Appeal No: SN/129/2016
Hearing Dates: 24th & 25th October 2017
Date of Judgment: 5th January 2018

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE GILL
MR NEIL JACOBSEN OBE

T2

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Mr H Southey QC and Mr N Armstrong
Instructed by:	Lupins Solicitors
Special Advocate:	Mr M Goudie QC
Instructed by:	Special Advocates' Support Office
For the Respondent:	Mr R Palmer and Mr J Stansfeld
Instructed by:	Government Legal Department

OPEN JUDGMENT

Introduction

1. This is our open judgment in this application pursuant to section 2C of the Special Immigration Appeals Commission the 1997 Act to set aside a direction made by the Respondent ('the Secretary of State') on 3 August 2016 to exclude T2 from the United Kingdom ('the direction'). The consequences of the direction were that the Appellant's leave to remain ('LTR') in the United Kingdom was cancelled, he was refused leave to enter ('LTE') the United Kingdom on 4 August 2016, and, while the direction is in force, any future application by T2 for entry clearance, or for LTE, would be refused. The Secretary of State certified the direction under section 2C of the 1997 Act. The effect of that certificate was that T2 was able to apply to the Special Immigration Appeals Commission ('the Commission') for a review of the direction and to ask the Commission to set the direction aside.

2. T2 was represented by Mr Southey QC and Mr Armstrong. Mr Goudie QC was the Special Advocate, and the Secretary of State was represented by Mr Palmer and Mr Stansfeld. We are grateful to all counsel for their written and oral submissions.

3. The directions in this case, dated 7 December 2016, were made by Flaux J (as he then was). They gave permission to T2 to give oral evidence by video link. We heard him give evidence. He was cross examined by Mr Palmer. The directions did not explain on what basis that permission was granted. There was nothing in the order for directions which stipulated that we should take the evidence into account, still less for what purpose. We heard the evidence, but, for the reasons we give below, we have decided that it was not relevant to the issues we have to decide, and we say no more about it.

4. T2 applied for a direction that the public be excluded from the open hearing and that reporting restrictions be applied to it. He argued that his account in his witness statement is that he has had 'a significant level of contact with the Security Services'. In her OPEN skeleton argument, confirmed by Mr Palmer in his oral submissions, the Secretary of State neither confirmed nor denied

this alleged contact with the Security Services. The Government of Iran, T2 argued, has a reputation for being suspicious of the United Kingdom and of not complying with 'recognised human rights standards'; his profile is unique, and if the proceedings were in public, and not subject to reporting restrictions, there was at least a risk that T2 would be exposed to ill treatment breaching article 3 of the European Convention on Human Rights ('the ECHR').

5. The Secretary of State did not oppose that application. We granted it at the start of the hearing. We should make clear that the grant of the order does not mean that we accept this part of T2's account. We express no view about its veracity. We made the order so as to guard against any article 3 risk to which T2 may have exposed himself by giving that account in his witness statement, whether or not it is true.

6. T2 applied to amend his grounds. The application was very late. The Secretary of State, however, did not oppose it, and we granted it.

The facts

7. T2 is a citizen of Iran. In his own words, he has 'enjoyed a full and varied life'. He continues, 'A full account of my life would be very extensive and much of it would appear to be irrelevant to the issues raised. In those circumstances I have sought to focus on what I believe may be relevant. If I have missed anything, it is because I require further disclosure in order to understand the relevance of it' (witness statement, paragraph 1).

8. T2 and his wife have three children, two of whom are less than 18 years old. On 17 May 2011, T2's wife was given LTR until 20 May 2014. On 28 May 2014, she was given further LTR until 4 May 2017 as a Tier-2 migrant. The children were granted leave until the same date, as her dependants. Despite the grant of LTR, T2's wife spent most of her time outside the United Kingdom. She made two applications for indefinite leave to remain ('ILR'). They were refused in August and November 2016. The reasons for the decision dated 28 November 2016 stated that advance passenger data showed that in the five

years preceding the application she had been absent from the United Kingdom for a total of 1541 days; that is for 323 days, 308 days, 343 days, 343 days and 224 days in each of those preceding five years respectively. Those absences meant that she did not meet the requirements of the relevant provisions of the Immigration Rules HC 395 as amended ('the Rules'). Those absences were also much more significant than the absences declared in her application (511 days). On 19 April 2017 T2's wife applied for an extension of her LTR. It was granted, until 4 August 2017. When that leave expired, she did not apply to renew it.

9. Between August 2011 and 3 August 2016, T2 came to the United Kingdom 22 times as the spouse of a Tier-2 migrant. He was granted LTR as such a spouse on 28 April 2014. It would have expired on 4 May 2017, had it not been cancelled.

10. The decision which is the subject of this application for a review is in a letter dated 3 August 2016. The decision said that the purpose of the letter was to tell T2 that, after the most careful consideration, the Secretary of State had personally directed that he be excluded from the United Kingdom on the grounds that his presence in the United Kingdom would not be conducive to the public good, as 'you were assessed to be the former manager of your local Basij, the Iranian paramilitary volunteer militia which participated in countering civil unrest during the 2009 election protests, alongside the Islamic Revolutionary Guards.' The letter said that, on the basis of the Secretary of State's decision, T2's LTR in the United Kingdom had been cancelled under article 13(7) of the Immigration (Leave to Enter and Remain) Order 2000 ('the 2000 Order') and paragraph 321A(4) of the Rules. The Secretary of State had certified the decision to exclude T2 under section 2C of the 1997 Act. As we have said, the effect of that was he could apply to the Commission for a review of the direction.

11. On 4 August 2016, a further decision was served on T2, who had tried to enter the United Kingdom, at Heathrow Airport. That decision recited that T2 had

asked for LTE, that under the Rules he needed an entry clearance or visa and that he did not have any. He had presented his Biometric Residence Card, but he had been told on 3 August 2016 that that Permit was cancelled. T2 was told not to try to travel to the United Kingdom with it. The decision then said, 'This was because the Home Secretary has personally directed that you should be excluded from the United Kingdom on the grounds that your presence here would not be conducive to the public good.' On that basis, T2's LTR had been cancelled under article 13(7) of the 2000 Order and paragraph 321A(4) of the Rules, on 3 August 2016. That decision repeated that the Secretary of State had certified the decision under section 2C of the 1997 Act, and the effect of that certificate. T2 had not sought entry under any other provision of the Rules, and LTE was refused. The decision also said that directions for T2's removal to Tehran had been set later on 4 August 2016.

12. The grounds are further explained in the Secretary of State's OPEN and CLOSED statements. The amended First OPEN statement says, under the heading 'Exclusion Case', 'A blog post from the website 'Azarakan' featured an article about [T2] and his role in the 2009 Iranian election protests. The article featured a picture of [T2] on the back of a motorcycle, tucking a firearm into his jeans. We assess that [T2] was acting as a member of the *Basij*. The *Basij* is the paramilitary volunteer militia founded by the First Iranian Supreme Leader, Grand Ayatollah Khomeini in 1979. The *Basij* receives its orders directly from the Islamic Revolutionary Guard Corps (IRGC) and the current Iranian Supreme Leader, Ayatollah Khameini.' This text is supplemented by explanatory footnotes, which we have omitted. The overall assessment was that T2's presence in the United Kingdom was not conducive to the public good.

13. Each decision spells out the effect of a certificate under section 2C of the 1997 Act, but neither explains why the certificate was made. Section 2C applies when a direction about the exclusion of a non-EEA national is made wholly or partly on the ground that the exclusion of that person is not conducive to the public good, and 'is certified by the Secretary of State as a direction that was

made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public – (i) in the interests of national security, (ii) in the interests of the relationship between the United Kingdom and another country, or (iii) otherwise in the public interest'. While lawyers who work in this field well understand what a certificate under section 2C means, we record our concern that the basis of the certificate was not spelt out in either decision. It should have been. The recipients of such decisions cannot be assumed to understand this statutory shorthand.

The OPEN grounds of challenge to the direction

14. There are six grounds.

i. The criteria for excluding a person from the United Kingdom are not in the Rules. It follows that the Secretary of State had no power to give the direction.

ii. The underlying decision was made unfairly.

iii. The Secretary of State failed to investigate properly, and or her decision was based on unreliable information.

1. She should have been told that the Appellant was willing to meet the Security Service, which suggested that he was not hostile to the United Kingdom.

2. He gave a good reason for ending that contact, again suggesting he was not a threat to the United Kingdom.

3. The Security Service were aware of the allegations on which the direction was based but took no action and allowed travel to the United Kingdom, also suggesting that he was not seen as a threat to the United Kingdom.

4. The material relied on to support the OPEN allegations was inherently unreliable. The Secretary of State should have been told that, rather than being told that allegations were facts.

iv. On his case, the Appellant was asked to co-operate with the Security Service and ultimately refused. He made it clear that if he did co-operate, he might be at risk of article 3 ill-treatment from the Iranian authorities. The Security Service, on his case, had suggested that they could 'harm his immigration status'. If those threats were made and carried out, the direction was given for an improper purpose, or in bad faith. We make clear again (see paragraph 4, above) that the Secretary of State neither confirmed nor denied this alleged contact. We also make clear that, as Mr Palmer repeated in his oral submissions, the Secretary of State expressly denies, in OPEN, that the decision was made on the basis of a failure to co-operate, to punish T2, or in bad faith, whether or not there was contact with the Security Service as alleged by T2. Those denials apply both to the decision and to the recommendation to the Secretary of State that she make that decision.

v. The decision was not justified.

vi. T2 was allowed to enter the United Kingdom many times after the Secretary of State must have known of the allegation against T2 based on the blog post. Allowing T2 to enter in that way was a practice which created a legitimate expectation that the Secretary of State would continue to allow him to enter, unless there was a good reason to depart from that expectation. In the OPEN case, there was no such good reason.

Our approach

15. T2 also makes submissions about the approach which we should adopt. In sum, he submits that his interests in the decision are very significant. 'They are of a nature that either engage article 8 [of the ECHR] or interests of similar importance'. We record that Mr Southey rather disowned reliance on article 8 in his oral submissions, in our judgment for good reason, given the pattern of T2's wife's stays in the United Kingdom. In his skeleton argument he

contended that T2 was granted leave in line with his wife in order to enable them to be together, while she exercised her entitlement to work in the United Kingdom. That leave entitled T2 to live in the United Kingdom. The effect of the direction is that T2 and his wife cannot have the degree of contact in the United Kingdom which they would wish. It might also put pressure on his wife to give up her work in order to be with him. A restriction on employment can engage article 8. The interests at stake are so important that a very intensive review is required, including an assessment of proportionality. By the end of his oral submissions, he put more emphasis on the point to which we now turn.

16. He accepted, we think, that this was not a case that was quite on all fours with *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591. He was right not to push the analogy too far, for the reasons given by Mr Palmer. Pham was deprived of his British nationality and had 'little real attachment to' his other country of nationality and was 'unlikely to be able to return there' (paragraph 98, per Lord Mance). Such a decision invoked a 'correspondingly strict standard of judicial review' in which proportionality was a 'tool' which could be both 'available' and 'valuable'. In any event, everything that the Supreme Court said about the standard of review is obiter; see paragraphs 56 and 102 of the judgments of Lords Carnwath and Sumption respectively, with both of whose judgments the majority agreed.

17. Nonetheless, Mr Southey submitted that judicial review is such a flexible procedure that we could be required to make of findings of fact, where appropriate. He relied on two cases in which, on an application for judicial review, the court had made findings of fact (*R v Derbyshire County Council ex p Times Newspapers Limited* (1991) 3 Admin LR 241 and *Mohibulla v Secretary of State for the Home Department* [2016] UKUT 00561 (IAC). We asked Mr Southey on what topics he invited us to make findings of fact. He replied that there were two such issues:

i. whether T2 was a Basij commander who was involved in suppressing legitimate political protest in 2009, or (his case) just joined with others from his community in preventing looting and crime in his neighbourhood; and

ii. whether there had been, and if so, the extent of, any meetings between him and the Security Service.

18. Mr Southey submitted in his reply that issue i was an issue about a historical fact, not an issue about predicting future risk. The latter, but not the former, was an issue about which the court might defer to the Secretary of State on the grounds of institutional competence. This formulation, it seems to us, invites us to treat this dispute as one which is in the ambit of the decision of the Court of Appeal in *E v the Secretary of State* [2004] EWCA Civ 44; [2004] QB 1044. However, this is not such a case, precisely because the 'historical fact' to which he refers is not such a fact, and is not an 'established' fact as envisaged in *E*; it is, by contrast, a contested fact. The Commission is not a primary fact-finder about that sort of 'fact' in a review under section 2C.

19. Mr Southey also referred to one decision about a control order and two decisions about Terrorism Prevention Investigation Measures Act 2011. He submitted that in such cases, where the court is also required to apply the principles which apply on an application for judicial review, judges had indicated a willingness to consider, for themselves, whether the respondents had, in fact, engaged in terrorism-related activity. We accept Mr Palmer's submissions about those cases: the judges concerned were neither permitted nor required by the relevant statutory provisions to decide those questions for themselves, and had done so for pragmatic reasons.

20. Mr Palmer referred us to the decision of the Divisional Court in *R (Secretary of State for the Home Department) v Special Immigration Appeals Commission* [2015] EWHC (Admin) 681; [2015] 1 WLR 4799, paragraphs 27, 28 and 34, per Sir Brian Leveson P. That case concerned the material which

the Commission must order the Secretary of State to disclose, as Mr Palmer rightly accepted, but, as he submitted, and we accept, it also sheds useful light on the exercise which the Commission must conduct in a review such as this.

21. Mr Palmer submitted that what we were required to do, in order properly to reflect the limitations imposed on the open representatives by the closed material procedure, and the difficulties created by the fact that the Special Advocates could not communicate with T2, was carefully to gain a 'complete understanding of the issues involved'. We have to review the closed material with care, bearing in mind the possibility that there may be other, perhaps innocent, explanations to rebut it. We are not required to consider all the material which could have been available to the official who wrote the submission to the Secretary of State which led to the direction, but rather, 'the underlying material on which the [author of the submission to the Secretary of State] actually relied in order to identify facts or reach the conclusion'. That material need not be exhaustive of all that is known, but must be sufficient to justify the contents of the submission. A review is 'an analysis of the facts and the basis for the facts which led to the recommendation or conclusion, together with the decision and its reasoning'. That material must be sufficient to permit challenge, if appropriate 'to the underlying rationality of any part of' the decision.

22. We accept Mr Palmer's submission about the approach we should adopt. It follows that we are not concerned with whether the allegation made against T2 in open was true, but whether there was evidence before the Secretary of State on which it was open to her reasonably to conclude that the allegation was true. It follows that T2's evidence to us, denying the allegation, is irrelevant.

23. We accept, in principle, on the basis of the *Derbyshire* case, that the court may hear live evidence in those relatively rare cases in which a claimant impugns the motives of a decision maker or makers and it is also necessary to make findings of fact about those motives. We will consider, in our CLOSED

judgment, Mr Southey's invitation to make the second finding of fact we refer to in paragraph 17, above.

The Rules

24. T2 argues that the considerations referred to in the Secretary of State's Guidance on Exclusion from the United Kingdom should, instead, be in the Rules, relying on the decisions of the Supreme Court in *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192 and *Alvi v Secretary of State for the Home Department* [2012] USKSC 33; [2012] 1 WLR 2208. The judgments in those cases were handed down on the same day. The issue considered by the Supreme Court in *Munir* was whether it was lawful for the Secretary of State to have a concessionary policy outside the Rules. The issue in *Alvi* was the extent to which the Secretary of State could lawfully refuse leave in reliance on criteria which were not contained in the Rules, but in guidance, which was not laid before Parliament.

25. Part I of the Immigration Act 1971 ('the 1971 Act') is headed 'Regulation of entry into and stay in the United Kingdom'. Section 1 is headed 'General Principles'. Section 1(1) deals with those 'who are in this Act expressed to have the right of abode in the United Kingdom' (see further, section 2). We note that the 1971 Act was amended with effect from 16 June 2006 by the insertion of section 2A. In short, this gives the Secretary of State power by order to remove the right of abode from a specified person only if the Secretary of State thinks that it would be '*conducive to the public good for the person to be excluded from the United Kingdom*' (our emphasis).

26. Section 1(2) provides that those who do not have that right 'may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act…' Section 1(3) provides for the common travel area. Section 1(4) provides: 'The rules laid down by the Secretary of State as the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of

abode shall include provision for admitting (in such cases and *subject to such restrictions as may be provided by the rules*, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom' (our emphasis).

27. Section 3 is headed 'General provisions for regulation and control'. Section 3(1) is introduced by the phrase 'Except as otherwise provided by or under this Act, where a person is a not a British Citizen'. There is then a list of three items. The effect of section 3(1)(a) is that such a person shall not enter the United Kingdom 'unless given leave to do so in accordance with the provisions of, or made under, this Act'. Section 3(1)(b) provides that such a person may be given leave to enter or remain for a limited, or for an indefinite, period. Section 3(1)(c) deals with the conditions which may be imposed on such leave.

28. Section 3(2) provides:

> '*(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).*
>
> *If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid).'*

29. Section 3(3) makes further provision about LTE and about LTR, and section 3(4) about the lapsing of leave in some circumstances when a person leaves the common travel area. Section 3(5) provides that a person who is not a British Citizen shall be liable to deportation if, among other things, the Secretary of State 'deems his deportation to be conducive to the public good'. Further provision about deportation is made by sections 5, 6 and 7.

30. Section 3A is headed 'Further provisions as to leave to enter'. Section 3A(1) gives the Secretary of State power by order to 'make further provision with respect to the giving, refusing, or varying of leave to enter the United Kingdom'. Section 3A(7) provides that the Secretary of State may, in such circumstances as may be prescribed in an order by him, give or refuse LTE or LTR. Such an order may also make provision for various functions of immigration officers to be exercised by the Secretary of State (section 3A(8)). The 1971 Act and any provision made under it has effect subject to any order made under section 3A (section 3A(11)). Such orders are subject to the affirmative resolution procedure (section 3A(13)).

31. The 2000 Order, referred to above, was made in the exercise of that power. When a person is outside the United Kingdom, article 13(7) of the 2000 Order permits the Secretary of State to cancel LTR which is in force under article 13. Article 13(8) permits the Secretary of State, but does not require her, to ask for information or documents before cancelling leave in such a case.

32. Section 3B is headed 'Further provisions to leave to remain'. Section 3(1) confers on the Secretary of State a power, similar to that conferred by section 3A, to make provision by order about LTR. Section 3B(2) and (3) make further provision about such an order. Section 3B(4) and (6) make provisions for such an order equivalent to those made by section 3A(11) and 3A(13) in the case of an order about LTE.

33. Section 3C provides, in some detail, for leave to be continued pending a decision on an application to vary leave, and section 3D, for continuation of leave after a decision to vary a person's leave 'with the result that he has no' LTE or LTR, or to revoke such leave. We note that this provision shows that Parliament contemplated that an exercise of the power to vary leave might result in a person having no leave, and therefore sheds light on the provision which may be included in orders made under sections 3A and 3B.

34. Section 4 is headed 'Administration of control'. The power 'under this Act' to give or refuse LTE is to be exercised by immigration officers and the power to give LTR or to vary any leave under section 3(3)(a) is to be exercised by the Secretary of State (section 4(1)). Section 4(2) enacts Schedule 2, which makes provision, among other things, for the appointment and powers of immigration officers, and the exercise by them of their powers in relation to entry into the United Kingdom, the removal of various people from the United Kingdom, for detention pending removal, and for 'other purposes supplementary to' the 1971 Act. Paragraph 1(3) of Schedule 2 provides that in the exercise of their functions under the 1971 Act, immigration officers 'shall act in accordance with such instruction (not inconsistent with [the Rules]) as may be given to them by the Secretary of State'.

35. Section 33(5) provides, 'This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative'.

36. As we have noted above, section 2C of the 1997 Act applies to certain directions about the exclusion of a non-EEA national from the United Kingdom made by the Secretary of State wholly or partly on the grounds that a person's exclusion from the United Kingdom is conducive to the public good. Parliament has enabled such a person to apply to the Commission 'to set aside the direction' (section 2C(2)).

37. Paragraph 320(6) of the Rules provides that one of the mandatory grounds for refusing LTE is where the Secretary of State has personally directed that a person's presence in the United Kingdom is not conducive to the public good. Paragraph 321A(4) of the Rules provides that a mandatory ground for cancelling LTR is where the Secretary of State has personally directed that a person's presence in the United Kingdom is not conducive to the public good.

38. The Secretary of State's primary argument in *Munir* was that everything she did to regulate LTE and LTR was done in the exercise of the prerogative, and she was not obliged to lay any rules before Parliament (judgment, paragraph 22). The Supreme Court held that the power to make the Rules derived from the 1971 Act and was not an exercise of the Royal prerogative. The 1971 Act conferred no express power and imposed no duty to make rules, but by implication the 1971 Act did do so. The Secretary of State had a wide discretion, derived from the 1971 Act, and not from the prerogative, to grant leave even when it would not be granted under the Rules, and to publish policies setting out the principles by which she would exercise that discretion. It was a question of degree whether such a policy was a 'rule', and thus required to be in the Rules, or not.

39. Lord Dyson (with whom the other members of the Court agreed) did not consider it necessary to enter into any debate about the scope of the prerogative power in relation to aliens (judgment, paragraph 23). Lord Dyson said that section 33(5) gives rise to two inferences: the prerogative power to regulate immigration did not apply to Commonwealth citizens, and that, subject to the saving in section 33(5), all powers of immigration control were to be exercised pursuant to the 1971 Act (judgment, paragraph 25). He said that the power to make the Rules derives from the 1971 Act. The purpose of the 1971 Act was to replace earlier laws with a single code on immigration control. 'Parliament was alive to the existence of the prerogative power in relation to *enemy* aliens and expressly preserved it by section 33(5) [our emphasis; the word 'enemy' is not in section 33(5)]. But prima facie, subject to the preservation of that power, the Act was intended to define the power to

control immigration and to say how it should be exercised' (judgment, paragraph 26).

40. In *Alvi* Lord Hope, with whom Lord Walker, but not the other members of the Court, agreed, made some wider observations about the prerogative. He said, with respect to section 33(5) that 'it is hard to see how that provision, which may have been thought appropriate 40 years ago, can have any practical effect today'. He then referred to article 5 of European Convention on Human Rights, and said, 'the old order, under which such a sweeping power could be exercised at will by the executive, is now long gone' (judgment, paragraph 30). Statements, he continued, that the prerogative remains or is in abeyance 'understate the effect of the 1971 Act. It should be seen as a constitutional landmark which, for all practical purposes, gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative. It is still open to the Secretary of State in her discretion to grant leave to remain or enter to an alien whose application does not meet the requirements of [the Rules]. It is for her to determine the practice to be followed in the administration of the Act. But the statutory context in which those powers are being exercised must be respected. As their source is the 1971 Act itself, it would not be open to her to exercise them in a way that was not in accordance with the rules that she has laid before Parliament.' (judgment, paragraph 31).

41. In paragraph 32 of his judgment, referring to the Secretary of State's argument that the Rules are a statement of how the Crown proposes to exercise its executive power to control immigration, he said, 'The powers of control that are vested in the Secretary of State in the case of all those who require leave to enter or remain are now entirely the creature of statute'.

42. In paragraph 33, he rejected the submission that 'it is open to the Secretary of State to control immigration in a way not covered by [the Rules] in the exercise of powers under the prerogative, assuming that there is no conflict with them. He went on, 'The obligation… to lay statements of the rules, and

any changes in the rules, cannot be modified or qualified in any way by reference to the common law prerogative. It excludes the possibility of exercising prerogative powers to restrict or control immigration in ways that are not disclosed by [the Rules]'.

43. Mr Southey accepted that the ratio decidendi of *Alvi* is that anything which has the characteristics of a 'rule' for regulating the entry into and stay in the United Kingdom of people who need leave to enter, including rules about the periods of such leave and the conditions to be attached to it, must be in the Rules. That is expressed, in slightly different ways, in paragraphs 94 and 97, 119-120 and 128 of the decision, by Lords Dyson, Clarke and Wilson. At paragraph 94, Lord Dyson said that '…any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2)). He added '…[the Rules] should include all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain' (paragraph 97). Mr Southey went on to submit, relying on Lord Hope's judgment, that the Secretary of State cannot control immigration in ways not disclosed by the Rules. We do not accept that wider proposition, which goes beyond the ratio of *Alvi*.

44. Mr Southey also relied on the approach of Lords Hope and Walker for the proposition that the enactment of the 1971 Act left no scope for any remaining prerogative powers to control immigration. Mr Southey also submitted that the current guidance about exclusion was wrong in law suggesting that the power to direct exclusion was a prerogative power. We would be inclined to reject that submission, for what that is worth. It seems to us that it is inconsistent with the reasoning of the whole Court in *Munir*, which recognised that section 33(5) preserved the prerogative in relation to aliens, and declined to enter any debate about what that meant.

45. As an aside, we have some difficulty with the gloss 'enemy' in paragraph 26 of *Munir*. That word is missing from section 33(5). We doubt whether,

consistently with the decision in *Pepper v Hart* [1993] AC 593, the statement by Lord Windlesham (reported in paragraph 25 of the judgment) is admissible to construe section 33(5). We note that none of the other members of the House of Lords agreed with the statement by Lord Steyn at paragraph 29 of *McDonnell v Congregation of Christian Brothers Trustees* [2003] UKHL 63; [2004] 1 AC 1101, which might be thought to touch on this point. The clear conclusion we have reached below means that if there was a prerogative power to exclude, it is at least suspended to the extent that the legislative scheme now expressly provides for a power to exclude. Should that decision be wrong for any reason, others may have to consider whether there is, in those circumstances, a prerogative power to exclude an alien such as T2.

46. We turn then to the question whether the Secretary of State may direct exclusion, consistently with the statutory scheme, as that scheme has been explained by the Supreme Court.

47. There have been many decisions of the higher courts about exclusion decisions. In none of the decisions to which we were referred, except two, was there much, if any, analysis of the source of the power to exclude.

48. In *R v Secretary of State for the Home Department ex p Farrakhan* [2002] EWCA Civ 606; [2002] QB 1391 the claimant made a 'reasons challenge' to such a decision (see paragraph 5 of the judgment of the Court of Appeal). The arguments centred on article 10 of the ECHR. There was no suggestion that the Secretary of State had no power to direct exclusion. Nor was there any such suggestion in the more recent decision of the Supreme Court in *Lord Carlile of Berriew v the Secretary of State* [2014] UKSC 60; [2015] AC 945, a further challenge to an exclusion decision, again based on article 10. Lord Sumption referred, in paragraph 14 of his judgment, to paragraph 320(6) of the Rules. That is the only reference to the source of the power. We note that, unlike this case, that was a case in which Convention rights were engaged. Even so, the Supreme Court indicated that an exclusion decision was one with

which the court should be very slow to interfere; the interests in play were for the executive, rather than for the court, to assess.

49. In *Cakani v Secretary of State for the Home Department* [2013] EWHC 16 (Admin) Ingrid Simler QC (as she then was), sitting as a Deputy Judge of the High Court, considered a challenge to a refusal by the Secretary of State to revoke an exclusion decision. One of the claimant's arguments was based on *Alvi*. The Deputy Judge rejected that argument. She held that paragraph 320(6) of the Rules assumes a practice or power to exclude; but that the power itself derives from the general powers of the 1971 Act rather than from any specific authority in the Rules. She referred specifically to paragraph 1(3) of Schedule 2 of the 1971 Act.

50. In *Geller v Secretary of State for the Home Department* [2015] EWCA Civ 45 the Court of Appeal described an exclusion direction as having been made 'in the exercise of the prerogative power and also pursuant to paragraph 320(6) of [the Rules]' (judgment, paragraph 1). The challenge to the decision in that case was, in substance, an attack on the Secretary of State's unacceptable behaviours policy, which gave indicative examples of conduct which could lead to the exercise of the power to exclude. The Court of Appeal referred to section 3(1) and (2) of the 1971 Act, and to paragraph 320(6) of the Rules. The Court of Appeal held that the policy was guidance, and was not required to be in the Rules; the list of unacceptable behaviours did not fall within the terms of section 3(2). It rejected the challenge based on *Alvi*, and an argument that the policy introduced a change to paragraph 320(6) which was invalid because it had not been laid before Parliament. In paragraph 30, Tomlinson LJ said that the relevant discretion was to be found in paragraph 320(6) of the Rules.

51. The provisions of the Rules to which we have referred recognise that the Secretary of State may give a direction for the exclusion of a person from the United Kingdom on the grounds that his presence in the United Kingdom is not conducive to the public good. Paragraph 1(3) of Schedule 2 obliges

immigration officers to act in accordance with instructions from the Secretary of State which are not inconsistent with the Rules. An instruction to immigration officers which says that the Secretary of State has personally directed a person's exclusion on such grounds would, in accordance with the paragraphs of the Rules we have referred to, have the consequences provided for in those paragraphs. Those consequences are not inconsistent with the Rules, but rather, consistent with them, because they are provided for in the Rules.

52. It seems to us that there are two closely linked potential sources of the power to exclude. The first, per *Cakani*, is the power to give instructions not inconsistent with the Rules (a power which, it could be argued, paragraph 1(3) of Schedule 2 of the 1971 Act does not expressly confer, but which rather, paragraph 1(3) assumes to exist). The second, per *Geller*, is the relevant paragraphs of the Rules (paragraphs 320(6) and paragraph 321A(4)). In that regard we are not impressed by the argument those paragraphs assume the existence of a power, but are not its source. A similar point could be made about the drafting of paragraph 1(3) of Schedule 2. The Rules are not a statute, and possibly are not even delegated legislation (see *Odelola v Secretary of State for the Home Department* [2009] UKHL25; [2009] 1 WLR 1230, obiter in the view of Lord Dyson, see paragraph 40 of *Munir*). They are, at all events, statements of the practice to be followed in the administration of the 1971 Act. They are not drafted with the care with which statutes are drafted. We do not consider that this elliptical method of drafting prevents paragraph 320(6) and paragraph 321A(4) of the Rules from being sources of the power to exclude. But it does not matter precisely by which route the source of the power is identified. Even if we suppose that Mr Southey's wider proposition (see paragraph 43, above) is right, it is not contradicted by the state of affairs we have described in the previous paragraph of this judgment.

53. We should deal with a further argument of Mr Southey's. He did not dissent, when asked, from the approach in *Cakani*, but contended that *Cakani* was distinguishable, because the claimant in that case had no leave when the

exclusion decision was made in his case, whereas T2 did. We do not consider that this is a principled basis for distinguishing *Cakani*. The analysis in *Cakani* applies just as much when a person has leave as when he does not, precisely because of the explicit link in the Rules between exclusion decisions and their consequences for a LTE and LTR. In other words, the Rules expressly contemplate an effect on a leave which is current at the point when the exclusion decision is made.

54. Finally on this part of the case, we accept that assumptions by Parliament do not make the law. We observe that it is, nonetheless, striking, if Mr Southey's argument is right, that Parliament has, in section 2C of the 1997 Act, both recognised, in a provision of primary legislation, a non-existent power, and provided a right of review against its exercise.

55. Mr Southey also submitted, in the alternative, that the criteria for exclusion were not sufficiently specified in the Rules. He did, accept, however that the phrase 'not conducive to the public good' meant the same in the relevant paragraphs of the Rules as it does in the deportation provisions of the Rules. We accept Mr Palmer's submission that to the extent that the deportation provisions are more detailed and extensive than the exclusion provisions, that is because the exercise of the power of deportation has much more extensive and potentially coercive consequences.

56. In *R v Secretary of State for the Home Department ex p Rehman* [2003] 1 AC 153 the House of Lords considered an appeal against a decision to remove the appellant from the United Kingdom on the grounds that his presence was not conducive to the public good. Lord Slynn said that there was no definition of, or limit on, this phrase. '…the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State' (judgment, paragraph 8). We accept Mr Palmer's argument that the phrase, which has been considered in many cases apart from *Rehman*, has a meaning which is well understood (it is used in section 2A of the 1971 Act, and in the deportation provisions of the 1971 Act, and in the Rules: see also *Lord Carlile's* case). In

the light of the broad discretion which this phrase connotes (1) we do not think that it is appropriate, or necessary, for it to be explained any further in the Rules, but (2) accept that it is open to the Secretary of State to issue indicative guidance about the sorts of circumstances in which she may consider that a person's presence in the United Kingdom is not conducive to the public good. The promulgation of such guidance does not offend against the reasoning in *Alvi* (see the approach of the Court of Appeal to the unacceptable behaviours policy in *Geller*).

Fairness

57. T2 submits that he should have been given an opportunity to comment before the Secretary of State made the direction, and/or that the Secretary of State should have disclosed to him her OPEN reasons for making the decision before she made it. What fairness will require in any case will vary, according to the factual and statutory context (see *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531, at p 560, per Lord Mustill). Unless the relevant statute expressly so provides, fairness does not always require, before a decision is made, either, an opportunity to make representations, or disclosure of the material on which the decision maker relies. We accept the Secretary of State's submission that where such a decision is based on considerations of national security, and is certified under section 2C of the 1997 Act, it is not unfair if the material relied on is not disclosed before the decision is made. Equally, when prior notification risks frustrating the purpose for which the decision is to be made, such notification is not required.

58. We accept Mr Palmer's two further arguments. First, giving a person an opportunity to comment before the decision is made will alert them to what is coming, and give them an opportunity to try and enter the United Kingdom before such a direction is given, thus defeating its object (cf paragraph 31 of *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700). We reject Mr Southey's submission that it was not likely that T2 would come and stay in the United Kingdom if notified; a risk of his presence would be enough, so as to entitle the Secretary of State not to notify him in advance. Second, the review in the Commission gives T2 an opportunity to challenge the OPEN statement

relied on by the Secretary of State and the Special Advocates the opportunity to challenge the closed material. We accept the Secretary of State's submissions that *ex p Fayed* [1998] 1 WLR 763, a naturalisation case, and *ex p Moon* (an exclusion case) are distinguishable.

Grounds iii - vi

59. We consider that each of these grounds is best considered as a whole in our CLOSED judgment.

Conclusion

60. For the reasons given in this OPEN judgment, read with the reasons given in our CLOSED judgment, we refuse this application to set aside the direction.