SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/179/2020**
Hearing Date: **10th - 13th July 2023**
Date of Judgment: **19th October 2023**

Before

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE LINDSLEY
SIR STEWART ELDON

Between

D8

Applicant/Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mrs Samantha Knights KC and Mr Alex Burrett (instructed by **JD Spicer Zeb Solicitors**) appeared on behalf of the Appellant

Mr Jonathan Kinnear KC and Ms Naomi Parsons (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr Martin Goudie KC and Mr David Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

MR JUSTICE JAY

OVERVIEW

1. D8, a citizen of Iran of Kurdish ethnicity and currently in the United Kingdom, was granted refugee status in April 2017 for a five year period. In February 2020 he left this country, on his account to visit family members in the Kurdish Region of Iraq. The Secretary of State says that he travelled from there to Iran and re-availed himself of the protection of that country. D8 denies this. In due course, and whilst he was away, D8 was excluded from the United Kingdom and his refugee status was revoked. However, he managed to return here on a small boat and claimed asylum. That application was refused by the Secretary of State on a number of grounds.

2. These proceedings involve wrapped-up challenges to the revocation, exclusion and asylum decisions. Each challenge will need to be examined separately because different issues arise and different legal principles apply. Given that the Secretary of State assesses that D8 has an Islamist mind-set, is supportive of ISIL and poses a danger to the national security of the United Kingdom, the jurisdiction of this Commission is engaged in respect of all three decisions.

3. Throughout this OPEN judgment and in the companion CLOSED judgment, the following nomenclature will be used:

   - D8 (for the appellant/applicant);
   - the Secretary of State (for the respondent. Where any decision was made by the Secretary of State personally, that will be made clear. Otherwise, the reference to the "Secretary of State" is to the department as a whole.);
   - the FCDO (for the Foreign, Commonwealth and Development Office);
   - the Security Services (for MI5 and MI6, unless it is necessary to specify which);
   - UNHCR (for the United Nations High Commissioner for Refugees);
   - KRI (for the Kurdish Region of Iraq);
   - KDPI (for the Kurdish Democratic Party of Iran);
   - the FtT (for the First-tier Tribunal);
   - the Commission (for the Special Immigration Appeals Commission);
   - the BNA 1981 (for the British Nationality Act 1981);
   - the AIA Act 1993 (for the Asylum and Immigration Appeals Act 1993);
   - the SIAC Act 1997 (for the Special Immigration Commission Act 1997);
   - the IA 1999 (for the Immigration and Asylum Act 1999);
   - the ATCS Act 2001 (for the Anti-Terrorism, Crime and Security Act 2001);
   - the NIA Act 2002 (for the Nationality, Immigration and Asylum Act 2002);
   - the IAN Act 2006 (for the Immigration, Asylum and Nationality Act 2006);
   - the EUWA 2018 (for the European Union Withdrawal Act 2018);
   - the ISSC Act 2020 (for the Immigration and Social Security Coordination (EU Withdrawal) Act 2020);

- the Qualification Directive (for EU Directive 2004/83/EC);
- the Qualification Regulations (for The Refugee or Person in Need of International Protection (Qualification) Regulations 2006);
- the Refugee Convention (for the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to the Convention);
- Articles 2, 3, 5, 6 and 8 (all are references to the European Convention on Human Rights).

4. The Commission sat over four days and considered a mass of evidence, both oral and in writing. The Commission's impressions of the witnesses, insofar as these are necessary, will be indicated at the appropriate stage.

ESSENTIAL FACTUAL BACKGROUND

5. D8's immigration history is lengthy and complex. Not every detail is required for present purposes.

6. D8 was born in Altash camp in KRI on 23rd August 1993. He is a Sunni Muslim. He is of Iranian, not Iraqi, nationality owing to his family's origins. When he was three years' old, the whole family moved back to Kaderi-Sarab-Zahab village (the spelling must be an approximation, and although the Commission has a general idea of its location we have not been able to find it on the map), Kermanshah province, Iran. D8 says that he has never held an Iranian passport.

7. In late January 2016 D8 decided to leave Iran. He travelled with an agent to the Turkish border and on 27th January 2016 crossed the border on foot, effectively from one predominantly Kurdish area into another. It is not disputed that D8's departure from Iran was illegal both in terms of his exiting Iran and entering Turkey.

8. On 17th February 2016 D8 entered the United Kingdom clandestinely in a lorry. He claimed asylum, was interviewed by the Secretary of State and was refused asylum on 4th August 2016. D8 then appealed to the FtT and on 30th March 2017 Judge Colvin allowed the appeal.

9. D8 told the FtT that he refused to do military service and worked as a farmer instead. On 19th January 2016 he was working on the farm when at around 11pm three Peshmerga fighters arrived, two of them having been wounded by gunfire from the Iranian authorities. Someone called Nazhad asked D8 to help the men which the latter did. D8 tended to their wounds and drove them to the border by tractor. The men left a bag-full of KDPI leaflets for Nazhad to collect the following day. Unfortunately, D8 forgot his mobile phone and had to start walking back to the farm when the tractor ran out of diesel. From a distance, he could see at the farm a contingent of armed men and vehicles; he was sure that these were the Iranian authorities. Using someone else's

phone, another friend came to collect him and in due course arrangements were made for him to leave the country.

10. D8 told Judge Colvin that when in the United Kingdom he regularly posted on his Facebook account anti-Iranian government and pro-Kurdish material, using the "public setting"[1]. The account was opened in September 2016 and he had 522 "friends". He said that he attended two rallies, one of which was in Birmingham in January 2017. In cross-examination, D8 said that he was a supporter and not a member of the KDPI.

11. Judge Colvin did not believe D8's account of what happened on his farm before he left Iran. He said that it was implausible that D8 should have placed himself under such personal risk when he had so much to lose. The story of his leaving his mobile phone behind when transporting the three men "seems similarly incredible". For these reasons, Judge Colvin concluded that D8 had not come to the attention of the Iranian authorities before he left Iran.

12. Judge Colvin then proceeded to analyse the Facebook posts, which he said were "opportunistic". That consideration, however, was "unlikely to be relevant to the Iranian authorities". Judge Colvin concluded that there was no evidence that D8 had already come to the attention of the Iranian authorities in consequence. However, and this was the sole basis of the decision to grant asylum:

> "… this has to be put in the context that the appellant will be returning to Iran after having been in the UK for over a year and on travel documents only – unless he is able to get his ID documents which he says are still in his home in Iran. He will also be returning as a failed asylum seeker who is Kurdish. On the basis of the above findings in *AB and others* [*AB and others (internet activity – state of evidence) Iran* [2015] UKUT 0257[2]] these factors are likely to enhance the interest that the Iranian authorities have in him on return and therefore subject him to being questioned. And in these circumstances that it is likely that the appellant will be asked about his internet activity and for it to be exposed. And whilst I am of the opinion that the appellant's asylum claim on other grounds is without merit, I am forced to the conclusion on the basis of the findings in *AB and others* that the appellant is at real risk of persecution once the unflattering nature of Facebook postings are exposed to the Iranian authorities."

[1] Although the Secretary of State does not accept that D8's Facebook account was set for general public access, that is the latter's evidence in these proceedings and there was no cross-examination about it. On the Commission's understanding of Facebook, the settings would have to be on "public" for the Secretary of State to be able to see what is going on. The Commission also takes into account the evidence of D8's solicitor, Ms Sunita Joshi, to the effect that she can verify that the settings were "public" and therefore viewable to all.

[2] In that case, the general point was made that there is a "pinch point" on return to Iran after a prolonged period of being in the United Kingdom. That may lead to scrutiny and to questions being asked about internet activity.

13. The Secretary of State did not seek to appeal Judge Colvin's decision to the Upper Tribunal. On 23rd April 2017 D8 was granted five years leave to remain as a refugee, and on 22nd December 2017 he was given a travel document valid until 22nd April 2022.

14. On 19th February 2020 D8 flew from London Heathrow to Sulaymaniyah, KRI via Istanbul. He had a return ticket to London on 5th April. When interviewed pursuant to powers under Schedule 7 of the Terrorism Act 2000 at Heathrow airport, he confirmed his intention to return here on Sunday 5th April.

15. D8's evidence, addressed more fully at §§73-107 below, is that he remained in Iraq until early August 2020. He was unable to return to the United Kingdom owing to COVID-19 restrictions. He met up with his family and on 5th March he became engaged to Elham Azizan Far, a distant relative. There is OPEN source material to indicate that on 8th March 2020 the Iraq/Iran border was closed in light of the pandemic.

16. On 2nd April 2020 the Secretary of State personally directed that D8 be excluded from the United Kingdom on non-conducive grounds, on the basis that he posed a threat to national security. The OPEN version of the Ministerial Submission indicates that D8's threat to national security reposes in his extremist mindset and support for ISIL or Daesh. The Secretary of State was also advised (see para 6 of the Submission) that any interference with D8's Article 2 and 3 rights was reasonable and proportionate due to the severity of the threat he represented. D8's leave to remain should be cancelled and the process of revoking his refugee status would be initiated. Finally, part of the overall decision-making entailed the assessment that D8 had re-availed himself of the protection of the country of his nationality. On 24th April 2020 a letter was sent to D8 by email (we have been shown the email address) informing him of the decision and of his rights of appeal. D8 does not accept that the email ever arrived. Finally, on 24th April a letter was sent to the UNHCR, including a copy of the letter of even date to D8, inviting their representations.

17. On the same day, and by the same means, D8 was sent a letter notifying him of the Secretary of State's intention to revoke his refugee status. Again, there is an issue as to whether D8 received this email (and a subsequent email communication sent in August) which the Commission will address later.

18. At the same time as the exclusion decision was made, D8's leave was cancelled under regulation 13(7) of the Immigration (Leave to Enter) Order 2000.

19. On 6th May 2020 D8 says that he made enquiries of the British Council and UKVI in Jordan to ascertain whether he would be able to return to the United Kingdom during COVID-19 restrictions.

20. On 2nd August 2020 D8 attempted to fly back to the United Kingdom from Istanbul but he was not permitted to board the flight. D8 was detained in Istanbul for a period of time, the intention being to return him to KRI.

21. On 18th August 2020 a brief was prepared by the Special Cases Unit for the Head of the Out of Country Casework Team recommending that, in the absence of evidence or submissions from D8 and/or the UNHCR, the former's refugee status be revoked and his leave to remain be cancelled. Authority to proceed was given the following day and D8's refugee status was revoked on 15th October.

22. The detail of what subsequently occurred in relation to the institution of proceedings in this Commission is not relevant, not least because the Secretary of State does not take a point on delay. It is sufficient to record that, after having instructed one firm of solicitors in August, D8 instructed JD Spicer Zeb on 6th November 2020 and six days later the revocation decision was appealed and an application for a review was sought in relation to the exclusion decision.

23. Meanwhile, on 7th November 2020 D8 left Iraq (having been returned to Erbil in mid-August 2020 by the Turkish authorities) and arrived in Italy on 11th November. There, he was fingerprinted and detained. In due course, D8 left Italy and travelled to northern France.

24. Between December 2020 and February 2021 there was correspondence between the Secretary of State and the UNHCR. In short, the Secretary of State made it clear to the UNHCR that D8's refugee status had already been revoked but representations were invited. On 8th January 2021 the UNHCR submitted representations of a generic nature only, noting that they had not been provided with detailed information about D8's immigration history, the reasons for his recognition as a refugee, and any criminal conduct including his alleged association with ISIL.

25. On 23rd March 2021 D8 came to the United Kingdom on a small boat from France. His immigration detention was authorised. D8 claimed asylum. There was a screening interview on 26th March during the course of which D8 informed his interlocutor that he had previously been granted asylum in the United Kingdom. This information led the Secretary of State on 6th April wrongly to void the asylum application on the ground that he could not claim asylum twice. At about the same time, the Secretary of State was considering the viability of removing D8 to a safe third country, in particular Italy. Eventually, the Secretary of State accepted that D8 was irremovable on this basis.

26. Between 30th March 2021 and 12th August 2022 D8 was held under immigration powers in HMP Belmarsh. He was released on bail by Lane J on the basis that the risk to national security did not outweigh the low absconding risk.

27. On 28th June 2021 the Secretary of State sought the views of the FCDO as to whether D8 could be safely removed to Iran. On 28th July the FCDO produced a Safety on Return report to the effect that he could not be. The FCDO's conclusions were that there was a real risk that D8 would be subjected to a violation of his Article 3 rights because:

> "… by virtue of [D8's] ethnicity and long stay in a western country that is perceived as an 'enemy', Iran will likely question him via interviews or interrogations, to determine whether he presents any 'threat' to the regime. During such questioning, it is possible that Iran could employ some of the methods outlined in paragraphs 2-21 above [including physical and mental torture]. Therefore, the FCDO does assess there are substantial grounds to believe that there is a real risk that [D8] would be subject to treatment contrary to Article 3 of the ECHR, should [D8] be removed to Iran and subsequently investigated by the Iranian authorities."

28. As for D8's Article 5 rights:

> "We judge that since [D8] … to the best of our knowledge … has not engaged in any activities against the Iranian state, the risk of arrest is low. However, given his Kurdish ethnicity, arbitrary detention is possible, particularly during any questioning or interrogation post-arrival. Therefore, the FCDO does assess there are substantial grounds to believe there is a real risk of a "flagrant breach" of Article 5 of the ECHR, should [D8] be removed to Iran and subsequently investigated by the Iranian authorities."

29. On 29th September 2021 the Special Cases Unit queried the Safety on Return assessment on the basis that "we hold information" that D8 was known to have travelled to Iran in 2020. Following a further flurry of emails, in October 2021 a revised Safety on Return report was provided. This concluded that there were no substantial grounds to believe that there was a real risk of violations of Articles 2, 3 and 5. The basic point was that, on the premise that D8 had returned to Iran in 2020, "we have no substantive reasons to believe that another return would run differently". It is clear from the Home Office explanatory note dated 25th March 2022 that the FCDO had been provided with CLOSED material relating to the issue of D8's return to Iran in 2020.

30. In late 2021 and early 2022 there was email correspondence between the Secretary of State and the Iranian Embassy regarding obtaining an Emergency Travel Document for D8. The Iranians were provided with a photograph and biographical details, and were made aware of D8's incarceration in HMP Belmarsh. Initially, on 18th November 2021, it was said that they had checked their registry system and could not find any information. On 23rd February 2022 an ETD interview was arranged with the Iranian Embassy and HMP Belmarsh for 4th March, but it did not take place. Then, on 15th March 2022 the relevant team within the Secretary of State, Returns Logistics, stated that they would arrange the ETD interview after receipt of photographic ID.

31. On 26th March 2021 an asylum questionnaire was completed over the phone with D8 still in HMP Belmarsh and the immigration officer located at Yarlswood IRC. There was a Farsi interpreter. D8 said that he did not have a passport. He was suffering from

depression, and subsequently PTSD, and was taking one tablet of Sertraline a day, later confirmed as being 50 mgs (there is evidence that some months later, on 19th July, D8 attempted suicide). Surprisingly, D8 was asked whether he had any evidence to prove that he had been granted asylum in the United Kingdom. He said that he went to Iraq in 2020 and did not want to claim asylum in other countries after leaving that country because he had already been granted asylum here.

32. It is not clear exactly when, but it is to be inferred that it was around this time that the Secretary of State accepted that D8 could make an asylum claim. This explains why the overtures to the Iranian Embassy abruptly ceased.

33. On 11th April 2022 an asylum interview was conducted via video-link with D8 still at HMP Belmarsh. D8 referred to the 2017 Facebook material in support of his claim, and also said that he had received threatening messages from Telegram and WhatsApp before arriving in the United Kingdom. D8 said that when he was in Iraq in 2020 his family came to visit him across the border, using their passports. He denied leaving Iraq (to travel to Iran) between 20th February and 7 November 2020. D8 could not remember when he had last posted on Facebook against the Iranian government but said "it's going back to the last year". D8 clarified that he posted on Facebook whilst in Iraq and that how often he did so was "depending on my life circumstances". He said that he had lost access to two Facebook accounts, and that this was between 2017-20. His current Facebook account had been opened about two years previously (i.e. some time in 2020). D8 said that he had been unable to attend any KDPI events whilst in the United Kingdom.

34. D8 was questioned further about what he was doing in Iraq in 2020. He said that he rented accommodation in Sulaymaniyah, had visited a doctor in Kalar (approximately two hours by car from Sulaymaniyah) in April or May owing to back ache, and had also visited a psychiatrist in Sulaymaniyah. He used his HSBC card or account to obtain some cash from an Iraqi bank in that city. D8 was also questioned about whether he renewed his 30 day visa whilst in the KRI. He said that he had not, and that the person he was renting accommodation from did not check.

35. On 11th May 2022 D8 gave a detailed statement which clarified some of the matters set out in the record of interview. In his view, whilst the interview record is accurate insofar as it goes, it fails to express his answers in a clear and coherent way. There may well be some force in what D8 says. He said that he did not travel to Iran in 2020 because that would have been too risky. He gave detailed information about his family travelling to see him in KRI and getting engaged on 5th March 2020. Finally, at para 49 of this statement D8 declared that he does not recall whether he received the two decisions which the Secretary of State says were sent to him by email.

36. On 13th June 2022 the Secretary of State confirmed that D8 was not entitled to refugee status as he had voluntarily re-availed himself of the protection of Iran. It was accepted that the asylum claim should not have been voided in March 2021. On 23rd June the

Secretary of State also confirmed that consideration was given to the UNHCR letter dated 8th January 2021 but the revocation and exclusion decisions remained unchanged.

37. On 4th July 2022 a Ministerial Submission was sent to the Secretary of State personally. Her authorisation was sought to certify the refusal of the asylum claim "into SIAC" so that CLOSED evidence could be relied on. Annex D to that submission was a further Safety on Return assessment from the FCDO dated June 2022.

38. In that assessment the following key matters were raised:

> "If [D8] is returned to Iran, Iranian security officials are likely to interview him upon arrival, although the severity of their questioning will depend on various factors (including whether he exited Iran illegally or not). We would not expect the authorities to examine [D8's] alleged KDPI links, given the Home Office's own assessment that his claims are discredited, but Iran may show interest in his Kurdish background. It is possible that the investigation would uncover the material referred to in the March 2017 decision of the FTT (though we note that the decision itself is anonymised). However, [D8's] safe return to Iran in 2020 suggests that in practice the authorities are either unlikely to seek out the information and/or to act on it.
> …
> [Article 2] … D8 travelled to Iran in March 2020. We consider that [D8's] travel to Iran in 2020 demonstrates that he faces little threat of being questioned by Iranian authorities via interviews or interrogations (by virtue of [D8's] ethnicity and long stay in a Western country that is perceived as an "enemy") to determine whether he presents any "threat" to the regime. D8's safe return to Iran in 2020 suggests that he is not in practice at a real risk of treatment contrary to Article 2.
> Therefore, the FCDO does not assess there are substantial grounds to believe that there is a real risk that [D8] would be subject to treatment contrary to Article 2 of the ECHR, should [D8] be removed to Iran."

39. Identical reasoning appears in connection with Articles 3, 5 and 6.

40. On 8th July 2022 the Secretary of State refused the asylum and humanitarian protection claims and relevant certificates, investing the Commission with jurisdiction, were issued. An appeal was brought against both decisions on 13th July 2022. As previously stated, bail was granted by the Commission on 25th July and D8 was released on conditions on 12th August.

41. Since his release, D8 has attended a number of demonstrations and has posted anti-Iranian government material on Facebook.

42. In March 2023 the FCDO provided a further Safety on Return Assessment. This does not differ materially from the June 2022 assessment. It is clear from both these assessments that they were predicated on D8 having returned to Iran in or about March 2020 safely and openly, in other words in the knowledge of the Iranian authorities.

THE DECISIONS UNDER CHALLENGE

43. The three decisions under challenge are: (1) that dated 2nd April 2020 excluding D8 from the United Kingdom ("the exclusion decision"); (2) that dated 15th October 2020 revoking his refugee status ("the revocation decision"); and (3) that dated 8th July 2022 refusing his asylum and human rights claims ("the asylum/HR decision").

The Exclusion Decision

44. D8 was informed on 24th April 2020 (without prejudice to his contention that the letter was never received) that he was being excluded from the United Kingdom on the grounds of national security as his presence here was deemed to be non-conducive to the public good. No other information was provided. We have summarised at §16 above the OPEN version of the Ministerial Submission.

45. We were told that the exclusion power resides under the Royal Prerogative and as a matter of convention is exercised by the Secretary of State personally. The parameters for its exercise do not fall for consideration in this particular case because D8 did not contend before us that it was not open to the Secretary of State to exercise what must be a residual power against an individual who has refugee status.

46. The exclusion decision was certified by the Secretary of State under section 2C(1)(c) of the SIAC Act 1997.

The Revocation Decision

47. The decision letter dated 15th October 2020 stated that no representations had been received either from D8 or the UNHCR. The Secretary of State concluded that D8's refugee status either must be or should be revoked on four separate bases, viz.:

    (1) under para 339AA of the Immigration Rules because, on account of his Islamist mindset and his support for ISIL, he had engaged in the type of activity described in Article 1F(c) of the Refugee Convention, and he was therefore a person "in respect of whom there are serious reasons for considering that he was guilty of acts contrary to the purposes and principles of the United Nations".
    (2) under para 339AC(i), because there were reasonable grounds for regarding him as a danger to the national security of the United Kingdom.

(3) Under para 339AB, because he had obtained his refugee status by misrepresentation of material facts, in particular he had failed to provide any evidence to show that he was entitled to refugee status, or that he needed international protection, or that the reasons for revoking refugee status on grounds of deception did not apply.
(4) Under para 339A(i), because he had re-availed himself of the protection of his country of origin, Iran.

48. The revocation decision was certified by the Secretary of State under section 97 of the NIA Act 2002. It follows that D8's right of appeal is not under section 82(1)(c) of the NIA Act 2002 but under section 2(1) of the SIAC Act 1997. The effect of section 92(5) of the NIA Act 2002 is that the appeal must be brought from outside the United Kingdom which is what has occurred. That D8 has since returned to the United Kingdom does not remove the Commission's jurisdiction. The principles that the Commission applies to an appeal under section 2(1) will be set out §§135-140 below.

The Asylum/HR Decision

49. As for the asylum/HR decision, this requires very close analysis, not least because it lies at the heart of this case. On any view, the Secretary of State has adopted a detailed and closely reasoned approach to the various limbs of D8's claims falling under this rubric. The Commission considers that some of the points might have been put in a different order in the relevant decision letter, and that is the exercise that we have undertaken.

50. In relation to the asylum claim, the Secretary of State accepted that D8 was Kurdish Iranian, that he left Iran illegally in 2016 and that he had carried out the *sur place* activities referred to by Judge Colvin. The Secretary of State did not accept that he had come to the adverse attention of the Iranian authorities owing to his activities with the KDPI, that he was in KRI for the whole period between February and November 2020, and that he had come to the adverse attention of the Iranian authorities because of his imputed link to ISIL.

51. As for D8's illegal departure from Iran in 2016, that in itself and without more could not found the basis for a Refugee Convention or Article 3 claim: see *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 308 (IAC).

52. The Secretary of State relied on the adverse findings of Judge Colvin, as she was clearly entitled to do. She reiterated her contention that the *sur place* activities, viz. the Facebook posts, were created for opportunistic reasons and post-dated the rejection of the first asylum claim on 4th August 2016. The Secretary of State accepted that the reason for D8 not submitting these posts in connection with his second asylum claim was that sometime between 2017 and 2020 he lost access to his Facebook profiles. It was also accepted that D8 participated in one KDPI rally in Birmingham before he was granted asylum.

53. The Secretary of State accepted that D8 had made approximately 40 Facebook posts between January 2020 and March 2021, predominantly in January to March 2021. Notwithstanding his claim to have more than 300 followers, it was said that the evidence did not substantiate the numbers, where they were from, or whether his profile was set as open to the public. It was pointed out that there was a maximum of 38 views.

54. In relation to these posts overall:

> "The SSHD considers it possible that the Facebook posts in 2021 submitted in support of this second asylum claim were also created for opportunistic reasons, coming as they do (predominantly) as you were attempting to enter the UK, but well aware that your refugee status had been revoked, and that an appeal was underway in respect of it.
> …
> Regardless of that consideration, the SSHD considers that you have re-availed yourself of the protection of your Iranian nationality, so it is not accepted that you are at risk on return due to this activity. The decision has been taken wholly or partly in reliance on information which the SSHD considers is not in the public interest to make public.
> …
> It is not accepted that the 2021 Facebook posts … [which] are the only ones [that] appear to be viewable and even then it is not clear that they can be viewed by the public … would have drawn the attention of the Iranian authorities. They are small in number, not widely viewed, and you are not likely to have been the subject of surveillance." [the Commission has substantially reordered the Secretary of State's reasoning here]

55. The Secretary of State also relied on the principles expounded by the Upper Tribunal in the case of *XX (PJAK – sur place activities – Facebook) Iran CG* [2022] UKUT 23 (IAC) in support of the proposition that Iran does not have the capability to monitor Facebook accounts on a large scale and:

> "More focussed, ad hoc searches will necessarily be more labour-intensive and are therefore confined to individuals who are of significant adverse interest.
> …
> By way of summary, relevant factors [in defining what is meant by "significant adverse interest"] include: the theme of any demonstrations attended, for example, Kurdish political activism; the person's role in demonstrations and political profile; the extent of their participation (including regularity of attendance); the publicity

> which a demonstration attracts; the likelihood of surveillance of particular demonstrations; and whether the person is a committed opponent."

56. The Secretary of State did not accept that D8 had been in KRI between February and November 2020. The Commission's interpretation of the decision letter is that it was not accepted that D8 had been in KRI throughout the *whole* of that period. It was pointed out that, despite having been invited to do so, D8 had failed to submit any documentation proving his presence in the KRI.

57. Further, the Secretary of State did not accept that there was a real risk that the Iranian authorities would believe D8 to be a supporter of ISIL. In this regard D8 relied on an anonymous message on WhatsApp, the fact that approximately 30 Iraqi and Iranian Kurds whom he encountered in Italy and France were apparently aware of his support for ISIL, and that his family knew that he was being held in a British prison when he had not told them. The Secretary of State's essential point was that D8's assertions were speculative, vague and unsubstantiated, and that his activities would unlikely come to the attention of the Iranian authorities in any event.

58. Additionally, the Secretary of State relied on section 8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 in making an adverse determination of D8's credibility. This was because he had failed to take advantage of a reasonable opportunity to make an asylum or human rights claim whilst in a safe country.

59. The decision letter then proceeded to address the risk on return. Reliance was placed on the Upper Tribunal case of *HB (Kurds) Iran CG* [2018] UKUT 430 (IAC) which itemised the factors relevant to the risk on return (whether in the context of the Refugee Convention or Article 3):

> "A period of residence in the KRI by a Kurdish returnee is reasonably likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing there and why they left.
>
> …
>
> Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.
>
> …
>
> Even low-level political activity, or activity that is perceived as political, such as, by way of example only, mere possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of

> persecution or Article 3 ill-treatment. Each case, however, depends on its own facts and an assessment will be need to be made as to the nature of the material possessed and how it would be likely to be viewed by the Iranian authorities in the context of the foregoing guidance.
>
> …
>
> The Iranian authorities demonstrate what could be described as a "hair-trigger" approach to those suspected or perceived to be involved in Kurdish political activities or support for Kurdish rights. By "hair-trigger" it means that the threshold for suspicion is low and the reaction of the authorities is likely to be extreme."

60. In the Secretary of State's view, D8 had not spent a substantial amount of time in the KRI, he had not previously assisted or worked for the KDPI and had not come to the adverse attention of the Iranian regime. In addition, it is said that D8 had re-availed himself of the protection of his Iranian nationality.

61. Further or alternatively, the Secretary of State said that she had determined that there were reasonable grounds for concluding that D8 was a danger to the national security of the United Kingdom. Article 33(2) of the Refugee Convention and para 334(ii) of the Immigration Rules therefore applied.

62. Turning to the humanitarian protection claim, Articles 2 and 3 of the ECHR and Article 15(b) the Qualification Directive, the Secretary of State, relying upon information which she did not consider it would be in the public interest to disclose, concluded that there was not a real risk of treatment likely to amount to a breach. Further, it was considered that D8 is a danger to the national security of the United Kingdom and para 339D(v) of the Immigration Rules applied. Finally, reliance was placed on D8's re-availment of the protection of Iran in 2020.

63. The Secretary of State rejected D8's Article 8 claim on the straightforward basis that he did not qualify under the Immigration Rules and there were no exceptional circumstances.

64. Finally, the Secretary of State considered and rejected the claim for discretionary leave based as it was on the proposition that removal to Iran would breach D8's Article 3 rights on medical grounds. Essentially, it was said that D8 had to demonstrate that his removal to Iran would generate a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering as a result of the absence of appropriate medical treatment or lack of access to such treatment: see *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; [2021] AC 633. There was a substantial public health programme in Iran including psychiatric treatment and the provision of Sertraline.

65. Both the asylum and the humanitarian protection decisions were certified by the Secretary of State under section 97 of the NIA 2002, conferring jurisdiction on the Commission under section 2(1) of the SIAC Act 1997. The Secretary of State also certified the asylum claim under section 55 of the IAN Act 2006, the effect of which is addressed at §§196-201 below.

THE NATIONAL SECURITY ASSESSMENTS

The First National Security Assessment

66. In MI5's First National Security Assessment dated 7th March 2022, it was assessed that there are reasonable grounds for regarding D8 as a threat to the national security of the United Kingdom and that his exclusion would be conducive to the public good. In short:

> "We assess that D8 holds an Islamist extremist mindset and is supportive of ISIL. Media coverage of ISIL, its intentions and extremist activities, and its commitment to perpetrating violence against those who it views as enemies of Islam, including Western countries, has been extensive and long-running. … We assess that [D8] maintains an Islamist extremist mindset and is supportive of ISIL and, is a threat to national security."

67. Part of the "national security case", at least as a matter of form, was that D8 has re-availed himself of the protection of his country of nationality. The Secretary of State's case is that D8 was present in Iran in March 2020. Most of the reasons for this conclusion are, of course, set out in CLOSED but the First National Security Assessment included the following:

> "… during [D8's] Initial Contact and Asylum Registration questionnaire interview, on 26th March 2021, when asked if he suffered from any mental health conditions, [D8] stated that he had received a diagnosis in Iran for depression and that this condition had started about six months ago. As this interview was conducted in March 2021, this statement indicates that [D8] was diagnosed in Iran in or around September 2020; this contradicts [D8's] account that he has not been to Iran since he claimed asylum in the UK."

The Second National Security Assessment

68. In MI5's Second National Security Statement dated 4th November 2022, the following appears:

> "In para 17 of his witness statement, [D8] refers to "Exhibit D8 – 1" which shows bank statements which he states demonstrate that he

was in Iraq. [D8] also states that no transactions are shown before 21st August 2020 because he was using cash. We do not dispute that [D8] may have been in Iraq in August 2020. Therefore, the bank statements do not undermine the SSHD's case that he has re-availed himself of his Iranian nationality, and that he does not have a genuine fear of persecution on return to Iran.
[D8] also refers to medical reports in para 18 of his witness statement that are dated 6 September 2020 and 23 August 2020. Even if these documents are genuine, [D8's] presence in Iraq on these dates is not inconsistent with the SSHD's case."

The Third National Security Assessment

69. In MI5's Third National Security Statement dated 29th March 2023, it was again accepted, having regard to photographs supplied by D8 and to the fact that when at Istanbul airport in August 2020 it was stated that he would be returned to Erbil, that D8 spent some time in Iraq between February and November 2020. MI5 also considered the screenshots from D8's Facebook account from October 2022 to January 2023 and photographs he had posted from demonstrations he had attended in London. MI5 assessed that this material was as equally self-serving as that he had posted in 2017.

70. On 14th June 2023 the Government Legal Department clarified that "the SSHD's case is that D8 was present in Iran in March 2020, the date of his travel to Iran is not a matter dealt with in OPEN". We do not interpret this to mean that D8 was present in Iran *only* in March 2020 although the letter might have been better worded.

D8'S GROUNDS OF CHALLENGE

71. In her skeleton argument on behalf of D8, Ms Samantha Knights KC has chosen not to identify the grounds of appeal and of review as set out in the relevant documents that initiated the procedure before this Commission. Instead, she has provided a summary of issues, which may be listed in the order she has chosen as follows:

    (1) Does D8 have a well-founded fear of persecution?
    (2) If so, should he be excluded from protection on the basis that he is a danger to the national security of the United Kingdom under Article 33(2) of the Refugee Convention?
    (3) Is D8 otherwise entitled to humanitarian protection under Articles 2 and/or 3 of the ECHR?
    (4) Has D8 re-availed himself of the protection of Iran and, if so, what is the impact of that on his appeals relating to humanitarian protection?
    (5) Is the decision to refuse his human rights claim in breach of Article 3 (suicide risk) or Article 8 (private/family life)?

(6) Has D8 committed acts which fall within Article 1F(c) of the Refugee Convention (not relied on in connection with the second asylum claim)?
(7) Were the decisions to exclude D8 from the United Kingdom and revoke his refugee status procedurally flawed?

72. The Commission does not agree that all of these issues arise or that they have been addressed in the right order. That will be made clear in the Discussion and Conclusions chapter of this judgment.

THE EVIDENCE CALLED ON BEHALF OF D8

D8

73. D8 has provided four witness statements dated, respectively, 14th June 2022 (for his bail application), 30th August 2022 (in connection with his exclusion and revocation application and appeal), 31st January 2023 (in relation to his asylum appeal) and 11th June 2023 (updating his asylum statement).

74. D8 denies that he has an extremist mindset or that he has ever expressed views which could be considered as such. He is not familiar with the views of ISIL because he does not support them. In February 2020 he went to Iraq and never went to Iran. He received medical treatment for back pain in April 2020 and on one occasion thereafter. He left Iraq for Turkey in August 2020 and was detained at Istanbul for 15 days before being returned to Erbil. Subsequently, he deployed the services of an agent to get him to the Iraq/Turkey border and cross it irregularly.

75. D8 states that he was in detention in Italy before being granted bail by a judge. From there he was able to travel to France and take a boat to this country.

76. D8 states that the Screening Interview wrongly records that he received treatment for depression in Iran. He is certain that he did not mention Iran. He would not have gone there and did not go there through fear of persecution.

77. Since D8's release on bail he has attended 12 anti-Iranian demonstrations, largely in Trafalgar Square but two outside the Iranian Embassy in South Kensington, near Hyde Park. The statement D8 has provided in connection with his asylum appeal sets out details of a number of his postings on Facebook. D8 has clarified that the profile of the Facebook account he was using in 2016 was set to "public". In August 2022 there was unusual activity on the Facebook account he was then using and he opened another account on 21st August. The fact that there may have been a maximum of 38 views is not relevant to the possibility that the Iranian government may be aware of these posts.

78. D8 also explains that he had good reasons for not claiming asylum in Italy and France, namely that he believed that he still had an entitlement to refugee status in the United Kingdom.

79. According to his statement dated 11th June 2023, D8 attended a demonstration in April 2023 which entailed walking from Parliament to Downing Street. D8 states that he can be seen in the photographs carrying the Kurdistan flag.

80. Finally, in a statement dated 8th July 2023, D8 has exhibited two receipts for gold jewellery purchased in Kalar city: the first dated 1st March 2020 (for a ring); the second dated 10th March 2020 (for a bangle).

81. D8 was cross-examined by Mr Jonathan Kinnear KC for the Secretary of State. He gave his evidence through a Farsi interpreter making it difficult for the Commission to assess matters of credibility on the basis of intonation, demeanour and mode of expression[3]. D8's demeanour throughout was somewhat antagonistic towards his interlocutor. He had what may be described as a haunted look, and seemed depressed. He was suspicious of the Commission and the whole process.

82. D8 accepted that it was his plan in early 2020 to meet his family and a woman to get engaged. He said that he was still engaged to the same woman, and that he was previously engaged before 2016 but his then fiancée was killed in an earthquake[4]. D8 agreed that the Iran/Iraq border was closed in early March 2020 on account of the pandemic. He was therefore stuck in whichever country he was in. He took steps to return here as soon as the airports re-opened.

83. D8 was asked about the port stop under anti-terrorist powers on 19th February 2020. According to the written record of that event, D8 said that he was visiting his cousin Rahan and he denied ever living in Iran. D8 told us that he does not have a cousin called Rahan and he denied saying that he had never lived in Iran. When asked why he did not tell the officers that he was travelling to get married, D8 gave a rather lengthy explanation which amounted to this: that there was no need to volunteer anything. Given that this interview was conducted in English without an interpreter, we are able to accept that explanation.

84. D8 was asked about the asylum screening interview on 26th March 2021. The record of that interview gives his date of birth as "1/1/93". D8's explanation was that he said "1993" and had forgotten the day and the month. In the Commission's view, whatever D8's mental state at that time, it is not credible that he could not remember his birthday. On the other hand, he had little motive to conceal it because he was keen to

[3] D8's preference was to give evidence via a Kurdish Sorani interpreter. The highly-qualified interpreter who came on the first day of the hearing was originally from the Iraq and not Iran. She pointed out that although she and D8 understood one another some words might not be understood. The Commission decided that it would not be right to persevere with her, but no Iraqi/Kurdish Sorani interpreter could subsequently be found. A Farsi interpreter was engaged at very short notice. D8 speaks excellent Farsi but that is not his language of choice.

[4] We believe that this must have been the earthquake that killed at least 8,000 people in November 2017.

tell the immigration officer that he had previously been granted asylum in the United Kingdom, in circumstances where that proposition was not being accepted. He therefore appreciated that there was no point suppressing personal details. Perhaps one possible explanation is that he may not have wanted to give out any information which might be of assistance to the Iranian Embassy.

85. According to the notes of this interview, D8 said that he was suffering from depression and received treatment in Iran six months previously (i.e. c. September 2020). D8 told us that this was not correct. His explanation for the error was that a confusion must have arisen in the translation. D8 did not accept that he had "slipped up".

86. D8 was asked about Dr Galappathie's main report (see further at §§115-117 below). This stated that D8's fiancée had called off their engagement. D8's explanation for that was that at one stage she did want to call it off but he persuaded her to continue. It seems from Dr Galappathie's addendum report that the couple have been reconciled.

87. D8 was asked about his account to Judge Colvin which was not accepted. D8 denied that this account was untrue.

88. D8 was asked about the funding of his trip. According to his statement dated 14th June 2022, he took with him to Iraq £1,000 and $700-800. This was intended to last until 5th April, in other words for approximately six weeks. An examination of the bank statements he has provided shows that there was virtually nothing in his account in late February 2020. D8 said that he "had money and money came through". It did not run out. He denied living off his family's means in Iran. D8 suggested that his father had sufficient means to pay for the agent who got him back to the United Kingdom although he did not know the cost.

89. D8 was asked about the entries in his bank statements for August 2020. The entry relating to "Reliance Bank loan" was in fact to a former employer who lent him £350. There were also payments from friends, including Y. Moradi Yaser being someone he had known since 2016. D8 accepted that there were no bank transactions between 19th February and 2nd August 2020 (give or take a day) but denied that the explanation for this was that he was in Iran.

90. D8 also said that he had spent four million Iraqi dinar or approximately £2,700-3,000 on purchasing various items of gold for his fiancée. He received the money to make those purchases via a friend, Sahr, who used an agency habitually used by Kurds in the United Kingdom. He did not retain the receipts.

91. D8 was asked about his family meeting him in Iraq in February 2020. He did not accept that they were taking a huge risk. He said that his father and mother were expecting him although they did not know exactly when he would arrive. D8 said that it was too risky for his family to give a witness statement in these proceedings, but he did not accept that his Facebook posts created a risk for them.

92. In his witness statement dated 30th August 2022, D8 said that he rented accommodation in Kalar city and that he and his family went there from Sirwan. In his asylum interview he claimed that he rented accommodation in Sulaymaniyah (by that he clearly meant the province of Sulaymaniyah, which includes the city of Kalar) and that the rental agreement was available. What we have now is only an unclear image on a mobile phone which cannot be deciphered. D8 said that he took a photograph of the document when he was in Italy and before his papers were confiscated (that photo is no longer available). His fiancée also took a photo of the document when they were in Iraq and our understanding of his evidence is that it is only this unsatisfactory image that remains.

93. D8 was asked about the medical reports that he has provided, both in English. The report relating to lumbar back pain relates to a consultation on 1st April 2020 although for some reason it is dated 6th September 2020. Again, we do not have the original. D8 said that he collected the report some months later, and that he took a photo and sent it to his fiancée. When he was in prison it was sent to his cousin, Sabr, who sent it to his solicitors. D8 asked the doctors to write the reports in English. D8 denied that these documents are forgeries.

94. We interpose at this juncture to point out that the psychiatric report dated 23rd August 2020 relates to a time when D8 was undoubtedly in Iraq. He could well have been suffering from a severe depressive episode at that time, not least because his attempts to return to the United Kingdom had failed. Moreover, the Commission does not conclude that D8 was in Iran in August or September 2020. It does therefore look as if the reference to Iran in the record of the asylum interview is a mistake. We are entitled, however, to be more sceptical about the orthopaedic report, in particular its date.

95. D8 was asked about the mobile phone he purchased in Iraq. His explanation for the absence of any phone records is that he left the phone there because its battery was having problems.

96. D8 was also asked about the jewellery receipts which he accepted had emerged in this case for the first time a few days before the hearing. D8 said that his fiancée has the originals and sent the images across. He denied that they were forgeries. D8 confirmed that he and his fiancée got engaged on 5th March 2020 which was 15 days after his arrival in Iraq. Her name was Elham Azizian Far. He agreed that the first time that she was mentioned in any witness statement was on 31st January 2023[5]. D8 was taken to the screenshots of the engagement which he says were taken in Iraq in Sirwan village, in the house of Adel, described as a relative of his fiancée. The Commission has not

[5] We think that Mr Kinnear was hinting that the photos that D8 has supplied were of his previous engagement before he left Iran to the woman who died in the earthquake. He did not put that proposition to D8 directly. He did not want to generate unnecessary distress.

been provided with digital photographs which show the date and/or could be geolocated. D8 said that his fiancée's family came to Iraq for the ceremony.

97. Mr Kinnear asked D8 to explain how it could be that his fiancée and her family could return to Iran in May 2020 when the border was still closed. His explanation was that there was some easing in the border restrictions for Iranians stuck in Iraq and vice versa. There was no easing for Iraqis who wanted to travel from Iraq to Iran and vice versa. The difficulty with that answer is that if the families were stuck in Iraq for two months or so, one would have thought that some evidence of that fact could have been provided.

98. We interpose at this juncture to make the following finding of fact. We accept that D8 was engaged to Elham Azizian Far on 5th March 2020. We do not reject as entirely fanciful Mr Kinnear's intimation that the photographs we have been shown may relate to D8s first engagement, but we do not reach that conclusion. We deal later with the issue of location.

99. D8 was asked about his Facebook postings. He denied that these were carried out in order to influence his asylum claim. He lost access to two accounts, the first because he could not remember his password. He opened a third account in 2020 (the month is not in evidence) and he was denied access to that account on 21st August 2022 owing to suspicious activity. D8 said that he was unable to regain access to any of his accounts although it was put to him that it would have been easy to do so and on his own evidence his fiancée had access to all his accounts, and could have provided him with passwords details etc. D8's explanation for this failure on his part is that it never crossed his mind at the time to try to recover these accounts.

100. A mysterious feature of this corner of the case is that D8's evidence was that his fiancée was using his Facebook accounts at all material times. If that were the case, one would have thought that Facebook's algorithms would have sent out a "suspicious activity" message once they were aware of usage in Iran. That may of course explain the message sent on 21st August 2022. This oddity cannot be demystified on the material we have.

101. D8 was also asked about more recent Facebook activity between 28th August 2022 and 21st January 2023. These show, amongst other things, pictures of demonstrations which D8 attended. D8 denied that he made these postings in order to improve his case.

102. D8 was asked about the email messages he claims he did not receive from the Secretary of State, attaching copies of two decision letters. Again, D8's explanation was that he was locked out of his email account because he had lost the password.

103. The Commission is unable to accept this explanation. The better view on the evidence is that D8 did receive these decision letters but decided not to do anything

about them. Maybe there was next to nothing that he could do about them at the time. Further, we think that D8 has been selective about the Facebook postings that he has sought to put in evidence. That factor lends some support to the Secretary of State's contention that D8 has been opportunistic and self-serving.

104. D8 was asked by Mr Kinnear whether he has an extremist mindset. D8 said that this was not true. He is pro the KDPI and defends Kurdish ethnicity. At university he was forced to study in Farsi, which he resented. The purport of his evidence, if the Commission has understood it correctly, is that D8's KDPI sympathies would be inconsistent with an extremist or pro-ISIL mindset.

105. The Chair asked D8 a number of questions about travel to and from Iran. D8 said that his fiancée and her family came to Iraq about 7-10 days after the arrival of his mother and father. D8 said that his home village, Kaderi-Sarab-Zahab is north of his fiancée's home city, Sarpol-e-Zahab. D8 said that the route from that city to Iraq would have entailed crossing the border at Khosrawi. He said that when he helped the wounded Peshmerga soldiers in 2016 he took them to Tapamaran. These locations, save for D8's home village, can all be seen on internet maps.

106. The Chair also asked D8 whether many people cross the border illegally. He said not, owing to minefields which are the legacy of the Iraq/Iran war of 1981-88.

107. Our further impressions of D8's evidence are set out in the Discussion and Conclusions chapter of this judgment.

Mohammed Amirinejad and Sabah Ameninazhad

108. These men are both cousins of D8. They deny that he holds extremist views. Mr Amirinejad spoke to D8 when the latter was in Iraq, although he cannot recall exactly when they spoke. D8's engagement took place in Iraq in March 2020. D8 would not have left her.

109. According to Mr Amirinejad:

> "I am confident he would not have gone to Iran. First of all, I do not think that it is possible to cross the border from Iraq to Iran without a valid passport. I do not think that D8 has an Iranian passport. He could not have crossed the border. Secondly, it is not possible to cross the border secretly: there are checkpoints to cross that are controlled by the authorities. I do not think that it is possible for smugglers to hide people in their cars/trucks to get them over the border because security is very tight. Thirdly, the situation in Iran is very dangerous for D8 … [t]here is no reason, therefore, for D8 to take such risks by going to Iran."

110. Mr Amirinejad was cross-examined with the aid of an interpreter. He confirmed the name of D8's fiancée and that D8 had been engaged previously. He said that he spoke to D8 about 3-4 times during his trip (according to his witness statement, at least one of these occasions was before the border closed) when D8 was Iraq. There were subsequent conversations when D8 was experiencing difficulties.

111. Mr Amirinejad was asked how he knew that D8 was in Iraq during these calls. His answer was that he knew that D8 was going to Iraq. The Commission is not convinced that Mr Amirinejad had a sound apprehension of the chronology. We consider that his evidence was more compelling in relation to the period when D8 was indubitably in Iraq, experiencing the difficulties we know about.

112. According to Mr Amerinazhad:

> "In 2020 D8 told me that he was going on holiday in Iraq. I was happy for him: he had been in the UK for 4 years by that point and had not been on holiday. I also knew that he was looking for a wife. The time was right for him … D8 and I spoke around 4 or 5 times when he was in Iraq. We did not speak regularly as he was busy with family and friends. D8 got engaged while he was in Iraq. The engagement took place in March 2020. His fiancée is my niece; her mother is my sister. I saw photographs of the engagement and of D8 and his fiancée together at different places."

113. Mr Amerinazhad was cross-examined without the assistance of an interpreter. He said that his niece, D8's fiancée, had sent him photos of the engagement via WhatsApp. He said that he would provide these photos on request. The Chair asked him where the engagement took place, and his answer was in Sirwan, near Kalar city, at the house of Adel, his brother-in-law. He was very clear about that. When asked about the engagement photos, he said that he did not recognise the location.

114. Both of these witnesses came across as reasonably honest and straightforward. The telephone conversations with D8 cannot prove that the latter was not in Iran for a period of time, because their evidence was not wholly precise as to timings, and it is not in dispute that D8 was in Iraq – certainly in February 2020 because the flight was to KRI (the period of time he remained in Iraq, assuming that he left, cannot be discussed in OPEN), and subsequently at the latest by the end of July 2020. The Commission must give very careful consideration to Mr Amerinzhad's evidence that his niece got engaged to D8 in Sirwan, at a particular location. It is possible, of course, although this was not explored, that the witness was told that by D8.

Dr Nuwan Galappathie, FRCPsych, Consultant Forensic Psychiatrist

115. Dr Galappathie has provided two reports. The Secretary of State did not ask that he be tendered for cross-examination.

116. Dr Galappathie has diagnosed: (1) single depressive disorder, severe, without psychotic symptoms; (2) generalised anxiety disorder; and (3) post traumatic stress disorder. For present purposes the focus must be on D8's PTSD.

117. In Dr Galappathie's opinion, D8's symptoms are genuine and there is no indication that he is malingering or exaggerating. The intensity of his subjective fear of return to Iran cannot be doubted. D8 was unable to provide an account of his past trauma in Iran as he found it too distressing to discuss. Dr Galappathie was aware of the account that D8 had given to Judge Colvin and elsewhere, and that it had not been believed. D8 described a number of symptoms consistent with PTSD. Overall:

> "He outlined having recurrent and distressing memories of the trauma that he reports by way of fearing that he would be executed if the Iranian authorities had found him prior to having fled Iran and travelled to the UK. … It should be noted that his symptoms of PTSD including his flashbacks may be related to any of his previous traumas he reports including within Iran or detention in Turkey, Italy or the UK and may also be related to his fear of being returned to Iran as a result of his Facebook postings …"

118. In his addendum report Dr Galappathie opined that D8's mental health problems are likely to have been caused by previously having helped the Peshmerga fighters and then having to flee Iran. It was also possible that his PTSD has been caused by other traumatic events as specified above. D8's mental health problems are likely to have impacted on his memory, recall and consistency. Were he removed from the United Kingdom, his symptoms would deteriorate rapidly leading to a high risk of self-harm and suicide that "is very real on his return".

119. In Dr Galappathie's opinion, D8 should be treated as a vulnerable witness under para 10 of the *Joint Presidential Guidance (Note No 2) 2010*.

120. There is independent evidence from HMP Belmarsh that in July 2022 D8 was placed on suicide watch because he was expressing suicidal intent; he believed that his life would be in danger in Iran. A letter from the prison dated 1st August refers to "a few suicide attempts".

121. The Secretary of State did not require that Dr Galappathie attend for cross-examination. The point is made that his report is predicated on a false premise: that D8 suffered trauma on account of his assisting the Peshmerga fighters, a version of events that was not accepted by Judge Colvin. The Commission prefers to take a more nuanced approach to this issue. Ms Knights on behalf of D8 did not seek to reargue the 2016 asylum claim and D8 gave very limited evidence about it (we are referring here

to the route taken to avail the fighters' exit from Iran). Matters have moved on very considerably since then. The Secretary of State cannot dispute Dr Galappathie's diagnosis of PTSD, and the latter does not base it solely on D8's historic account. D8 may well have experienced traumatic events since then: in particular, his incarceration in Turkey in August 2020; his illegal departure from Iraq subsequently; his travel to Italy and then the small-boat crossing to the United Kingdom. His PTSD cannot prove that he suffered trauma in 2016 or indeed that he harbours a subjective fear of returning to Iran; but, conversely, Judge Colvin's disbelief of D8's account does not prove that he is not suffering from PTSD.

Dr Rebah Fatah

122. In his report dated 17th February 2023, Dr Fatah outlined the well-known difficulties facing the minority Kurdish population in Iran.

123. In Dr Fatah's opinion, D8 risks being detained and interrogated on his return to Iran, the level of that risk being dependent on the length of time he has been outside the country and whether there are any problems with his documentation.

124. The Iranian authorities monitor the activities of Iranian nationals abroad including their activities online. Were they to become aware of D8's social media posts, it is possible that he may be at risk of persecution on his return. The same applies to his background and support for the KDPI. If the Iranian authorities became aware of D8's security profile in the United Kingdom, they would likely interrogate him on his return.

125. The Secretary of State did not require Dr Fatah to attend for cross-examination.

The Danish Immigration Services' Report on the Iranian Kurds, February 2020

126. The Commission has considered the entirety of this helpful report which is in line with the Upper Tribunal's Country Guidance decisions referred to below. We draw attention only to the following passages:

> "**7.1 Legal Crossings**
>
> As of October 2017, there were five[6] official entrances/crossings between Iran/Iraq:
>
> - Haj Omran: Erbil
> - Basmaq: Mariwan-Suleimania
> - Parwizhkhan: Qasr-e Shirin-Sulaymaniya
> - Khosrawi: Karank-Kirkuk

[6] The report only specifies four. We have been able to work out where these crossings are on the map.

The visa requirement between Iraq and Iran has been lifted which implies that a short term visa of 30 days is granted on the border.

7.2 Illegal Crossings

The border, between Iran and the Iraqi Kurdish areas, is mostly mountainous. Despite the border guards' stringent control, it is still possible to cross the border illegally. However, great caution is advised for safety reasons. One must travel with a person familiar with the area.

Most of the border in Iran is guarded by a special force, "nero intizami"; however, in the Kurdish area the border is now guarded by the IRGC forces, by order of the Supreme Leader.

Over the past three to four years, the Iranian military have been guarding the border more intensely. More military checkpoints have been built in the mountains in places where they are difficult to build. There are mines in the border area stemming from earlier periods of hostility as well as new mines that were recently planted. In 2019 (January to October), 23 people were victims of mines and either killed or wounded.

In the Iranian Kurdish border area, the IRGC forces are given permission to kill anyone who crosses the border illegally. …"

THE LEGAL FRAMEWORK

The Exclusion Decision

127. The Secretary of State's decision to exclude D8 from the United Kingdom is reviewable by the Commission under section 2C(3) of the SIAC Act 1997 and judicial review principles apply. It is not in dispute that the full range of public law challenges is open to D8, including *Wednesbury* and *Tameside*. An enumeration of these principles is not required.

128. At the heart of the exclusion decision is the Security Services' national security assessment. An issue arises as to whether the "anxious scrutiny" standard applies. In *Shamima Begum v Secretary of State for the Home Department* (SC/163/2019), at paras 47-48, this Commission decided that "anxious scrutiny" applied in a deprivation of nationality case, although in an appeal governed by section 2B of the SIAC 1997 it may be added that the point is somewhat moot because on such an appeal the Commission's "powerful microscope" is switched on (see para 49). In section 2C(3) cases, there is no appellate function and no similar tool. It is submitted on behalf of D8 that "anxious scrutiny" applies in any case involving fundamental rights, and in the present case the Commission is concerned with the right of a refugee not to be excluded from his country of recognition.

129. Both the Commission and the Court of Appeal have said on a number of occasions that the basic unfairness inhering in a procedure which relies on CLOSED material to which the appellant or applicant is blind places an additional burden on us to examine all the available evidence and material with meticulous care. This is tantamount to saying that "anxious scrutiny" applies. In our view, meticulous care is required across the entire range of the Commission's functions under the SIAC Act 1997. The application of any lower or laxer standard seems counter-intuitive.

The Revocation Decision

130. Article 33 of the Refugee Convention provides:

> "**Prohibition of Expulsion or Return**
> (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

131. Para 338A of the Immigration Rules provides:

> "A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply."

132. The relevant provisions in paras 339A – 339AB are as follows:

> "… they have voluntarily re-availed themselves of the protection of the country of nationality" [para 339A(i)] (NB This reflects the wording of Article 1C(1) of the Refugee Convention)
> "As regards the application of Article 1F of the Refugee Convention, this paragraph also applies where the Secretary of State is satisfied that the person has instigated or otherwise participated in the crimes or acts mentioned herein." [para 339AA]
> "This paragraph applies where the Secretary of State is satisfied that the person's misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of refugee status." [para 339AB]

> "This paragraph applies where the Secretary of State is satisfied that: (i) there are reasonable grounds for regarding the person as a danger to the security of the United Kingdom." [para 339AC[7]]

133. Where the Secretary of State is considering revoking refugee status, para 339BA requires that the person be informed in writing and be given the opportunity to submit in a personal interview or written statement reasons against the decision. Further, a representative of the UNHCR is entitled to present his view, in the exercise of his supervisory responsibilities under Article 35 of the Refugee Convention, regarding individual revocation decisions at any stage of the procedure: see para 358(c).

134. Under the Secretary of State's Guidance, *Revocation of Refugee Status*:

> "It will normally be appropriate to give [the UNHCR] an opportunity to present their views on individual cases before a final decision is taken. This reflects the requirements in paragraph 358C of the Immigration Rules. UNHCR should normally be contacted after the individual concerned has had an opportunity to comment so that UNHCR can take the representations of the refugee into account in preparing their view of the case, but where there are exceptional circumstances, you [the caseworker] may contact both the individual and UNHCR in tandem."

135. The appeal to the Commission is under section 2(1) of the SIAC Act 1997 on account of the Secretary of State's certificate given under section 97 of the NIA 2002. The effect of section 2(2) is that section 84(3) of the NIA 2002 applies to the appeal before this Commission, and the issue to be determined is whether the revocation decision "breaches the United Kingdom's obligations under the Refugee Convention".

136. Although the revocation decision relied on para 339AA and Article 1F(c) of the Refugee Convention, Mr Kinnear very sensibly abandoned the point. We therefore need say no more about it.

137. In our judgment, the issues under paras 339A(i) and 339AB raise factual and evaluative questions which the Commission must determine for itself on all the available evidence, bearing in mind that the burden of proof is on the Secretary of State. Conversely, the issue under para 339AC is, essentially, whether the Secretary of State could reasonably be satisfied that the person represents a danger to the security of the United Kingdom.

138. When it comes to para 339AC, the Secretary of State must place before the Commission the material which she says constitutes the reasonable grounds for

[7] This gives effect to Article 14(4) of the Qualification Directive which reflects Article 33(2) of the Refugee Convention.

regarding D8 as a danger. In exercising its appellate function, the Commission adopts the same approach as it applies to national security in all equivalent contexts, in other words the approach in *Shamima Begum* and *U3*. We cannot accept Ms Knights' submission that because the appeal comes before us via section 82 of the NIA 2002 some different approach is required. We set out our reasons under §§152-153 below.

139. An issue arises as to whether in a revocation appeal the relevant questions must be determined as at the date of the Secretary of State's decision as opposed to the date of the Commission's own decision. In an asylum context generally (see further footnote 10 below), it is the later date. Moreover, in a revocation context generally, it is also the later date: see *SSHD v MM (Zimbabwe)* 2017 EWCA Civ 797, para 35 in particular[8]. Furthermore, the para 339A(i) issue, viz. voluntary re-availment, requires that consideration be given to the presence or absence of a past fact. Questions of present and future risk are irrelevant. Either the refugee voluntarily re-availed himself or he did not; and if he did revocation under the Immigration Rules is mandatory. That past fact is determined as at the date of the Commission's decision on the basis of evidence that may not have been available at the time the Secretary of State's decision was made.

140. Despite *MM (Zimbabwe)* where the point appears to have received little prominence, there remains a doubt in the Commission's mind as to the relevant date in a revocation appeal in the context of the national security assessment. We will therefore consider both possible dates.

Voluntary Re-Availment: UNHCR Guidance and relevant jurisprudence

141. According to Chapter III of the UNHCR Handbook dealing with Cessation Clauses, Article 1C(1) of the Refugee Convention implies three requirements, viz.: (1) voluntariness, (2) intention (the refugee must intend by his action to re-avail himself etc.), and (3) re-availment (the refugee must actually obtain such protection). A distinction is to be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. An application for and obtention of a passport falls into the former category.

142. Para 125 of the Handbook deals with the issue of travel documents rather than passports to a refugee. It provides:

> "Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former country and to have

[8] The Commission fully appreciates that when it comes to the law, policy and practice that should be applied to an asylum or human rights claim, the legal and policy framework is not that extant as at the date of the relevant tribunal's decision but that applicable at the time of the decision under challenge. What we are referring to here is a state of affairs or the evaluation of present and future risk.

lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country then regular visits to that country spent on holidays or for the purpose of establishing business relations."

143. Para 6 of the UNHCR's April 1999 Guidelines on the application of Cessation Clauses emphasises that the concept of seeking diplomatic protection underlines Article 1C(1).

144. It is clear from the case of *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745 that considerable weight should be given to UNHCR Guidance in view of its mandate and special status (see para 36), and that cessation clauses should be interpreted restrictively.

The Asylum/Human Rights Decision

General

145. Para 334 of the Immigration Rules provides:

"An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:

(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
(ii) they are a refugee, as defined in regulation 2 of [the Qualification Regulations];
(iii) there are no reasonable grounds for regarding them as a danger as a danger to the security of the United Kingdom[9];
(iv) [N/A]
(v) refusing their application would result in them being required to go … in breach of the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group."

146. If the individual does not qualify, the Secretary of State must refuse the application for asylum (para 336). However, in most cases, including the instant case, the Secretary of State would have to consider the broader claim under Article 3.

147. It is common ground in this case that if an individual falls under the exception to the prohibition of *refoulement* under Article 33(2) of the Refugee Convention, he

[9] This gives effect to Article 14(5) of the Qualification Directive which reflects Article 33(2) of the Refugee Convention.

may still be a refugee under Article 1A but not qualify for refugee status under the Immigration Rules. This is because someone who is a refugee and is also a danger to national security may be removed to a country where he has a well-founded fear of persecution. He cannot avail himself of the benefit of Article 33(1).

148. The jurisprudence governing asylum claims generally is too well-known to require exposition. The only matters that need be made explicit are that, as already indicated, the Commission determines the issue of risk to the individual as at the date of its judgment[10], not as at the date of the Secretary of State's decision (a similar approach applies to Article 3 of the Convention); and that although there is a burden of proof on an applicant, the standard of proof is lower than the balance of probabilities. Having taken account of all the relevant material the Commission must consider whether there is a real and substantial risk of persecution (again, there is a similar approach to Article 3).

149. The Commission raised with the parties the issue of how the re-availment of protection issue interplays with the issue of well-founded fear of persecution. If, *arguendo*, we were to conclude that D8 *did* re-avail himself of the protection of Iran, his revocation appeal would be dismissed. That does not of course prevent him from advancing a fresh asylum claim, which is what *ex hypothesi* we would be considering. The fact that three years ago D8 re-availed himself of the protection of Iran does not mean that his asylum claim must necessarily fail, but it is a factor to be borne in mind in considering the entirety of his case as at today's date. This is an issue touched on by para 123 of the UNHCR Handbook, which provides:

> "… If he subsequently renounces either intention, his refugee status will need to be determined afresh. He will need to explain why he has changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee."

We do not read this as suggesting that unless D8 provides a good explanation (given that he denies ever travelling to Iran, he has not provided one) his asylum claim must fail; and Mr Kinnear did not so submit. The real point is that D8 is (on this hypothesis) making a fresh asylum claim which must be considered against the background *inter alia* that he has in the past re-availed himself of the protection of Iran.

150. It is common ground that Article 3 is absolute in its effect. The question is whether there is a real risk of torture or ill-treatment, and that applies even if the

[10] See, in an asylum context, *Ravichandaran v Secretary of State for the Home Department* [1996] Imm AR 97 and section 77(3) of the IA Act 1999. In an Article 3 context, the same position is achieved by section 77(4) of the same statute, and in a human rights context generally, by the decision of the House of Lords in *R (oao Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 364. Further, evidence of post-decision facts is admissible: see sections 85(5) and 85A(2) of the NIA Act 2002. Ms Knights is correct to point out that the legal and regulatory framework is that in place at an earlier date, either the date of the Secretary of State's decision (in relation to revocation) and D8's application (in relation to asylum and human rights), but nothing turns on this.

individual may be a threat to national security (see *Othman v United Kingdom* [2012] 55 EHRR 1, at para 185). A person constituting such a threat will not qualify for humanitarian protection (see para 339D(iii) of the Immigration Rules), but he will obtain some form of discretionary leave.

151. Article 3 of the ECHR also bears on D8's case to the extent that he contends that removal to Iran would generate an unacceptable risk of self-harm or ill-health. Here, the relevant principles have been set out in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; [2021] AC 66 and *MY (Suicide Risk after Paposhvili) v Secretary of State for the Home Department* [2021] UKUT 00232 (IAC). In short, D8 has to demonstrate the existence of substantial grounds for believing that, on account of the absence of appropriate treatment either in or *en route* to Iran, he would face a real risk of (1) a serious, rapid and irreversible decline in his state of health, or (2) a substantial reduction in his life expectancy. That is a high threshold. If it is surmounted, then the burden shifts to the Secretary of State to dispel any serious doubts raised by D8's evidence. Paras 137ff of *MY* provide a helpful analysis of how a tribunal should approach the fact-finding exercise in such a case, recognising always that each individual case must turn on its own facts.

152. The appeal against the asylum and human rights decisions lies to the Commission under section 2(1) of the SIAC Act 1997. The provisions of sections 84-86 of the NIA 2002 are also applicable (via the same route as applies to revocation). Given the statutory scheme, the Commission conducts a full merits appeal (i.e. the appeal that would be conducted by the FtT in the absence the section 97 certificate and the national security dimension) in relation to all relevant issues, save in relation to the issue covered by that certificate. Contrary to Ms Knights' submission, the test in relation to that issue – national security - is as per *Begum* and *U3*.

153. Our reason for this conclusion is that the *locus classicus* of *Secretary of State for the Home Department v Rehman* [2001] UKHL 7; [2003] 1 AC 153 was also a case on section 2(1) of the SIAC Act 1997 – more precisely, what was then sub-section (c), being the provision dealing with deportation appeals[11]. Everything that the majority, led by Lord Hoffmann, had to say about the approach to national security cuts right across Ms Knights' submission. *Rehman* was, of course, the juridical basis for *Begum* in the Supreme Court, notwithstanding the different statutory scheme: viz. not section 2(1) but section 2B. The only issue left in doubt by *Begum*, but which has now been resolved by *U3*, is whether SIAC may make findings of fact in the context of national security.

154. The issue of safety on return is not covered by the Secretary of State's certificate, and the Commission conducts, as we have said, a full merits appeal. There was some discussion as to whether the Commission is required to show any deference to the expert view of the FCDO.

[11] The relevant provision is now section 2C of the SIAC Act 1997. It sets out a different approach.

155. Generally speaking, we would be according a measure of deference to the expert assessment of the FCDO. The position in asylum and humanitarian cases is that the FtT and the Upper Tribunal are expert bodies that have accumulated their own expertise over time, both individually (through trying a considerable number of cases) and corporately (in the sense that the Upper Tribunal promulgates Country Guidance decisions). No deference as such is accorded to the Secretary of State, and in this context there can be no difference between this Commission and other tribunals. However, the FCDO occupies a slightly different position inasmuch as the Iran Unit, for example, is dedicated to the study of that country and receives evidence and material from a range of sources. It is for this reason that the Secretary of State sought expert input from the FCDO in this case, and that reason should, other things being equal, be exported into the approach that we should adopt.

156. However, there are concerns about the approach taken by the FCDO to some of the key questions, and there are also a range of unanswered questions that the Commission itself raised at the start of the hearing. A witness from the FCDO would have been of assistance on the issues of documentation, border posts, clandestine entry, the procedures at Tehran airport, and some of the assumptions made in the later Safety on Return reports.

157. Overall, the absence of an FCDO witness, and the obvious lacunae in the material before the Commission, should lead us to be cautious about the Safety on Return reports and some of the inferences that the Secretary of State invites us to draw against D8.

158. We think that the correct analysis is that the Commission must bear in mind the experience and expertise of that department when reaching its own assessment. In the circumstances of the present case, the degree of "deference" – whether slight, some or considerable – will have no bearing on the outcome.

159. In any case, even if one takes the final Safety of Return report at face value, and also takes into account the cogent submissions made by Mr Martin Goudie KC inviting us to do no more than draw common sense inferences based on our assessment of D8 on a human level, the conclusion must be that the Secretary of State has failed by a wide margin to persuade us that it would be safe to return D8 to Iran. We reach that conclusion even if every other point in this case had been determined in the Secretary of State's favour.

Iran

160. As the Chairman remarked during closing argument, Iran has one of the worst human rights records on the planet, in an admittedly crowded field. However, it does not follow that all ethnic Kurds, even those who left Iran illegally, automatically qualify for refugee status.

161. The Secretary of State's decision letter refusing the asylum and human rights claims referred to the Country Guidance case of *AB.* Although Ms Knights drew our attention to all the relevant passages, it seems to us that para 457 of this decision, cited by Judge Colvin and forming the narrow basis of his ruling in favour of D8, is critical. This paragraph should be read in conjunction with paras 469-47 which we do not set out.

162. However, *AB* is all of value in vouching a separate proposition:

> "464. We do not find it at all relevant if a person had used the internet in an opportunistic way. We are aware of examples in some countries where there is clear evidence that the authorities are scornful of people who try to create a claim by being rude overseas. There is no evidence remotely similar to that in this case. The touchiness of the Iranian authorities does not seem to be in the least bit concerned with the motives of the person making a claim but if it is interested it makes the situation worse, not better because seeking asylum is being rude about the government of Iran and whilst that may not of itself be sufficient to lead to persecution it is a point in that direction."

163. This paragraph could have been worded slightly differently. Judge Colvin's held that D8's asylum claim was made out notwithstanding that his posts were considered to be opportunistic. It does not follow that D8's subsequent posts were equally so, and that was not quite the Secretary of State's assessment in the decision letter (see §54 above and the use of the adjective "possible"). But it may be putting the matter a notch too high to say that an Iranian asylum claimant's motives are not at all relevant. We think that they are a factor to be considered although it is one that may well not carry much weight given the likely response of the Iranian authorities to any perceived criticism (for a subtler analysis of this issue, in an admittedly slightly different context, see para 159 of the judgment of Laws LJ in *Sepet v Secretary of State for the Home Department* [2001] Imm AR 452, with its focus on the issue of perception).

164. The Secretary of State's decision letter also referred to the Country Guidance case of *SSH* (see §51 above). The Commission sets out the Upper Tribunal's conclusions:

> "(5) Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. …
> (6) A period of residence in the KRI by a Kurdish returnee is reasonably likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-

exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing and why he left.

(7) Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.

…

(9) Even "low-level" political activity, or activity that is perceived to be political, such as, by way of example only, possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of persecution or Article 3 ill-treatment. Each case, however, turns on its own facts and an assessment will need to be made as to the nature of the material possessed and how it would likely to be viewed by the Iranian authorities in the context of the foregoing guidance.

(10) The Iranian authorities demonstrate what could be called a "hair-trigger" approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. By "hair-trigger" it means that the threshold for suspicion is low and the reaction of the authorities is likely to be extreme."

165. Finally on the topic of Country Guidance cases is *XX*, also addressed in the Secretary of State's decision letter (see §55 above). It is right to add two observations. First, the Upper Tribunal recognised that if someone in D8's position were returned to Iran he would need an ETD and an application to the Embassy here would need to be made. That is the first potential "pinch point" and internet searches of a basic nature would then likely be carried out. Secondly, *XX* also makes the point that it may be relevant to consider whether D8 would delete his Facebook account before returning to Iran, if that were to be his destiny. However, that possibility has not been examined in evidence or in submission, and we cannot therefore investigate the issue any further.

166. On a related theme, what D8 would or might do on return to Iran, presumably via Tehran International Airport with its sophisticated computer systems, was not explored in evidence. As Lord Hope of Craighead JSC explained at para 18 of his judgment in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596, attention must be focused on what D8 would actually do if returned to Iran, and the fact that he could take action to avoid persecution does not disentitle him to asylum if in fact he would not act in such a way as to avoid it, even if that failure were unreasonable. In any case, were D8 to say to his interlocutors at Tehran airport or elsewhere that his Facebook posts and ostensible anti-Government activities were in reality to bolster his asylum claim, which may have a grain of truth, we very much doubt that would improve his chances.

National Security

167. There are three issues to address under this rubric. The first is the approach the Commission should be taking to national security in the context of paras 339AC and 334(iii) of the Immigration Rules and refoulement of a refugee. The second is the impact of section 55(1)(b) of the IAN 2006 on the determination of the asylum appeal. The third is the overarching approach that the Commission takes to national security in the exercise of its appellate rather than review function whenever that issue arises.

Article 33(2)

168. In relation to the first of these issues, Article 33(2) of the Refugee Convention has not been incorporated into domestic law, but (1) section 2 of the AIA Act 1993, headed "Primacy of the Convention", provides that nothing in the Immigration Rules shall lay down a practice which would be contrary to the Convention; and (2) in *R v Asfaw* [2008] UKHL 31; [2008] AC 1061 it was recognised that domestic law and practice is closely assimilated to the Convention model. The Qualification Directive was not directly applicable to the United Kingdom, but there was a requirement to transpose it by 10th October 2006. The Government has achieved this via a combination of the Immigration Rules[12] and the Qualification Regulations. The latter are expressly referred to in para 334 of the Immigration Rules.

169. It follows that the Immigration Rules should be interpreted as far as possible as to achieve the objectives of the Refugee Convention and the Qualification Directive. All relevant provisions refer to a *danger* to national security. However, in our view, there is no real difference between the concepts of risk and danger in this context. In any case, the Secretary of State's decision letters in this case refer to danger rather than to risk, reflecting the relevant wording.

170. Article 13 of the Qualification Directive confers the right on the individual to be granted refugee status, and Article 21(1) obliges member states to respect the principle of *non-refoulement*. These obligations remain on the United Kingdom following the United Kingdom's departure from the EU: in other words, they are "retained EU law" for the purposes of the EUWA 2018[13]. There are, of course, similar obligations under the Immigration Rules.

171. Article 21(2) of the Qualification Direction provides:

> "Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:

[12] Refugee Convention compliant rules were already in place.

[13] The route to this conclusion is not via ss. 4 and 6(7) of the EUWA 2018 but s. 2. The Commission is aware that this point is on appeal to the Supreme Court.

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; …"

The "international obligations" referred to are those under Articles 2 and 3. It may be seen that Article 21(2) mirrors Article 33(2) of the Refugee Convention.

172. In *T v Land Baden-Wurttemberg* [2016] 1 WLR 109, the CJEU held, at paras 70 and 71:

> "70. Article 21 of [the Qualification Directive] lays down the principle that refugees are normally protected from *refoulement*. However, Article 21(2) provides a derogation from that principle, by permitting refoulement of a refugee, whether formally recognised or not, either, pursuant to Article 21(2)(a) of that Directive, where there are reasonable grounds for considering him or her to be a danger to the security of the member state in which he or she is present, or, pursuant to Article 21(2)(b) [the particularly serious crime exclusion, not relevant to the instant case].
> 71. The *refoulement* of a refugee, while in principle authorised by the derogating provision Article 21(2) of the [Qualification Directive], is only the last resort a member state may use where no other measure is possible or is sufficient for dealing with the threat the refugee must pose to the security of the public or that member state. …"

173. The *T* case is binding on the Commission: see section 6(3) of the EUWA 2018. However, there is an issue between the parties as to the relevance of this decision to the present case, and we will therefore need to return to that.

174. The UNHCR's letter dated 8th January 2021 states that Article 33(2) "must be interpreted restrictively and with full respect for the principle of proportionality".

175. In the context of the special weight to be accorded to the views of the UNHCR (see *Al-Sirri*, referenced at §144 above), the following paragraphs of the Guidance Note on Extradition and International Refugee Protection, April 2008, are relevant:

> "14. The application of the provision [Article 33(2)] requires an individualised determination by the country of asylum that the following criteria in relation to the exceptions to the principle of *non-refoulement* are met:
> (i) For the "security of the country" exception to apply, it must be established that the refugee poses a current or future danger to the host country. The danger must be very serious, rather than of a lesser order, and must constitute a threat to the national security of the host country. …

> 15. As regards the *non-refoulement* provisions of the 1951 Convention, a restrictive application requires that there be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security of the host country. A restrictive application also means that *refoulement* should be the last possible resort for eliminating the danger to the security or community of the host country. Additionally, the danger for the host country must outweigh the risk of harm to the wanted person as a result of *refoulement*. Moreover, the determination of whether or not one of the exceptions provided for in Article 33(2) is applicable must be made in a procedure which offers adequate safeguards. …
>
> 16. The provisions of Article 33(2) of the 1951 Convention do not however affect the requested State's *non-refoulement* obligations under international human rights law [including Articles 2 and 3] which permit of no exceptions. …"

176. On the foot of these materials Ms Knights submitted, particularly in the light of para 71 of *T* and the views of the UNHCR, that a strict approach must be taken to Article 33(2) and the domestic provisions which enact it. In particular, it must be shown that the danger to national security is serious and that this measure of last resort is proportionate.

177. Mr Kinnear submitted the Secretary of State has not taken a *refoulement* decision in D8's case, and this is relevant to the correct interpretation of Article 33(2). He argued that the decision of the CJEU in *T* is of no relevance because it was concerned with Article 24 of the Qualification Directive and not Article 21. Further, he contended that the concept of "danger" required an individualised assessment of the risk, present and future, and that no further gloss was required. He drew attention to section 34(1)(b) of the ATCS Act 2001 which, on his analysis, precluded any application of the principle of proportionality to the interpretation of Article 33(2). Finally, Mr Kinnear invited the Commission to treat the UNHCR guidance as placing an unwarranted gloss on the Refugee Convention.

178. We begin our analysis of this issue with Mr Kinnear's submission that the Secretary of State has not in fact made any *refoulement* decision in this case. It is true that the revocation and asylum decisions were not made in the context of removal or deportation[14] under Schedules 2 and 3 of the Immigration Act 1971. However, the issue is whether the exception in Article 21(2)(a) of the Qualification Directive (based as it is on Article 33(2) of the Refugee Convention), and the relevant Immigration Rules on which that directive is based (themselves framed as exceptions to a general

[14] We mention deportation simply to make the point compendiously. Given that he has not been granted leave to enter, D8 would be subject to removal not deportation.

principle), *permits* the *refoulement* of someone who would or might otherwise qualify as a refugee. If the Secretary of State successfully defends the revocation and asylum appeals on the basis that the national security exception applies, then in any future proceedings assailing the lawfulness of D8's physical removal from the United Kingdom it would not be open to D8 to relitigate this issue.

179. It follows that in our view Mr Kinnear is seeking to draw an artificial distinction based on form rather than substance. In any event, the accuracy of his submission may be tested in a different way. In proceedings which *were* directly concerned with the summary removal of D8[15], the logic of Mr Kinnear's stance is that the true construction of the relevant provisions should vary. It would be strange indeed if the true construction of Article 33(2) read in conjunction with Article 21 could vary according to the context: that it should bear one interpretation if *refoulement* were directly in play, and another if it were not.

180. The next question is whether *T* is of any relevance to the instant case. Mr Kinnear is correct in submitting that the direct focus of *T* was not Article 21 but Article 24, which is a broader provision (see paras 74 and 75 of the CJEU's judgment). However, an examination of the opinion of Advocate General Sharpston and the judgment of the CJEU demonstrates that the conclusions reached as to the scope of Article 24 were closely connected to an analysis of Article 21.

181. At para 1 of her opinion, Advocate General Sharpston observed that the referring court was seeking guidance as to the interpretation of both Articles 21 and 24. Questions 1(b), 2(b) and 3 referred directly to Article 21: see para 42. Furthermore, paras 53-62 of her opinion deal directly with the interpretation of Article 21(2), para 61 being the most important. The issue is whether, if the exception applies, a Member State is permitted to *refoule* an individual who does have a well-founded fear of persecution back home. *Refoulement* and expulsion are not the same, because the latter may contemplate removal to a third country where there is no well-founded fear of persecution.

182. Moreover, the CJEU's judgment addresses Article 21 at various stages in its analysis: see paras 68-75 *passim*. At para 72 the CJEU, agreeing with para 81 of the opinion of Advocate General Sharpston, stated that the consequences for the refugee concerned of applying the derogation "are potentially very drastic", owing to the possibility of return to a country where he may face persecution. At para 75 the CJEU, contrasting Article 21 with Article 24, concluded that the former provision requires a higher degree of seriousness[16]. What the CJEU meant by this is that, although Article

[15] In practice, such proceedings could only be brought if D8 made a fresh claim. In the absence of such a claim, D8's removal under Schedule 2 could not be challenged, reinforcing the point that the Secretary of State has made a *refoulement* decision.

[16] Article 24 refers to "compelling reasons of national security". As we have seen, the English text of Article 21 refers to "reasonable grounds" whereas the French text to "raisons sérieuses". Whatever the possible differences in meaning between these two language versions of Article 21, the point of T is that "reasonable grounds" imposes a more stringent requirement than "compelling reasons".

21(2) does not expressly define "danger" or seek in terms to set any threshold for its gravity, the concept of danger is necessarily fluid and what is required in practice is something towards the higher rather than the lower end of the notional spectrum.

183. It is true that T himself was complaining about the revocation of his residence permit under Article 24 rather than *refoulement* under Article 21, and that if it were necessary to attempt to identify the *ratio* of that decision the issue would not be clear-cut[17]. However, in the Commission's view, it is impossible to relegate *T* to a state of irrelevance for present purposes.

184. But before we reach a final conclusion on this issue, we should bring into consideration the views of the UNHCR. Boiling these down, the UNHCR considers that "danger" means "serious danger" and that the danger to national security must be balanced against the harm to the individual if *refouled*.

185. Our first observation is that this balancing exercise is expressly precluded by section 34(1)(b) of the ATCS Act 2001[18]. Ms Knights submitted that the Secretary of State should not be permitted to rely on this provision after the hearing had concluded and without the opportunity to adduce oral argument. She also contended that this provision is contrary to the well-established jurisprudence on Article 33(2) and is, therefore, *ultra vires*.

186. The Commission does not accept the argument that it is too late for Mr Kinnear to raise what is essentially a pure point of law. The explanation for its lateness is that in an appeal raising a multitude of difficult issues this particular one was missed by the Secretary of State until further researches were carried out on the scope of *T*, Article 33(2) and the Qualification Directive at the Commission's request after the hearing had concluded. Further, we cannot accept that it is open to the Commission to hold that a piece of primary legislation is *ultra vires* a Convention which does not have direct effect domestically.

187. In any event, the scope of section 34(1)(b) must be strictly confined. All that this provision precludes is a proportionality exercise which balances the level of danger to national security against the level of danger to the individual if *refouled*. The sub-section does not prohibit a proportionality exercise which measures the level of danger to national security against the practicability of surveillance and other measures in the context of a provision of last resort.

188. As the Commission pointed out in *Shamima Begum* (at para 30), referencing Lord Hoffmann in *Rehman* (para 56), the evaluative assessment that is required in all

[17] The Commission did not receive submissions on that topic, and is aware that the common law concepts of *ratio* and *obiter* to a decision of the CJEU may not apply.

[18] "Articles 1(F) and 33(2) of the Refugee Convention … shall not be taken to require consideration of the gravity of –

…

(b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply."

cases of this nature, whatever the context, must take into account the degree of prejudice to national security and also the importance of the security interest at stake. *Rehman* also mentions the serious consequences of deportation for the individual, but that is irrelevant here in the light of section 34(1)(b). There can therefore be no doubt that the decisions of both the Secretary of State and of this Commission must respect proportionality to the extent not precluded by statute. In *Shamima Begum* we rehearsed the authorities and the principles, and it is unnecessary to till this ground.

189. Further, in the context of the UNHCR view that "danger" means "serious danger", the Commission agrees with Stanley Burnton LJ in *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630 and Ouseley J in *AA (Palestine)* that it is not appropriate to gloss the words of the provision under consideration. In other words, as a matter of construction, "danger" means "danger" and the insertion of qualifying adverbs or adjectives is not permitted. Overall, the views of the UNHCR do not provide independent support for D8's case.

190. Of more difficulty for Mr Kinnear is the judgment of the CJEU in *T* that Article 33(2) is a measure of last resort and should only be applied where no other measure is possible or sufficient for dealing with the threat (para 71). That analysis, if correct, is *not* precluded by section 34(1)(b) of the ATCS 2001. It is a different sort of proportionality analysis which requires that some consideration be given to the level of the danger to national security on the one hand (see para 75 of *T* and the reference to "degree of seriousness") and the measures that could be taken to reduce it to an acceptable level. Furthermore, the CJEU was not, we think, notionally inserting an epithet into Article 21(2) (i.e. "serious" before "danger"). Rather, the CJEU was saying that "danger" is a matter of fact and degree.

191. Reduced to its essentials, and stripping away those aspects of it that we cannot accept, Ms Knights' submission was that the relevant Immigration Rules, construed in the light of Article 33(2) of the Refugee Convention, Article 21(2) of the Qualification Directive and, in particular, *T* in the CJEU, impose on the Secretary of State a more onerous standard in relation to national security than would apply in, for example, a section 2B appeal where asylum issues are not at stake.

192. Not without a modicum of hesitation, we have come to the conclusion that paras 68-75 of *T*, including those paras to which we have expressly referred, are highly persuasive and should be applied to the present case. As we have explained, in *T* the CJEU carried out a close and compelling comparison between Articles 21 and 24 of the Qualification Directive. Although not necessarily binding, we see no reason to disagree with the CJEU's reasoning and conclusions in relation to Article 21, so closely bound up as they are with its analysis of Article 24. In particular, there is no answer to Advocate General Sharpston's analysis, supported by the CJEU, highlighting that the degree of risk or danger to national security required by Article 21 must be *greater* than that contemplated by Article 24. This is because the consequences for the refugee are more

serious in an Article 21 case. It follows that in an Article 21 case what is required is something *greater* than "compelling reasons" of national security.

193. The reasons for our hesitation should be made explicit. It is arguable that the CJEU in *T* have gone further than the terms of Article 33(2) of the Refugee Convention in terms of what must be proved by the Member State seeking *refoulement*. It is also arguable that there is no obvious reason why it should be more difficult for a Member State to *refoule* a refugee than to deprive a person of citizenship under section 40 of the BNA 1981. The Commission emphasises that the Secretary of State has not advanced these arguments but, instead, chose to dismiss *T* as being entirely irrelevant. We mention them in recognition of the importance of the issue.

194. It follows that the Secretary of State must balance the degree of danger to national security (assuming that it is possible to assess it in the circumstances of an individual case, and particularly so if it has been assessed) against the cost, practicability and feasibility of any measures that may be taken to ameliorate the risk; and must demonstrate that she has regarded the Article 33(2) exclusion as a measure of last resort. If it is reasonably apparent from the available evidence that the Secretary of State has carried out that analysis, then the Commission's role is limited to carrying out its post-*Begum* subordinate function. If, conversely, it is clear from the CLOSED assessments in particular that the relevant analysis has not been performed *and* that it is not evident to the Commission what the outcome would have been had it been carried out, then the Commission should be driven to conclude that the Secretary of State's conclusion as to danger to national security is flawed.

195. Finally, the approach of the CJEU in *T* is not, we think inconsistent with *Begum* in the Supreme Court and what may be described as the post-*Begum* line of authority. In a deprivation of citizenship case, the Secretary of State is given very considerable latitude in deciding what is conducive to the public good. The terms of section 40(2) afford the Secretary of State a wide margin of appreciation in evaluating all the available material. The CJEU in *T* envisages, we think, a rather different approach, but that arises in the context of a statutory scheme which affords considerably less freedom to the decision-maker. As we have already said, the overall approach in *Begum* applies to the Commission's appellate function, subject to our being satisfied that the decision-maker has at least addressed and considered what Article 21 requires.

Section 55 of the IAN 2006

196. This brings us to the second issue. The Secretary of State has certified the asylum claim under section 55(1)(b) of the IAN Act 2006. Under section 55(3), this Commission is required to begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate: that Article 33(2) of the Refugee Convention applies to D8 on the grounds of his danger to national security. On a literal meaning of the statutory wording, the effect of section 55(4) is

that if the Commission agrees with the certificate, we must dismiss the asylum appeal without considering any other aspect of the case.

197. Ms Knights submitted that this cannot be the effect of the sub-section consistent with the Refugee Convention considered as a whole. She argued that the question of whether D8 is a refugee is inextricably linked to the question of whether the Secretary of State can demonstrate that D8 should be subject to the Article 33(2) exception on *non-refoulement*. In particular, the question of whether D8 is a refugee is logically anterior to any issues arising under Article 33(2); and, in accordance with the clear guidance of the UNHCR, that provision must be interpreted in a proportionate manner considering both the risk to D8 on return and the danger he poses to the national security of the United Kingdom. In other words, it is simply neither possible nor lawful to treat the national security issue as entirely ring-fenced, which is the concept underpinning section 55(1).

198. Ms Knights drew our attention to para 41 of the opinion of Lord Steyn in *R (oao European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 AC 1, but that was a case about the immigration rules and informally adopted practices and not primary legislation.

199. Mr Kinnear submitted section 55(1) cannot be interpreted and applied in this fashion, and he reiterated that the proportionality exercise contemplated by Ms Knights has been expressly prevented by statute. Although Mr Kinnear accepted that it was appropriate to receive evidence and hear submissions on all issues, he contended that the effect of section 55(1) was to require us to reach a conclusion on the national security issue first; and, if it were adverse to D8, then cease any further deliberations.

200. The Commission must emphasise that section 55(1) has no application to the revocation appeal and to the human rights/Article 3 appeal. The revocation appeal comes first in time and must be addressed before the asylum appeal. By the time the asylum appeal is considered, we will already have determined whether or not D8 is a danger to national security. The issue is, therefore, close to being academic.

201. To the extent that it is not, the Commission must reluctantly agree with Mr Kinnear. Parliament has decided that national security must be addressed first. To the extent that proportionality is relevant, we have addressed the issue not in the terms outlined by Ms Knights but in the context of the decision of the CJEU in *T*.

The Overarching Approach and U3

202. The third issue is the overarching approach taken by the Commission to the issue of national security following *Begum* in the Supreme Court. The decision of the Court of Appeal in *U3 v Secretary of State for the Home Department* [2023] EWCA Civ

811 was handed down the day following the hearing in this appeal, and written submissions were therefore sought from the parties.

203. The Commission's reading of paras 170-172 of Elizabeth Laing LJ's judgment is that paras 37-39 of *U3* at first instance have, in effect, been endorsed. The Court of Appeal may not have expressly approved all of this Commission's reasoning, but in our view there are no material differences.

204. The Court of Appeal in *U3* did not comment on *B4* and *Shamima Begum*. This was doubtless because those cases are now before the Court of Appeal in their own right and will be heard not before too long, permission having been granted in both cases by the Commission itself. However, the Commission made it clear in *B4* and *Shamima Begum* that it agreed entirely with *U3*, and insofar as these two authorities contain additional reasoning and analysis they do no more than seek to expand on the solid platform of *U3*. We will continue to follow the *Shamima Begum* approach; it is certainly one that does not disfavour D8.

205. Paras 173-178 of *U3* make it clear that the Commission does have power to make findings of fact. In the instant case the Commission, even without *U3*, is required to make findings of fact in relation to whether D8 was in Iran in 2020 and, if so, how he travelled there. However, if we have correctly understood her argument, Ms Knights invites us to find as a fact, on the balance of probabilities, that D8 does not have an extremist mindset and is not an ISIL supporter. We decline that invitation. Although it is trite that the state of a man's mind is as much a fact as the state of his digestion, the intelligence assessments of the Security Services as to the threat D8 poses to national security are evaluative and subjective. In this regard the Security Services have made no factual findings as such. The assessment that D8 is an ISIL supporter cannot be sensibly disentangled from the overarching national security assessment. Ms Knights' invitation would, if accepted, result in *Begum* in the Supreme Court being rewritten. We would, per the first sentence of para 174 of *U3*, be using a factual finding precisely for the purpose of substituting our own view of national security for that of the Secretary of State.

206. The interaction between the first and third issues we have identified should be made explicit. The Commission has set forth a test for the application of Article 33(2) (see §§192-195 above) which is stricter than that applicable to, for example, deprivation of citizenship cases. What this means, in the present context where administrative law principles apply, is that the Commission must examine whether the decision-maker has at least identified and considered the factors relevant to the exercise that is being conducted: i.e. the application of the Article 33(2) to the individual case. If the decision-maker has done so, the Commission then exercises a secondary review function obedient to the principles set forth in the line of cases starting with *Begum* in the Supreme Court and ending (at the time of writing) with *U3*. If the decision-maker has not done so, the appeal must be allowed.

Section 8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004

207. This provides:

> "(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging a person's credibility, of any behaviour to which this section applies.
> (2) This section applies to any behaviour by the claimant that the deciding authority thinks –
> (a) is designed or likely to conceal information,
> (b) is designed or likely to mislead …
> …
> (4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim in a safe country."

208. The effect of section 8(7)(d) is that sub-section (1) applies to this Commission.

209. Section 8 is a controversial provision inasmuch as on one reading it comes close to ignoring the separation of powers. In *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878; [2009] 1 WLR 1411, the Court of Appeal sought to dilute the strict language of the provision – "shall take into account" – by one of two processes. For Laws LJ, giving the second judgment of the Court, the word "potentially" should be interpolated before "take". For Pill LJ, giving the first judgment of the court, the solution was to recognise that to take something into account is not to accord it any particular weight. Carnwath LJ, as he then was, agreed with both judgments. Maybe in practice there is little to choose between the two approaches.

210. In the circumstances of the present case, section 8(1) adds little or nothing to the Secretary of State's contention that we should regard D8's credibility as having been damaged. Reliance is placed only on section 8(4). In that regard, even if D8 were aware that steps had been taken to revoke his refugee status, he would reasonably have wanted to return to the United Kingdom in an attempt to regularise his status rather than claim asylum in Italy or France. It seems to us that the Secretary of State should be relying on better arguments in seeking to impugn D8's credibility.

211. Conversely, Ms Knights drew our attention to *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65, where Sir John Dyson JSC, as he then was, said at para 41:

> "The consequences of failure for those whose cases are genuine are usually grave. It is not, therefore, surprising that appellants frequently give fabricated evidence in order to bolster their cases."

We do not doubt that this is so, but Sir John Dyson was not seeking to lay down any sort of principle of general application. At the end of the day we have to decide, to the extent that it is relevant, whether D8 has told lies notwithstanding that he has a genuine claim or because he does not have a genuine claim.

212. We say more about the issue of credibility generally in §§232-247 below.

THE SUBMISSIONS ON BEHALF OF D8

213. Ms Knights made a number of submissions on the law which the Commission has already taken into account under the chapter heading, Legal Framework. Further written submissions were filed post-hearing on 19th, 26th and 28th July 2023.

214. As ever, the Commission is grateful for Ms Knights' submissions. We also recognise the vast amount of work that had been undertaken on D8's behalf by his solicitors. They have done an excellent job.

215. The only submission of Ms Knights that caused us a measure of surprise was her contention that it has not been proved that the exclusion decision was made by the Secretary of State personally. We think that was a step too far: it came close to alleging bad faith, because if correct it would mean that the department was proceeding against D8 in the certain knowledge that the Secretary of State had not personally approved this course of action. Mr Kinnear informed us, and we accept, that he has seen an email from the Secretary of State's private office confirming that the Ministerial Submission had been considered and approved.

216. For completeness, the Commission must point out that the exercise of a prerogative power does not have to be exercised personally by a Secretary of State; it can be delegated by her to another Minister of the Crown.

217. Turning now to her stronger points, Ms Knights submitted that in assessing D8's credibility, to the extent that it is relevant, the Commission should bear in mind his mental health difficulties and Dr Galappathie's report to the effect that his PTSD may have an impact on his memory and consistency. Judge Colvin did not have the benefit of that evidence. In any event, Ms Knights contended that the issue of credibility is far from central to the asylum and human rights claims, particularly on the questions of subjective fear and safety of return.

218. Ms Knights identified what she called three fundamental pillars of D8's case which exist independently of any possible adverse credibility finding. First, D8's subjective fears cannot be seriously gainsaid, and have not been in cross-examination. Secondly, D8's social media postings and political activities whilst in the United Kingdom are objective factors; his motivations are irrelevant. As it happens, the Secretary of State's asylum decision letter refers only to the *possibility* that D8's

Facebook posts were opportunistic, although Mr Kinnear's cross-examination put the matter more forcefully. Thirdly, the Iranian Embassy was made aware by the Secretary of State that D8 was in HMP Belmarsh. The Embassy would therefore have grounds to suspect that he was suspected of terrorist activities. Although it is no more than a forensic point, Ms Knights is fully entitled to complain that the Secretary of State should not have been attempting to facilitate the removal of D8 in circumstances where his asylum claim had not been determined (her submission was advanced in rather more forceful terms).

219. Given the extreme sensitivity of this regime to criticism, and all the circumstances known to the Commission, Ms Knights invited us to conclude that it is highly likely that he would be of considerable interest to the Iranian authorities on arrival at Tehran. She submitted, as she was entitled to on all the evidence, that the situation for the Iranian Kurds had worsened since Judge Colvin's decision in 2017. Her headline submission was that it would not be safe to return D8 to Iran even if we should conclude that he voluntarily re-availed himself of the protection of that regime in 2020. She contended that the Iranian regime is hostile to ISIL and anyone with terrorist links.

220. Ms Knights submitted that in any event it is clear that D8 could not have entered Iran openly in March 2020 or at any time (it would have had to have been before 8th March when the border closed) on a refugee travel document. As for the possibility of clandestine entry, Ms Knights reminded us of the evidence of D8's cousins as to the risks involved, and we have not forgotten D8's own evidence to similar effect. In oral argument Ms Knights did not repeat, but we have not ignored, what she said in para 95 of her first skeleton argument about the possibility of a clandestine return.

221. Ms Knights submitted that Dr Galappathie's evidence, uncontradicted by the Secretary of State, demonstrates the existence of a suicide risk that meets the *AM* and *MY* threshold. That risk would arise almost immediately. The Secretary of State's assertion that Sertraline is available in Iran therefore misses the point. In any event, and reflecting the language of paras 139 and 140 of *MY*, D8 would be arriving in Tehran alone and without support.

222. Ms Knights advanced a number of submissions in writing on Article 8 of the ECHR. She did not repeat those orally. We think that if D8 has, at it were, lost all the way down the line to this point, Article 8 could not possibly save him. It is unnecessary, therefore, to dwell on this aspect of the case.

223. Finally, Ms Knights submitted that the exclusion and revocation decisions were procedurally flawed because neither D8 nor the UNHCR (in relation to the latter decision only) was given the opportunity to make representations. In relation to the exclusion decision, it is said that at the material time there was no reasonable prospect of D8 returning to the United Kingdom. The situation is therefore analogous to *Shamima Begum*.

THE SUBMISSIONS ON BEHALF OF THE SECRETARY OF STATE

224. The Commission was extremely impressed by the quality and candour of Mr Kinnear's submissions. He recognised that on any view this was a difficult case, and it was clear that his primary objective was to assist the Commission.

225. Mr Kinnear did not hold back from submitting that D8's credibility was completely undermined. He submitted that the medical reports and gold receipts were not genuine in the sense they had been produced for the purposes of these proceedings. There are no originals, only screenshots of photographs have been produced; the explanations for how the physical and electronic documents have come about are entirely unsatisfactory; and perhaps the most important documents, the gold receipts, only entered the case on 11th July, being the Saturday before the hearing commenced. Mr Kinnear further submitted that if the Commission were to conclude on all the evidence, both OPEN and CLOSED, that D8 did re-avail himself of the protection of Iran, that would fatally undermine his case. It would mean, contrary to his adamant assertions to the contrary, that he had treated Iran as a safe country (notwithstanding his Facebook postings and everything else before his first asylum appeal) and the inference must be that history would repeat itself.

226. Mr Kinnear accepted that clandestine entry into Iran in March 2020 would not be sufficient to amount to re-availment. It is a relevant consideration here that it is not D8's case that he entered clandestinely. The overwhelming inference, submitted Mr Kinnear, is that D8 was in Iran between the end of February/early March 2020 and the end of July 2020. There is a complete absence of any footprint in Iraq over that period (e.g. no bank activity; no mobile phone records). Mr Kinnear also relied on the port stop on 19th February 2020 when he said that D8's head was scrambled, and – caught by surprise – he had not got his story straight. Hence the explanation for his denial that he had ever been to Iran: he wanted to distance himself from that country.

227. Mr Kinnear submitted that D8's want of credibility impacts on his claim to have a subjective fear of return to Iran, and that has knock-on consequences for the evidential value of the psychiatric evidence, which was necessarily predicated on the reliability of D8's account. Not merely had Dr Galappathie relied on D8's version of events in relation to the Peshmerga fighters etc., he was unaware that D8 had in fact returned to Iran in 2020. The subjective element of the asylum claim did not exist.

228. Mr Kinnear described the recent Facebook postings as "low-level". D8 was simply reposting the views of others. This was a complete reprise of what happened in 2016/17. Furthermore, D8's explanation for the loss of the two earlier Facebook accounts is not credible. The Commission is therefore precluded from looking at the whole social media picture, some of which could be unfavourable to D8's case.

229. Mr Kinnear submitted that the exchanges between the Secretary of State and the Iranian Embassy take D8's case no further. Considering the relevant emails, the latter was showing no interest in him.

230. Finally, Mr Kinnear made a series of submissions on the law, which have been considered under the chapter heading, Legal Framework. We have also taken into account the Secretary of State's post-hearing submissions dated 25th and 28th July 2023.

DISCUSSION AND CONCLUSIONS

231. In our view, there are two overarching issues which fall to be addressed at the very outset. First of all, and in deference to Mr Kinnear's submissions, we think that we should set out our conclusions as to D8's credibility; and, having done so, indicate where they lead. Secondly, we should address the safety on return question.

Credibility

232. At the start of the hearing, and indeed for a period of time as it progressed, the Commission was prepared to afford D8 a considerable amount of slack. It is clear that he suffers from mental health difficulties and he appears to be tormented by internal demons. Given his evident lack of proficiency in English, it is difficult to reach fair and sound conclusions on the basis of factors such as demeanour and intonation of voice. Moreover, this is not a case where an examination of the inherent probabilities really assists. For example, the Chair raised in oral argument the inherent unlikelihood of the fiancée and her family travelling to Iraq as opposed to D8 making the trip alone to Iran, where after all his own family was situated. Generally speaking, that would be a fair point to make, assuming always that there are no cultural issues which militate otherwise. However, if D8 genuinely feared for his life in Iran, which is his case, there are no circumstances in which he would have travelled there openly. That factor serves to neutralise what would otherwise be the cogency of the inferences to be drawn from an examination of the inherent probabilities.

233. D8 has been aware for well over a year that the Secretary of State's contention is that he was in Iran. In that knowledge, D8 has sought to adduce a mass of largely photographic evidence apparently testifying to his being in Iraq, in particular on 5th March 2020. That evidence includes receipts, medical reports, an illegible rental agreement and photos of the engagement, most of which are screenshots and none of which provide independent verification that D8 was indeed in Iraq. Just one photograph that would enable geolocation in Iraq at a critical time as opposed to Iran would be decisive in D8's favour, but there is none. Instead, everything has been provided to the Commission in such a way that this sort of basic analysis cannot be undertaken. D8's almost invariable explanation was that his fiancée has retained the originals and/or that the original photographs are on her phone. It is not clear why the

photographs were not sent via WhatsApp or some other platform from the fiancée's phone to D8's phone in the United Kingdom.

234. Many of the photographs have been taken in the same way against a similar background - what appears to be some sort of carpet. The gold receipts, the most incriminating documents in our view, appear – to use Mr Kinnear's adjective – to be pristine. The original documents are apparently in Iran, although D8's case is that he bought these items in Iraq. If he gave the receipts to his fiancée for safe keeping before they separated (a possible hypothesis), one would have thought that they would have been adduced in evidence far earlier. No satisfactory explanation has been given for their very late entry into the case. D8's evidence about how money was transferred from London to Kalar, KRI is not inherently implausible, taken in isolation at least, but the scepticism with which we are entitled to treat this strand of evidence fortifies our conclusion about the integrity of the gold receipts. Even without considering the CLOSED evidence, we are driven to conclude that the gold receipts are recent forgeries. We consider that it is very easy to obtain forged documents in this unsettled region, at a price. That conclusion has a number of obvious ramifications for D8's case overall.

235. At this stage we should record that our conclusion on the CLOSED material – without taking into account the OPEN evidence - is that there is compelling intelligence showing that D8 was in Iran certainly by the beginning of March. We are unable to be more precise in OPEN as to the exact date.

236. We also take into account the two medical reports. Both of these were written in English and are not put forward in these proceedings as being contemporaneous. The orthopaedic report is deeply suspicious in itself, and our conclusion that D8 has arranged for the gold receipts to be forged only serves to fortify those concerns. One possible explanation is that D8 visited a physician for his back problems on 6th September, and asked him to antedate the report (in his asylum interview D8 did say that he saw a doctor for back problems on two occasions); and that he indeed visited the psychiatrist on 23rd August 2020. That was just after his incarceration in a Turkish prison and D8 was back in Iraq, desperately hoping to be able to return to the United Kingdom as soon as possible. The notion that he was suffering from a depressive disorder is not fanciful at all. However, this is the most favourable interpretation of these reports from D8's perspective.

237. There are no supporting mobile phone records (it is possible to obtain these if one knows the name of the provider) and no bank activity showing D8's whereabouts until 2nd August 2020. The evidence from D8's cousins, one of whom was apparently compelling, must be weighed against all the material pointing against D8's case.

238. There is no supporting evidence from any family member, including D8's fiancée.

239. D8's answer to Mr Kinnear's question about wanting to surprise his family in February 2020 was, we think, illuminating. There would have been little or no surprise if they had to travel to Iraq to meet up with him. Comprehending this, D8 said that his family would not know the *exact* time of his arrival, but that was an unconvincing answer. Of course, turning up unannounced at the family home in Iran would have been a lovely surprise.

240. Finally, and as we have already observed, one odd feature of D8's evidence was that his fiancée and both families were trapped in Iraq until about May 2020 when the border restrictions were loosened for people of Kurdish origin on both sides of the border. It follows that on D8's case two families were ensconced in Iraq, no doubt with their respective extended families, for about two months. One would have thought that evidence of this unconvenanted state of affairs would not be difficult to find.

241. Taking into account the whole of the available evidence, including the intelligence picture in CLOSED, we find as a fact that D8 was in Iran between 5th March 2020 (at the very latest) and late April/early May 2020. We are unable to accept the Secretary of State's case that D8 was in Iran until a few days before the airports re-opened. Most of our reasons for our conclusion about the late April/early May date appear in our CLOSED judgment, although we take into account D8's evidence, which we accept, that on 6th May 2020 he made enquiries of the British Council and UKVI in Jordan about the possibility of returning to the United Kingdom. At the end of the day, however, nothing really turns on the date of his leaving Iran.

242. The ramifications of the Commission's adverse credibility findings need to be spelt out. First, they cause us to be doubtful about the genuineness of his motives as to his political activities and Facebook postings in the United Kingdom. On this issue, we have reached the same conclusion as did Judge Colvin. This activity appears to be opportunistic. However, we do not rule out the real possibility that D8 has strong pro-Kurdish sympathies. In any case, for the purposes of both his asylum and human rights claim the issue is not the genuineness of his political beliefs but how they would be perceived by Iran, were they to be discovered.

243. Secondly, our adverse credibility findings are a neutral factor when we come to address the issue of D8's mode of travel to Iran. D8 and his cousins sought to persuade us that entry into Iran by any means was close to impossible: if it were by conventional methods, he would have been executed on arrival, and clandestine entry was practically impossible and far too dangerous. It is not D8's case that he entered clandestinely, but *non constat* that the Commission must proceed on the alternative basis that he entered lawfully. That is not D8's case either, and the burden of proof lies on the Secretary of State.

244. Thirdly, our adverse credibility findings are relevant when the Commission comes to consider what would or might happen at Tehran international airport were D8 to return to Iran. This was a strong point made by the Special Advocates in CLOSED.

It is highly relevant to the *HJ (Iran)* question. The issue is not, *pace* Ms Knights, that D8 would not be expected to lie. The issue is rather than D8 might well have to lie to save his skin and, put bluntly, he is not a good liar.

245. Fourthly, we must address Mr Kinnear's closing submission that D8's want of credibility bears on the question of his subjective fear of return to Iran. If his credibility has been blown apart, we should reject D8's evidence as to subjective fear. The Commission cannot accept the high watermark of Mr Kinnear's submission. Our credibility findings are relevant to D8's subjective fears but they are only one factor. A more important factor is, we think, whether D8 returned to Iran openly in 2020. But even if he did, the Commission would still need to consider the evidence as to safety on return in the light of all the water that has metaphorically flowed over the past three years. If the objective evidence clearly demonstrates that D8 ought to be afraid of return, even if he travelled openly in 2020, it would be somewhat bizarre that we should be rejecting his case on subjective fear just because he was a bad witness. The premise would have to be that he is irrational as well.

246. Furthermore, D8 was not directly cross-examined as to not having a subjective fear of return to Iran.

247. Before we leave this sub-chapter, the Commission should address in slightly more detail one point that arises in the context of D8's mindset. The Security Services have assessed that D8 has a pro-ISIL mindset. It is common knowledge that Kurds, generally speaking, despise ISIL. That should lead us to examine the intelligence material with extreme care, which we have of course done. However, even if we were driven to conclude that the national security case cannot be contradicted, it does not follow that we must also conclude that D8 as pro-ISIL cannot have pro-Kurdish sympathies.

Safety on Return

248. The FCDO changed its mind about Safety on Return because it received CLOSED material to the effect that D8 had returned openly to Iran. Mr Kinnear conceded that if the Commission were to conclude that D8 returned clandestinely to Iran (the burden of proof that D8 returned openly being on his client), it must follow that it would not be safe to return D8 to that country.

249. The Commission's conclusion is that the Secretary of State has failed to prove that D8 returned openly to Iran (see §§276 below). It follows that it would not be safe to return D8 to that country.

250. However, that is not the end of the matter, for two reasons. First, the FCDO's Safety on Return assessment does not address the asylum claim. Substantial grounds for believing that there is real risk of Article 3 ill-treatment (at the very least) does not automatically translate into a well-founded fear of persecution under the Refugee

Convention. That issue will, therefore, need to be addressed, albeit under a separate sub-chapter. Secondly, the Commission considers that it should reach a conclusion on Safety on Return on the alternative basis that D8 travelled openly.

251. The FCDO's analysis presupposes that events would repeat themselves. In the Commission's judgment, the FCDO's analysis is entirely unconvincing. Our reasons are as follows.

252. First, D8 did not travel to Iran in March 2020 on an ETD following a prior overture by the Secretary of State to the Iranian Embassy. He travelled in some different way across the border between KRI and Kurdish Iran. That is a rather different scenario from travelling under compulsion to Tehran International Airport.

253. Secondly, the Iranian Embassy is already aware that D8 was held in HMP Belmarsh. That fact in and of itself would excite a considerable level of interest.

254. Thirdly, an ETD application would attract some basic due diligence by the Iranian Embassy. There is a real risk that D8's Facebook posts will be unearthed. That they may well have been opportunistic is nothing to the point.

255. Fourthly, the Iranian authorities are likely to ascertain that D8 has been in the United Kingdom for at least two years. They are also likely to find out that he was in Iran in 2020. Inquiries will likely be made as to the reasons for his travel, and the circumstances and mode of both his entry and departure.

256. Fifthly, there is a real risk that the Iranian authorities will find out that the British authorities regard D8 as a danger to national security on the basis of his pro-ISIL mindset. If they find that out, the consequences for D8 would be extremely serious.

257. Sixthly, it is all but certain that D8 will be interrogated at Tehran airport, if not at a subsequent location. This Commission has found that he was not a good witness. It is reasonable to infer that he would not withstand interrogation well, in particular that any lies will be found out. No criticism of the FCDO is intended in this particular respect because it could not predict the outcome of this appellate process.

258. Seventhly, and here we do criticise the FCDO, there is an unacceptable risk of Article 3 ill-treatment during the course of any interrogation. That was the FCDO's initial view, and nothing has changed. The FCDO has failed in our view to recognise the "hair-trigger" factors which would, as we have said, almost inevitably lead to an interrogation on arrival.

259. Eighthly, it is necessary to keep well in mind the Country Guidance decisions of the Upper Tribunal as well as the conclusions of Judge Colvin. The FCDO has not conducted an analysis of those decisions.

260. Ninthly, the FCDO's assumption that there is no reason to believe that things would run differently now, as compared with 2020, is both somewhat blithe and, with respect, jejune. It does not withstand the lightest scrutiny given everything we have already said. The most favourable gloss that may be placed on matters is that the FCDO was not properly briefed.

261. For all of the foregoing reasons, and the further highly relevant reasons set out in CLOSED, the Commission has concluded that it would not be safe to return D8 to Iran. We go so far as to say, for reasons given in CLOSED, that he faces the risk of a violation of his Article 2 rights. We have come to that conclusion without any real hesitation.

262. On the basis of this conclusion, D8's human rights appeal succeeds. But unless he wins the danger to national security issue, he will not qualify for either asylum or humanitarian protection. Even if he were to succeed on the national security issue, the Commission has already explained that it does not automatically follow that the asylum appeal must prevail. We will need to consider whether all the available evidence supports a well-founded fear of persecution as opposed to a claim based on a violation of Articles 2 and 3.

The Exclusion Review

263. The Commission is treating the exclusion review as indistinguishable from a judicial review of the Secretary of State's decision made on 2nd April 2020. The evidence must be considered as at that date.

264. Ms Knights submitted that the fact that D8 was a refugee was a materially relevant factor which under public law principles needed to be carefully considered before taking the decision to exclude. However, the Secretary of State was informed in terms of D8's refugee status and that the next step she would be invited to take was to revoke it, once relevant procedures had been followed.

265. Although this point was not taken by Ms Knights, para 6 of the Ministerial Submission contains an egregious error. D8's rights under Articles 2 and 3 are absolute; proportionality has no relevance. However, the Secretary of State was not deporting D8 from the United Kingdom to a country where he faced a risk. The Secretary of State's understanding was that D8 was in fact in Iran. He travelled there either openly or clandestinely. Either way, at the time the exclusion decision was made, there was no risk of a violation of Articles 2 and/or 3 at the instance of the Secretary of State.

266. The only reference to proportionality in any of the decisions under scrutiny, and in any of the National Security Assessments, is in the exclusion decision in the context of Articles 2 and 3.

267. We find as a fact that D8 was notified by email of the exclusion decision but after it was made. Ms Knights submitted that he should have been notified of the proposed decision and been given an opportunity to make representations. The Commission is prepared to proceed on the basis that, in view of the Secretary of State's understanding of D8's whereabouts in early April 2020 and the COVID-19 pandemic, an early return by D8 to the United Kingdom would not have been possible: see para 343 of its recent judgment in *Shamima Begum*. However, on that premise the Commission makes two relevant findings. First, had he been given the predicated opportunity – by email – D8 would not have availed himself of it. Secondly, there was nothing that D8 would or could have said that might have made a difference to the outcome.

268. Ms Knights also submitted that it was manifestly unreasonable to exclude D8 at a time when international travel was highly restricted. In our view, this factor is relevant to the issue we have just addressed (prior notification), but it is not otherwise germane. If there were grounds to exclude D8 in the public interest, those grounds were in no way vitiated by the consideration that he could not as a matter of fact travel back here in any event. The purpose of the exclusion order to ensure that, when conditions ameliorated, D8 would be refused boarding a plane.

269. For the reasons set out in our CLOSED judgment, the exclusion review must be dismissed.

The Revocation Appeal

270. The Secretary of State no longer relies on Article 1F(c) of the Refugee Convention and para 339AA of the Immigration Rules. Mr Kinnear did not press para 339AB and misrepresentation. He was correct not to do so because it is not permissible to take into account what happened in 2020 (return to Iran etc.) in order to prove that a misrepresentation was made in 2016/17.

271. Did D8 re-avail himself of the protection of Iran for the purposes of para 339A(i)? The answer to that question hinges primarily on whether the Secretary of State has proved that D8 returned openly to Iran in early 2020. It is accepted that a clandestine return would not constitute re-availment.

272. What the Commission can say in OPEN in answer to the rhetorical question we have posed is as follows. First, *a priori* it is inherently implausible and improbable that D8 obtained some sort of travel document from the Iranian authorities. He would have needed such a document for the purposes of an open border crossing because he did not have an Iranian passport and he could not have crossed the border on the back of his refugee travel document alone. Here, we are stressing the adverb *inherently*. We are not to be understood as saying that an open return could not have happened; we are considering the question on an *a priori* basis. Secondly, it is inherently unlikely that D8 would have risked a clandestine entry, at least without assistance. It follows that,

given that D8 *did* enter Iran, the Commission must reach a conclusion on the balance of probabilities as to the method of entry against the backdrop that either mode of crossing appears inherently unlikely.

273. The FCDO has not assisted the Commission with any evidence as to what documents D8 would have required for open travel, and the risks of and difficulties attendant on clandestine entry. The Secretary of State could have asked for relevant information from the Iran desk but did not. Instead, having originally advised the Secretary of State that D8 could not safely be returned to Iran, the FCDO came to a different conclusion on the basis that there was an intelligence that he had gone there. The Commission is unable in OPEN to say what information the FCDO was or may have been given. What it can say is that the FCDO proceeded to reconsider its first Safety on Return report on the premise of an open return.

274. The Commission has taken into account the report of the Danish Immigration Services (see §126 above) which addresses both open border crossings and the dangers of travelling clandestinely. However, it is clear from this report that although it may well be foolish to attempt an illegal unaccompanied, travelling with someone with knowledge of the terrain, the minefields and the likely presence of Iranian forces would mitigate the risk. Whether that risk is acceptable to an individual would depend, we think, on a whole host of personal factors.

275. Overall, an examination of the inherent probabilities and nothing else draws the Commission to the conclusion that clandestine entry was slightly less unlikely than entry via an open border crossing.

276. For this reason, and the fuller reasons set out in our CLOSED judgment, the Commission has concluded that the Secretary of State has not proved that D8 returned to Iran openly. It follows that he did not voluntarily re-avail himself of the protection of Iran.

277. Ms Knights also relied in this regard on para 125 of the UNHCR Handbook (see §142 above). This assumes an open return to Iran. Although, on this hypothesis, D8 was intending no more than a six week stay in order to visit the family he had not seen for years and to find a bride, we cannot accept in the circumstances of this case that he would not have voluntarily re-availed himself. Whatever the pressures on him and the validity of his reasons for wanting to be in Iran, he was on his case travelling openly to a country where he feared summary execution[19]. The Commission does not infer that D8 obtained an Iranian passport in order to travel, but it does conclude that the circumstances set forth in general terms in para 125 of the UNHCR Handbook do not apply to D8's particular case.

[19] For the avoidance of doubt, the same considerations do not apply to clandestine entry. The inference we draw is that D8 would feel safe amongst fellow ethnic Kurds in this border territory. The only risk would have been of denunciation.

278. The next issue is whether D8 is able to demonstrate a well-founded fear of persecution for a Convention reason. We have concluded that he has a subjective fear, but the objective element requires examination. We have concluded that D8 would not be safe in Iran were he to be returned there, but it by no means follows that he faces a risk of persecution as opposed to ill-treatment for some other reason.

279. The concern in this case is two-fold: that D8 faces risks in Iran owing to either or both of his perceived pro-Kurdish sympathies (based on his Facebook and other political activities) and his perceived pro-ISIL mindset. The emphasis must be on the adjective "perceived" given the Commission's credibility findings and, as regards his pro-ISIL mindset, neither D8 nor the Iranians will ever know the basis of the Secretary of State's conclusions in CLOSED about this. It could well be argued that ill-treatment on the basis that he is a suspected terrorist (putting the matter in deliberately graphic terms) could not possibly form the basis of persecution for a Convention reason.

280. However, no one can predict what suspicions the Iranians would or might have about D8. Adopting their "hair-trigger" approach, they might just focus on what might be called the Kurdish aspects; they might focus on why D8 was in HMP Belmarsh and the assessment of the British government (discovered during the course of interrogation) that he poses a danger to national security; or they might focus on both. Frankly it matters not for present purposes. There are reasonable grounds for concluding that D8 faces a well-founded fear of persecution in Iran for a Convention reason, namely his perceived pro-Kurdish political activities.

281. This brings us to the issue of national security. Virtually the whole of this issue can only be addressed in CLOSED.

282. If we had concluded that Mr Kinnear's submissions on the law were correct (see, *inter alia*, §171 above), we would also have concluded – to adopt a shorthand – that the national security case was made out. The consequence would have been that D8's revocation appeal would have to be dismissed for that reason alone. Our reasons are set out in CLOSED.

283. However, on the basis of the Commission's analysis of the governing law (see §§178-195 above), we have reached the conclusion that the Secretary of State's approach to the issue of national security was flawed. In particular, although the Secretary of State has considered whether D8 represents a danger to national security, she has not addressed the terms of Article 21 of the Qualification Directive in the manner glossed by the CJEU in *T*, at paras 68-75. Mr Kinnear did not submit that she had; his argument was that *T* has no relevance. Further, we cannot conclude on all the available material that the outcome would have been the same had the correct approach been adopted. Our reasons are set out in the companion CLOSED judgment.

284. Finally, Ms Knights relied on two procedural arguments. The first is that the UNHCR ought have been consulted before taking the decision to revoke D8's refugee

status. However, the UNHCR did not reply to the Secretary of State's correspondence. There was no requirement to wait. By the time the UNHCR did eventually respond, the revocation decision had been made. The Secretary of State did invite post-decision representations, and these were considered. In any event, the general, high-level observations that the UNHCR made have not been ignored during this decision-making process. They have been fully considered by the Commission itself.

285. The second procedural argument is that the Secretary of State failed to provide D8 with an adequate opportunity to make representations before the revocation decision was made. This is required by para 339BA of the Immigration Rules. However, we find as a fact that D8 did receive the email communications dated 24th April and 3rd August 2020. He was given an opportunity to make representations but chose not to. In any event, (1) the Commission has conducted a full merits appeal in relation to some features of the revocation decision, and (2) in relation to national security, there is nothing that D8 could or would have said about the merits.

286. The Commission has concluded that D8 did not voluntarily re-avail himself of the protection of Iran and that it has not been demonstrated, applying the legal analysis we have set forth at length in this judgment, that D8 is a danger to national security. It follows that the revocation appeal must be allowed.

The Asylum and Human Rights Appeal

287. We address the asylum appeal for reasons of completeness only. This is because, given that D8's revocation appeal has succeeded, he is not entitled to make a fresh asylum claim.

288. We begin the asylum appeal with a consideration of the Article 33(2) issue. Our conclusions on that issue match those of the revocation appeal.

289. Next, we consider whether D8 has a well-founded fear of persecution in Iran. He has, and our conclusions on that issue match those of the revocation appeal.

290. It follows that the asylum appeal succeeds.

291. This leaves the human rights appeal which we address out of an abundance of caution.

292. Given our conclusions on Article 33(2) and national security, and also taking into account our conclusions on the issue of safety on return, the humanitarian protection appeal succeeds.

293. In the event that virtually all our foregoing conclusions were reversed on appeal, but the safety on return finding were to survive, D8's Article 3 appeal would succeed. *Ex hypothesi*, he would not be entitled to asylum or humanitarian protection,

but he could not be safely removed to Iran. It would be for the Secretary of State to determine how our finding should be reflected in the grant of some sort of leave to enter/remain in the United Kingdom.

294. Finally, the Commission must address D8's alternative Article 3 claim based on suicide risk were steps taken to remove him to Iran. Dr Galappathie has concluded that in these circumstances D8's mental health would deteriorate rapidly and there would be a high risk of suicide. The issue is whether the stringent threshold set forth in the relevant jurisprudence has been met. In our judgment, it clearly has and it is no answer to say that psychiatric services are available in Iran as is Sertraline. D8 is taking that drug at the moment. The risk of suicide will reach an unacceptably high level long before D8 comes anywhere near an Iranian psychiatrist.

295. The Secretary of State decided to defend the mental health issue by seeking to undermine the premises of Dr Galappathie's report and inviting the Commission to make adverse credibility findings against D8 without obtaining psychiatric evidence of her own. The Commission has analysed Dr Galappathie's report closely. We cannot reach its own conclusion as to whether Dr Galappathie may have overstated the risk because we do not have relevant expertise. Assuming that was the Secretary of State's personal view, Dr Galappathie should at the very least have been required to attend for cross-examination.

DISPOSAL

296. The exclusion review is dismissed.

297. The revocation, asylum and human rights appeals are allowed.