Case No: CO/5160/2014

Neutral Citation Number: [2015] EWHC 2354 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2015

Before:

THE HONOURABLE MR JUSTICE CRANSTON

- -

Between:

THE COMMISSIONER OF THE POLICE OF THE METROPOLIS	**Claimant**
- and -	
SYED TALHA AHSAN	**Defendant**

- -
- -

Mr Tom Little (instructed by the **Metropolitan Police Legal Service**) for the **Claimant**
Mr Daniel Squires (instructed by **Birnberg Peirce & Partners**) for the **Defendant**

Hearing dates: 24/07/2015

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Judgmen

tMr Justice Cranston:

Introduction:

1. This is an application by the Commissioner of Police of the Metropolis ("the Commissioner") for an order to impose notification requirements for a period of 15 years on Syed Talha Ahsan ("Mr Ahsan") under the Counter-Terrorism Act 2008 ("the 2008 Act"). In 2013, he was convicted in the United States of conspiracy to provide material assistance for terrorism through his involvement in a website. He has now returned to the United Kingdom. The notification order will require him for that period to attend police stations to provide, and update, information about his living arrangements and to provide details about his travel plans, for which permission can be refused. Breach of the requirements is punishable with imprisonment of up to 5 years.

2. Notification requirements have been imposed in many cases when persons have been convicted in the UK of terrorist-related offences. This is the first case in which a notification order has been contested in respect of a person convicted outside the UK of a corresponding foreign offence. The case raises a number of issues regarding the interpretation of the 2008 Act and the imposition of notification requirements in such cases.

Background

3. Mr Ahsan is a first generation British citizen. He is now aged 35. He obtained a first class degree in Arabic at SOAS, University of London. He then studied Arabic in Damascus before commencing a Masters in linguistics, which he did not complete. He has had different jobs ranging from telephone surveying, acting as a security guard, private tutoring, and working at human rights organisations. He is currently working for the family business. He has suffered from recognised psychiatric and psychological conditions, to which I return. He has been to Afghanistan twice. On both occasions he went to a training camp but not one associated with Al-Qaida. He became involved with Babar Ahmad who, between 1997 and 2002, had established and operated a group of websites known as the Azzam publications.

4. In December 2003, Babar Ahmad was arrested by officers from the Metropolitan Police. In July 2004 the Crown Prosecution Service informed him that no further action would be taken against him. Later that month, on 28 July 2004, the US federal District Court for the district Connecticut, issued a criminal complaint against Babar Ahmad and a warrant for his arrest. He was accused of maintaining azzam.com, which solicited funds for the Taliban regime in Afghanistan. The alleged offences had been committed in the UK, but azzam.com was at one time hosted in the US. In August 2004, Babar Ahmad was arrested on the US warrant and on 17 May 2005 Senior District Judge Workman held that he could be extradited.

5. Mr Ahsan was not arrested until the following year, 19 July 2006. It followed a request for extradition from the US in relation to the assistance he had provided to Babar Ahmad in connection with azzam.com. A considerable volume of material was found by the police at his home address. Five years later, the Crown Prosecution

Service wrote on 22 November 2011 that the position differed between Babar Ahmad and Mr Ahsan.

> "Whilst some material was submitted to the domestic prosecutor in respect of Babar Ahmad, none has ever been submitted in respect of Syed Ahsan. At no time has any part of the case against him been subject to consideration by a domestic prosecutor."

6. Both Mr Ahsan and Babar Ahmad remained in detention in the UK pending their extradition. There followed legal proceedings both domestically and in the European Court of Human Rights. Judicial review of the refusal by the Crown Prosecution Service to consider the question of prosecution of Mr Ahsan in the UK was refused: *R (on the application of Ahsan)* v. *DPP* [2008] EWHC 666 (Admin). In the course of his judgment, with which Swift J agreed, Richards LJ said:

> "[36] Certain facts relevant to Ahsan's case were set out in Mr Coppel's skeleton argument but have subsequently been confirmed in a witness statement by Mr John Davis of the Treasury Solicitor, based on information received from the CPS. Mr Davis confirms that (1) the involvement of the Metropolitan Police Counter Terrorism Command in relation to the allegations made against Ahsan by the US authorities has been restricted to providing information to the US authorities, and the Command has not conducted its own investigation of him for those matters; (2) no police investigation of Ahsan has been referred to or considered by the CPS; and (3) so far as the CPS is aware, no police investigation of Ahsan is in contemplation… There has been no relevant police investigation and no file has been passed to the CP…"

On 10 April 2012, the Strasbourg court dismissed the applications of Mr Ahsan and Babar Ahmad seeking to prevent their extradition: *Application nos. 24027/07*, *11949/08*, *36742/08*, *66911/09* and *67354/09*. Mr Ahsan and Babar Ahmad were extradited to the US later that year. Mr Ahsan was detained by the US authorities from his arrival in the US in October 2012 until his return to the UK in August 2014. He spent a period of a year and a half in solitary confinement.

7. In December 2013, Mr Ahsan signed a plea agreement based on his involvement in assisting through azzam.com to provide support for the Taliban regime in Afghanistan between early 2001 and 1 September 2001. Specifically he admitted the following acts:

> "Mr Ahsan conspired to provide and assisted the provision of material support for terrorism in three ways through Azzam.com:
>
> (1) by assisting Mr Ahmad, Mr Ahsan assisted the solicitation of and conspired to provide funds for the Taliban regime in Afghanistan;

> (2) by assisting Mr Ahmad, Mr Ahsan assisted the solicitation of and conspired to provide personnel for the Taliban regime in Afghanistan; and
>
> (3) by assisting Mr Ahmad, Mr Ahsan assisted the solicitation of and conspired to provide physical items for the Taliban regime in Afghanistan."

During its existence, the website had sought to facilitate financial and other support for Muslims in the civil war in Bosnia and Chechens fighting in a civil war in Chechnya. The postings relating to Bosnia and Chechnya made up 98 percent of its content.

8. On 16 July 2014 Judge Janet C. Hall, Chief Judge of the US District Court for the District of Connecticut, sentenced both Babar Ahmad and Mr Ahsan. She considered that neither had an interest in operational terrorist activities but noted that Azzam Publications supported the Taliban, who in turn supported Al-Qaida, so that efforts to raise money and material for the Taliban therefore rendered them indirectly connected to Al-Qaida. She observed: "I can only draw the conclusion that… neither of these two defendants were interested in what is commonly known as terrorism." After considering Babar Ahmad's case at length, she sentenced him in total to 150 months in prison.

9. The judge turned to Mr Ahsan. She described his role as being that of a "mail clerk" dealing with what was in the website's mailbox. She said that he had a nonviolent outlook on life and that his view had not been that of a terrorist who might wish to blow up innocent people or attack a target of US military might. He had never intended to be a part of what she called the "false Jihad of terrorism". She said that he did not support 9/11 or the London Underground bombings. His support of Azzam Publications, given what it was doing in 2001 vis-à-vis the Taliban, was serious, but his involvement was limited. Whereas Babar Ahmad continued involvement after 9/11, Mr Ahsan did not. Mr Ahsan had been a model prisoner. The judge said that:

> "[T]here is no sign that Mr. Ahsan's view of what is Jihad in an Islamic sense should be equated with terrorism. There is no evidence that he adopted beliefs of people who believe in terrorism, attacks on civilians. In fact, his own writings speak out against the attacks on the civilians in the tubes in London. He disagreed with 9-11. He felt that was wrong. He's rejected the views of Al-Qaida"

She added:

> "[At the time of his arrest, he] had material of all kinds of views. And I would say that certainly in the months going up to the time of his arrest, to the extent they are reflected in his personal, private journal, they indicate a man who is interested in his poetry and writing poetry, who is a moderate person who has peaceful views… In all, you appear and strike me as a man who is sensitive and curious, intelligent and talented… [T]here are many letters in support of you [which] speak about you and

> your character as one which is 'not violent and not aligned with the views of people who are violent."

10. The judge did not think that Mr Ahsan would "recidivate" but was worried that with his depression things might look different. "But I don't see that as a reason to conclude that you will recidivate, particularly if you access appropriate treatment and support." The judge concluded her sentencing remarks as follows:

> "You were very young at the time [of the offences]. And in my view, your culpability is low…. you never intended to, never planned to, never wanted to be involved in what I call invalid or terroristic Jihad… You strike this court as a gentle person… And I don't see you in any way involved in [the future in] anything that could smack of terrorism or material support of conduct which we describe as terrorism."

11. Judge Hall then sentenced Mr Ahsan to time served, the 7 years and 362 days he had already spent in custody in the UK and US. The official record, signed by the judge, stated that:

> "[T]he sentence reflects that Ahsan was involved in serious conduct by assisting Azzam Publications while it was supporting the Taliban, at the time the Taliban was harbouring Osama bin Laden. However, Ahsan's minor role in the conspiracy, as well as the fact that all of his assistance occurred prior to 9/11, supports the court's finding that his involvement was of a less serious nature. Ahsan's history and characteristics inform the court's conclusion that the likelihood of recidivism is low."

12. Mr Ahsan was to be on supervised release in the US for 3 years under which he was to participate in a programme approved by the probation office for mental health treatment. He was also to submit himself and his residence, office or vehicle to a search, conducted by a probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of his release. Failure to submit to a search might be grounds for revocation. He was also to provide the probation officer with access to requested financial information and, as directed by the probation office, was to notify third parties of risks that may be occasioned by his criminal record, personal history or characteristics.

13. In fact, Mr Ahsan was returned to the UK on 21 August 2014. A few days later, on 26 August 2014, the Commissioner applied for his notification order pursuant to the 2008 Act. Initially the order would have required notification for 30 years. When in the acknowledgement of service Mr Ahsan's solicitors pointed out that the period was calculated incorrectly, and should have been 15 years, the Commissioner accepted this in an amendment. The Commissioner also amended the foreign corresponding offences he was relying upon for the purposes of the Act. In the consent order reflecting agreement to the amendments, approved by Ouseley J on 15 April 2015, Mr Ahsan was also permitted to rely on psychiatric evidence and the Commissioner was able to ask Mr Ahsan's medical expert questions in writing.

Dr Deeley's report

14. Dr Quinton Deeley, a consultant psychiatric at the ADHD clinic at the Maudsley Hospital, London, and also at the National Autism Unit, Bethlem Royal Hospital, Kent, prepared a medico-legal report on Mr Ahsan on 13 May 2015 ("the 2015 report"). Dr Deeley had already assessed Mr Ahsan in 2009 and 2010 when he was detained in HMP Long Lartin prior to his extradition. On those occasions, he had noted that there was a family history of bipolar affective disorder and of schizophrenia. Dr Deeley identified symptoms of depression when Mr Ahsan was at school and of self-harming during A-levels, and that he had suffered from depression, impulses to self-harm and suicidal ideation of fluctuating severity. In March 2009, Dr Deeley diagnosed Mr Ahsan as suffering from Asperger's syndrome and recurrent depressive disorder, which was then severe. He also noted that Mr Ahsan reported obsessions and in particular repetitive, intrusive, distressing thoughts.

15. In their letter of instructions to Dr Deeley for the 2015 report, Mr Ahsan's solicitors asked him to report on what he considered to be the possible detrimental impact upon Mr Ahsan and his mental health, now and in the future, if the Commissioner's application to the High Court for a notification order should succeed. The instructions stated that in their (the solicitors') experience, while not expressly provided for in the legislation, in practice individuals subject to notification requirements were also regularly, and unexpectedly, visited by police officers at their home address to check that they are complying and that the information provided was up-to-date. There was no provision for the exercise of discretion for individual circumstances to be taken into account with the notification regime. Mr Ahsan would have to comply with intrusive police reporting measures for the next 15 years. The solicitors explained that they were seeking to highlight that there was no scope for considering individual vulnerabilities. Potential concerns in Mr Ahsan's case included that he had to publicly attend a police station to report. The letter then outlined as a possible relevant factor his "ordeal" from his arrest in 2006. Less than one week after his return from the US, there was the possibility of the additional burden and intrusion of police reporting notification requirements.

16. In his report, Dr Deeley recalled his instructions, outlining the statutory requirements for a notification order, referring as well to the solicitors' reference to police visits. He explained that Mr Ahsan found it difficult to describe his thoughts and feelings, but he refused to fall into despair. Dr Deeley then outlined what Mr Ahsan had told him. Because of his conviction, a career in academia was virtually impossible. He was concerned at this marriage prospects and about learning his father's business now he could not have a career in the academy. He had had thoughts of suicide, some insomnia and a tendency to ruminate. There was an acute sense of injustice about the notification requirements when the authorities here had not taken action against him. Reporting would interrupt his day and become intrusive. The notification requirements would affect his marriage prospects. The police visiting to check compliance would be particularly difficult. When Dr Deeley asked him about his mental health needs, Mr Ahsan said he had none, although he added that the American judge thought he did. He did not think he was clinically depressed when in Long Lartin.

17. Dr Deeley administered the Beck Depression Inventory which found Mr Ahsan to be moderately depressed and moderately anxious. Dr Deeley interviewed Mr Ahsan's

father, who thought many in the family and community would avoid them because of continuing police involvement, and that his son's marriage prospects would be adversely affected.

18. In the opinion part of his report, Dr Deeley recorded a current diagnosis of Asperger's syndrome and recurrent depressive disorder, the current episode mild to moderate. Supportive features included depressed mood, loss of interest and enjoyment, and increased fatigability. Asked whether the proposed notification requirements could have an adverse impact on Mr Ahsan's mental health, and if so what the likely effect(s) on him would be, Dr Deeley answered that their imposition

> "[is] likely to have a severe adverse impact on [Mr Ahsan's] mental health… [with] the imposition of a more restrictive regime for prisoners in the detainee unit at Long Lartin prison in December 2008… [Mr Ahsan's] interpretation of and response to these circumstances was influenced by his Asperger Syndrome (with associated rigid thinking style, propensity to ruminate, difficulty identifying and managing emotions) and past history of depression. In this context Mr Ahsan developed a severe depressive illness which included persistent thoughts of self-harm and suicide… Mr Ahsan currently exhibits most of these symptoms of depression to a mild to moderate degree, with the potential for deterioration given his past history. As noted Mr Ahsan's Asperger syndrome is associated with a rigid thinking style, a propensity to ruminate obsessively, and difficulty identifying and managing emotions, while his past history of severe depression in prison indicates an ongoing vulnerability to recurrence of severe depression under conditions of perceived stress. Mr Ahsan currently ruminates about his circumstances and has a strong and preoccupying sense of having been unjustly treated by the British authorities. It is likely that imposition of the notification restrictions would intensify his sense of being unjustly treated, increase feelings of powerlessness and hopelessness about his situation; adversely affect his employment and marriage prospects, which will deprive him of important sources of esteem and support; cause distress and stigma to his family, straining family relations and further exacerbating his sense of injustice. All of the above factors are likely to lead to a significant deterioration of his mental health. The general fact of being subject to notification requirements is likely to be perceived by Mr Ahsan as unjust and lead to obsessive ruminations and deterioration of mood and other symptoms of depression as outlined above. Compliance with the specific notification requirements are likely to be perceived by Mr Ahsan as specific instances of injustice and mistreatment by the British authorities which are likely to intensify his ruminations and worsening of depressive symptoms. For example, the requirement to periodically notify the police of his address, and any permanent or temporary change of address; or to notify the police of travel plans prior to

> travelling, is likely to be associated with anxious rumination, a sense of grievance, frustration, and powerlessness when anticipating these requirements, with an associated increase in anticipatory anxiety, along with lowering of mood and other symptoms of depression. Mr Ahsan is also likely to perceive visits by the police to his house to check the accuracy of the information he has provided to be an intrusion of privacy and violation of his rights, leading to anxious grievant ruminations, anticipatory anxiety, and worsening of mood along with other symptoms of depression. Rumination about and anticipation of compliance with these conditions is likely to significantly contribute to worsening of depression and anxiety, in addition to the actual fact of complying with specific conditions."

19. Dr Deeley was also asked whether he considered that any adverse impact of the notification requirements on Mr Ahsan would be more severe than on an average person of reasonably good mental health. He answered:

> "In my opinion any adverse impact of the notification requirements on Mr Ahsan will be more severe than on an average person of reasonably good mental health. This is because Mr Ahsan's Asperger syndrome and recurrent depressive disorder make him more vulnerable to significant further deterioration in mental health compared to a person of reasonably good mental health under conditions of psychosocial stress (such as imposition of notification requirements)."

20. He was also asked whether he considered that there was a risk that Mr Ahsan would suffer any adverse impact immediately, soon after the application of the notification requirements or later, potentially cumulatively, during their 15 year duration. He answered:

> "The probable immediate adverse impact of the imposition of notification requirements is set out in my reply to question 2 above. Over the longer term, imposition of the notification requirements is in my opinion likely to be associated with further significant deterioration of mental health…
>
> It should be noted that by virtue of his Asperger Syndrome and history of depression Mr Ahsan is less able to manage stressful circumstances compared to an average person of reasonably good mental health… In light of his history of suicidal ideation and acts when depressed he must be considered to be at high risk of attempted suicide should he develop a severe depressive illness (which in my opinion is likely should notification requirements be imposed)."

21. To a question whether it was likely that Mr Ahsan would find it difficult to comply with the notification requirements, Dr Deeley said:

> "In my opinion Mr Ahsan would find it difficult to comply with the notification requirements because (i) severe depression is likely to make it harder for Mr Ahsan to organise himself and be sufficiently motivated to comply with the conditions; (ii) satisfying the conditions (e.g. attending police stations, informing police of his travel plans) is likely to become increasingly aversive as time passes, motivating avoidance behaviour (e.g. a very strong sense or feeling of not wanting to comply with the conditions, which could motivate non-compliance with conditions).
>
> In my opinion being returned to prison for non-compliance would have an extremely adverse effect on Mr Ahsan given the strong sense of already having been unjustly treated by the British authorities. I would be concerned about a very severe deterioration in mental state, including an increased risk of suicide, if Mr Ahsan was returned to prison for non-compliance."

22. The Commissioner did not pose any questions to Dr Deeley pursuant to the consent order of 14 April 2015. Nor did he seek to have Mr Ahsan separately examined. At one point, he foreshadowed the intention to cross-examine Dr Deeley at the hearing but later did not pursue this.

23. The GP with whom Mr Ahsan has been registered since his return from the US has not recorded any requests from Mr Ahsan for assistance about mental health issues.

Legal framework

24. Part 4 of the 2008 Act contains provision for the imposition of notification requirements on persons convicted and sentenced for specified terrorism offences: s.40(1). It also provides for orders applying notification requirements for persons dealt with outside the UK for corresponding foreign offences: s.40(2).

25. The initial notification requirements include the person's home address, any other address where the person regularly resides or stays, and any address which he resides at for a period totalling more than 7 days in any period of 12 months: s.47. Changes to this information must be notified and the information must be re-notified annually: ss.48–49. The information required must be provided in person at a local police station: s.50. A person must also notify the police seven days in advance regarding plans to travel outside the UK for three or more days, including the point of arrival in each foreign country, the name of the carrier, the address where the person will stay, the date of return, and the point of intended arrival back in the UK. The person must also notify the police on return. Once an intention to travel is notified, the police can apply to a Magistrates' Court for a foreign travel restriction order to prevent the person travelling: ss.52, 58, Schedule 5; Counter-Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009, 2009 SI No.2493. Once notification requirements are imposed they apply for 30 years, 15 years or 10 years, depending on the length of the sentence for the underlying conviction: s.53. Failure without reasonable excuse to comply with any notification requirement is an offence and a maximum of five years' imprisonment can be imposed: s.54.

26. Those convicted of a specified offence in the UK are automatically subject to a notification order: s.40. Specified offences are, first, listed terrorism offences and offences ancillary to these (aiding, abetting, counselling or procuring the offence, or attempting or conspiring to commit the offence): s.41; and secondly, certain offences where a court has determined that they have a terrorist connection (for example, murder kidnapping, causing an explosion likely to endanger life): s.42, Schedule 2. Listed terrorism offences include section 15(1) of the Terrorism Act 2000, which makes it an offence to invite another to provide money or property intending it to be used, or if the individual has reasonable cause to suspect that it may be used, for the purposes of terrorism. A specified sentence for the purposes of section 40 includes a sentence of imprisonment of 12 months or more, and a hospital order imposed after conviction for an offence with a maximum sentence of 12 months or more: ss.45(1)(a)(ii), 45(1)(b).

27. Persons dealt with outside the UK with respect to a corresponding foreign offence may be subject to notification requirements: section 57, Schedule 4. Paragraph 2 of Schedule 4 defines a corresponding foreign offence as follows:

> "(1) A "corresponding foreign offence" means an act that –"
>
> (a) constituted an offence under the law in force in a country outside the United Kingdom, and
>
> (b) corresponds to an offence to which this Part applies.
>
> (2) For this purpose an act punishable under the law in force in a country outside the UK is regarded as constituting an offence under that law however it is described in that law.
>
> (3) An act corresponds to an offence to which this Part applies if –
>
> (a) it would have constituted an offence to which this Part applies by virtue of section 41 if it had been done in any part of the United Kingdom, or corresponds to an offence to which this Part applies.
>
> (c) it was, or took place in the course of, an act of terrorism or was done for the purposes of terrorism."

28. The conditions for making a notification order, set out in paragraphs 3(2), 3(4) and 3(5) of Schedule 4, insofar as relevant to the present case are that: (1) the person has been convicted, under the law in force in a country outside the UK, of a "corresponding foreign offence" and has received in respect of the offence a sentence equivalent to specified domestic sentences (which include a sentence of imprisonment for more than 12 months): paragraph 3(2)(a); (2) the sentence was imposed after the commencement of Part 4 of the 2008 Act, i.e., on 1 October 2009: paragraph 3(4)(a); and (3) the period for which the notification requirements would apply in respect of the offence has not expired: paragraph 3(5). Paragraph 3(6) provides:

> "(6) If on an application for a notification order it is proved that the conditions in sub-paragraphs (2), (4) and (5) are met, the court must make the order."

29. In England and Wales, an application for a notification order under Schedule 4 may only be made by the chief officer of police, and only if the person resides in the chief police officer's police area or the chief police officer believes that the person is in, or intends to come into, that area: paragraph 4(1) or (2). The application is made to the High Court: paragraph 4(3). The notification requirements are the same as for a person convicted in the UK.

Commissioner's application

30. In advancing the Commissioner's case for a notification order, Mr Little submitted that the statutory criteria in paragraph 3 of Schedule 4 of the 2008 Act had been met. Mr Ahsan had been convicted of terrorist offences in the US which satisfied the requirements of being corresponding foreign offences and had received a custodial sentence for that offending of the requisite length. The offences corresponded to conspiracy and aiding and abetting offences regarding section 15 of the Terrorism Act 2000 through the provision of support for the Taliban. Mr Ahsan was sentenced after the requisite date in 2009 and the 15 years notification period had not expired. Thus a notification order should be made. As background, Mr Little referred to the material summarised earlier in the judgment, underlining matters such as the material found at Mr Ahsan's home address on his arrest in 2006, and the fact that although Judge Hall concluded that Mr Ahsan's risk of reoffending was unlikely, she had concerns about the future as a result of his depressive personality.

31. In opposition to the Commissioner's case for a notification order, Mr Squires for Mr Ahsan advanced three grounds: that the statutory requirements for notification had not been met; the Commissioner had acted unlawfully in applying for an order and that therefore the court had no power to grant his application; and that a notification order would be in breach of Mr Ahsan's rights under Articles 3 and 8 of the European Convention on Human Rights ("the ECHR").

Ground 1: corresponding foreign offence

32. Mr Squires's first ground was that Mr Ahsan had not committed a corresponding foreign offence pursuant to Schedule 4, paragraph 2(3)(a) of the 2008 Act in that he was not convicted of an offence which constituted an act that "would have constituted an offence… if it had been done in any part of the United Kingdom…" The reality was that all of the acts which constituted the offences relied upon by the Commissioner were committed in the UK and thus did not fall within the wording "would have constituted… if". Those words plainly apply to offences committed abroad; here the acts were offences in the UK because they were committed here. To put it another way, they were domestic offences, not corresponding foreign offences. In Mr Squires's submission, this was no doubt a deliberate choice by Parliament. Offences committed within the UK are expected to be prosecuted here and if it is not in the public interest to do that, it is not the purpose of the 2008 Act that the person be subject to notification requirements. Thus the strained interpretation of paragraph 2(3)(a) which the Commissioner argued for was not possible, since it did not meet the criteria in *Wentworth Securities Ltd* v. *Jones* [1980] AC 74, 105D–106A, per Lord

Diplock, and *Inco Europe Ltd* v. *First Choice Distribution* [2000] 1 W.L.R. 586, 592 G–H, per Lord Nicholls.

33. In my view Mr Squires's construction of the 2008 Act will not do. The context of the legislation is of terrorist offending, which can have an extra-territorial and cross-border character. Such offending may be an offence and be prosecuted in more than one jurisdiction. Parliament's intention must have been to encompass it. In my view the plain intention of Parliament is to ensure that those who commit serious terrorist offences, whether here or abroad, should be the subject of the notification requirements in the 2008 Act. That may be strained construction of paragraph 2(3)(a) of Schedule 4 of the Act but one giving effect to the Parliamentary intention: *Clarke* v. *General Accident Fire and Life Assurance Corporation Plc* [1998] 1 W.L.R. 1647, 1658 D–E, per Lord Clyde. Parliament must have intended that the notification requirements should apply to terrorist conduct committed here which results in a conviction in a foreign court, even if it could have been prosecuted here but was not.

34. In *Inco Europe Ltd. and Others v First Choice Distribution* Lord Nicholls said, with the agreement of the other law lords (at 592G-H):

> "The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: *per* Lord Diplock in *Jones* v. *Wrotham Park Settled Estates* [1980] AC 74, 105-106."

The Parliamentary intention behind this part of the 2008 Act is clear. By inadvertence Parliament failed to give effect to that purpose in the drafting of Schedule 4 but the substance of the provision it would have made, albeit not the precise words, is clear. Thus in my view, taking a purposive approach, and even assuming that all elements of Mr Ahsan's offending occurred here, the offences he was convicted of in the US are corresponding foreign offences.

Ground 2: unlawful exercise of discretion

35. The second ground of challenge Mr Squires advanced is premised on the discretion which the Commissioner is said to have to apply to apply for a notification order in the case of a person convicted overseas. Since he exercises discretion, the argument ran, he is bound by ordinary principles of public law to act rationally, to consider

relevant factors, and so on. The court should uphold the principles of legality. Consequently, if the Commissioner applies for an order in breach of public law principles, the court should refuse it.

36. Mr Little contended that it was only circumstances of illegality (undefined) which could be raised and that the Commissioner's decision to make this application was not capable of any other public law challenge. He highlighted Schedule 4, paragraph 3(6), which states that if, following an application made by a chief officer of police the conditions for imposing notification requirements set out in paragraph 3(2), (4) and (5) are met, the court "must" make the order.

37. In my view Mr Little's conception of what can be marshalled against an application for a notification order is too narrow. A chief police officer has discretion to apply for an order. That is recognised in the explanatory notes to the 2008 Act, which at paragraph 138 refer to provisions setting out the circumstances in which "the police may apply for a notification order and the procedure to be followed in England and Wales". Since there is a discretion, its exercise should be open to challenge on public law. There is a strong legislative steer that, where there has been a corresponding foreign conviction and the requisite sentence has been imposed, an application should be made. Consequently, the circumstances in which a public law challenge will be successfully mounted will be exceptional. Nonetheless judicial review is possible.

38. There is a procedural issue which should be mentioned. The Commissioner in this case decided not to take the point that any challenge to the exercise of his discretion should have been by an application for judicial review. (Mr Ahsan's representatives indicated that if the Commissioner had pursued the point they would have issued judicial review, to be heard alongside the current proceedings, subject to the availability of public funding). In my view the Commissioner was right not to take the point. The modern authorities permit public law challenges to be handled in this way: see *Doherty* v. *Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367; Sir Clive Lewis, *Judicial Remedies in Public Law*, 5th ed., London, 2015, 123. It would be an obvious waste of time and money where there is already this process under the 2008 Act to deal with the public law flaws to the exercise of the Commissioner's discretion to have to make the separate application for judicial review. It is in the interests of the administration of justice that all matters affecting the application be dealt with in one set of proceedings, rather than be subject to collateral challenge.

39. As regards the merits of this ground, Mr Squires' submissions began with what he contended was the Commissioner's belief when he made the application for a notification order on 26 August 2014 that it was a purely formal process and that he did not need to take account of the exceptional facts of Mr Ahsan's case. At the time he applied for the order he did not have Judge Hall's sentencing remarks, and later when he did, he did not address the implications of either those or of Mr Ahsan's mental health. The Commissioner, Mr Squires submitted, had not taken relevant factors into account and thus his exercise of discretion to apply for the order was flawed.

40. In my view Mr Squires's relevant considerations attack fails. None of these matters are relevant considerations in the legislation. None are so obviously material that a failure to consider them would be contrary to the legislative intent: *Re Findlay* [1985]

AC 318, 333-4. To put it in the way this principle is sometimes expressed, it cannot be said that it was *Wednesbury* unreasonable for the Commissioner to leave these considerations out of account: *R (on the application of London Criminal Courts Solicitors' Association)* v. *The Lord Chancellor* [2015] EWHC 295 (Admin), [34]-[36], per Laws LJ. The fact is that the legislative steer in the 2008 Act, as I have said, is strongly in favour of an application being made.

41. Mr Squires then majored on the fact that Mr Ahsan had not been prosecuted here. To impose notification requirements on him would, in Mr Squires's submission, be contrary to the policy and objects of the 2008 Act: *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] AC 997. The 2008 Act was designed for those who commit offences outside the UK. It was not designed to cover those persons where a decision had been taken that it was not in the public interest to prosecute them here, but who happened to be extradited and convicted of the offence abroad. To impose notification requirements on someone in those circumstances would, the submission continued, be unfair and an abuse of the process covering foreign convictions. It was therefore an unlawful exercise of the discretion conferred on the Commissioner to apply for a notification order in those circumstances.

42. In my judgment these submissions meet the same hurdle as the first bracket of submissions under this ground: given the legislative steer it cannot be said that a failure to prosecute Mr Ahsan here is so obviously a material consideration that it should be factored into a later decision to apply for a notification order. Moreover, I do not accept that it follows from a Parliamentary intention to treat in the same manner those who commit terrorist-related offences outside the UK as those who commit offences here that, if someone is not prosecuted here, no notification order should be sought. There are many reasons that one jurisdiction rather than another will prosecute offending even when both could do so because of its cross-border character.

43. Mr Squires's submissions on this point were premised on the assumption that the offences of which Mr Ahsan was convicted in the US – providing material support for the Taliban prior to 9/11 – were not offences regarded as being in the public interest to prosecute in this country. Mr Squires referred to evidence to this effect of Gareth Peirce, the principal in Mr Ahsan's solicitors and someone with extensive experience in the area. The difficulty is that all the court knows about Mr Ahsan's case is that the police never forwarded material to the Crown Prosecution Service for it to consider a prosecution. Mr Little observed that, to learn more, Mr Ahsan's solicitors could have issued judicial review proceedings naming the Crown Prosecution Service as an interested party, with an accompanying disclosure application, but did not do so. There could be many reasons for this, including public funding difficulties. More persuasive is his submission that the conduct of Babar Ahmad, Mr Ahsan's co-conspirator, continued after 9/11, yet he was not prosecuted either, suggesting that there may have been other reasons for proceedings not to have been taken against both him and Mr Ahsan. In short, I do not see that this point goes anywhere.

Ground 3: Article 3/Article 8 ECHR

44. For the Commissioner, Mr Little submitted that because the effect of the notification requirements is limited, the high threshold for breach of Article 3 ECHR is not met, and although they amount to an interference with a person's private and family life for

the purposes of Article 8 ECHR, they are not incompatible with that right overall. The fact that Mr Ahsan suffers from recognisable psychiatric conditions did not, in his submission, change the analysis.

45. As to the notification requirements, Mr Little submitted that their impact on Mr Ahsan was overplayed. There had to be very occasional and short visits to the police station. If a person was moving between addresses, both addresses could be provided to obviate the need to notify every movement between them. The evidence of periodic visits by the police to check that the notification requirements were being observed was assertion rather than the reality. There was no witness statement from Mr Ahsan himself explaining the difficulties that he would have with a notification order. Indeed it was not suggested that he would not live at his current address in the long-term or that he intended to travel abroad to a place that would be problematic. In any event the requisite details for foreign travel were not much more than had ordinarily to be provided for anyone travelling at the point of departure and on arrival at the destination.

46. As regards the medical evidence, Mr Little was highly critical of the letter of instructions from Mr Ahsan's solicitors to Dr Deeley and the impression conveyed about the draconian nature of the notification requirements. He also questioned whether, if it occurred, the cause of any future deterioration in Mr Ahsan's mental health would be attributable to the notification requirements. The sentencing hearing before Judge Hall revealed some fortitude on Mr Ahsan's part to being incarcerated in the US. Time in prison and his extradition may be responsible, at least in part, for any future deterioration in his mental state or other adverse effects on his private and family life such as his marriage prospects.

47. Mr Little cited *R (Irfan)* v. *Secretary of State for the Home Department* [2012] EWCA Civ 1471; [2013] QB 885 in support, where the Court of Appeal held that the automatic ten year notification requirements in the case of someone convicted in the UK of a terrorist offence were not a disproportionate interference with his rights under Article 8 ECHR for lack of any right of review. There the trial judge accepted that *Irfan* would not act again as he had. But he had associated with a major terrorist post 9/11, assisting him to ship goods for use by Al-Qaida against allied forces. In the course of his judgment Maurice Kay LJ, with whom Munby and Tomlinson LJJ agreed, said that he reached that conclusion first, because terrorism offences fall into a special category, and secondly, because it was appropriate to accord considerable weight to the view of Parliament. Maurice Kay LJ continued:

> "[13]… Thirdly, it is important to concentrate on the actual requirements. They do not remotely resemble the stringent conditions which attached to many control orders for example, the 16-hour curfew in AV's case [2009] EWHC 902 (Admin). This claimant was released on licence on 4 February 2009. Since then, he has had to attend police stations in Birmingham once a year, each time for about 30 minutes. He has never informed the West Midlands Police that he intends to stay away from his home address or that he intends to travel abroad. The fact that he is subject to the statutory notification requirements is stored on the Police National Computer for the purpose of monitoring his compliance with the notification requirements

> but any information provided by him is not… Police officers in plain clothes have visited his home, initially once per month but now less frequently. They have stayed for about five minutes each time but have not entered the premises. Whilst, as is now conceded on behalf of the Secretary of State, all this amounts to an interference with the claimant's private life for the purposes of article 8, it is essentially "light-touch" when set against the legitimate aim of the prevention of terrorism, or (in article 8 terms) "the interests of national security" and "the prevention of disorder or crime". It is important to keep in mind the gravity of the disorder or crime which is being sought to be prevented.
>
> [14] Fourthly, even if it is the case that there may be exceptional cases of "no significant future risk", their possible existence does not preclude a general requirement of relatively moderate interference in a context such as this. In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, para 33 Lord Bingham of Cornhill said:
>
> > "legislation cannot be framed so as to address particular cases . . . A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to H invalidate the rule if, judged in the round, it is beneficial".
>
> In my view, that resonates here. Given the relatively moderate intrusion caused by the interference with the private lives of convicted terrorists generally, and having particular regard to the interference with the private life of this claimant, I do not think that it can be said that either the scheme or its application to the claimant is disproportionate. I do not consider that the statute is incompatible with article 8 or that the claimant is a victim within the meaning of section 6 of the Human Rights Act 1998."

48. Mr Squires submitted that the imposition of notification requirements created a real risk that Mr Ahsan would be subjected to inhuman or degrading treatment in breach of Article 3 ECHR. He drew on the jurisprudence that State action such as deportation or extradition will be unlawful if it exposes an individual to a real risk of the requisite level of suffering: *Saadi* v. *Italy* (2009) 49 EHRR 30. In particular, measures likely to exacerbate an existing mental illness have the potential to cross the Article 3 threshold: *Bensaid* v. *United Kingdom* (2001) 33 EHRR 10, [37]. Therefore, Mr Squires submitted, while a person without mental health problems would not experience notification requirements in a way engaging Article 3, that is not the case for someone with Mr Ahsan's particular mental health condition, where there is a real risk of a serious impact on his mental health: *Aswat* v. *United Kingdom* [2014] 58 EHRR 1.

49. In my view the inhuman treatment alleged in this case does not meet the minimum level of severity required for a successful Article 3 claim. The three authorities (*Saadi*, *Bensaid* and *Aswat*) Mr Squires cites are not analogous. Although there is no mechanism for review of the notification requirements under the 2008 Act once imposed, they do not have the finality and lasting impact of removal, deportation or extradition from this country. Article 3 can certainly operate in a domestic context. Although not cited to me, *DD* v. *Secretary of State for the Home Department* [2015] EWHC 1681 (Admin) is a recent example, where Collins J held that the requirement to wear an electronic tag was in breach of Article 3 since DD's mental health had deteriorated to the extent that he had a paranoid belief that it contained a bomb. But that case highlights the high threshold demanded: when before the courts earlier Ouseley J had decided that there was no violation of DD's Article 3 rights: [2014] ECHC 3820 (Admin); [2015] 1 W.L.R. 2217. Similarly, in *Aswat* v. *United Kingdom* the applicant's mental health was much more serious than Mr Ahsan's: the applicant there had been detained under the Mental Health Act 1983 in Broadmoor Hospital, a high security psychiatric institution.

50. It is in relation to Mr Ahsan's Article 8 rights that I find his case persuasive. There is undoubtedly an interference with his private and family life: *R (Irfan)* v. *Secretary of State for the Home Department* [2012] EWCA Civ 1471; [2013] QB 885 is the authority for that. In my view, the interference is not as light touch as Mr Little sought to portray. In *R (F and Thomspon)* v. *Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331, Lord Phillips considered the similar notification requirements applicable to specified sexual offenders, highlighted the obvious inherent risk that third parties would become aware of the reason for their visits to a police station, and described their impact on those who travel as a considerable burden: [42]–[43]. Moreover, *R (Irfan)* records that there were occasional visits by the police in that case to the home of the person subject to notification requirements, to check on compliance (at [13]), lending support to Mr Squires's submission that this was potentially an additional interference.

51. The issue is whether that interference is necessary and proportionate pursuant to Article 8(2) and is therefore lawful under section 6(1) of the Human Rights Act 1998. First, there must be some doubt whether in Mr Ahsan's case it is necessary or proportionate to protect the public from the risk of his engaging in further terrorist offending. This would seem to be one of those exceptional cases Maurice Kay LJ contemplated in paragraph [14] of his judgment in *R (Irfan)*, where there is "no significant future risk". In her sentencing remarks, quoted at length earlier in this judgment, Judge Hall said that Mr Ahsan posed no serious risk of engaging in terrorism. He had a "nonviolent… outlook on life" and "never intended to be a part of what I will call the false Jihad of terrorism." There was no evidence that he adopted the beliefs of people who believed in terrorism and attacks on civilians. He was a "moderate person who has peaceful views" and his chance of recidivism was low. And so on.

52. Secondly, and crucially in my view, there is the impact which the notification requirements are likely to have on Mr Ahsan's mental health. It is well accepted that Article 8 rights of a person with a mental health condition may be interfered with to a greater extent than would be the case for a person without it. Article 8 protects the physical and psychological integrity of a person and there is an interference with

Article 8 rights if steps are taken which undermine an individual's mental stability: *Razgar* v. *Secretary of State for the Home Department* [2004] UKHC 27, [2004] 2 AC 368, [9]. *Irfan* is not an answer since it did not involve a person with a mental health diagnosis. The background with Mr Ahsan is his Asperger's syndrome, recurrent depressive disorder and obsessions. In summary, Dr Deeley's opinion is that the notification requirements are likely to have a "severe adverse impact" on Mr Ahsan's mental health and are likely to lead to the development of a "severe depressive illness" and an accompanying "high risk of attempted suicide".

53. Mr Little sought to discount Dr Deeley's medical report because his instructions gave the wrong impression of the impact of the notification requirements. But that argument comes too late. The Commissioner could have posed questions to Dr Deeley and could have cross-examined him, but chose not to do so. I must accept Dr Deeley's expert evidence which, in effect is undisputed. In any event, Dr Deeley outlined the notification requirements accurately in his report. In passing, I also note that in *DD* v. *Secretary of State for the Home Department* [2015] EWHC 1681 (Admin), Collins J described Dr Deeley as "an impressive witness": [55]. Mr Little then submitted that many defendants convicted of criminal offences suffer from a variety of different psychiatric or psychological conditions, and these are not an answer to the clear intention of Parliament that they should be made subject to the notification requirements. But that submission does not address the impact on this particular person of these particular requirements. Thirdly, Mr Little stated that the police are aware of Mr Ahsan's mental health problems and the court must proceed on the basis at this stage that they will act lawfully and proportionately in the way in which they deal with him. I accept that but in my view it is beside the point: it is Mr Ahsan's perceptions which count. Finally, Mr Little referred to a lack of evidence from Mr Ahsan's GP of deterioration in recent times regarding Mr Ahsan's mental health. In my view that is unsurprising when the evidence is that he does not accept he has mental health issues and, because of a perceived social stigma, would not in any event report them.

54. Even if the notification requirements are in Mr Little's characterisation modest, and even if their impact was overplayed in the solicitors' instructions to Dr Deeley, the fact is that the undisputed medical evidence is of serious detrimental consequences for Mr Ahsan's mental health from the imposition of the notification requirements. Once the requirements are imposed there is, of course, no review mechanism. They will continue for 15 years whatever the adverse consequences upon Mr Ahsan even if, as Dr Deeley predicts, they lead to a significant deterioration in his mental health. This likely deterioration in Mr Ahsan's mental health means that the interference with his Article 8 rights require significantly more by way of justification if it is to be lawful. Against the background of Judge Hall's findings that Mr Ahsan does not pose a threat, the Commissioner, in my judgment, has not made that case. Consequently, this application is flawed and it would be wrong for me to grant it.

Conclusion

55. The application is dismissed.