed concern that anything he said during a mentoring session would be used against him in court. In his witness statement made for the purposes of these proceedings, he says that from March 2019 he spent the mentoring appointments playing chess with the mentor and engaging in minimal conversation. The appointments then moved to a library. Since then, he has spent the time reading a book which he brings with him.

10. The Secretary of State has considered a number of requests by QX to vary the obligations, either on a temporary or on a permanent basis. I need not set out here the nature or details of each request. Two examples suffice to give the flavour. On 13 February 2019, QX's reporting obligation was rescheduled to enable him to attend a job interview; and from 6 June to 9 June 2019, the period within which he had to report to the police was altered so that he could spend time with his family during Eid.

11. On 19 June 2019, QX's solicitors requested that the mentor appointments be suspended while he remained under criminal investigation and that his reporting obligation be reduced to once a week in person, with other reporting to be undertaken by telephone. The solicitors stated that QX wished to take up employment but had been prevented from attending interviews by the reporting obligation which was also having an impact on his private and family life. They noted that there had been no formal indication that material gathered from the mentor appointments would not be passed to the police or Crown Prosecution Service, and expressed concern that they were not confidential. There was in any event little point in QX's attendance at the appointments.

12. By letter dated 5 July 2019, the Home Office refused these variation requests on the grounds that the obligations in their current form remained necessary and proportionate for protecting the public from a risk of terrorism. As regards the mentoring appointment, QX was "under no compulsion to divulge information to his mentor." The Crown had not

sought to rely on the product of mentoring sessions in a criminal trial. The admissibility of evidence would be determined by the trial judge who would consider the fairness of proceedings under section 78 of the Police and Criminal Evidence Act 1984.

13. On 4 October 2019, a fresh Notice of Obligations was sent to the claimant's solicitors. The notice contained the requirement to attend appointments with a theologian once a week for two hours at places notified to the claimant by the theologian. The appointments with the mentor were correspondingly reduced to once a week for two hours. In his witness statement, QX indicates that he has never engaged with the theologian: he reads a book during each session.

14. On 17 October 2019, QX's solicitors requested information about his new mentor, specifically what qualifications and experience he had; who had employed or engaged him; and whether he processed QX's personal information in accordance with data protection legislation. In relation to the theologian, the solicitors requested similar information as well as information relating to the purpose of the appointments.

15. On 20 December 2019, the Home Office replied to the correspondence saying that the obligations under the TEO would continue in their current form. The solicitors' requests for information could be addressed in the present proceedings which had by that time been launched.

Home Office assessment

16. As to the grounds for imposing the TEO, the Secretary of State has informed QX that he is assessed to have travelled to Syria and to have aligned with a group that is aligned to Al-Qaeda (AQ). The Secretary of State assesses that:

> "anyone who has travelled voluntarily to align with an AQ-aligned group demonstrates a high level of commitment to the ideology and aims of AQ and is aware of the attacks that it has carried out. Furthermore, we assess that an individual aligning with an AQ-aligned group will be subject to radicalisation and desensitised to violence, so this ideological commitment is likely to remain, or even grow stronger."

17. The assessment goes on to say that the threat from AQ-aligned individuals who return to the United Kingdom from Syria could manifest itself in a number of ways including violent attacks, recruitment of UK-based associates, and providing support to AQ operatives. The Secretary of State assesses that QX poses a significant terrorism-related risk to members of the public. A TEO is both necessary and proportionate to manage, understand and mitigate the risk which he poses. The obligations under the TEO were necessary and proportionate when they were imposed and continue to be necessary and proportionate.

Legal framework

Imposition of a TEO

18. Under section 2(1) of the 2015 Act, a TEO is 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…, or
>
> (b) the return is the result of the individual's deportation to the United Kingdom."

19. The Secretary of State may impose a TEO on an individual if conditions A-E are met (section 2(2) of the 2015 Act). They are:

    Condition A: The Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom;
    Condition 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 the individual;
    Condition C: The Secretary of State reasonably considers that the individual is outside the United Kingdom;
    Condition D: The individual has the right of abode in the United Kingdom; and
    Condition E: The court gives the Secretary of State permission under section 3.

20. Prior to imposing a TEO, the permission of this court must be granted (section 3 of the 2015 Act) save in urgent cases (Schedule 2 to the Act). On an application for permission, the court must determine whether the Secretary of State's decisions on Conditions A to D are "obviously flawed" (section 3(2) and 3(10)). The court must apply the principles applicable on an application for judicial review (section 3(5)).

21. A TEO will remain in force for a period of two years but may be revoked or otherwise brought to an end earlier (section 4(3)(b) of the 2015 Act). A person's British passport is invalidated at the time when a TEO comes into force (section 4(9)).

Permit to return

22. It is possible for a person to enter and remain in the United Kingdom during the currency of a TEO. Section 5 of the 2015 Act permits individuals to enter under a "permit to return." Permission may be made subject to a requirement that the individual comply with conditions specified in the permit which will state when the individual is permitted to arrive in the United Kingdom, the manner in which he is permitted to return (the route and method of transport) and the place where the return will take place. Section 5 enables the Secretary of State to know of and manage an individual's return and to serve all necessary documents relating to the TEO on the individual's arrival.

23. If an individual applies for a permit to return, the Secretary of State must (subject to conditions which are not relevant here) issue a permit within a reasonable period (section 6(1) of the 2015 Act). The Secretary of State must issue a permit to return to an individual who stands to be deported to the United Kingdom (section 7(1)).

Obligations after return to the United Kingdom

24. A person who is subject to a TEO and has returned to the United Kingdom may by notice be required to comply with certain "permitted obligations" (section 9(1) of the 2015 Act). The permitted obligations are exhaustively defined by section 9(2). They include an obligation to report to a police station and an obligation to attend at appointments. Both

these obligations are (by virtue of section 9(2)(a)) intended to mirror similar obligations imposed on individuals subject to a TPIM notice under Schedule 1 to the Terrorism Prevention and Investigation Measures Act 2011. An individual may also be required to notify the police of, and any change to, his place of residence. The Secretary of State may issue a further notice varying or revoking a previous notice of obligations (section 9(4)).

25. An individual subject to a section 9 obligation is guilty of an offence if, without reasonable excuse, he does not comply with the obligation (section 10(3) of the 2015 Act). The maximum sentence is five years following trial on indictment (section 10(5)(a)).

Closed material procedure

26. An individual who is subject to a TEO and who is in the United Kingdom may apply to this court for a review of (among other things) the imposition of the TEO and the decision to impose any of the section 9 obligations (section 11(2)(b) and (d)) of the 2015 Act). In determining the review, the court must apply the principles applicable on an application for judicial review (section 11(3)).

27. Schedule 3 to the 2015 Act makes provision for a closed material procedure subject to rules of court. Material in TEO proceedings may be withheld from an individual and his legal representatives. Closed sessions may take place from which the individual and his representatives are excluded and in which a special advocate represents the individual's interest. Rules of court modify the overriding objective in Part 1 of the Civil Procedure Rules to the extent that the court must ensure that information is not disclosed contrary to the public interest (CPR 88.2(2)). Subject to that duty, the court must satisfy itself that the material available to it enables it properly to determine proceedings (CPR 88.2(3)).

28. As in other closed material procedures, the Secretary of State must apply to the court for permission to rely on closed material (CPR 88.27). The special advocate may object to material being kept in closed (CPR 88.28). The court must give permission to the Secretary of State to withhold material where it considers that disclosure would be contrary to the public interest (CPR 88.28(8)).

29. If the court accepts the special advocate's objection and does not give permission to the Secretary of State to withhold sensitive material, the Secretary of State is not required to serve that material. If the Secretary of State decides not to do so, the court may (in relation to material that might be of assistance to the person from whom it has been withheld) direct that the matter to which it relates is withdrawn from the court's consideration or direct that the Secretary of State make an appropriate concession or take other steps. In relation to material that does not assist the person from whom it has been withheld, the court may direct that the Secretary of State must not rely on that material (CPR 88.28(7)).

30. As Mr Squires emphasised in his submissions, the closed material procedure and the use of special advocates is for all material purposes similar to the procedure in other statutory contexts, such as asset-freezing proceedings (see CPR Part 79), TPIM proceedings (see CPR Part 80) and the now-repealed provisions of the Prevention of Terrorism Act 2005 for control orders (see CPR Part 76 which remains in the White Book).

The right of abode

31. British citizens are entitled to enter the United Kingdom by virtue of the right of abode. That right is laid down by section 2(1)(a) of the Immigration Act 1971. The nature and extent of the right is contained in section 1(1) of the 1971 Act which among other things 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".

32. Those who do not have a right of abode require permission to enter or remain in the United Kingdom (section 1(2) of the 1971 Act). Permission may be subject to "restrictions" in immigration rules and to "conditions" (section 1(4) of the 1971 Act).

Article 6(1) of the Convention

33. The right to a fair trial is enshrined in article 6 of the Convention which has both a civil and a criminal aspect. In relation to the civil aspect, article 6(1) lays down the principle of open justice as follows:

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

34. The concept of "civil rights and obligations" cannot be interpreted solely by reference to national law but has an autonomous meaning within article 6(1) (*Ferrazzini v Italy* (2002) 34 EHRR 45, para 24). The European Court of Human Rights has commented that there has been a shift in its case law towards applying the civil aspect of article 6(1) to cases which "might not initially appear to concern a civil right" but which may have "direct and significant repercussions on a private right" (*De Tommaso v Italy* (2017) 65 EHRR 19, para 151). The administrative or public law character of the legislation which governs the question to be determined and the public nature of the authority whose decision is challenged have been held to be "of little consequence" (*Ringeisen v Austria (No 1)* (1979-1980) 1 EHRR, para 94). It follows that procedures classified domestically as relating to public law can come within the "civil" aspect of article 6(1) if "the outcome was decisive for private rights and obligations" (*Ferrazzini*, para 27).

35. There remain areas of public law which cannot be classed as involving "civil rights and obligations." The Court in *Ferrazzini* held, at para 29, that the obligation on individuals or companies to pay tax is fundamentally and predominantly a matter of public law. A state's powers of taxation remain within the "hard core of public-authority prerogatives" and do not engage article 6.

36. In similar fashion, in *Maaouia v France* (2001) 33 EHRR 42, the Court held that the decision whether or not to authorise a non-national to remain in a host country does not entail any determination of his civil rights. The fact that an expulsion order may have major repercussions on an individual's private and family life is incidental to the exercise

of state powers to take administrative measures for the purpose of immigration control. Those incidental effects do not bring expulsion proceedings within the scope of article 6.

37. In the context of control orders, the Secretary of State conceded in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, para 15, that proceedings fell within the civil aspect of article 6(1) because they were at least in some respects decisive for civil rights. That concession was maintained in *AF (No 3)* which became the leading authority on whether the procedure that resulted in the making of a control order and the Secretary of State's reliance on closed material in a closed hearing satisfied the right to a fair hearing guaranteed by article 6(1). Lord Phillips gave the leading speech in which he considered the effect of the decision of the Grand Chamber of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625, GC, which had considered the scheme for a closed material procedure in reviews of executive orders made under the now-repealed provisions of the Anti-terrorism, Crime and Security Act 2001. Lord Phillips observed at para 57:

> "The Grand Chamber was dealing with applicants complaining of detention contrary to article 5(1). The relevant standard of fairness required of their trials was that appropriate to article 5(4) proceedings. The Grand Chamber considered, having regard to the length of the detention involved, that article 5(4) imported the same fair trial rights as article 6(1) in its criminal aspect…Mr Eadie submitted that a less stringent standard of fairness was applicable in respect of control orders, where the relevant proceedings were subject to article 6 in its civil aspect. As a general submission there may be some force in this, at least where the restrictions imposed by a control order fall far short of detention. But I do not consider that the Strasbourg court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial. Were this not the case, it is hard to see why the Grand Chamber quoted so extensively from control order cases."

38. There follows the much-cited passage (at para 59) which encapsulates the test to be applied:

> "I am satisfied that the essence of the Grand Chamber's decision lies in para 220, and, in particular, in the last sentence of that paragraph. This establishes that 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".

39. In *Secretary of State for the Home Department v BC and BB* [2009] EWHC 2926 (Admin), [2010] 1 WLR 1542, Collins J considered two control orders with obligations that were considerably less restrictive than in *AF (No 3)*. The Secretary of State contended that *AF (No 3)* could be distinguished because the obligations were sufficiently "light" that they did not engage human rights. The obligations on BC were (1) to reside at his present address and give at least two working days' notice if he intended to stay overnight elsewhere; (2) to report to a nominated police station every day; (3) to surrender his passport and any other travel document, and not to travel outside Great Britain; (4) not to associate with BB without permission of the Home Office. The obligations on BB were of a similar magnitude.

40. Collins J held that the obligations imposed on BC and BB interfered with private life under article 8(1). He held (at para 20) that the control orders, even if "light", gave rise to interference with individuals' civil rights. In contradistinction to those areas of law (such as taxation) that involve state prerogative, the controls were not generally applied to all citizens but were:

> "specific and exceptional novel provisions which control the activities of individuals and prevent them from exercising all those rights which a citizen of this country generally is able to exercise."

41. Collins J went on to say (at para 25):

> "Article 8 is breached if there is a disproportionate interference with the rights set out in article 8(1). The obligations imposed do in my view interfere with the exercise by the controlees of their private lives. They are subjected to requirements, breaches of which are criminal offences…Thus they are not able to live as freely as the general population."

42. Collins J had heard argument on the question of whether Convention rights are themselves to be regarded as civil rights within the meaning of article 6(1) which had not been argued in *MB* or *AF (No 3)* owing to the concession that I have noted above. In concluding that Convention rights are civil rights, he observed (at para 29) that "there are a number of strong dicta to the effect that they are and there are none to the contrary effect." Among those strong dicta, he cited *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, para 71, in which Lord Nicholls of Birkenhead held:

> "Although a right guaranteed by article 8 is not *in itself* a civil right within the meaning of article 6(1), the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Act article 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1). This is because, now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8."

43. Collins J observed that if this passage was not part of the ratio decidendi (in the sense that it was not an essential part of the decision that the House of Lords reached), it was nevertheless "the strongest possible obiter that one can imagine" and "powerful support" for the proposition that a breach of a Convention right is a breach of a civil right which

engages article 6 (*BC and BB*, para 31). Collins J noted that Lord Nicholls's approach had been cited by Lord Hope of Craighead as stating the law in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787.

44. *BC and BB* is in my judgment binding authority for the proposition that a breach of article 8 is a breach of a civil right in the form of a statutory tort. Collins J himself stated, in *Mastafa v Her Majesty's Treasury* [2012] EWHC 3578 (Admin), [2013] 1 WLR 1621, para 14, that it was now accepted that a human right which is protected by the Human Rights Act is a civil right within article 6(1).

45. Article 6(1) will not be engaged in procedures that do not "determine" civil rights and obligations in the sense of adjudicating upon and making a dispositive legal determination of rights (*Fayed v United Kingdom* 18 EHRR 393, para 61). A tenuous connection or remote consequences will not suffice: the result of the proceedings must be "directly decisive" of a civil right or obligation (*Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1 para 47; see also *Ringeisen v Austria*, above, para 94). There must be a "genuine and serious dispute" which stands to be "conclusively settled" by a court (*De Tommaso v Italy*, above, para 153).

46. Where article 6(1) is engaged, not all cases will require the same degree of disclosure. The requirements of article 6 "depend on context and all the circumstances of the case" (*Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776, [2016] QB 595, para 23, per Lord Dyson MR). Restrictions that amount to detention or do not fall far short of detention will meet the test for full *AF (No 3)* disclosure (as is clear from *AF (No 3)*, para 57). The control orders in *BC and BB*, although less restrictive than others, were sufficiently restrictive that they fell to be treated as detention cases (*BC and BB*, paras 49-55). Outside the context of detention, the courts have held that full *AF (No 3)* disclosure is required in cases concerning asset-freezing orders (*Mastafa*, above) and administrative directions that financial institutions cease business relationships or transactions with a foreign bank (*Bank Mellat v Her Majesty's Treasury (No 4)* [2015] EWCA Civ 1052, [2016] 1 WLR 1187).

47. In *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, the claimant's security clearance had been withdrawn and he had been suspended from his employment. He commenced proceedings in the Employment Tribunal, claiming damages on grounds of race and religious discrimination. The Home Office withheld material on national security grounds. He argued that the fundamental nature of equality rights made it critical for him to receive *AF (No 3)* disclosure. The Supreme Court disagreed. Lord Mance JSC said at para 27:

> "Detention, control orders and freezing orders impinge directly on personal freedom and liberty in a way to which Mr Tariq cannot be said to be exposed….Mr Tariq also has an important interest in not being discriminated against which is entitled to appropriate protection…But the balancing exercise called for in para 217 of the judgment in *A v United Kingdom* depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself."

48. Lord Hope of Craighead DPSC emphasised that the context will always be crucial to a resolution of questions as to where and how the balance between national security and the fundamental right to a fair trial must be struck. Mr Tariq's case was entirely different from *AF (No 3)*. Where fundamental rights are severely restricted by actions of the executive, the rule of law requires a greater degree of disclosure than in cases where an individual seeks damages for discrimination (para 81).

The Parties' submissions

49. Mr Squires submitted that the present proceedings engage article 6(1) because they will determine QX's civil rights and obligations. The section 9 obligations give rise to a significant interference with QX's article 8 rights. The requirement to report to the police every day is a significant interference with his private life, as is the requirement that he attend appointments with the mentor and theologian against his will for a total of four hours per week. Breaches of these obligations are criminal offences for which he may be sentenced to a term of imprisonment. It follows that the obligations prevent the claimant from living as freely as the general population and engage article 8 rights.

50. Relying on *BC and BB* and on *Mastafa*, Mr Squires submitted that it is now established in domestic law that Convention rights are "civil rights" for the purpose of article 6(1). The present proceedings will "determine" QX's civil rights. QX's case is that the interference with his article 8 rights occasioned by the impugned obligations is not "necessary" under article 8(2). The Secretary of State's case is that the interference is necessary and that there has therefore been no breach of QX's rights. The present proceedings will therefore determine whether the obligations are necessary and thus lawful and permitted to continue, or whether they are unlawful and should be quashed. The alleged breaches of QX's civil rights are a direct effect of the impugned obligations and there is a dispute, which the present proceedings will determine, as to whether those rights have in fact been breached. The guarantees laid down by article 6(1) therefore apply.

51. Mr Squires submitted that the *AF (No 3)* test was met. Daily reporting to the police and twice-weekly sessions with a mentor or theologian for a period of two years are an obvious interference with the claimant's liberty or "virtual liberty" in the sense used by Lord Mance at para 27 of *Tariq*. The interference is not less than the "light" obligations in the control orders considered in *BC and BB*; not less than asset-freezing measures; and significantly more restrictive than the banking restrictions considered in *Bank Mellat*.

52. On behalf of the Secretary of State, Mr Tam QC and Mr Gray submitted orally and in writing that the admission of British citizens to the United Kingdom and the conditions upon which they are entitled to take up their right of abode are public law matters falling within the category of the "hard core of public-authority prerogatives" such that article 6 cannot be engaged. Any effects on QX's private and family life under article 8 are incidental and insufficient to bring the proceedings within the scope of civil rights protected by article 6(1). The review proceedings are in any event not determinative of QX's article 8 rights in the sense required by the case law.

53. It was submitted in the alternative that, if article 6 does apply to these proceedings, it does not follow that the principle in *AF (No 3)* applies. Relying on *Tariq* and on earlier case law on public interest immunity at common law, it was submitted that article 6 does not require a uniform approach to disclosure in all cases. There is no uniform test even in

cases involving national security and no absolute requirement that a minimum amount of information be disclosed in all cases engaging article 6(1).

54. The facts underlying the present proceedings do not justify the conclusion that QX is subject to actual or virtual imprisonment as envisaged by Lord Mance in *Tariq*. Nor are they analogous to the context of *AF (No 3)* which involved severe restrictions by the executive on fundamental rights and personal liberty.

Article 6(1) of the Convention: analysis and conclusions

55. I turn to the question whether QX's post-return obligations should be regarded as forming part of the "hard core of public-authority prerogatives" outside the scope of civil rights protected by article 6(1) of the Convention. In my judgment, the imposition of a TEO under section 2 of the 2015 Act qualifies the right of abode of British citizens. An individual who must return to the United Kingdom in accordance with a permit to return, or who may return only as the result of deportation, is not free to enter the United Kingdom without "let or hindrance." The TEO on its own or in combination with the permit to return constitutes a let or hindrance under section 1(1) of the 1971 Act.

56. In my judgment, the qualification of the right of abode falls within the hard core of public-authority prerogatives. The right of abode is a statutory right contained in an Immigration Act. It is contained in the part of the 1971 Act dealing with the regulation of entry into the United Kingdom. No principled reason was advanced before me as to why the authorisation or non-authorisation of British citizens into the territory of the United Kingdom is not a measure of immigration control. Nor has Mr Squires advanced any reason relating to the interpretation of the 1971 Act. The right of abode is an immigration measure. Its qualification is also an immigration measure, forming part of the Secretary of State's powers to control the admission of individuals to the United Kingdom. In my judgment, the control of persons who enter the territory of states is a matter of state prerogative and does not attract the procedural guarantees of article 6 (*Ferrazzini*, above; *Maaouia*, above). To this extent, I agree with the submissions of the Secretary of State.

57. I raised with counsel at the hearing the possibility that the qualification of the right of British citizens to enter the United Kingdom is a qualification of nationality or citizenship rights on the basis that it makes inroads into the state's duties towards its own nationals. However, upon reflection, I have reached the view that immigration law, not nationality law, prevails because the right of abode is expressly part of the architecture of an immigration statute.

58. It does not however follow that post-return obligations are immigration measures raising questions of state prerogative. The Secretary of State submits that obligations under section 9 of the 2015 Act perform the same function and are legally equivalent to conditions of entry that may be imposed on non-nationals as part of immigration control under the 1971 Act. Such conditions are a natural part of the normal operation of the immigration system in relation to those who do not have the right of abode.

59. I am not persuaded that the Secretary of State's analysis withstands scrutiny. The primary legal source for imposing conditions of entry to the United Kingdom is section 3(1)(c) of the 1971 Act. The permissible conditions on the entry of non-nationals are expressly stated there. In short, they are a condition restricting work; a condition restricting studies; a condition of non-recourse to public funds; a condition requiring registration with the police; a condition of reporting to the Home Office; and a condition about residence. Section 3(1)(c) states that if a person "is given" limited leave to enter,

the leave "may be given" subject to conditions. On the wording of the statute, therefore, conditions are imposed upon entry in the legal sense, namely at the point when leave to enter "is given". The permissible statutory conditions are imposed as part and parcel of the grant of entry in the legal sense.

60. No express provision has been drawn to my attention to suggest that obligations imposed under section 9 of the 2015 Act have anything to do with these statutory conditions of entry. British citizens do not require leave to enter under the 1971 Act – even under TEOs. The scheme for granting limited leave to enter subject to conditions does not transpose itself to the 2015 Act. Nor is it apt to do so.

61. The Secretary of State makes a similar argument by reference to more general restrictions or conditions (outside section 3(1)) which may be imposed by immigration rules under section 1(4) of the 1971 Act. An example would be the grant of limited rather than indefinite leave to enter or remain. I do not accept that section 9 obligations are comparable or that they have the same legal function as the restrictions on non-nationals that are permitted under the 1971 Act. No express statutory provision has been drawn to my attention to that effect.

62. The Secretary of State advances four reasons for the proposition that section 9 obligations are of the same nature as, and comparable to, conditions and restrictions under the 1971 Act: (i) they are directly related to an individual's return to the United Kingdom; (ii) the imposition of a TEO and return to the United Kingdom are conditions precedent to imposition of a section 9 condition; (iii) section 9 conditions regulate what the individual does after he or she has entered the United Kingdom in the same way as conditions imposed under the 1971 Act; and (iv) they are of a similar kind to conditions which could be imposed under the 1971 Act.

63. In considering the Secretary of State's submissions, I do not find it helpful to draw analogies or to compare the effect (whether legal or practical) of one statutory scheme with another. Such an approach would be rudimentary and would fail to follow the principle that Parliament's intention in relation to section 9 obligations is to be found in the words of the governing statutory provisions and not others. Section 9(1)(b) provides that the Secretary of State has power to impose obligations on a person who is subject to a TEO and who "has returned" to the United Kingdom. I agree with Mr Squires that these words imply that the obligations may be imposed after a person has returned to the United Kingdom. At any rate, it is in my judgment not possible to read into section 9(1)(b) that the obligations are part and parcel of the return.

64. I also agree with Mr Squires that the purpose of section 9 obligations is not to control an individual's right of abode. In my judgment, the intention of the relevant parts of the 2015 Act is twofold. First, the statutory scheme enables the Secretary of State to manage the return of dangerous British citizens to the United Kingdom by qualifying the right of abode. Secondly, it imposes controls after an individual's return which have the same purpose as control orders or TPIMs, namely the protection of national security. These post-return, discretionary controls are discrete from the imposition of the TEO. They are legally distinct and require separate executive action.

65. The Secretary of State's analysis that it is the TEO which both permits an individual's return to the United Kingdom and governs what he can do thereafter does not take account of the need for separate executive action under section 9. Nor does it yield a common sense conclusion, as may be seen from the history of the post-return obligations in the present case. I discern no material connection between attending appointments

with a theologian and immigration control. The variation of obligations – from four hours of mentoring per week to two hours of mentoring and two hours with the theologian - cannot conceivably affect immigration control. These sorts of measures are more naturally regarded as "specific and exceptional novel provisions" (*BC and BB*, above, para 20) in the interests of national security which are intended to restrict QX in what he is allowed to do after he has taken up his right of abode in the United Kingdom. For these reasons, I do not accept that section 9 obligations are to be regarded as the conditions upon which British citizens are entitled to take up their right of abode. The Secretary of State's resort to immigration control and to the *Maaouia* line of cases fails.

66. The Secretary of State further submitted that the post-return obligations were imposed on QX as part of the state's essential duty to protect its citizens from terrorism which is solely a public law function falling within the state's prerogative. However, the national security context has not prevented the courts from applying article 6(1) in other cases. In *Secretary of State for the Home Department v Mohamed (formerly CC)* [2014] EWCA Civ 559, [2014] 1 WLR 4240, Maurice Kay LJ (with whom Sullivan LJ and Briggs LJ agreed) held (at para 16) that the horrendous nature of terrorism is not in itself a good reason for radical departure from procedural and constitutional normality. In *Tariq*, Lord Dyson MR observed (at para 143) that the force of *AF (No 3)* is that "there must be disclosure, regardless of how important the competing national interest may be in favour of withholding the information." Lord Brown in *Tariq* emphasised at para 88 the importance of the national security context. In my judgment, Lord Brown is emphasising that, in the context of monetary claims for discrimination with which *Tariq* was concerned, the national security context would weigh against *AF (No 3)* disclosure in a case that did not concern state-imposed restrictions on liberty. I do not regard him as disagreeing with or saying anything different to Lord Dyson.

67. My attention was drawn to Lord Hoffmann's speech in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, para 178, in which he said: "it is the nature of the proceedings which decides whether article 6 is engaged or not". The Secretary of State submitted that the nature of the present review (which will have the form of judicial review proceedings) engages public law rather than "civil rights and obligations." It is difficult to envisage how such a submission can now succeed. Control order proceedings were conducted in accordance with judicial review principles; yet the appellate courts – whose case law binds me – did not regard this feature of the legislative scheme as preventing the application of article 6(1).

68. For these reasons, I reject the Secretary of State's submission that the post-return obligations fall within the hard core of public-authority prerogatives and that article 6(1) cannot apply.

Article 8 rights

69. The Secretary of State submitted that "civil rights and obligations" do not arise in a review of section 9 obligations in which there has been no challenge to the imposition of the TEO. The Secretary of State's assessment of the risk posed by QX will not be in issue: the court will take the national security case at its highest. Irrespective of the outcome of the review, the TEO will remain extant. QX will continue to face restrictions on travel abroad. The residence condition (which is not the subject of challenge before me) will also continue.

70. In my judgment, the distinctions which the Secretary of State draws between a challenge to the imposition of a TEO and a challenge to section 9 obligations are legally irrelevant. The question is in my view not the formal nature of the proceedings, or the fact that QX has not chosen to undertake a root and branch assault on the TEO, or that he challenges only two of the three obligations. The question is whether, in the particular circumstances of this case, QX's civil rights or obligations are engaged. The answer will depend on the nature and extent of the obligations themselves and the overall context.

71. This is consistent with the approach of Mitting J in *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin), [2010] 1 All ER 847, para 8. He refused to draw a distinction between an appeal against a modification of an obligation under a control order (in that case, a change to where the controlled person should live under a residence obligation) and the review of the need for the same obligation. He observed that both types of challenge involved the same apparent interference with the same civil right.

72. Mr Gray relied on a number of factual differences between the obligations in this case and in others (such as *BC and BB*) in order to argue that the section 9 obligations are matters of inconvenience which do not affect QX's rights. I am not bound by the factual analysis in other cases and Mr Gray did not seem to draw any further point of principle from them.

73. In my judgment, the combination of obligations in this particular case amounts to an interference with QX's right to respect for private life under article 8. The frequency of the reporting requirement (daily) coupled with a requirement to attend appointments for four hours each week has the effect of circumscribing QX's movements. The section 9 obligations prevent him from living as freely as the general population, and require him to adhere to significant interventions by the state on pain of committing a criminal offence if he fails to do so. QX has in fact been charged in relation to three breaches of his TEO; my understanding is that criminal proceedings are ongoing. The interference with QX's article 8 rights is not incidental but "direct and material" (*Le Compte v Belgium*, above, para 49).

74. Mr Gray pointed out that QX's rights are circumscribed by the TEO (with its restrictions on travel) and the third, residence obligation which is not in issue. He submitted that any further circumscription caused by the section 9 obligations under challenge was marginal and immaterial so as not to interfere with QX's rights. I do not agree. The section 9 conditions are sufficiently onerous in themselves to interfere with QX's private life.

75. I have reached my conclusions in the circumstances of this case and in the context of the particular obligations that are challenged. I shall decline, however, to decide the broader question of whether section 9 obligations will always engage a person's private life. Mr Squires submitted that, in effect, the Secretary of State loses the more general argument because a similar argument has consistently failed in the context of other statutory schemes such as control orders. I do not need to decide the broader question. Certain passages within *BC and BB* may suggest that article 8 issues will inevitably be determined and that article 6 will therefore always be engaged in this sort of proceeding. For my own part, I agree with the approach of Ouseley J in *K, A and B* in which he observed that there is a spectrum of cases and a spectrum of disclosure (para 12). On the facts of *BM*, Mitting J expressed the view that the modification to the control order did not directly engage BM's article 8 rights, albeit that he did not hear full argument on the point as he decided that article 6(1) applied for other reasons. In the context of section 9

obligations under the 2015 Act, it is possible to conceive that (for example) reporting to a police station close to home once or twice a week would not engage article 8 at all because there could be no interference with an article 8 right. For present purposes, though, QX's article 8 rights are engaged.

The determination of civil rights

76. As I have summarised above, I am bound by existing case law to accept that human rights (such as article 8 rights) which are protected in domestic law by the Human Rights Act are civil rights under article 6(1). I did not understand the Secretary of State to argue the contrary in this case. I shall therefore proceed on the basis that QX's article 8 rights are civil rights.

77. As to whether the proceedings determine article 8 rights, Mr Gray emphasised that significant elements of QX's private life continue in existence despite the restrictions which the section 9 obligations have brought about. For that reason, the court will not adjudicate upon or determine QX's rights in a decisive way. However, I do not read the case law as requiring the complete deprivation of a person's article 8 rights before a court can adjudicate upon and decisively determine aspects of those rights. Mr Gray cited no authority which put the matter in such stark terms. I prefer the submission of Mr Squires that there is a dispute about QX's article 8 rights which will be subject to decisive determination by the court, which is sufficient for the determination of a civil right under article 6(1).

78. As Mr Squires submits, these proceedings will determine whether the section 9 obligations under challenge are necessary and lawful (in which case, they will continue) or whether they are unlawful (in which case, the court will grant relief). The court will consider and determine QX's challenge to the obligations which he makes under article 8. In these circumstances, the court will adjudicate and decisively determine QX's civil rights. It follows that article 6(1) applies to the proceedings.

Paragraph 5(1) of Schedule 3 to the 2015 Act

79. As an additional string to his bow, Mr Squires relied on paragraph 5(1) of Schedule 3 to the 2015 Act which provides that nothing in the 2015 Act or in rules of court that establish or concern the closed material procedure is to be read as requiring the court "to act in a manner inconsistent with Article 6 of the Human Rights Convention". Mr Gray submitted that the provision meant merely that there may be some cases under the Act to which article 6 applies. In those cases, the court must act compatibly with article 6.

80. In the context of asset-freezing orders, Collins J in *Mastafa* considered an equivalent provision in the Counter-Terrorism Act 2008, which was made applicable to asset-freezing orders by the Terrorism Asset-Freezing Act 2010. He held that, by including the provision in the 2008 Act, Parliament had intended that article 6 should apply. He reached this conclusion by reference to the relevant part of the Explanatory Notes which accompanied the Counter-Terrorism Bill. Mitting J had taken a different view in *R (Bhutta) v HM Treasury* [2011] EWHC 1789 (Admin), para 19, on the basis that this is not what the section says. The draftsman could have provided that the rules were subject to the procedural requirements of article 6 but had not done so.

81. For my own part, I tend to agree with Mitting J's reasoning as reflecting the statutory language which the Explanatory Notes cannot modify. I would therefore have preferred

the Secretary of State's position on this point. However, I do not need to decide the point for the purposes of the present case. My conclusions rest on other matters.

The application of AF (No 3)

82. What is the extent of disclosure required by article 6(1) in the present case? It is plain from the case law that there is no uniform standard to be applied in every kind of case. At one end of the spectrum are cases concerning "actual or virtual imprisonment" (per Lord Mance in *Tariq*, para 27, above). In such cases, full *AF (No 3)* disclosure is needed for a fair trial. In other cases, an outline of the grounds for decision coupled with the protections built into the closed material procedure will suffice.

83. The extent of the disclosure required for a fair hearing will depend on the facts of the particular case. In my judgment, it is appropriate to consider the "context and all the circumstances of the case" (*Kiani*, para 23, above). As I have already indicated, the nature and extent of the obligations under challenge in this case are onerous. They have the effect of restricting QX's freedom of movement within the United Kingdom. They constitute executive action against QX which is intended to disrupt his activities (Open Witness Statement of Laura Weight on behalf of the Secretary of State, para 11 (i)-(iii)). In my judgment, the restrictions are comparable with others of the sort described by Lord Mance in *Tariq* as "virtual imprisonment." I conclude, therefore, that *AF (No 3)* applies.

84. In these circumstances, the key and critical criteria for a hearing in compliance with article 6 are set out in the speech of Lord Phillips in *AF (No 3)* at para 59 which I have cited above. Other cases (including those cited to me in detail at the hearing) have considered and expanded on the *AF (No 3)* test. It seems to me, however, that later case law glosses but does not add to the clear test which Lord Phillips lays down.

85. Applying Lord Phillips' test, I have considered whether QX is able to give instructions either to his solicitors or to his special advocates on the various issues which will arise for judicial decision. The Secretary of State's open assessment is that, as a person who travelled to Syria and aligned himself with AQ, he is a threat to national security. To this extent, the case against him can be answered by QX with the assistance of the special advocates. He is able to give instructions to his solicitors and to the special advocates about (i) whether he has ever travelled to Syria; and (ii) the purpose of his travel. He is able to give sufficient instructions "not merely to deny but to refute" these allegations (*Bank Mellat v HM Treasury*, above, para 34). His counsel with the assistance of the special advocates will in my judgment be able to address the court on whether the section 9 obligations are necessary and proportionate to impose on a person aligned with AQ. To this extent, the proceedings would comply with article 6(1).

86. However, the closed material contains some further, more specific information which may have an impact on whether the nature and extent of the present obligations is necessary and proportionate. Should the Secretary of State continue to rely on that information, QX's article 6 rights could, as things stand, be breached. I give further reasons for this conclusion in my closed judgment. However, it would be premature for me to rule definitively on whether article 6(1) has been breached, which is better considered closer to or at the substantive hearing when the Secretary of State's finalised position (in light of my closed judgment and generally) will be known to the court and to the special advocates. The Secretary of State must clarify her case and I shall direct that this be done in writing.

QX's requests for disclosure

87. QX has requested disclosure of specific material set out in Mr Squires' written Note. These requests concern (in the main) the general procurement processes for the Home Office DDP provider, as well as material relating to the qualifications and training of the mentors and theologians who work within it. Mr Squires also requests information relating to the measures taken to ensure the lawful processing of QX's personal data; notes and written records from quarterly TEO Management Group Meetings; written records of the decision-making process in relation to the review of the obligations imposed on QX including reviews conducted in response to QX's requests for variations; reports and written advice provided by the Academic Advisory Group concerning effective practice of DDP; intervention reports from QX's mentoring and theologian sessions; and correspondence relating to the appointment of QX's mentors and theologians.

88. By letter dated 27 February 2020, the Government Legal Department confirmed that the Secretary of State has disclosed information relating to many of these matters. In my judgment, by the end of the disclosure process to which the special advocates have vigorously contributed, QX will have sufficient information on these subjects that he will be able to give effective instructions to the special advocates. None of the requests relate to information that is personal to QX or that relates to his past activities or experience. His contribution to their analysis or to the analysis of the issues that arise from them would be limited. In my judgment, the special advocates will be as well placed to deal with them as Mr Squires.

89. Mr Squires seeks disclosure of material relating to complaints about the DDP made by others who have been required to engage in the DDP or attend meetings with mentors or theologians. In my judgment, this broad and untargeted request amounts to a fishing exercise. It is far from clear that unadulterated complaints from DDP subjects (whether or not disaffected) would carry any real probative value or could advance QX's case. I am therefore doubtful that this request would succeed even on ordinary principles of judicial review. In the context of *AF (No 3)*, the special advocates will be able to deal with this aspect of the case as effectively as QX's instructed counsel.

Data protection

90. In his skeleton argument, Mr Squires submitted that, apart from interference with QX's private life under article 8, the mentoring and theologian requirement entailed the collation, processing and dissemination of QX's personal sensitive personal data, thereby directly engaging other "civil rights" under article 6(1). He relied on the Secretary of State's evidence that "intervention providers are required to write intervention reports of sessions with individuals that are shared" with other relevant Home Office officials and that "personal information is processed for the effective operation of the programme." Given the nature of the mentoring and theologian sessions, it is clear that those reports and assessments would contain sensitive personal data and would engage civil rights protected by (among other things) the Data Protection Act 2018.

91. Mr Squires did not press this argument in oral submissions. It is not clear what it adds to the case. Any complaint under data protection legislation is a far cry from the restriction of liberty or virtual liberty. It may have consequences for the continuation of the particular obligations imposed on QX but it does not directly impinge on his personal freedom and liberty. It is a necessary consequence of the section 9 obligations that the

Secretary of State will assess and evaluate their effectiveness taking into consideration all relevant data. That assessment and evaluation is carried out in the interests of national security. In my judgment, the weight of the interests of national security means that the state must be free to process data to the extent that it is necessary for national security. On the other hand, QX's rights fall at the lower end of the spectrum. For these reasons, *AF (No 3)* does not apply to QX's data protection rights.

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