SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No SC/124/2014
Hearing Dates: 7-10 July 2015
(Further material submitted up to 10 August 2015)
Date of Judgment: 22 December 2015

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE SOUTHERN
DAME DENISE HOLT

BETWEEN:

M2

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr H Southey QC and **Mr R Halim** (instructed by **Duncan Lewis Solicitors**) appeared on behalf of the Appellant.

Mr T Eicke QC and **Mr S Gray** (instructed by the **Government Legal Department**) appeared on behalf of the Respondent.

Mr Z Ahmad and **Ms S Rahman** (instructed by the **Special Advocates Support Office**) appeared as Special Advocates.

Approved Judgment

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

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MR JUSTICE IRWIN

Introduction and Overview

1. The Appellant is an Afghan, born in 1989. He is one of a considerable number of siblings. His father and brothers operate a business selling vans, tractors and agricultural equipment. There is a family house and compound outside Jalalabad.

2. The Appellant left Afghanistan in 2003 at the age of 14. He arrived in the United Kingdom in December 2003 and claimed asylum as an unaccompanied minor. He was granted discretionary leave to remain for three years. He was granted Indefinite Leave to Remain ["ILR"] in 2009 and gained British citizenship on 11 December 2011. He has lived in the area of Southall, Hayes and Northolt since about 2005, going to school in Hanwell and college in Uxbridge. He has worked as a mobile phone technician and since 2012 as a private car hire driver.

3. It is agreed that the Appellant's uncle (his father's brother) lives in Afghanistan, again in a family house, near the Appellant's immediate family. That family contains a number of the Appellant's cousins, including a cousin named Mir Alam, who is married to the Appellant's sister. Mir Alam is also known as Meralam, Miralem and Kamran. Mir Alam is a significant figure in this case. The Appellant's case is that, due to a family dispute, his father and brothers are estranged from their uncle and cousins, although the Appellant himself has maintained some contact with Mir Alam, essentially so as to maintain relations with his sister. The Secretary of State places a different construction on this relationship. Her case is that Mir Alam is a significant terrorist with whom the Appellant is a sympathiser and co-operator.

4. Further, in about 2010, or rather later, the Appellant married his wife, Gulalai, who lives with his parents and siblings in Jalalabad, Afghanistan.

5. The Appellant travelled to Saudi Arabia in June/July 2006 and again in early 2010. Before the end of 2013, the Appellant spent three significant periods outside the United Kingdom, between 5 November 2010 and 20 January 2011, 28 May 2012 and 19 November 2012, and 2 October 2013 and 15 November 2013. At the end of 2013 he was on bail facing a significant criminal charge of sexual offending.

The Appellant's 2014 Trip to Afghanistan

6. In mid-January 2014, the Appellant's case is that he was told his mother was seriously ill. He says, as a result of that news he arranged at very short notice to fly to Afghanistan to see her although, responding to her wish, the arrangement was that he would go for some ten days on a religious pilgrimage to Saudi Arabia before moving on to Jalalabad.

7. On Friday 17 January 2014, the Appellant says he went to PC World in West London. As he left the shop he was approached by a man who asked to speak to him. According to the Appellant, the man showed him a card indicating he was from MI5, and introduced himself as "Tom". They got in a car, which already had a man and a woman in it. Tom then asked M2 if he knew why he had been stopped. M2 said he did not. He was told there were "some people who they thought may be harmful to our country". M2 says he was asked if he could help and was shown four

photographs. He says he recognised one person from his mosque, but not the other photos. The name Mir Alam was mentioned to him, but "none of the photographs that were shown to me were noticeably Mir Alam".

8. The Appellant describes how Tom then discussed the Appellant's journeys to Afghanistan, including the imminent journey planned for that weekend. Tom asked about that journey and requested the Appellant's phone number, which was supplied.

9. The next day the Appellant's account is that Tom phoned and warned him that he was due in court soon, and told him that he might be stopped as he left. If that happened he was to call Tom on a number given. Tom further advised the Appellant that he should speak to his (criminal) solicitor before he travelled. The Appellant's evidence is that he did so, and was told that he could travel.

10. On Sunday, 19 January 2014, M2 went to Heathrow airport to fly to Saudi Arabia but was prevented by police officers, who informed him that his criminal case was due to be heard on the following day and his departure would be in breach of his bail. He was prevented from leaving. He appeared at a magistrates' court on the following day and his bail was revoked. The trial proceeded at the end of January. The jury who heard his case were unable to agree, following which he was informed by the CPS that it had been decided to drop the case against him. He left the UK on 12 February 2014 and returned to Afghanistan via Saudi Arabia. He arrived in Afghanistan on 24 February 2014.

11. As he came through Kabul airport the Appellant says he was stopped by Afghan police and very shortly was in discussion with a representative of MI6. According to the Appellant, this was the man who had been sitting in the car with Tom in London on 17 January 2014. He was in possession of a Macbook Air and two sophisticated mobile telephones. On his own account he also had a newly purchased camcorder and a third iPhone. He had a conversation with the officers at the airport and left, travelling back to his family home with a brother and an uncle. On this leg of the journey his account is that he was stopped again by Afghan officers and MI6 representatives. He was, he says, warned and released.

12. The position of the Respondent is that she neither confirms nor denies that there was contact between the Appellant and members of the Security Services.

The Decision to Deprive, and After

13. On 20 May 2014, the Secretary of State took the decision to deprive the Appellant of his British citizenship on the ground that his presence in the United Kingdom was not conducive to the public good, since the Appellant presented a risk to the national security of the UK. Notice of that intention, dated 20 May 2014, was sent to the Appellant's representatives and he was contacted by telephone to inform him directly of the decision. He retained his Afghan passport marked with his indefinite leave to remain.

14. The Appellant attempted to return to England on 3 June 2014 but was stopped at Kabul airport.

15. The Appellant's evidence is that during his time in Afghanistan, he had contact with MI6 and Afghan Security Officers a number of times: in Kabul airport on arrival; shortly after leaving Kabul airport when his brother's car was stopped and subsequently in approximately seven phone calls from the Afghan Intelligence Officer. He was asked general questions in the course of these conversations, including his whereabouts. On one occasion he was asked to come to Kabul to see the Afghan Security Officers. When he arrived in the city he was told in a telephone call that it was no longer necessary that he should meet them.

16. There can be no doubt that the Appellant considered that the Intelligence Services had a strong interest in him and his movements. Proceeding on the basis that his evidence on this point is correct, this is likely to have made him more security conscious.

17. On 26 July 2014, the Appellant returned to the UK, travelling on his Afghan passport. He came via Pakistan, flying to Heathrow from Islamabad. He was, of course, not legally in the UK and as such he sought leave to enter the UK. The Respondent refused him leave to enter on 12 August 2014. He requested a reconsideration on grounds of Article 8 of the ECHR. On 12 December 2014, leave to enter was again refused, once more on national security grounds. The Appellant appeals against the decision to deprive him of his British citizenship (Section 40(2) of the British Nationality Act 1981) and against the decision refusing him leave to enter the United Kingdom.

Summary of the Cases Presented

18. In summary, the Respondent's case is as follows. M2 is an associate of his cousin Mir Alam and other Al Qaeda extremists, in particular men known as Askar or Askari and Mufti Yusef. It is alleged that he has at least indirect association with the important Al Qaeda leader, Faruq Al Qahtani. Al Qahtani is said to be the leader of a small group of highly experienced Al Qaeda militants operating in Kunar and Nuristan Provinces, engaged in fighting the International Security Assistance Force ["ISAF"]. It is assessed that the Appellant intended to courier the laptop and mobile phones for use by such extremists. It is assessed that M2 is himself an Islamist extremist who has been involved in terrorism-related activity. His wife lives permanently in Afghanistan, and any Article 8 claim is extremely weak.

19. The Appellant's case, in summary, is that his association with Mir Alam is entirely innocent and he does not know and does not associate with Askar/Askari, Mufti Yusef or Al Qahtani. He has not engaged in any terrorist-related activity. He went to Afghanistan because his mother was ill. He went via Saudi Arabia because that was her wish. The equipment which he took to Afghanistan was for legitimate personal purposes. Although a devout Muslim and active in the organisation Tableeghi Jamaat, he is not an extremist Islamist. He wishes to live in England and has a private life in the UK of which he is deprived by these decisions.

The Law Governing this Decision

20. SIAC set out its approach to deprivation cases in *Y1 v SSHD* SC/112/2011, judgment of November 2013, in paragraph 13, following the previous decision in *Al Jedda v SSHD* (2009) SIAC SC/66/2008. We repeat the approach here. The appeal is a

challenge to the merits of the decision itself, not to the discretion to make the decision. We have come to our own decision as to the facts, applying the civil standard of proof. We have given great weight to the assessment of the Secretary of State and her security advisers, but we have reached our conclusions, based on our own assessment as to whether the Appellant represents a threat to the national security of the United Kingdom. We have considered what inferences can properly be drawn from the Appellant's past actions and current capacity and beliefs, so as to inform our assessment of future risk. Finally, we make our own assessment of the impact of the deprivation decision on the Convention rights of the Appellant, and, in relation to Article 8, of members of his family. Because of arguments presented, we address the question of proportionality below.

21. In considering what constitutes a threat to national security we re-state and reaffirm a further passage from *Y1*, as follows:

> "56. We have cited reasonably extensive passages from *Rehman* [*SSHD v Rehman* [2001] UKHL 47] in order to ground our proper approach, when considering what constitutes a threat to national security. The critical points emerging from the speeches in *Rehman* are as follows: firstly, there must be a proper factual basis for the decision; secondly, the Secretary of State is entitled to take the material together, to form an overview, and there is no obligation to treat each discrete piece of information as a separate allegation, which, if refuted or weakened one by one, necessitates without more a decision against deprivation; thirdly, the essence of the test is that the individual represents a "danger" to national security, not that he or she can be proved to have already damaged it: the Secretary of State is entitled to take a preventative or precautionary approach; fourthly, national security is engaged with matters beyond the borders of the United Kingdom, perhaps particularly in relation to terrorism, even where that activity is directed against other States; fifthly, due deference must be shown to the policy of the Executive with regard to national security, and the views of the Secretary of State must be given considerable weight."

22. Mr Southey urged a number of key propositions on us, with the effect of qualifying or modifying that approach. We intend no disrespect to Mr Southey's arguments but we summarise them briefly.

23. The Appellant argues that deprivation of citizenship is a serious step with broad implications. That was the purport of the judgment of Lord Mance in *Pham v Home Secretary* [2015] 1 WLR 1591, [2015] UKSC 19 at paragraph 98, where such a step was described as "radical". The same emerges from the judgment of Lord Sumption in paragraph 108. There is an important distinction to be made between the position of an alien (such as *ZZ* [as considered by the Court of Appeal in *ZZ v The Secretary of State for the Home Department [2011] EWCA Civ 440* – see para 103, lines 4 & 5, below) and a citizen such as this Appellant, see for example *Rottmann v Freistaat Bayern* [2010] QB 761. It can hardly be the law that there are fewer rights (of disclosure or otherwise) attendant on the citizen than on an alien: hence the

disclosure obligation should be the same. In addition, any balancing exercise or judgment as to the proportionality of deprivation must reflect the Appellant's status as a citizen.

24. Mr Southey acknowledges that SIAC is bound by *G1 v SSHD* [2013] QB 1008, and thus that SIAC must hold that EU law does not apply directly in this case, despite the fact that it turns on a deprivation of citizenship. He reserves the right to argue elsewhere that *G1* was wrongly decided. However he also observes that the Supreme Court in *Pham* may require the Commission to identify whether the imposition of EU law would have made a difference to disclosure in the case, or indeed to the outcome on the issue of the proportionality of deprivation. We address those points below. We also bear in mind the remarks of the Supreme Court as to the likely similarity of the judgment on proportionality in English and EU law, which chimes with the decision of the Court of Appeal in *Kiani v Secretary of State for the Home Department* [2015] ICR 1179, [2015] EWCA Civ 776. See also the remarks in *Pham*, where at paragraphs 59 and 60, 98, and 108-110, the Supreme Court emphasised that proportionality was part of domestic law, and that it may be that domestic law and EU law would reach the same outcome in adjudicating the proportionality of this decision.

25. Mr Southey suggests that the EU law as to proportionality imports the notion that the State must employ the "least restrictive measure" test, see the formulation rehearsed by Lords Reed and Toulson in *R(Lumsdon) v Legal Services Board* [2015] UKSC 41 [2015] 1 WLR 121 at paragraph 33. See further *Sinclair Collis Ltd v Secretary of State for Health* [2012] QB 394, [2011] EWCA Civ 437. Mr Southey acknowledges that EU law (and Article 9(1)(c) of the Parliament and Council Directive 2006/1123/EC in particular) applied in *Lumsdon*. To that extent he was unable to argue that *Lumsdon* is direct authority for the approach in the instant case. However, he did in effect ask the Commission to adopt a similar course, as a means of achieving a proportionate outcome.

26. For these reasons Mr Southey argues that the approach laid down in *Y1* was in error, in that it did not sufficiently accommodate proportionality. However, the impact of EU law on domestic law meant that the requirements of domestic law now mean that the Commission should "subject the justification presented by [the Respondent] to intense review despite her apparent expertise".

27. Mr Southey also submitted that common law principles of fairness apply to this appeal. It is not clear how far he sought to extend this. As is now well-established, the full range of procedures to satisfy the requirements of the common law are not applicable in such circumstances, see: *Home Office v Tariq* [2012] 1 AC 45, [2011] UKSC 35.

28. The Respondent's position is that the approach laid down in *Y1* is correct. The judgments in *Pham* provide no support for a changed approach. Mr Eicke also relies on the dicta referred to above, suggesting it is unlikely that there will be a difference in practice between the domestic and EU requirements on proportionality. He referred to the judgment of Lord Sumption in paragraph 108 of *Pham*:

> "108. Although the full facts have not yet been found, it seems likely that the outcome of this case will ultimately depend on

> the approach which the court takes to the balance drawn by the Home Secretary between Mr Pham's right to British nationality and the threat which he presented to the security of the United Kingdom. A person's right in domestic law to British nationality is manifestly at the weightiest end of the sliding scale, especially in a case where his only alternative nationality (Vietnamese) is one with which he has little historical connection and seems unlikely to be of any practical value even if it exists in point of law. Equally, the security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale, depending on how much of a threat Mr Pham really represents and what (if anything) can effectually be done about it even on the footing that he ceases to be a British national. The suggestion that at common law the court cannot itself assess the appropriateness of the balance drawn by the Home Secretary between his right to British nationality and the relevant public interests engaged, is in my opinion mistaken. In doing so, the court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security. But it would have to do that even when applying a classic proportionality test such as is required in cases arising under the Convention or EU law, a point which I sought to make in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] 3 WLR 1404, at paras 31-34."

29. In *R(Rotherham Borough Council and others) v Secretary of State for Business Innovation and Skills* [2014] PTSR 1387,[2014] EWCA Civ 1080, the Court of Appeal stated that where there was a choice of possible measures, the test was whether the member state's assessment of the appropriateness of a given measure was "manifestly wrong", by reference to the broad discretion which must be accorded the State in political, economic and social choices, and *a fortiori* in matters of national security (see paragraph 56). Therefore in adjudging the proportionality of deprivation, the expertise of the State must be respected.

30. The Respondent submits that it would be wrong, by reference to Directive 2004/30/EC, to import an "imperative grounds" test, before deprivation can be justified. No such special threshold applies. Even in *Rottmann*, the CJEU itself applied a proportionality test with no such special threshold, and concluded that deprivation of citizenship was proportionate by reason of the failure by *Rottmann* to disclose that he was the subject of a judicial investigation into suspected fraud, and did so, despite the fact that the decision rendered *Rottmann* stateless.

31. Mr Southey has also argued that the Appellant can rely on the prohibition on arbitrary deprivation of citizenship under Article 12(4) of the International Covenant on Civil and Political Rights ("ICCPR") and the UN Declaration on Human Rights. He says this imports "high standards of predictability, clarity and due process". As a consequence the "balance of probabilities' threshold, the normal civil standard of proof, is inappropriate. Mr Eicke rejects this argument. The ICCPR and the UN

Declaration are not enforceable in English law: see *R(SG and others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, [2015] UKSC 16. Nor are those international law documents imported into domestic law through the gateway of Article 8.

32. We reject the argument that those provisions apply in English law, and we are sceptical that, even if they did, there would arise the consequences claimed by Mr Southey. The civil standard of proof does apply here. We do of course recognise the need for great care in examining the evidence and reaching our conclusions, given the impact of deprivation. In any event, anything truly resembling an arbitrary deprivation of citizenship would fail the test formulated in *Y1*, and would not be proportionate.

33. There was also an argument between the parties as to the engagement of Article 8 of the European Convention. Mr Southey submits that if the exclusion of a settled migrant engages Article 8 (see: *Üner v Netherlands* (2007) 45 EHHR 14), then the Article 8 rights of a citizen who has spent years living in the UK must be engaged. Essentially, Mr Eicke replies that the facts here show that Article 8 is not engaged, or at least not infringed. We address this question below after making findings of fact.

34. We return to the formulation of the proper approach summarised in *Y1* and quoted above. We have followed that approach. For clarity, we add that we have considered the proportionality of the measure adopted to the identified threat: that exercise is implied by the formulation in *Y1*. We make it explicit we have done so. We do not consider that EU law would make any detectible difference as to the approach to the proportionality of deprivation, or to the outcome of that judgement in this case. We do not accept that there is a formal requirement for the "least restrictive measure" here, since EU law does not apply. However, a consideration of proportionality, even where proper deference is paid to the expertise of the State, must involve a consideration of whether another measure with a lesser impact, would sufficiently protect the interests of the public.

35. Mr Southey has raised the possibility that some of the evidence in this case "may well have come from Afghanistan", and that there have been allegations of torture in Afghanistan. He says the Commission must therefore conduct "a careful [CLOSED] review of any suspect evidence with that possibility in mind". We confirm here that there is no evidence in CLOSED which gives rise to this concern. We should not be understood as indicating that there is, or is not "suspect evidence" at all.

The Appellant's Background and Associations

36. The Appellant agrees he is a practising Muslim and a member of Tableeghi Jamaat, an organisation dedicated to the spread of Islam. The Appellant is clear that he has never had violent or Jihadist friends or associations. His connection with his cousin, insofar as it exists, is mainly a family matter, preserved to keep up communication with his sister.

37. He says he has never knowingly sought out Jihadist material on the internet. He has watched Islamic material including sermons and lectures by Islamic preachers. His statement continues as follows:

> "I believe some of them may have been extremist. I do not remember the name of these preachers and depending on how much time I had, I may watch the videos to the end or only part of the way through. I was not specifically looking for extremist preachers but I would watch anything that came up when I searched for '*Islamic Preachers*'. You receive many different results when you search this. I may have watched these videos to see what they were about and what was contained in them. I did not watch these regularly."

38. The Respondent argues that an affiliation to Tableeghi Jamaat does not mean that an individual is an extremist, however nor does it indicate moderate views. Public material has shown that some extremists, including for example two of the 7 July 2005 London bombers, were affiliates.

39. We have carefully considered the character evidence served and called on the Appellant's behalf. Muhammad Farooq is a lecturer and magistrate. He knows the Appellant from attendance at the same mosque over the last eight years. He gave a very positive picture of the Appellant as a well-disposed and moderate man. He said the community was shocked by the accusations against the Appellant. He said the Appellant had spent "most of the time in isolation in the corner of the mosque" as a consequence. The community had thought not and "did not" think him extremist. Mr Farooq appeared an entirely genuine witness.

40. The Appellant also submitted letters and statements from his school, his college, from Hillingdon Social Services and from the Chief Imam and another official from the Abu Bakr Mosque, Southall. In addition to the evidence of Mr Farooq, we have read with care eight statements of character, from people who have known him over many years, as fellow immigrants, or from the mosque, or as fellow taxi-drivers. They consistently paint a picture of a peaceful and law-abiding man, who they do not believe can be involved with terrorism.

The Journey to Afghanistan: Detail of the Evidence

41. An important issue is the reason for the Appellant's decision to travel to Afghanistan in January 2014. It will be recalled that he was on bail to the Crown Court at the time. The Appellant's account is that he travelled because his mother was seriously ill. As he put it in paragraph 32 of his main witness statement of 13 May:

> "On (I believe) Thursday 16 January 2014 I received a call from my family informing me that my mother had had two heart attacks and was very ill. My family informed me that it was her wish for me to go first to Umrah to say a special prayer for her good health and then come and see her afterwards. I then spoke to the travel agent and booked a one-way trip to Saudi Arabia with a connection to Dubai. I did not book a return ticket as I was aware that I have an up-coming court hearing and did not know when it was due to be heard. It did not make sense to book a return ticket in case I was required to go earlier."

42. The Appellant then describes how he paid extra for a visa "issued in an emergency for Umrah". A process which involves an agent taking the passport directly to the Saudi embassy to have it stamped. This was done and booking was confirmed on Saturday, 18 January 2014 for a flight scheduled for the 19th January 2014.

43. In his addendum statement of 12 December 2014, the Appellant describes how one of his brothers subsequently attended the hospital in Peshawar where his mother had been treated and obtained the medical records confirming her illness.

44. The Commission has seen copy records from the Hayatabad Medical Complex, Peshawar. The covering note confirms the admission of Ms Marjana Jamaludim to the hospital on 18 January 2014. There are details of assessment and treatment for an enlarged right ventricle of the heart. The records recall a discharge from the hospital on 28 January 2014. There is a temperature chart completed between 18 and 28 January. Interestingly, there is a chart of prescriptions with seven drugs listed. There is no record of dose, route, form of delivery in respect of any drug and no markings suggesting that any drug was administered. According to the "medical certificate" the patient was a "known hypertensive", with a history of six months of Ischemic Heart Disease ["ISD"]. The records do not include any blood pressure measurement, either on the chart or in the clinical notes. The history also records that the patient had "uncontrolled diabetes which is controlled with INJ insulin". There is one "glucose random" result recorded, which is in the middle of the normal range. There are no further tests of the level of glucose. The "total cholesterol" result is well within the desirable range.

45. One difficulty about the Appellant's account is that the Umrah visa in his passport is dated 15 January 2014: in other words one day before he says he was told of his mother's illness, three days before the medical records suggest she was admitted to hospital in Peshawar and four days before he was due to fly to Saudi Arabia. When he was cross-examined about this, the Appellant's reply was that he was not sure of the date when he was told of his mother's illness. Further, his mother fell ill and would have been treated at a local hospital and sent home if she had been well enough. She was not well enough, that would then have meant a transfer to the better medical facilities in Peshawar. That sequence explains the admission date of 18 January. However there is no direct evidence on behalf of the Appellant as to that sequence of events.

46. In addition to planning a detour to Saudi Arabia when his mother was dangerously ill, M2 devoted a good deal of energy to acquiring electronic goods to take to Afghanistan. Another point of remark is that when eventually he was able to travel a month or more after his mother is reported as having fallen ill, M2 still travelled to Saudi, and remained there for a period before his onward journey to Afghanistan.

Electronic Equipment

47. The Appellant's account was that, before he heard the news of his mother's illness (and thus on his account, before he knew he was going to travel to Afghanistan) he went to PC World to purchase a camcorder. He says he was told there were none in stock. He therefore ordered one to pick up later. On Friday 17 January 2014 he was told another was in stock, and he went to collect it that evening. The Appellant's Visa records show the camcorder was paid for on 17 January 2014. The Appellant's

evidence was that it was "coincidence" that this was ordered before he knew of his mother's illness. It was also coincidence that the records show payment on 17 January 2014, when he collected the camcorder. He says he paid for it when he ordered it on 15 January 2014.

48. When the Appellant actually travelled, he says he took the camcorder, a Macbook Air and three phones with him. When interviewed at Kabul airport on entry to the country, his bag was searched at the start of the interview (main statement paragraph 54). The Appellant says his bag was not searched properly, and not all of this equipment was found. The statement describes the process as "one iPhone, one Samsung and one Nokia phone. These were not expensive phones" (paragraph 125). The statement goes on to suggest that the Appellant gave "one of the small phones as a gift to my nephew" and the other small phone to a relative. He used the iPhone in Afghanistan and then left that with his brother Sultanjan (paragraph 127). In oral evidence he stated he had bought another cheap Nokia in Afghanistan to travel back with.

49. The Appellant said he had a laptop in his Afghan house already, before this trip (paragraph 130). It was not being used by anyone there: "I no longer needed it as I generally used my iPhone" (paragraph 130). In his written statement (paragraph 132-137) he explains that it is common to take electronic equipment to Afghanistan. He was asked by a doctor friend in Jalalabad to bring a laptop for the doctor's use. He had built a particular rapport with this doctor. However, he does not know his name. He called him "Doctor SAB, out of respect". Therefore the Appellant bought the Macbook Air in Mega Savers just before his planned departure in January 2014.

50. When he got to Afghanistan, he did not give the Macbook Air to the doctor. Instead, he gave him the laptop which he already had in his Afghan house. The Macbook Air he left in that house. In oral evidence, the Appellant confirmed (1) that he did not normally use a laptop when in Afghanistan, and (2) that his wife could not use a laptop. It has been left in their room.

51. It was put to the Appellant that this story concerning the computer was an elaborate lie to conceal the fact that he brought the computer for terrorist purposes. He denied it.

52. In oral evidence, the Appellant said he had brought the camcorder for his own purposes. He said he was intending to bring it back to the UK but decided to leave it behind. He had "bigger issues" to deal with. He also intended to go to Pakistan on his way home, and at the border crossing to Pakistan "they give you a hard time if they find electronic equipment". As the cross-examination continued, he confirmed that he had taken the camcorder with him on the trip he made to Kunduz/Kunas, to the north of Afghanistan. It had stopped working there: there was "something wrong with the battery".

53. The Appellant was asked if he had ever taken electronic equipment abroad and left it there on previous trips. He denied this. He was then taken to his Barclays Bank statement from the end of May 2012. This was a period just before an earlier trip to Afghanistan. Entries for 29 May 2014 show payments to Currys of £199.99 and to PC World of £364.96. On the same day the Appellant agrees he bought clothes and shoes to take to his family abroad. However, he said the payments to Currys and PC

World were not payments by him, and he took no electronic goods to Afghanistan on this trip. He suggested in cross-examination that these payments may have been when a friend (unnamed) used his Barclaycard, something which he sometimes allowed. He was taken to the statement for 15 June 2014. The card had not been used at all from 30 May 2014 to 15 June, when it was used to withdraw cash in Mecca. The Appellant confirmed that he had the card with him throughout, and the withdrawals in Mecca were his.

54. The Security Service has also drawn attention to the fact that payments for the Appellant's travel arrangements do not appear on his bank account. His travel tickets for Saudi Arabia and then Afghanistan must have been purchased on another account, or in cash.

The Association with Mir Alam

55. The Appellant agrees that his first cousin and brother-in-law, Mir Alam, is the man referred to by that name, or as Kamran, in the national security statement. As we have indicated above, the Respondent says Mir Alam is a significant figure. He is assessed by the Security Service to be an important associate of Faruq Al Qahtani, who is said to be the leader of "a small group of highly experienced Al Qaeda militants" operating in the Kunar and Nuristan provinces of Afghanistan, engaged in active fighting against ISAF forces. Mir Alam is linked to other members of this group, named as "Askari" and "Mufti Yusef".

56. The significance and leadership role of Al Qahtani is supported by OPEN material, and was not addressed as a live issue before us.

57. Mir Alam is older than the Appellant and has been married to his sister for many years. On the Appellant's account, Mir Alam and his family "have always lived on the land two doors down from me". He volunteered the connection with Mir Alam when interviewed at Heathrow on 26 July 2014. On the Appellant's account Mir Alam and his brothers are on the other side of a really serious family dispute which has involved a shooting. The Appellant, in contrast to the rest of his immediate family, does not believe in maintaining family disputes, and therefore has tried to keep in touch with Mir Alam. He would see his sister and her husband when he was in Afghanistan and would speak to Mir Alam from the United Kingdom on the telephone. Because of Afghan custom, his sister has no phone and if he wished to speak to her he would have to call Mir Alam first.

58. The Appellant accepts that he is now aware that, whilst he was in the United Kingdom between late 2010 and 2012, his cousins were arrested at home in Afghanistan, save for Mir Alam who was not at home. Those arrested were detained, in one case for two years. When the Appellant visited in 2012 he did not see one of his cousins, Noor Mohammed. This was unusual as he would have expected to see him. He asked his uncle as to the whereabouts of his cousin and his uncle told him that his son had gone to Dubai. He asked no more questions. On his return to England his account is "I did not concern myself with where Noor Mohammed was as I was busy with my own work". When he returned to Afghanistan in 2013 (despite the family dispute) he saw his uncle and his cousins, including Noor Mohammed, but not Mir Alam. Nor did he see his sister and her children. His account is "I was told by my family that they were living in Pakistan but they [his family] were not certain".

59. Following on with the Appellant's account, as he set out in his witness statement and confirmed in oral evidence, having reached Afghanistan in February 2014 (more than two years after the arrests) he still did not know of the detentions nor did he know the whereabouts of his sister, her children or their father, Mir Alam. He travelled to Pakistan for medical treatment. He had "stomach issues" which had not been resolved in Jalalabad. He travelled to Peshawar in Pakistan, which is around 2½ hours away. He visited a private hospital. He had planned to stay at the house of a relative. When he arrived there following his treatment, a relative asked him if he knew that Mir Alam and his sister and children were living in Peshawar. The Appellant answered that he had heard that she lived here but did not know where. Helped by the relative, he travelled to their house by taxi. He saw his sister, Mir Alam and the children, purely for social and family reasons. He did not think it unusual that Mir Alam and his sister were now living in Pakistan.

60. On his return to Jalalabad, the Appellant then says he asked his wife about all of this. It was only then that he was told, for the first time, that his cousins had been arrested, detained and released. His wife told him that when he, the Appellant, had last been in Afghanistan in 2012, Noor Mohammed was in fact still detained for questioning and Mir Alam was "not at home very often". His wife told the Appellant that this was very secret, and they did not want to tell anyone about it. Thus he had not been told. He asked his wife why his cousins had been arrested, and she told him that they thought someone had passed information that they were involved with the Taliban. His wife told him that "people were saying" that Mir Alam had fled to avoid arrest. The Appellant asked no more questions of his uncle about all of this.

61. When the Appellant visited his sister and Mir Alam in Peshawar he emphasised in his oral evidence that he had been keen to see her. However, he told the Commission that he never asked her why she and her husband had moved from Jalalabad. He said it was normal to move between Jalalabad and Peshawar. He did talk to Mir Alam on this visit, but it was simply family small talk, general conversation. He never asked Mir Alam if he was working in the family timber business, since such a question "doesn't look very good for them".

62. The Appellant's evidence was that so far as he was aware his sister is still with her husband, Mir Alam. However he does not know if they remain in Pakistan or if they are elsewhere. His sister does not, even today, have a mobile phone and he has no way of getting in contact with them to find out. In paragraph 122 of his statement, he adds this:

> "My family know my situation but even if I requested information about Mir Alam, they would not give it to me. This could be because they may be scared of giving this information but also could be because they do not know where my cousin and my sister currently are."

63. When the Appellant was cross-examined, he stated that his wife had also needed medical treatment and had planned to come to Peshawar but "she found a doctor in Jalalabad" and so did not accompany him. It was put to him that his account was quite incredible. Not only had his wife and his family concealed the arrest and detention of his cousins for an extended period, but his wife had done so in full knowledge of the Appellant's disapproving attitude to the family feud. It was also

suggested that the Appellant's account of visiting Peshawar in ignorance that his sister and husband were living there was incredible.

64. One of the witnesses called on behalf of the Appellant was Haji Aktar Muhammad. He is an uncle of M2's wife, who has taken care of her since her father's early death. He has also known M2 since his childhood. Both the Appellant and Haji Aktar Muhammad emphasised that they have a very close relationship. The Appellant stated in evidence they were "closer than brothers". The Appellant confirmed that he had not told Haji Aktar Muhammad that he had met his sister and her husband, Mir Alam, in Peshawar.

65. The Appellant first called his oldest brother, Abdul Wakil Jabarkhil. In his witness statement, this witness confirmed that he lives in the same house with his parents and brothers and their children. This is the same house in which the Appellant's wife has lived since their marriage.

66. Mr Jabarkhil gave evidence via video link. The technical quality of the link was adequate, but the quality of translation gave cause for concern. The interpreter spoke Pakistani Pashtu. She was experienced in translating for Afghan Pashtu speakers and the witnesses called from Afghanistan confirmed that they could understand her. However, there was a degree of stilted difficulty in the process. The Commission released the video tapes of this witness's evidence and that of the other witness, Haji Aktar Muhammad. We have checked our notes of evidence against the translated transcript of the evidence given and we have concentrated upon the written translation of the direct speech from both these witnesses.

67. Mr Jabarkhil is a man not yet in middle age. He said more than once that his memory was weak and that his hearing was weak, although confirming that he was understanding the exchanges. In cross-examination he confirmed that he was the only member of the Appellant's family with a car and that whenever the Appellant wanted to go out, he would ask him to travel with him. His words were:

> "He asked me to go with him and without me he would not go to any place."

68. Against this backdrop, the witness was asked about the Appellant's trip to Peshawar and about Mir Alam. The witness said that when the Appellant went to Peshawar to see a doctor he, the witness, did not know if the Appellant had met Mir Alam and his sister. He did not know at the time and he was not told afterwards. The Appellant is his younger brother "I don't ask him that much question and he doesn't answer that much too". The witness said he himself was unaware that Mir Alam and his sister and their children were living in Peshawar. He said he did "not have relation with Mir Alam and I don't have any information about the job or work of Mir Alam". For 15 or 20 years the witness said he had no relation or contact with Mir Alam, not even "family social relation with him". The witness was then questioned about the raid on his uncle's house. He confirmed that he knew of the raid. All of his cousins were arrested, apart from Mir Alam, who was not there. He confirmed that his cousin, Noor Mohammed Khan, was detained for two years. He then said that after that raid he had not seen Mir Alam anywhere, "we haven't seen my sister and him since". The witness also said that he had never discussed the raid, the detentions or the

disappearance of Mir Alam with the Appellant at any stage, "that is quite right; I have not discussed it with him".

69. Following the Appellant's brother, the next witness was Haji Aktar Muhammad. He gave evidence with similar content. He said that he was very close to the Appellant, who would talk to him frankly and tell him things that he (the Appellant) would not even be willing to tell his brothers. This witness supported the Appellant's account that he went to Peshawar for medical treatment, and went there on his own. As noted above, despite their close relationship, the Appellant never told Mr Muhammad he had met Mir Alam in Peshawar.

Two Problems with this Part of the Evidence

70. We note as an aside, but relevant to the credibility of this evidence, that at the conclusion of Mr Jabarkhil's evidence we formed the clear impression that the subsequent witness Mr Muhammad had been in the room with him. We raised this concern at the time. The Appellant's solicitors made enquiries, and in late July the Commission was given copies of a series of exchanges between the Appellant's solicitor and those responsible for the video link. The Appellant's solicitor asked for a short witness statement from those responsible, but none has been produced. The exchange reaches its high point in the email of a Mr David Wilson of 23 July, which reads:

> "This was the information that I was passed on from the facility and this is all I can do, they told me that there was only one person in the room at one given time."

71. We do not regard that as authoritative on the point. Even in the body of the translation of the video-taped exchanges there is reference to another person present in the room, initially described as "witness's friend" although subsequently recorded as saying "this is technical, technical and my name is Hakim". The transcript suggests that technical person left the room and subsequently returned.

72. Mr Haji Aktar Muhammad was asked directly in the course of his evidence if he had been present when Mr Jabarkhil was answering questions and he denied that, saying he was sitting outside the room.

73. Since receipt of the transcript at the end of July, the Commission has taken the opportunity to review the recording of the transition between the two interviews. Our conclusion remains that it is likely Mr Haji Aktar Muhammad was present for at least some of the evidence of the Appellant's brother, Mr Jabarkhil.

74. The second problem arises in respect of the evidence of Mr Haji Aktar Muhammad. Mr Muhammad is illiterate. According to the second witness statement of the Appellant's solicitor, Mr Hossein, the witness was seen in Pakistan by a Mr Abbas, on 9 and 10 June 2015, where his statement was obtained, checked with him, signed by the witness and counter-signed by the interpreter. Mr Abbas returned from Pakistan on 15 June 2015. The Appellant's evidence was due to be served on 16 June. Mr Hossein received the hard copy of Mr Aktar Muhammad's signed statement on 17 June 2015. He served it by email at 16.45 that day. At that point he had not read the statement closely. Later that evening, Mr Hossein reviewed the evidence which had

come from Pakistan. In relation to this witness, but not the others, Mr Hossein picked out "some issues with … [the] statement". As a result, he arranged that a telephone call was to be made to Mr Aktar Muhammad to go through his statement again. It is clear that the matters picked out by the solicitor were points where the witness's evidence did not conform to the account given by the Appellant.

75. Mr Aktar Muhammad was taken to those points by an assistant solicitor, using an Afghan Pashtu speaker for the questioning. According to Mr Hossein:

> "In that conversation, the witness corrected some sentences within the statement of his own motion."

76. The final version was agreed by the witness.

77. Mr Hossein was called as a witness on this issue. Mr Hossein says his understanding was the revised version would be filed with the Respondent by email on the same day, with an explanation that the previous version had been amended (Hossein, paragraph 9). This was clearly not done. The Respondent was left working with the original version. The amended version was filed in the Court's bundle, with the alterations but with the **original** signature and counter-signature. It follows that anyone who had not been served with the original version, or who was not vigilant to observe the differences between the two versions, would conclude that the witness's version had always been consistent from the beginning.

78. In fact, there is one important difference between the two versions. In the original version the witness had deposed that:

> "When M2 visited Afghanistan again in 2013, he was ill. He went to Peshawar for his treatment. **His wife went with him** [emphasis added]. I was not with him."

79. In the revised version, the assertion that the Appellant's wife went with him to Peshawar had been removed. This was the only matter raised in connection with paragraph 15 of the witness statement. For reasons which will now be apparent, this was a significant detail.

80. Mr Gray cross-examined the witness Haji Aktar Muhammad on behalf of the Secretary of State. He took the witness to paragraph 15, working from the original version, which was all that he had. Thus Mr Gray understandably thought the witness's evidence was as it originally had been. The transcript of the evidence reads as follows:

> "**Witness**: Yes, I am aware, He went there and he had some stomach problem and he went there for medical treatment.
>
> **Interpreter**: Yes, he had some stomach problem and he went there for treatment.
>
> **Counsel**: According to your statement he went with his wife.
>
> **Interpreter**: According to your statement he went with his wife.

> **Witness**: No, no, his wife before – we did not note the date at that time and we were not aware of this issue that it will be formed. He went alone for his medical treatment of his stomach problem to Peshawar. He asked me to go with him but I was busy and I did not go with him and he had stomach ache and then he went alone."

81. The significance of this detail is considerable. The Appellant's account, repeated more than once, is that his wife was aware Mir Alam and family were in Peshawar from before the Appellant's visit, but had not told the Appellant, her husband. According to him his visit was for another purpose and he learned of Mir Alam's presence from a more distant relative after his arrival in Peshawar. The Secretary of State submits that the Appellant's account is not credible, even if his wife remained behind, but clearly would be even less credible if his wife did in fact accompany him on this trip.

Travel within Afghanistan

82. A subplot in the evidence concerns the Appellant's movements within Afghanistan. His account in his witness statement, confirmed in oral evidence, is that he travelled to the city of Kunduz, where his brother has a tractor showroom. He and his older brother Abdul, with two other relatives, travelled first to Kabul, and stayed one night there. The next day they moved to Kunduz, stopping one night on the way, at Puli Khumri. After arrival at Kunduz, they went "to the fishing site for a couple of hours" and returned home. His account is that they left early the next morning, and returned all the way to Jalalabad on that day.

83. The Respondent compares that account to the contents of the interview conducted with the Appellant on his return to Heathrow on 26 July 2015. There he describes a trip over several days including a stay in "Kunas", where his brother "had a showroom". They stayed in an apartment and the showroom. The stay included a visit to the "seaside" at Shirsham Munda.

84. The Respondent suggests there is a significant conflict between these two accounts. We were unable to reach any such conclusion.

85. So far as we can see, there is no town or city known as Kunas, or Kundas, in Afghanistan. This is likely to be an error or transliteration in the interview notes. There is no "seaside" in Afghanistan, which is landlocked. A journey from Jalalabad to Kunduz via Kabul would logically take the traveller through Puli Khumri (or Pol-e-Khumri). In short, we found no significance in this suggested conflict.

Conclusions on the National Security Case

86. We did not find the Appellant a credible witness. Even giving due weight to the character evidence, the problems with his OPEN evidence are manifold. We find that the discrepancies as to the events just before his intended departure from the UK in January 2014 point to a motive for travel other than any illness of his mother. It is highly probable that his travel was for other purposes.

87. On the OPEN evidence only, we would find it was probable that the medical notes produced to verify the claimed illness of M2's mother were false.

88. The Appellant's professed ignorance of the whereabouts of his sister and her husband in 2014 is quite incredible, and further diminishes his reliability as a witness. The only purpose of such a false account, as we find it to be, can be to place a distance between M2 and Mir Alam. We find his account of his travel to Peshawar (1) in ignorance of the fact that his sister and Mir Alam were living there, and (2) in ignorance that his cousins had been arrested as suspect Taliban, with one cousin being detained for an extended period, to be false. We would and do reach that finding on the basis of the OPEN evidence.

89. The evidence from the Appellant's older brother Abdul Wakil Jabarkhil and his wife's uncle Haji Aktar Muhammad do not strengthen his case but weaken it. The brother's evidence was lacking in detail and firmness, except upon the crucial detail of whether the Appellant's wife travelled with him to Jalalabad. The conditions under which this evidence was given were concerning, since what we have found to be the presence in the room of the next witness, casts doubt upon the independence and reliability of this witness. As to the evidence of Haji Aktar Muhammad, we place no weight upon it in the Appellant's favour. We have grave concerns about how this changed evidence came about. There was a direct contradiction between the witness's first statement and the evidence he gave orally.

90. We find it highly probable that M2 exported the various electronic items detailed above with the intention of helping the terrorist group associated with Mir Alam. It may well be that, because of the searching of his baggage and/or his level of security consciousness, that this equipment or some of it, was retained at the Appellant's family home in Jalalabad. However in our judgment that does not affect the conclusion as to the original intention. We bear in mind the evidence of earlier purchases.

91. The important association behind all of this is that with Mir Alam. If there ever was a dispute between the two branches of the family, we find it has not operated to divide the Appellant from Mir Alam. On the contrary, the falsehoods told as to this relationship tend to confirm the association between them. This conclusion is reached on the basis of the OPEN evidence.

92. We find that it is very highly probable that the Appellant is an Islamist extremist. He has a direct association with Mir Alam and at least an indirect association with the group connected with Faruq Al Qahtani. It is probable he travelled to Afghanistan for purposes connected with the group, including the supply of electronic equipment. The OPEN evidence does not provide conclusions as to other specific activities, but the evidence of the association is firm.

93. The Appellant has given ambiguous evidence about watching extremist material on-line or downloaded. There was on his part a hesitation in denial which, in our view, may well proceed from security-conscious guesswork as to what may be known. His offer to permit the Security Service to research the memory of equipment he currently holds is not significant: even a slight degree of preparedness and security consciousness might enable such an offer to be made with confidence.

94. There is considerable support in the CLOSED evidence for our conclusions as to the national security case. There is nothing in the CLOSED evidence which runs counter to those conclusions.

Article 8: The Facts

95. We have covered many of the relevant facts above. The Appellant has some of his family resident in the UK, but there is little evidence of close association with them. There is no evidence before us from any of them. As the SSHD makes clear in paragraph 35 of her Second Statement, the Appellant has not asked that any UK resident family members should be "permitted visitors" within the terms of his SIAC bail.

96. We have noted that the Appellant has made repeated and extended visits to Afghanistan over the years. Thus his time in the UK has been punctuated by longish periods abroad. We accept that he has developed a private life here. He has been living in a small flat working as a minicab driver. He was educated here from his arrival. We accept that he has formed friendships, established attendance at the mosque and earned his own livelihood.

97. On the other hand it is perfectly clear on the totality of evidence both OPEN and CLOSED that the Appellant has a lively family life in Afghanistan: parents, siblings, wife, and Mr Haji Aktar Muhammad, the relative to whom he is "closer than a brother". There is the curious aspect to his history that he arrived on his own and claimed asylum, although his parents and siblings all continue to live in Afghanistan and are clearly in business in a reasonably prosperous way. There are family commercial premises in more than one city. There is a family house occupied by three generations, many siblings and their wives. The Appellant's wife lives in the Appellant's family home. While he says his intention was to move her from Afghanistan to England, there is no evidence that any steps, even preparatory steps, had been taken to achieve that. Moreover, we note from the evidence of the witness Zafar Abbas, a solicitor acting for the Appellant, that when he needed to get information from the Appellant's wife:

> "I spoke to her through Mr Muhammad because a woman in Afghan culture, as I have been told by M2 and the two witnesses, is not allowed to speak to a male stranger." (p.413, paragraph 5)

One must therefore wonder whether family life was really intended to be moved to a one-bedroom flat in West London with no extended family members nearby.

98. We conclude that the Secretary of State was fully justified in the decision to deprive M2 of his British citizenship. The evidence would justify deprivation even in the face of a serious incursion on the Appellant's private and family life. The evidence of association with the jihadist terrorists is strong, particularly in relation to Mir Alam. The evidence concerning jihadist material is strong. There is a strong case that the Appellant has extremist views and has engaged in terrorist related activities. It is highly probable that he transported electronic equipment to Afghanistan for the use of terrorist associates. He has been dishonest in ascribing his journey to Afghanistan in early 2014 to illness on the part of his mother.

99. We make it clear that the risk represented by M2 is such that deprivation can properly be regarded as proportionate and "the least restrictive measure" to address the risk identified. If such a discrete test were imposed by the law, it would be surmounted.

100. We have not found that the law required "imperative grounds" before deprivation was justified. It certainly does not arise from the facts of this Appellant's private or family life. However, had we taken that view of the law, we would still have concluded that deprivation was justified on the facts here.

101. We reject the submissions that the decision to deprive whilst the Appellant was out of the country was an abuse of process. Even if a "tactical" decision to deprive once abroad would or could, for no other reason, be an abuse of process (a proposition rejected by the Commission in *L1 v SSHD* SC/100/2010, judgment of 4 August 2014), the facts on this case mean there was no such abuse. The reasons are set out in the CLOSED judgment.

102. For those reasons, the appeal is dismissed.

Addendum

103. In accordance with the remarks of the Supreme Court in *Pham*, and our earlier ruling, we address the question of disclosure. The test formulated by the CJEU in *ZZ (France) v Home Secretary* [2013] QB 1136, Case C-300/11 *ZZ(France)*, as considered by the Court of Appeal in *ZZ v The Secretary of State for the Home Department* [2011] EWCA Civ 440, was that in that case "the essence of the grounds" against ZZ had to be disclosed to him, regardless of the impact on national security. SIAC expressed its interpretation of that test in *ZZ v Secretary of State for the Home Department* SC/63/2007, judgment dated 2 July 2014, see paragraphs 42-46.

104. If that test applied here, we indicate that some further disclosure would be necessary. This would likely take the form of further summary or gist. We should add that we are of the view that even were any matters omitted from the CLOSED case which would require such further summary or gist, the outcome of the case would have been the same. We give that indication in the light of the remarks of the Supreme Court in *Pham v Home Secretary* [2015] UKSC 19.