**SPECIAL IMMIGRATION APPEALS COMMISSION**

BEFORE:

**THE HONOURABLE MR JUSTICE IRWIN**
**UPPER TRIBUNAL JUDGE ESHUN**
**MR C D GLYN-JONES CBE**

BETWEEN:

**Y1**
SC/112/2011

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

# OPEN JUDGMENT

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MR D GOTTLIEB and MR F SAIFEE (instructed by HMA Solicitors )
appeared on behalf of the appellant.

MR J SWIFT QC and MS M CUMBERLAND (instructed by the Treasury Solicitor)
appeared on behalf of the Secretary of State.

MS T AYLING QC and MR Z AHMAD (instructed by the Special Advocate's Support Office)
appeared as Special Advocates

MR JUSTICE IRWIN:

**Introduction**

1. This is an appeal against the decision by the Secretary of State for the Home Department ["SSHD"] taken on 30th July 2011 to deprive Y1 of British nationality. The decision was taken pursuant to section 40 (2) of the British Nationality Act 1981 ["the 1981 Act"] on the basis that the SSHD was satisfied that the deprivation was conducive to the public good.

2. The appellant originally contended that the decision rendered him stateless and was, therefore, unlawful as being contrary to the prohibition in section 40(4) of the 1981 Act. That claim has already been determined against the appellant, following a hearing in May 2012. The appellant now appeals on the twin bases that there was no factual foundation for the conclusion that deprivation was conducive to the public good, and that the deprivation was an unjustified interference with his rights under article 8 of the European Convention of Human Rights.

3. The appellant was born on 6th July 1972 in Kabul, Afghanistan. He arrived in the UK on 16th or 18th September 1998. On 13th October 1998, he claimed asylum and was granted exceptional leave to remain on the same date. On 18th May 2003, the appellant obtained indefinite leave to remain. He was subsequently naturalised as a British citizen on 25th August 2004.

4. On 4th August 2010, the appellant travelled to Kabul with his second wife, Mehnaz Sarwar. They travelled further to Waziristan and spent a period living in Miranshah. In mid 2011, the appellant and his wife left Miranshah. On the night of 12th/13th July 2011, Y1 and his wife were detained by UK military forces in Herat, Afghanistan. The appellant was then detained at a facility in Afghanistan until Saturday, 30th July 2011. During this period he was debriefed.

5. On 29th July 2011, an application for habeas corpus was made, with an initial return date of 1st August 2011. On Saturday, 30th July 2011, the SSHD communicated to the appellant her decision to deprive him of his British citizenship.

6. In the "Notice of Deprivation" served by the SSHD, the appellant was informed that:

> "The reason for this decision is that you are considered to be involved in terrorism related activities and have links to a number of Islamist extremists. ..."

A letter from the SSHD served on the same date told him that he was to be deprived of his British citizenship on the grounds that it was conducive to the public good. On 9th August, the SSHD made an order excluding him from the United Kingdom.

7. On 23rd August 2011, Y1 appealed this decision to SIAC, the SSHD having certified that, in reaching her decision, she relied on information which should not be made public because disclosure would be contrary to the public interest. On 9th August 2011, the SSHD made a further decision excluding the

appellant from the United Kingdom. Judicial review proceedings against that decision have been stayed pending the outcome of the instant appeal.

**Evidence before SIAC**

8. The open witness evidence before SIAC consists of the following: five witness statements from the appellant dated 20th October 2011, 6th January 2012, 19th October 2012, February 2013 and 10th July 2013. The appellant has submitted statements from his wife, Mehnaz Sarwar, and her mother, Mahjbeen Kauser Sarwar, both of February 2013. The appellant relies on a psychological report dated 6th February 2013 by Dr Kari Carstairs in respect of the appellant himself, a psychiatric report by Dr Guy Hillman dated 5th February 2013 on Mehnaz Sarwar, a report by Professor Ron Geaves of 7th February 2013 and a report by Hasan Khan dated 8th February 2013. The appellant himself gave oral evidence by video-link.

9. The SSHD has served three open statements dated August and December 2012, and January 2013. The witness ND gave evidence as to their contents. The SSHD also relies on the statement from Graham Zebedee, Deputy Director of the Home Office, of 19th June 2013. Mr Zebedee also gave oral evidence. The first and third open statements of the SSHD have been amended following proceedings pursuant to Rule 38 of the SIAC Procedure Rules 2003.

10. SIAC has also received closed material which has not been served on the appellant or his open representatives, but has been served on Special Advocates acting on the appellant's behalf.

**Case Summary**

11. The SSHD's case relies on the appellant's travel to Pakistan in 2009 and his motivation for that journey, his involvement in the United Kingdom in 2009/2010 with Al Muhajiroun, and his travel in 2010 to Pakistan, including the Federally Administered Tribal Area ["FATA"], which the SSHD has concluded was for the purpose of terrorist related activity. The SSHD has concluded that the appellant engaged in extremist activity in Pakistan, including terrorist training; that he was a member of a network of extremists; that he trained to fight and was possibly involved in fighting against Afghan and Coalition forces in the border area between Afghanistan and Pakistan. The SSHD also relies on the assessment by the Security Service that, since release from detention in Afghanistan, the appellant continues to adhere to an extremist agenda and remains prepared to take action in pursuit of that agenda. The SSHD relies on the specific matters that we have just identified and upon additional matters raised in closed evidence. The SSHD submits that there are more than sufficient grounds to be satisfied that it was conducive to the public good to deprive the appellant of British nationality. The SSHD also contends that interference with the appellant's Convention rights was in accordance with law, in pursuit of a legitimate interest and proportionate. In the latter regard, the SSHD relies on the fact that the appellant and his wife had decided to leave the United Kingdom and relocate abroad in 2010.

12. The appellant's submissions begin from the assertion that the main factual issue is whether the appellant intends to prepare or commit an act or acts of terrorism in the United Kingdom. The appellant submits that there is no evidence of such an intention. On the facts of this case, it is said by the appellant that the question as to whether the deprivation of the appellant's British nationality is "conducive to the public good" is coterminous with the question of intent to prepare or commit an act of terrorism in the UK. The appellant submits that there is no evidence to support that inference.

The appellant also submits that in a procedure based in part on closed material, it is "disproportionate" to deprive a British citizen of his citizenship unless the "threshold test" for deprivation is high. The appellant also relies on the impact of his private and family life of deprivation, pursuant to Article 8 of the European Convention of Human Rights.

**The Commission's Approach**

13. The appeal to the Commission is pursuant to S.2B of the Special Immigration Appeals Commission Act 1997 ["the SIAC Act"]. The approach to such an appeal was carefully analysed by the Commission under the chairmanship of Mitting J in *Al Jedda v SSHD* (2009) SIAC SC/66/2008. We have followed the same approach in this appeal. The appeal is a challenge to the merits of the decision itself, not to the discretion to make the decision. We have come to our own decision as to the facts, applying the civil standard of proof. We have given great weight to the assessment of the Secretary of State and her security advisers, but in the end we reach our conclusions, based on our own assessment as to whether the Appellant represents a threat to the national security of the United Kingdom. We have considered what inferences can properly be drawn from the Appellant's past actions and current capacity and beliefs, so as to inform our assessment of future risk. Finally, we make our own assessment of the impact of the deprivation decision on the convention rights of the Appellant, and, in relation to Article 8, of members of his family.

14. In closing submissions in both open and closed proceedings, we invited help on one aspect of our approach: how should the Commission address material which became known only after the Home Secretary's decision, but is known to us? Both Mr Gottlieb and Mr Swift agreed there is no authority on the point. Mr Gottlieb invited us to consider after-coming material generally, for example considering in his favour the Appellant's behaviour since the deprivation decision. Mr Swift submitted that was too broad. He said material which related to the period up to the decision, but which only became known after the decision, should be considered, precisely because the appeal is not a judicial review. However, material relating to a period after the decision should not be considered, since to do so would convert the appeal into a fresh hearing and a decision by the Commission rather than an appeal.

15. Returning to this proposition in closed proceedings, Ms Ayling QC, leading Special Advocate for the appellant, supported the submissions of Mr Gottlieb. She put the matter pithily, by saying that the Commission should consider material which became available only after the decision, to see if the risk assessment was correct, and that approach was correct, whether the material related to events before or after the decision.

16. In response, Mr Swift developed his position somewhat from his formulation in open. He said we should take great care in considering "after- coming" material where it arose from events after the decision. It was only legitimate to consider the material if it could properly found an inference as to the correctness of the decision at the time, to avoid the error of making a fresh decision rather than conducting an appeal. A Damascene conversion, meaning that an appellant no longer represented a threat to national security, could not show that a decision to deprive of nationality was incorrect, and it would be anachronistic to consider it might.

17. We have considered the matter carefully, and we agree with the refined position adopted by Mr Swift. It is legitimate to bear in mind material which elucidates the facts before the decision to deprive, including the state of mind of the appellant, even where that material has only become available after the decision, and could not have been considered by the Secretary of State. It may be correct to consider events after the decision, but only so far as they may elucidate the facts up to and including the date the decision was taken. Hence, it is legitimate to consider the appellant's conduct since the decision, but only insofar as it is capable of telling us of his state of mind at the time.

**The Facts**

18. The witness ND has been a member of the Security Service since 2009. Since joining, he has worked in the section which investigates all aspects of international terrorism, including terrorism "inspired by a radical interpretation of Islam". He adopted as his evidence the amended first, second and third open Security Service statements and confirmed their accuracy, with one minor amendment. He, therefore, confirmed a picture of a continuity of involvement in Islamist extremist activity from Y1's journey to Pakistan in 2009, through involvement with Al Muhajiroun in the United Kingdom prior to departure from the UK in August 2010, culminating in travel to Pakistan and Afghanistan for the purpose of terrorism related activity. ND confirmed that Y1 had been a member of a network of extremists, including Imran Mahmood and Adil Khan.

19. ND confirmed the assessment that Y1 was a full-blown supporter of Al Muhajiroun and was in full sympathy with its glorification of terrorism, the basis upon which it was proscribed in January 2010. The Security Service assesses that Y1's views were not only aligned with those of Al Muhajiroun, but that he has demonstrated by his engagement abroad, a desire to put into practice the shared ideological commitment to terrorism.

20. The assessment of the Security Service confirmed by ND is that the original journey to the Pakistan/Afghanistan region in January to May 2009 is likely to have been with the intention of engaging in terrorism related activity. He may have had other purposes in mind, such as visiting family and possibly conducting some business, as well. So also in respect of the later trip, coordinated with others. It was a deliberate trip, all along planned to end in the FATA, with the intention of engaging in terrorist activities.

21. The Security Service assessment rejects the explanation offered by Y1 in his witness statement, that his experience with firearms and explosives whilst in the FATA was "survival training". This training was organised by a group named Jundullah, as has been acknowledged by Y1 himself in his third witness statement. On-line sources and the Security Service assessment both indicate that Jundullah is the media arm of the Islamic Movement of Uzbekistan ["IMU"], an Al Qaeda-affiliated group, whose leadership cadre is said to be based primarily in North Waziristan. The Security Service assessment is therefore firmly to the effect that Y1 was involved in terrorist training.

22. The third amended statement on behalf of the SSHD addresses the potentially exculpatory material produced in the case. On his return from travel abroad in 2009, immigration officials noted that Y1 "had provided good reasons for his travel to different countries". However, the Security Service maintains its assessment that, although Y1 may have visited family abroad and possibly included business or family purposes within his travels to other countries, he is likely also to have travelled in order to engage in terrorism related activity. The statement also addresses Y1's account of his

arrest outside Southall Mosque in April 2010, noting the evidence that he was arrested for common assault. The assessment is that the dispute arose from the distribution of extremist leaflets outside the mosque.

23. Finally, it is of note that the third amended statement reiterates the assessment that the money transferred to Y1 whilst in Waziristan may have been intended and used at least in part for building a house. Nevertheless, the assessment is maintained that some of these funds were deployed for terrorism related purposes.

24. When cross-examined by Mr Gottlieb for the appellant, ND indicated that he was unable to answer a number of matters in open evidence. The principal response of this kind concerned the status or seniority of Y1 within the terrorist groupings with which he was associated; whether he constituted a substantial risk to UK national security abroad; his continuing actions since detention in July 2011; the kind of fighting in which it is possible he had been engaged whilst in the FATA; whether a search of his belongings had been conducted; an assessment of the risks represented by Y1 since the deprivation order and the assessment as to whether it would be preferable for Y1 to be deprived of British nationality or not.

25. ND was pressed as to whether, in general terms, engaging in terrorist activity abroad represented a threat to UK national security and he confirmed that in his view that was generally true. The risk posed by Y1 was not confined to engagement in foreign terrorism or recruitment of foreign fighters: there was a "training risk" to national security, since such training can be used in the UK or abroad.

26. ND emphasised that the links to Mahmood were firm. The previous association, taken together with the travel to the FATA at the same period, and the very similar training undergone by Mahmood, confirmed the assessment that Y1 was indeed engaged in terrorist activity. ND was asked whether the assessment was Y1 had actually engaged in terrorist fighting, following the training that he had undergone. ND's confirmation was "possible but less than probable" that he was actually involved in such fighting. That did not exclude other continuing terrorist related activity.

27. As the last matter in cross-examination, ND was asked to consider whether, even employing hindsight, the judgment that Y1 was a substantial risk to national security might be wrong. The answer from ND was a firm rejection. He said that he stood by the assessment even in the light of all the available material to date.

28. Graham Zebedee was Deputy Director of the Office of Security and Counterterrorism at the Home Office from March 2010 until May 2013. He was the senior official co-ordinating advice to the Home Secretary on the relevant issues.

29. In his witness statement, Mr Zebedee recites the detention of the appellant in Afghanistan on 13th July. Following his detention, consideration was given as to whether or not there were grounds on which the Home Secretary could exercise her powers to deprive Y1 of British nationality. This consideration became more acute in the last week of July 2011, when it became clear that Y1 would shortly be released from detention. It was assumed that, following the end of his detention, Y1

might decide voluntarily to return to the United Kingdom. As an Afghan national, he could not be deported from Afghanistan. As Mr Zebedee acknowledges in his witness statement, "It was realised that a strategy would need to be developed to manage the risk his presence would pose to national security." By 25th July 2011 there was active consideration of two questions: whether there were grounds on which to base a decision to deprive Y1 of British nationality and, secondly, whether it was desirable to do so.

30. The Security Service gave advice to the Home Secretary on both points. Mr Zebedee's witness statement includes the following passages:

> "8. The Security Service considered that Y1 presented a substantial risk to UK national security, although believed that his detention had reduced the immediate risk he posed and judged that there may be more options for controlling that risk if Y1 were in the UK. By 27th July 2011, the strength of the case in support of a possible decision to deprive him of British nationality had been considered. The conclusion reached was that the case for deprivation was made out, i.e. that there was clear information that depriving Y1 of British nationality was conducive to the public good. The Home Secretary was informed of this conclusion and she agreed with it.
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> 9. The second matter for consideration was whether, given the first conclusion, the Home Secretary should, in fact, make a deprivation order.
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> 10. The Home Secretary wished to be sure she understood the reasoning for the view that Y1 should be permitted to re-enter the United Kingdom. The Home Secretary also discussed the matter with senior Cabinet colleagues."

31. Mr Zebedee confirmed in his evidence both points: namely, the view that there was a proper basis to deprive Y1 of his nationality and that the Security Service advice was that there may be more options for controlling the risk he posed if he were in the UK rather than abroad. Clearly, that was the effect of the Security Service advice to the Home Secretary. Mr Zebedee made it clear that in giving that advice the Security Service were not departing from their support for the first conclusion.

32. Mr Zebedee could recall no other case where a British national had been engaged in training for fighting, and had possibly been involved in fighting, and had they had their nationality removed, although he emphasised that he was not aware of all the possible cases which may have arisen.

33. Ultimately, the Home Secretary rejected the advice of the Security Service on the "management" issue. Following consultation with other senior Ministers, the decision to deprive was made on 29th July, and the order formalised on the 30th.

**Appellant's Case**

34. The appellant gave oral evidence by video link from Kenya, where he is currently staying on a three-month visitor's visa. He adopted the witness statements submitted on his behalf. In his evidence in chief, he asserted that the leaflets and material produced by those said to be fellow members of Al Muhajiroun were not warlike, and did not glorify terror. The incident which took place outside the

mosque was stimulated by an outsider, not a Muslim, who created difficulty as to the presence of the appellant and his friends.

35. The move to Waziristan was essentially to escape the problems and pressures of living in England, where the appellant's wife in particular was receiving constant public pressure as a result of her Islamic dress. The couple wanted to live "in an Islamist place" and under Sharia law. They never wanted to engage in any terrorist activity and never were so engaged. If they had wanted such a life, they would not have bought land and built a house.

36. The purpose of undergoing the "survival training" was to address the conditions they found in Waziristan. Everybody, young and old, carries guns. The appellant was told that he had to go through survival training in order to protect his family in those conditions. He had never carried guns or weapons before. He was unaware of the nature of the organisation, Jundullah, who provided the training. He was simply told by his landlord in Waziristan that he should undergo the training. After a period of three or four weeks, the group who were conducting the training had a dispute amongst themselves and he, the appellant, reacted to this by stopping the training process. He did not train at all after that. He had no knowledge of explosives.

37. The appellant stated that he does not believe in attacks on UK forces, has never been involved in any fighting of any kind and is not prepared to take part in any such activity.

38. Addressing his fifth witness statement, the appellant confirmed that his wife was born in Kenya and her father was Kenyan. She is entitled to a Kenyan passport.

39. The appellant was cross-examined by Mr Swift QC for the Secretary of State. He pressed the appellant on his association with those who were members or supporters of Al Muhajiroun. The appellant confirmed that he met Waseem Imran in around 2008 at an Al Muhajiroun event. The appellant said he never knew if Waseem Imran was a member. With Omar Zahir he said he could not say either if he was a supporter, nor with Abu Shafi. The appellant said that he, himself, would never say or claim they were supporters of Al Muhajiroun: "I cannot guarantee they were supporters".

40. The appellant did confirm that he spent most Saturdays and many Sundays with this group of people, handing out literature. They, not he, provided the leaflets. As to whether the leaflets came from Al Muhajiroun, he said that he would not, or could not, say that they did. He did not know that. Following some possibly rhetorical questioning, the appellant agreed that as far as he was concerned it could be "anyone" who produced this material: that did not bother him if he saw nothing wrong with its content. He did acknowledge that he usually agreed with those companions in their views on Islam and their interpretation of Islam, although he did have some different opinions. He did act with them to persuade Muslims not to vote in the run up to the last General Election. The appellant agreed, of course, as to the subsequent track record of some of this group of people.

41. The appellant was next cross-examined as to the move he made with his wife to Waziristan. It was suggested to him that he had always intended to travel to Waziristan rather than merely to join his family in Kabul. He denied this suggestion. He had got to his family in Kabul, and the plan to move on to Waziristan only arose at that stage. The appellant was pressed on this point because of the nature of conditions in Kabul. He agreed that from his previous travels and his knowledge of Afghanistan, he knew that Sharia law did not apply in Kabul. However, the appellant insisted that the move to Kabul was in order to live under more purely Islamic conditions.

42. The appellant was then taken to paragraph 60 of his third witness statement. It is helpful to incorporate the following passages here:

> "60. I knew someone from my time in Peshawar, who had contacts in Waziristan. He was called Nassrat. He had given me the number for Nasser in Waziristan in mid-2009 when I came back from Pakistan. I had called him about living in Waziristan and asked him some general questions about living in Waziristan to live a purer life. He seemed happy to help, but left any decisions to me.
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> 61. Nassrat came to Kabul and took us to Waziristan. We got a taxi together and travelled for about half an hour and then got another taxi to Khost, which took about five or six hours. We stayed overnight somewhere and early the next morning we travelled by car to Waziristan."

43. The appellant's account thereafter is that he was introduced to Nasser in Miranshah, and Nasser let him stay in the top floor of the house for the ensuing period of months. Against this backdrop, the appellant was pressed by Mr Swift QC that his intention all along must have been to travel to Waziristan. That was the purpose of the follow-up phone call after the appellant's earlier trip to the region. That was the purpose of the arrangements made, culminating in a three-day taxi ride to reach the FATA and that was why arrangements had been made in advance for the use of the accommodation in Miranshah. The appellant continued to deny the suggestion that he and his wife had all along intended to go to Waziristan. He repeated that the intention was to visit family in Kabul and the prospect of an onward journey only arose after their arrival.

44. He rejected the suggestion that it was highly unlikely he would be helped in this way, by a man he had met once casually 20 months before in Peshawar, and a man he had spoken to only once on the telephone a considerable time previously. The appellant agreed that he had given Khan the telephone number of Nasser in Waziristan. He said that he never asked Khan why he wished to know Nasser's telephone number in Waziristan. It was a coincidence that Khan arrived in Waziristan very shortly after the appellant. He had never discussed the matter with Khan and he never knew of Khan's plan to travel to the same destination.

45. The appellant was taxed about the training he underwent. He agreed that the training was both physical training and training in the use and maintenance of guns, particularly a pistol and an AK47. He said that he never intended to use such weapons in any terrorist purpose. He had acquired a pistol for a few months whilst in Miranshah but had never acquired an AK47. The training was simply "part of survival training". When he was asked why this training included the use and maintenance of an AK47, if he never intended to possess one, his answer was because the course or package of training contained that element. He confirmed that the training took three to four weeks, which he said meant training one to three hours a day. He agreed that this was a considerable

commitment of time. The training included a discussion of the range of the weapons concerned and he did an examination in the use of the guns.

46. Paragraph 75 of the appellant's third witness statement reads as follows:

> "We would go each day from the morning until the afternoon for three or four weeks. We would be given theory about the use of a pistol, PK and AK47, such as how far you could fire the weapon, the ammunition, how to open it and about how to clean it. We had a written exam about the use of the guns. In terms of practice we were shown how to hold the guns, but did not fire the guns. We did not have any target practice. We did some physical training including jogging and push-ups. We were told the training was important for us to keep fit and survive in Miranshah, because we were supposed to head our households in a very remote area, which required a lot of physical activity."

47. In oral evidence, the appellant repeated that he had never practised shooting an AK47 and never shot an AK47, despite spending three to four weeks training how to do so. He did acknowledge that his wife's evidence included the fact that she shot an AK47.

48. It is common ground that whilst in Waziristan the appellant decided to sell his video camera to one of those running the training programme, Abdulaziz. The potential customer, according to the appellant, decided that it was helpful to test the camera by doing some filming first. The method chosen was that the appellant went on a journey 15 or 20 minutes by car from Miranshah with the camera and then:

> "I gave Abdulaziz the camera and he would set it on a stone and use it to film a small explosion. I did not ask any questions about what they were doing. In fact, I stood well away from what they were doing because I was told to hide from the explosions. I tried to stay away from what happened because I was afraid I might be injured by the blasts. I could only hear what was going on. I believe that Abdulaziz and a few other people would detonate small amounts of explosives. I was never involved in any of the detonations. They did this three or four times. Later I put the videos on my laptop and transferred on my iPod so that I could demonstrate how the camera operated. I then sold my video camera to Abdulaziz for about 50,000 Pakistani rupees."

49. The appellant was tasked in cross-examination with this account. Mr Swift asked him if it was not an odd way to test the quality of a video camera. The appellant's response was that Abdulaziz had just told him he was going somewhere to try out the camera - no details were given beforehand. The appellant did not ask Abdulaziz why things were managed in that way. He did not consider that there might be a risk of him being robbed of the camera, which he agreed was quite valuable, whilst travelling with a group of men who he did not know well. He walked away from the explosions because he did not want to be harmed. He was upset and annoyed with Abdulaziz on that occasion. It was after that occasion that the group conducting the training had their dispute.

50. The videos were then transferred on to the laptop and the iPod because Abdulaziz and the others

asked the appellant to do it and he needed the money. He put the images on to his laptop and iPod before he sold the camera because the others wanted to see the pictures. In answer to the suggestion that they could have seen the picture replayed on the camera itself, he agreed that they could.

51. The appellant agreed that in the event the training he had undergone was a waste of time, since he never made any use of the training and then left Waziristan.

52. The appellant rejected the suggestion that he had undertaken the training because he wanted to fight. He said that he had no intention to learn about any of the weapons and he did not intend to fight. The appellant denied that he was doing that in order to kill US or UK troops. That would in any event not be effective. Towards the close of his evidence under cross-examination, he stated that he and his wife had tried to leave Waziristan from the beginning of their period there. He had built a house but that was an attempt to make their stay better. He agreed in re-examination that in the course of his fourth witness statement he had acknowledged that he had been loaned an AK47 for a period, but it was not his gun and he had never shot at any member of the UK, US or Afghan forces.

**The meaning of "conducive to the public good"**

53. This question was closely examined by the Court of Appeal and the House of Lords in *SSHD V Rehman* [2003] 1 AC 153, [2001] UKHL 47. The appellants in that case successfully argued at first instance before SIAC for a restricted interpretation of what constituted a threat to national security. In terms which are to a notable degree echoed by the appellant's written argument here, it was submitted that national security consisted of activity directed against the United Kingdom. The conclusions of SIAC were summarised in the Commission's decision as follows:

> "In the circumstances, and for the purposes of this case, we adopt the position that a person may be said to offend against national security if he engages in, promotes or encourages violent activity which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom of its nationals. National security extends also to situations where United Kingdom citizens are targeted, wherever they may be. This is the definition of national security which should be applied to the issues of fact raised by this appeal."

54. This approach was rejected by Lord Woolf MR in the Court of Appeal, and by the House of Lords. The proper approach was more nuanced, and it was important to focus on the future: the question is not has the individual endangered national security, but does he represent such a danger:

> "33 The correctness of SIAC's approach as to what is capable of being regarded as a threat to national security is the most important issue on this appeal. SIAC acknowledged they were adopting a narrow interpretation. They were influenced in doing so by the alternative grounds set out in section 15(3) of the 1971 Act. The use by SIAC of the word "targeted" clearly indicates that SIAC considered the conduct relied on had to be directed against the United Kingdom. Mr Macdonald initially in his skeleton argument was minded to accept the correctness of SIAC's approach. However, in the course of this hearing and in his oral submissions he accepted that the approach which SIAC adopted was too restrictive.

34 It cannot be the case that, if a course of conduct would adversely reflect on the security of this country, it is not open to the Secretary of State to regard the person's presence in this country as not being conducive to the public good because the target for the conduct is another country. Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent upon the security of other countries. The establishment of NATO is but a reflection of this reality.

38 At the conclusion of the argument we invited counsel to submit a definition of national security. Mr Macdonald provided the following definition:

> "In alleged terrorist cases, a person may be said to be danger to the United Kingdom's national security if he or she engages in, prompts or encourages violent activity which has, or is likely to have, adverse repercussions on the security of the United Kingdom, its system of government or its people."

39 We regard this as being a generally helpful approach but it is not conclusive or exhaustive. It first of all recognizes that what can be regarded as affecting national security can vary according to the danger being considered. Mr Macdonald wisely confined his definition to cases involving terrorism. We also approve the reference which is made in the definition to there having to be adverse repercussions on the security of this country. The repercussions can be direct or indirect. Mr Macdonald indicated that he considered that the adverse repercussions had to be "likely". We consider that it is sufficient if the adverse repercussions are of a kind which create a risk of adverse repercussions. As long as there is a real possibility of adverse repercussions, then the degree of likelihood only becomes important when the Secretary of State has to weigh up against the risk of adverse repercussions the adverse effect of deportation on the immigrant.

40 As to the three situations referred to in section 15(3) of the 1971 Act, while it is correct that they are alternatives, there is clearly room for there to be an overlap. Here if there were terrorist activities to which Mr Rehman was giving encouragement, which were directed against India's links with Kashmir, then the involvement of individuals coming from this country could damage relations between this country and India. However, the fact that the conduct could have an adverse affect on our relationship with a friendly state does not mean that the activities could not also have national security consequences. The promotion of terrorism against any state is capable of being a threat our own national security. The Government is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country.

41 It follows that the approach of SIAC was flawed in so far as it required the conduct relied on by the Secretary of State to be targeted on this country or its citizens."

55. That approach was endorsed by a number of the speeches in the House of Lords, notably Lord Slynn at paragraphs 16 to 22, and Lord Steyn at paragraphs 28 and 29:

> "**LORD SLYNN**
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> 16. I accept as far as it goes a statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):
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> "A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature".
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> That was adopted by the Commission but I for my part do not accept that these are the only examples of action which makes it in the interests of national security to deport a person. It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.
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> 17. In his written case Mr Kadri appears to accept (contrary it seems to me to his argument in the Court of Appeal that they were mutually exclusive and to be read disjunctively) that the three matters referred to in section 15(3) of the 1971 Act, namely "national security", "the relations between the United Kingdom and any other country" or "for other reasons of a political nature" may overlap but only if action which falls in one or more categories amounts to a direct threat. I do not consider that these three categories are to be kept wholly distinct even if they are expressed as alternatives. As the Commission itself accepted, reprisals by a foreign state due to action by the United Kingdom may lead to a threat to national security even though this is action such as to affect "relations between the United Kingdom and any other country" or to be "of a political nature". The Secretary of State does not have to pin his colours to one mast and be bound by his choice. At the end of the day the question is whether the deportation is conducive to the public good. I would accept the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security, and that such co-operation itself is capable of fostering such security "by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states". There is a very large element of policy in this which is, as I

have said, primarily for the Secretary of State. This is an area where it seems to me particularly that the Secretary of State can claim that a preventative or precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.

18. National security and defence of the realm may cover the same ground though I tend to think that the latter is capable of a wider meaning. But if they are the same then I would accept that defence of the realm may justify action to prevent indirect and subsequent threats to the safety of the realm.

19. The United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the Secretary of State as likely to take action against the United Kingdom and its citizens.

20. I therefore agree with the Court of Appeal that the interests of national security are not to be confined in the way which the Commission accepted.

21. Mr Kadri's second main point is that the Court of Appeal were in error when rejecting the Commission's ruling that the Secretary of State had to satisfy them, "to a high civil balance of probabilities", that the deportation of this appellant, a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so. The Court of Appeal [2000] 3 WLR 1240, 1254, para 44 said:

> "However, in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion."

22. Here the liberty of the person and the practice of his family to remain in this country is at stake and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgement or assessment.

There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good."

"**LORD STEYN**

28. Section 15(3) of the Immigration Act 1971 contemplated deportation of a person in three situations, viz where:

"his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

The Commission thought that section 15(3) should be interpreted disjunctively. In the Court of Appeal [2000] 3 WLR 1240 Lord Woolf MR explained, at p 1253, para 40 that while it is correct that these situations are alternatives "there is clearly room for there to be an overlap." I agree. Addressing directly the issue whether the conduct must be targeted against the security of this country, Lord Woolf observed, at p 1251, para 34:

> "Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent upon the security of other countries. The establishment of NATO is but a reflection of this reality. An attack on an ally can undermine the security of this country."

Later in his judgment, at pp 1253-1254, para 40, Lord Woolf said that the Government "is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country". I respectfully agree. Even democracies are entitled to protect themselves, and the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies. This broader context is the backcloth of the Secretary of State's statutory power of deportation in the interests of national security."

56. We have cited reasonably extensive passages from *Rehman* in order to ground our proper approach, when considering what constitutes a threat to national security. The critical points emerging from the speeches in *Rehman* are as follows: firstly, there must be a proper factual basis for the decision; secondly, the Secretary of State is entitled to take the material together, to form an overview, and there is no obligation to treat each discrete piece of information as a separate allegation, which, if refuted or weakened one by one, necessitates without more a decision against deprivation; thirdly, the essence of the test is that the individual represents a "danger" to national security, not that he or she can be proved to have already damaged it: the Secretary of State is entitled to take a preventative or precautionary approach; fourthly, national security is engaged with matters beyond the borders of the United Kingdom, perhaps particularly in relation to terrorism, even where that activity is directed against other States; fifthly, due deference must be shown to the policy of the Executive with regard to national security, and the views of the Secretary of State must be given considerable weight.

**Closing Submissions**

57. Mr Gottlieb submitted that his client's account was credible. It was credible that he and his wife travelled from the UK not for terrorism but to seek a life under Islam. The indications of his associations before departing with members of Al Muhajiroun were weak and tentative. The account of events in Afghanistan was also credible. It would be wrong to conclude the training in Waziristan was other than survival training. The appellant's lack of engagement with anything to do with terrorism since the decision in July 2011 should be borne in mind in his favour as demonstrating he never was a danger to national security. The view of the Security Service that they would prefer him to be permitted to return to the UK in fact indicated that the decision to deprive him of nationality was poorly founded. He poses no risk to the security of the United Kingdom.

58. In closing submissions on behalf of the respondent, Mr Swift QC essentially emphasised the matters he had put in cross-examination to the appellant. The evidence given in open confirmed the association with other extremists in Al Muhajiroun. The Security Service assessment was correct. The 2009 trip was indicative of a desire to become involved in terrorist activity and led to the connections which facilitated the later trip. The intention all along had been to travel to Waziristan, since travel to Kabul could never have satisfied the desire of the appellant and his wife to live under Sharia law, as the appellant himself well knew. The account of "survival training" was incredible, as was the appellant's version of his engagement with the training. Mr Swift added that the claim advanced in respect of Article 8 of the Convention did not get off the ground, since the family had already left the United Kingdom and were able to live together elsewhere.

**Our Conclusions**

59. We find with confidence that the appellant's account is deliberately deceptive and lacks credibility in all its major points. The associations formed during the appellant's first trip to Pakistan in 2009 were instrumental in his journey to Waziristan in 2010. It is highly unlikely that the named individuals who helped arrange the second trip, with such a commitment of time and energy, did so through casual friendship or through a desire to give support for a religious pilgrimage. We are not convinced by the expert report from Professor Geaves that these journeys are to be explained simply as a religious migration or Hijra. Nor do we find the evidence of Mr Hasan Khan persuasive that this appellant travelled to Waziristan for personal satisfaction, or a desire to live in conditions of Islamic purity. Those may have formed ancillary motives, but were not the primary purpose for his travel.

60. The appellant's associations with the other named members of Al Muhajiroun, and his activities in distributing material and demonstrating near the mosque in London, cannot rationally be explained as the appellant seeks to do. It is beyond belief that he was unaware of the true nature of the group around him and of their activities. These associations give rise to two inferences: firstly, that he had already formed jihadist views and, secondly, that his evidence in the appeal was deliberately misleading.

61. We consider it is the fair inference to draw from the open evidence that the second trip to Pakistan was all along intended to be a journey to Waziristan, utilising the contacts earlier made by the appellant. It is uncontroversial that the appellant and his wife hold similar views concerning Islam.

62. The appellant's accounts of an unwitting connection with Jundullah, survival training unconnected to terrorist activity, training to use an AK47 without ever shooting such a weapon, and filming explosives in order to demonstrate the quality of a second-hand video camera are, in our view, quite incredible. The proper inferences from the open evidence are that he intended to travel to Waziristan to become involved in terrorist activity and undertook sustained training to fit himself for that task. We find that the weapons training was exactly that, and that there must have been, to some degree at least, training in explosives as an explanation of the appellant's own account of events.

63. The evidence before us in our view wholly supports the assessment advanced by ND on behalf of the Security Service. Nothing in the evidence has served to undermine or weaken that assessment. We are not impressed by the apparent lack of terrorist-type activity since the appellant was detained and debriefed. In our judgment, the proper inference from this is that the appellant is responding to his new situation. He now knows he has been discovered, and will no doubt assume he will be watched. He may also be influenced by his disengagement with life in the UK, by his wife's miscarriages and the birth of their child, but none of that is a proper basis for inferring he has changed his outlook, or will in the future be unwilling to engage in such activities again. In any event, we remind ourselves that this is an appeal not a fresh decision. This material is not a proper basis from which to infer that his state of mind was different before the decision by the Secretary of State.

64. We have considered closely the evidence of Mr Zebedee. He was careful to distinguish between the case that the appellant represented a danger to national security, from the tactical position adopted by the Security Service as to how best to manage the risk represented by the appellant. We accept these were and are discrete questions. The views of the Security Service as to the management of the risk cannot logically or properly detract from the principal conclusion that the appellant represented a danger to national security.

65. For all these reasons, we have concluded that the open evidence amply satisfies the test and, accordingly, we find that the Secretary of State was fully justified in concluding that the appellant represented a danger to national security.

66. We have considered carefully the closed evidence before the Commission, including the exculpatory material. None of that serves to undermine the conclusions we have expressed based on the open evidence. Much of the closed material strongly augments and confirms these conclusions. We regard the closed material as absolutely conclusive evidence of the appellant's desire to engage in terrorist activity and very strong evidence of an enduring commitment to Jihadist ideas.

67. We have considered the Article 8 claim advanced in written submissions, although given very little emphasis by Mr Gottlieb. We consider he was right in that regard. We have considered the five questions which must be addressed in an Article 8 claim: see: *R (Razgar) v SSHD* [2004] 2AC 368. Both the appellant and his wife made it clear that they did not wish to live in the United Kingdom. They have lived together abroad in Afghanistan and in Kenya and travelled together through a number of other countries. There is no basis for a claim that their family or private lives will be

disrupted by the decision. Even if there were such a claim, it would be impossible to regard the decision as disproportionate given the facts of this case.

68. For those reasons this appeal fails.