SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/144/2017**
Hearing Date: 14.12.20 - 18.12.20
Date of Judgment: 22nd March 2021

Before

THE HONOURABLE MR JUSTICE JOHNSON
UPPER TRIBUNAL JUDGE SMITH
MR PHILIP NELSON

Between

L3

Applicant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Hugh Southey QC and Nick Armstrong (instructed by **AGI Criminal Solicitors**) appeared on behalf of the Applicant

Rory Dunlop QC and Jennifer Thelen (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Ashley Underwood QC and Tom Little QC (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1. L3 is a national of Libya. His wife is a dual Libyan-British national. They have six children (aged 13, 11, 8, 6 and 1) who are British citizens. In August 2017 the family, who were then living in the United Kingdom, travelled to Libya. Whilst they were away, the Secretary of State decided to exclude L3 from the UK. On 26 March 2020 the Secretary of State withdrew that decision and made a fresh decision to exclude the Applicant. The reason given was that it was assessed that L3 "held a leadership position in the Zintan Martyrs Brigade a militia group active in Libya, which contained hardline Islamic elements and engaged in arbitrary detentions, and that you killed a security guard in a hospital whilst holding this position."

2. L3 seeks judicial review of the decision. He contends that it was (1) irrational, (2) a breach of policy, (3) insufficiently reasoned, (4) a breach of Article 8 ECHR, (5) a breach of the *Zambrano* principle, and (6) unfair. Insofar as it is possible to do so, without damaging the interests of national security, we address that claim in this "open" judgment. We are handing down a "closed" judgment at the same time which contains additional reasoning which [subject to any representations from SAs] we do not consider can be disclosed without damaging the interests of national security.

The facts

3. The Applicant provided detailed evidence in a witness statement dated 24 November 2019. He provided a short clarification statement dated 1 February 2020, and a further, supplementary, statement dated 1 November 2020. He relied on three expert reports of Alison Pargeter, who is "an analyst and consultant specialising in political and security issues in North Africa and the Middle East, as well as in political Islam and radicalisation" dated 12 December 2019, 8 January 2020 and 29 January 2020. The Applicant also relied on statements from a number of witnesses who were able to give detail about his activities with the Zintan Martyrs Brigade in 2011-2014.

4. There was a dispute between the parties as to whether evidence that post-dated the Secretary of State's decision was admissible and (partly for that reason) whether live evidence was necessary. Nonetheless, the parties invited us to read all of the evidence de bene esse, and to hear oral evidence on the same basis. We acceded to that invitation. We heard oral evidence from the Applicant and Ms Pargeter.

5. Applicant's biographical history: The Applicant was born in 1976. He was brought up in Benghazi. He describes his family as "not particularly religious" and as "mainstream Muslims." In about 2002 the Applicant moved to Tripoli. In 2005 he married a woman who is a dual Libyan-British national. They remained living in Libya. Whilst living in Libya they had 3 children. In 2014 L3 and his wife left Libya and spent some weeks in Turkey. L3 and his wife then came to the UK, leaving their children at a school in Turkey under the care of an aunt. L3's wife gave birth in the UK to their fourth child, before then returning to Turkey to be with her children, leaving L3 alone in the UK. In October 2015 UK passports were issued for the children. That month, L3's wife and children moved to the UK. L3 was granted leave to remain until 7 April 2018 on the basis of his private and family life.

6. Applicant's involvement in the Zintan Martyrs Brigade ("ZMB"): In February 2011 there were extensive protests which marked the start of a revolution against the Libyan government and its leader, Colonel Gaddafi. At that point, the Applicant moved back from Tripoli to Benghazi. He formed a group with 11-12 friends, including a man called Salim Nabbous. The group was formed between 19 and 28 February 2011: "the first week of the revolution." The members of the group were from the same neighbourhood where L3 was living. It was one of a number of groups formed to fight against the Gaddafi regime and to secure Benghazi. L3 was nominated as leader, or coordinator, of the group at around the end of February or the beginning of March. By that time there were between 12 and 20 members of the group. Salim Nabbous became L3's deputy. The group expanded. They wanted members "to come and help us with the revolution." The group became known as the ZMB. L3's evidence was that they did not want anyone with extreme views or a criminal background to join the group, but nobody checked the political beliefs of new members.

7. Shooting of security guard: In May 2011 L3 shot and killed a security guard at a hospital. His case is that he was acting in self-defence. The evidence relied on by L3 is to the effect that he was going to the hospital in order to check on wounded associates. He was the passenger in a vehicle. They approached the external perimeter of the hospital, which was about 50-100 metres from the hospital building. There were places to park both inside and outside the perimeter wall. L3 and the driver wished to park inside the perimeter, where other vehicles were already parked. There was an armed guard at, or near, the gate. The guard stopped the vehicle. According to one of L3's witnesses the guard said that armed vehicles were not allowed to enter the hospital area. L3 denies that this was said, although he agrees that the guard said that they should park outside the perimeter. An argument ensued, with raised voices but without any indication that physical violence might be used on either side. It was not possible for the driver to reverse because of a ramp or obstruction behind the car. Accordingly, in order to accede to the guard's request, it would be necessary to drive into the hospital grounds to carry out a u-turn manoeuvre so as to park outside the perimeter. The Applicant says that they were given no opportunity to agree to the guard's request or to indicate that they would carry out a u-turn. The driver proceeded through the gate. The guard opened fire. The driver of the vehicle was hit in the head. The Applicant returned fire, killing the guard who was at a distance of just over a car's length away. The Applicant said that he had to shoot in order to protect himself. There is an outstanding warrant for the Applicant's arrest. The Applicant contends that the warrant is politically motivated. There is evidence that a form of restorative justice (or "Tribal conciliation") has taken place between the Applicant and the family of the deceased hospital guard.

8. Incarceration by ZMB: Ms Pargeter says in her report that the ZMB ran makeshift prisons and "were detaining people at whim." She references a document published on the website "humanrightsinvestigations.org" which is entitled "Detention of US Citizen NGO Representative" and which refers to an incident on 1 December 2012. Ms Pargeter said that the website was run by an organisation that had an interest in Libyan affairs and which had become disillusioned with work carried out by other human rights organisations such as Amnesty and Human Rights Watch. Ms Pargeter said she had no reason to doubt the content of the report. Equally, however, she had no independent corroboration of the content of the report or the reliability of its author. The report states:

> "On December 1, the US citizen chief of party of a US based NGO operating in Libya was detained by members of the Zintan Martyrs Brigade... [He] was attending an engagement party... During the event, 50-60 members of the Zintan Brigade... raided the house... believing the occupants to be [pro-Qadhafi] elements. The militia stated they acted under orders from the Prosecutor General's office. Failing to find evidence of [pro-Qadhafi] suspects, the leader of the Zintan Brigade orders his men to round up and detain all 22 men in attendance for listening to loud music and on suspicion of drinking alcohol.
>
> All 22 men, including the US citizen chief of party, spent the next day and a half in the custody of the Zintan Brigade. In the middle of the second day, the Brigade took them to the office of the Prosecutor General of Benghazi, who refused to acknowledge their authority to arrest and investigate possible cases of law breaking. He informed them they should hand the group over to the police, who alone had the authority to arrest and investigate those suspected of breaking Libyan law, or release them."

9. L3 agrees that this incident occurred, but he gives a different account of the detail. He says that the ZMB worked with the Attorney General to execute arrest warrants that were issued by the Attorney General and which had been processed by a prosecuting lawyer. There were prosecuting lawyers who worked in the same room as judges. Any decision to arrest "had to go through the prosecuting lawyer." L3 agreed that the ZMB maintained a detention centre. He said that it was well known and "legitimate". At the time, police stations were attacked and set on fire, and the police were trying to re-organise themselves. The police would hand detainees over to the ZMB until things were sorted out at their police station.

10. Alignment with Ansar Al Sharia: L3's evidence is that a group known as Ansar Al Sharia (described by Ms Pargeter as a militant Islamist group that supported Daesh) was allegedly carrying out assassinations and kidnappings in and around Benghazi in late 2012 and early 2013. It is linked with the murder of the US Ambassador, Christopher Stevens, in September 2012. By this stage a new government had been formed in Libya. L3 had recommenced studies as a student. Although he was a student, L3 was willing to help take responsibility for the security of Benghazi and to arrest those who were carrying out assassinations and kidnappings. He did not have authorisation to order arrests.

11. By now, the ZMB had disbanded and its members became members of a much larger group known as Brigade 319. Ms Pargeter explains that Brigade 319 "formed part of the Joint Security Chamber that comprised various security bodies including the police, Special Forces and the Military." In 2014 a civil war in Libya began. In May 2014 Khalifa Haftar launched "Operation Dignity": he sought to take over Benghazi and to eliminate all Islamist forces, including Ansar Al Sharia. Some within Brigade 319, including L3 and Salim Nabbous, opposed Khalifa Haftar. Others wished to remain neutral. L3 was opposed to Haftar and, to that extent, had common cause with Ansar Al Sharia. However, he denied that he was a supporter of Ansar Al Sharia in any broader sense. The Benghazi Revolutionaries Shura Council was formed. L3 accepted that he was involved in negotiations with a precursor of this group. It comprised an alliance of forces who were

opposed to Haftar. It included Ansar Al Sharia, but also those with a less extreme outlook. Ms Pargeter says that L3 was involved in negotiations to form the Shura Council.

12. L3 gave an interview in which he said:

> "Every day, someone is being killed and I am here to tell you that I am ready to die just to keep the security. I don't like carrying guns... but being a revolutionary and for the sake of the martyrs and the people who were killed, we want to achieve the revolution's goals. The reason I have been turned back to guns now along with many other people like me is Khalifa Haftar. He surfaced to fail our revolution and establish himself as a new dictator."

13. In another interview he said (in relation to Haftar):

> "...I swear that the only thing you will face is bullets.... I, as a civil revolutionary who has been turned back to guns, swear by Allah Almighty-that I will fight against you in the same way I fought against Qadhafi, you and those your likes... We do not want this army of Khalifa Haftar. We will sacrifice our lives, we swear that we will sacrifice our lives; we shall be the convoys of martyrs until we achieve our revolution's goals."

14. L3 agreed that he did not publicly denounce Ansar Al Sharia. He said that he did not meet the leaders of Ansar Al Sharia. He said that he did not know that (as suggested by Ms Pargeter) his deputy, Salim Nabbous, fought alongside Ansar Al Sharia.

15. Ms Pargeter's evidence is that Ansar Al Sharia and Salim Nabbous launched an attack against those members of Brigade 319 who had not joined the fight against Haftar. In July 2014 14 members of Brigade 319 were killed. One man, known as having a "moderate outlook", was beheaded and tortured. Most of those who were killed were moderates who did not share Ansar Al Sharia's ideology.

16. Wissam Ben Hamid and Salim El Darby: L3 gave an interview with these two men in late 2012 or early 2013 in order to address allegations that they had received government monies unlawfully. It was reported in 2013 that Wissam Ben Hamid was involved in the killing of 32 protesters. L3 was aware of that reporting at the time, but he said that it was after he had given the joint interview. L3 also says that Wissam Ben Hamid and Salim El Darby joined Ansar Al Sharia or Daesh, but he only became aware of that subsequently. At the time he knew Wissam Ben Hamid he was not an extremist or terrorist. L3 said that he did not have any contact with Wissam Ben Hamid after he, L3, came to the UK in 2014. This is disputed by the Secretary of State who, in this respect, relies on evidence that has not been disclosed to L3.

17. L3's moderate views: There are a number of public recordings of interviews and speeches made by L3. Those show, and he accepts, that he was willing to engage in armed conflict to oppose Gaddafi, and to (at least) support armed conflict in opposition to Haftar. He says he was not motivated to do so by any extremist ideology and he had no wish to impose a "harsh" version of Sharia law in Libya. He found himself in alliance with those who did espouse extremism and supported Daesh, but he says he did not support their views. None of his recorded speeches or interviews show him espousing an extremist ideology or

expressly supporting extremist groups. The Secretary of State points out that they equally do not show him expressing opposition to those with extremist views.

18. L3 has served a body of evidence to support his account that he is moderate in his outlook. These include statements from those who he says are in a position to speak authoritatively about his motivations in 2011-2014, as well as those who have known him over a much longer period:

    (1) L3's wife has provided a statement in which she says that L3's beliefs are not "strict" and that they lead a "normal life". They pray and fast but "that is about the limit of our religious observations".

    (2) Abdulsalam Alkumati was the commander of Brigade 319 and has known L3 since 2007. He says "L3 was not an extremist... He did not have any theological agenda for ZMB. I can't say that he had no contact with AAS because their members fought alongside us in the revolution. Later he would have been regarded by the AAS as a devil because he fought with the Libyan army."

    (3) Youssef El Mangosh was General Chief of Staff in the Libyan army, and, in that context, had dealings with L3. He says that he has "never seen any indications that he was an extremist. According to what I know he does not hold extremist views."

    (4) Almahdi Albarghathi is a General in the Libyan army. He met L3 at the time of the revolution in 2011, and has met him several times since. He believes that L3's objectives were "the establishment of a legitimate state... He was serious about building an orderly state. Extremists believe that the state is an enemy. They believe government money is religiously unlawful (Haram). They want to build their own."

    (5) Dr Mohammed Al Magariaf was the President of the General National Congress in Libya from August 2012 until May 2013. He met L3 during that period as part of "joint efforts to promote peace and democracy". He says: "My first impression of L3 was that he was a sincere and civilised person with a sense of nationalism and love for the country... I did not consider L3 to be a particularly religious person or a person with certain religious ideology or extremist views. Had this been the case, he would not have had any part of anything to do with the government."

    (6) Mehdi Kashbur was a lawyer in Benghazi and a human rights activist for many years before the revolution. He first met L3 in May 2011 and has kept in contact with him since: "My impression of L3 was that although he was a revolutionist, he was an honest and genuine person who loved his country. I did not see any signs of religious zealousness or strict following of our religion of Islam in him." In relation to L3's relationship with Ansar Al Sharia, he says: "When some of the Ansar Al Sharia extremist brigade leaders approached some of the other civilian brigades' current and former leaders for the purpose of joining a new revolutionary grouping to fight Haftar, L3 withdrew from the negotiations. L3 later told me 'how could I stay with people who think I am a nonbeliever because I joined the army and believe in democracy.'... The revolutionary grouping was later formed and given the name of the Shura Council of Benghazi Revolutionaries (SCBR). I know that L3 was not part of this Shura Council when it was later established and that he left Benghazi without partaking in the fighting against Haftar although he said publicly that he was prepared to fight Haftar forces."

Procedural background

19. On 1 August 2017 L3 left the UK with his wife and children and travelled to Libya. On 8 September 2017, whilst they were away, the Secretary of State decided to exclude L3 from the UK. This was said to be on the grounds that L3's presence in the UK was not conducive to the public good on grounds of national security. At that stage, no further reasons were given.

20. On 10 September 2017 L3's wife and children returned to the UK. L3 was prevented from boarding the flight. On 26 October 2017 L3's wife and family left the UK for Turkey, where they currently live with L3.

21. L3 sought judicial review of the decision to exclude. On 24 July 2018, the Secretary of State provided the following gist of her reasons for the decision:

> "[L3] was a commander in the Zintan Martyrs Brigade in Benghazi, which was an Islamist militia associated with Ansar Al Sharia in Libya a violent jihadist group that sought to implement Sharia Law in Libya."

22. In response, L3 served a considerable amount of evidence in support of his claim (much of which is briefly summarised above).

23. Following service of this evidence the Secretary of State made an application to adjourn the hearing of L3's claim for judicial review. That application was refused. The Secretary of State then agreed to withdraw the decision to exclude L3 and to reconsider the question of whether L3 should be excluded. She did so in response to a submission dated 26 March 2020. The version of this submission that has been disclosed to L3 provided the following information:

> "[L3] held a leadership position in the Zintan Martyrs Brigade (ZMB), a militia group active in Libya which contained hardline Islamist elements and engaged in arbitrary detentions, and killed a security guard at a hospital while holding this position. In his OPEN evidence [L3] has admitted to killing the security guard but claims that this was in self-defence.
>
> [L3] confirms in his representations dated 24 November 2019 that he held a leadership position in the ZMB. L3's expert witness, in her statement dated 12 December 2019, states that "the ZMB comprised mainly Islamist fighters, and its leaders certainly had an Islamist worldview". His expert witness further states that "it is... undeniable that... the ZMB... contained hard line Islamist elements."
>
> In the evidence he has submitted [L3] admits having contact with individuals who later became extremists or terrorists but concludes that he never shared their views or actions. He mentions by name Wissam Ben Hamid and Salim Eli Darby.
>
> In any legal challenge against his exclusion [L3] may seek to argue that the exclusion infringes his Article 8 ECHR rights (his right to a private and family life)... It is noted that [L3] resided in the UK, with LLTR between 2014 and 2017 when he was excluded and that his wife and children all hold British

> Citizenship. Since his exclusion in 2017 he has been residing in Turkey with his family. While [L3's] OPEN evidence suggests that his family life is more precarious than it was in the UK, in that he has faced difficulties such as not being entitled to work and problems with his wife accessing medical treatment, they are still able to continue their family life there..."

24. The full version of the submission that was provided to the Secretary of State contained additional material which has not been disclosed to L3 and which we have set out in our closed judgment. The fuller version of the submission did not give any fuller summary of the evidence on which L3 sought to rely.

25. In response to this submission the Secretary of State made a fresh decision that L3 should be excluded from the UK on the grounds of national security. The Applicant was informed of this decision by a letter dated 31 March 2020. The letter gave the following grounds for the decision:

> "It is assessed that you held a leadership position in the Zintan Martyrs Brigade a militia group active in Libya, which contained hardline Islamic elements and engaged in arbitrary detentions, and that you killed a security guard in a hospital whilst holding this position."

26. The consequence of the Secretary of State's decision was that L3's challenge was treated as withdrawn, as determined by a judgment of Steyn J dated 10 June 2020. L3 brought a challenge to the decision of 26 March 2020.

27. The Special Advocates contested the Secretary of State's application to withhold material from L3. As a result of discussions with the Special Advocates, the Secretary of State, by a letter dated 5 October 2020, provided the following additional information about her reasons for excluding L3 from the United Kingdom:

> "In deciding whether to withdraw the exclusion decision of 8 September 2017 and to re-exclude L3, the Home Secretary had regard to an assessment that L3's statements as to his associations may give a misleading account of the full extent and nature of those associations and that he had regular and frequent contact with Ben Hamid as late as December 2015."

28. In response, L3 provided a further statement in which he set out, in detail, his account of the extent of his contact with Wissam Ben Hamid. He said that, to the best of his recollection, he had no contact with Ben Hamid after he left Libya in 2014. He says that it is possible that he has been at an event, or has been copied into an email, that he has forgotten about, but that he is "as sure as I can be that it is nothing beyond that." He says that in 2014, at the time when it is alleged he was still in contact with Ben Hamid, he was in the UK, using his home telephone (registered in his name) and that all contact with Libya was from his home telephone save for some occasional instances. He believes that he did not, at the time, use any media-based or internet-based communications (such as WhatsApp or other encrypted media). He considers that there must be some false or misunderstood information about his alleged contact with Ben Hamid, and that there might be a problem of mistaken identity.

Legal framework

29. Section 3(1) Immigration Act 1971 states:

> "Except as otherwise provided by or under this Act, where a person is not a British citizen-
>
> (a) He shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act."

30. Where the Secretary of State has personally directed that a person should be excluded from the United Kingdom that person must be refused leave to enter the United Kingdom – see paragraph 9.2.1 of the Immigration Rules:

> "**Exclusion or deportation order grounds**
>
> An application for entry clearance, permission to enter or permission to stay must be refused where:
>
> (a) the Secretary of State has personally directed that the applicant be excluded from the UK;..."

31. In September 2018 the current version of the Secretary of State's policy guidance entitled "Exclusion from the UK" was published. It states:

> "Exclusion of a person from the UK is normally used in circumstances involving national security, criminality, international crimes (war crimes, crimes against humanity or genocide), corruption and unacceptable behaviour.
>
> National security
>
> National security threats will often be linked to terrorism. Terrorist activities are any act committed, or the threat of action designed to influence a government or intimidate the public, and made for the purposes of advancing a political, religious or ideological cause and that:
>
> - involves serious violence against a person
> - may endanger another person's life
> - creates a serious risk to the health or safety of the public
> - involves serious damage to property
> - is designed to seriously disrupt or interfere with an electronic system.
>
> ...
>
> Assessing cases
>
> A recommendation to exclude an individual from the UK must be based on reliable evidence. This could include where the recommendation is to exclude the person on the basis of criminality in the UK or overseas that has been confirmed through criminal record checks. In other cases, the evidence may not be so straightforward and a greater degree of scrutiny and assessment may be required.

You must give appropriate weight to evidence when deciding whether to recommend exclusion; for example, rumours or uncorroborated tip-offs by members of the public are likely to carry less weight than an assessment provided by a professional body or evidence supplied by another government department. However, where evidence has already been assessed by law enforcement agencies or similar organisations, it will usually be reasonable to rely on that assessment without undertaking your own consideration of the reliability of the underlying evidence.

...

An exclusion decision must be reasonable, consistent with decisions taken in similar circumstances, and proportionate. There must also be a rational connection between exclusion of the individual and the legitimate aim being pursued, for example safeguarding public security or tackling serious crime."

32. Section 2C of the Special Immigration Appeals Commission Act 1997 states:

"**Jurisdiction: review of certain exclusion decisions**

(1) Subsection (2) applies in relation to any direction about the exclusion of a non-EEA national... from the United Kingdom which-

(a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the non-EEA national... is conducive to the public good,

(b) is not subject to a right of appeal, and

(c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public-

(i) in the interests of national security.

...

(2) The non-EEA national... to whom the direction relates may apply to the Special Immigration Appeals Commission to set aside the direction.

(3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.

(4) If the Commission decides that the direction should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."

Assessment of the open evidence

33. We address below the approach that is to be taken to the review of the Secretary of State's decision and, in particular, the extent to which the Commission may make findings of fact.

However, to put that discussion into context it is appropriate to make some preliminary observations about the open evidence.

34. We do not consider that the open evidence unambiguously shows that L3 poses a risk to UK national security. In other words, the open evidence is not such that it is clear that the only rational decision that could be made is that L3 poses a risk to UK national security.

35. L3's opposition to Gaddafi and Haftar, and his participation in armed revolution, is consistent with a desire to promote peace and democracy in Libya and, in particular, Benghazi. To the extent that he found himself aligned with those who had an extremist agenda there is nothing in the open evidence to show that he shared that agenda. On the contrary, there is a body of evidence to support L3's account that he did not hold extremist views.

36. The account on the "humanrightsinvestigations.org" website supports the evidence of Ms Pargeter that the ZMB were engaged in arresting people "at whim". The Secretary of State understandably characterises this as L3 (or at least his organisation) engaging in arbitrary arrests, and we do not consider that the Secretary of State can be criticised for relying on evidence that L3 had, himself, put forward. However, we know nothing of the source for the website report and it is simply not possible to assess its reliability.

37. There is a serious question as to whether L3's shooting of the security guard really was in self-defence. The Secretary of State was entitled to be sceptical about L3's account that it was in self-defence. On his own account he had not clearly complied with the instruction of an armed security guard and the vehicle had proceeded beyond the armed check-point in apparent defiance of the security guard's instruction. Although L3 claims that the arrest warrant is politically motivated, the Secretary of State is entitled to consider that there may well be a proper basis for L3's arrest – cf *R (Ivlev) v Entry Clearance Officer* [2013] EWHC 1162 (Admin) *per* Sales J at [64]-[65]:

> "...The position in which the ECO and the Secretary of State found themselves, awkward though it might be, was that the charges which had been filed against the Claimant which the Russian courts (albeit courts which might possibly be suspect in terms of their independence from the executive) had scrutinised and determined to have sufficient merit to justify them being taken forward... The charges against the Claimant had not been subjected to detailed assessment at a trial...
>
> There appeared, therefore, to be objective grounds for thinking that there was a significant possibility that the Claimant might have been involved in some way in the serious wrong-doing alleged against him. The ultimate truth or falsity of the charges could not be determined by the decision-maker. The United Kingdom authorities had done nothing to bring this state of affairs into existence; nor were they in a position to resolve the factual issues underlying the charges... The decision-maker was entitled to take the view... that whilst it could not be assumed that the charges were well founded, it was possible that they were..."

38. Likewise, we consider that the Secretary of State was not required to take the Applicant's assertion that he was acting in self-defence at face value: she was entitled to take the view

that it was possible that he was not acting in self-defence. However, this does not appear to have been a politically motivated killing or to have been a manifestation of any extremist ideology. It does not clearly indicate that L3 would be a risk to UK national security. It might support a broader assessment that – quite apart from any national security concerns – permitting the Applicant to enter the UK would not be conducive to the public good. That is not, however, the reason why L3 has been excluded.

39. What the open evidence does show is that L3 has associated in the past with those who are now known to have subsequently become extremists, in particular Salim Nabbous, Wissam Ben Hamid and the group AAS, that he is experienced in armed conflict and that he has previously used lethal force against an armed guard (whether or not in self-defence).

40. The open evidence does not, however, stand alone. The Secretary of State also relies on evidence that has not been disclosed to L3, but has been disclosed to the Special Advocates. The Commission has granted the Secretary of State permission not to disclose that evidence, on the ground that to give disclosure would be contrary to the public interest. The Secretary of State has informed L3 that she considers that he has not been truthful about the extent of his contact with Wissam Ben Hamid. None of the evidence on which the Secretary of State relies in that respect has been disclosed to the Applicant. Of course, neither we nor the Special Advocates can know what L3 would say if the evidence on which the Secretary of State relies were disclosed to him. In considering the evidence that is relied on by the Secretary of State we have taken into account everything that L3 has said about that, including the possibility that there has been a case of mis-identification, or that the Secretary of State has been provided with false or misleading information. We have also had regard to the submissions that have been advanced to us by the Special Advocates.

41. We have considered the closed evidence in the light of all of the open evidence, including L3's account as to his (lack of) contact with Ben Hamid. For the reasons we give in our closed judgment we have concluded that the Secretary of State was entitled to assess that L3 has associated with Islamist extremists, including individuals involved in AAS, and including regular and frequent contact with Ben Hamid, and that his statements as to his associations may give a misleading account of the full extent and nature of those associations.

42. There is no clear "innocent" reason for the Applicant to have had regular and frequent contact with Ben Hamid, including as late as December 2015, and to have lied about that. It is therefore not surprising that the Secretary of State concluded that there was unlikely to be an innocent reason for the contact. It is therefore easy to see how it might be concluded that the Applicant would pose a risk to UK national security. The Applicant's background as a military commander, with his experience and network of contacts, is relevant to the level of risk that he would pose.

43. Against that assessment of the evidence we turn to the individual grounds of challenge.

Ground 1: Irrationality

Submissions

44. Although ground 1 is couched as a rationality challenge, Mr Southey QC argues that the test to be applied is that of proportionality. He relies on the observations of Lord Mance

JSC in *Pham v Secretary of State of the Home Department* [2015] UKSC 19 [2015] 1 WLR 1491 at [98]:

> "Removal of British citizenship under the power provided by section 40(2) of the British Nationality Act 1981 is, on any view, a radical step, particularly if the person affected has little real attachment to the country of any other nationality that he possesses and is unlikely to be able to return there. A correspondingly strict standard of judicial review must apply to any exercise of the power contained in section 40(2), and the tool of proportionality is one which would, in my view and for the reasons explained in *Kennedy v Information Commissioner* [2014] 2 WLR 808, be both available and valuable for the purposes of such a review..."

45. He also relies on the Secretary of State's own policy which makes clear that exclusion decisions must be "proportionate". Even if the test is one of irrationality, he contends that none of the matters relied on by the Secretary of State are rationally connected to the need to exclude him, and that there was no adequate material to justify the decision to exclude him. Further, he argues that the Secretary of State should have sought further information from L3 before making the decision. He says that the Secretary of State failed to have regard to relevant factors when making her decision, relying on the fact that critical detail from the evidence on which he relies was omitted from the submission that was put before the Secretary of State.

46. Mr Dunlop QC argues that SIAC should not apply a proportionality test and should instead assess whether the decision is irrational in the sense explained in *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. He points out that SIAC has itself previously decided that this is the correct approach – see *T2 v Secretary of State for the Home Department* (SN/129/2016) *per* Laing J at [16]. He says that the cumulative effect of the evidence amply justified the Secretary of State's assessment that L3 posed a risk to national security. Mr Dunlop contends that L3's case in respect of the submission that was put before the Secretary of State does not fall within the scope of his pleaded grounds, that he should be required to seek permission to amend his grounds, and that any such application should be refused on the grounds that the underlying complaint is without merit, but that if permission to amend is granted then the Secretary of State should be permitted to adduce additional evidence as to what her decision would have been if she had been presented with all of the underlying evidence.

Discussion

47. Threshold for review: In the context of this case, and for the reasons we give below, we have concluded that the outcome does not depend on the precise threshold test that is applied: the outcome, in our judgment, is the same whether approached through the prism of proportionality or rationality.

48. Nevertheless, we accept the submission of Mr Dunlop QC that the correct approach to a rationality challenge is the classic *Wednesbury* test, namely whether the Secretary of State had regard to all relevant factors (but not any irrelevant factors) and whether she reached a reasonable decision. We accept, of course, that the ambit available to a reasonable decision maker depends on the context, which includes the consequences of a decision. Moreover,

if a decision is disproportionate (for example, because there is no rational connection between the aim that it is sought to achieve and the decision that is made, or where the adverse impact on an individual is out of all proportion to the benefit that might be achieved) then that is relevant to the assessment of whether it falls within the bounds of reasonable decision making. In that way the concept of proportionality, and the ingredients of the test of proportionality, may in some cases be valuable in assessing whether a decision falls within reasonable bounds. But that does not mean that a test of proportionality is substituted for that of rationality, or that the test of rationality is anything other than that described in *Wednesbury*. Far less does it mean that the Commission should substitute its own view of the facts for that reached by the Secretary of State. It just means that the application of the *Wednesbury* test is sensitive to context.

49. We do not consider that this is inconsistent with the observation of Lord Mance in *Pham* that in some contexts the proportionality tool may be relevant and valuable. In any event, however, the type of decision that was made in *Pham* was, as Mr Dunlop points out, quite different from the decision in this case. That was a "radical" decision to deprive a person of their nationality, a status which is "fundamental" both at common law and European and international law (see *Pham* at [97] and [98]).

50. A decision to exclude a non-UK national from the United Kingdom on the grounds that their presence would not be conducive to the public good is of a different nature from a deprivation of citizenship. It does not involve the removal of any fundamental status. There is a well-established body of authority establishing that (subject to any public law constraints that are engaged, including the obligation to act compatibly with rights under the European Convention of Human Rights) the Secretary of State is entitled to take a precautionary approach and has a wide ambit of discretionary judgment as to the circumstances in which it would be conducive to the public good to make such a decision, particularly in the field of national security:

    (1) In *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606 [2002] QB 1391 Lord Phillips of Worth Matravers MR, giving the judgment of the Court of Appeal, identified at [71]-[74] four factors which made it "appropriate to accord a particularly wide margin of discretion to the Secretary of State" in this context: the fact that a decision to exclude is "an immigration decision" motivated by concern for public order within the United Kingdom, the fact that the decision is made personally by the Secretary of State, the fact that the Secretary of State is far better placed than the court to make an informed decision as to the likely consequences of granting leave to enter, and the fact that the Secretary of State is democratically accountable for her decision.

    (2) In *Home Secretary v Rehman* [2003] 1 AC 153 *per* Lord Slynn at [26]: "the Commission must give due weight to the assessment and conclusions of the Secretary of State... He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him..." (and cf *per* Lord Hoffmann at [62]).

    (3) In *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094 [2004] INLR 612 Judge LJ explained (at [83]) that the "public good" is a "wide-ranging

but undefined" concept which engages "broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter... the United Kingdom" for which system the Secretary of State has "a prime responsibility." It is necessary for a reviewing court to "[give] weight to matters which the Secretary of State was entitled or required to take into account when considering the public good."

(4) In *CB (United States of America) v Entry Clearance Office (Los Angeles)* [2008] EWCA Civ 1539 a singer who then identified as "Snoop Dogg" was refused entry clearance because it was considered that his presence in the United Kingdom would not be conducive to the public good. Laws LJ observed at [15]: "...In this particular area, unlike some other areas of immigration and asylum law, a degree of deference is due to the original decision maker. The subject matter is the good of the United Kingdom generally. That, it may be said, has strategic or overreaching elements where the Secretary of State and indeed his Entry Clearance Officers have special responsibility."

(5) In *Amirfard v Secretary of State for the Home Department* [2013] EWHC 279 (Admin) Lang J said, at [59], that the test of irrationality is "especially difficult to satisfy in an area where Parliament has conferred a broad discretion on the Secretary of State and the Court of Appeal has declared that "it is no part of the function of the courts to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances" (*per* Nourse LJ in *ex parte Al Fayed (No 2)*)."

(6) In *R (Lord Carlile) v Home Secretary* [2015] AC 945 Lord Clarke JSC was "extremely sceptical" about the reasons given by the Home Secretary for refusing entry clearance but nevertheless accepted that (in the absence of contrary evidence) the court was not in a position to doubt the Home Secretary's national security concerns (see at [111]-[117]). Lord Neuberger agreed, saying that whilst "any citizen" might hold a sceptical opinion about the Home Secretary's reasons "I do not consider that is an opinion on which a court would be entitled to act in this case... a judge has neither the experience nor the knowledge to make such a finding, save in exceptional circumstances, and I do not consider that it would be open to us to hold that this was such an exceptional case without the justification having been established through cross-examination... And, even if the likelihood is small, the risk of grave harm exists, and it is primarily for the executive to assess the extent of such a risk and to decide what to do about it."

51. We readily accept this entirely orthodox and very well established approach. If the Secretary of State has had regard to all relevant factors (and none that are irrelevant) and has reached a reasonable decision, then a rationality challenge must fail. However, the Secretary of State's decision making is not inviolable. It is subject to review. The Commission has the reviewing role. The primacy of the Secretary of State in the decision making, and the important respect that is to be accorded to her decision-making, makes it all the more important that the Secretary of State has regard to all relevant matters in making the assessment.

52. Ambit of pleaded case: Paragraph 3 of the Applicant's grounds of review states:

> "The Applicant specifically asserts that there is a failure to take into account relevant matters... The Secretary of State has not had any, or any proper, regard to the evidence about the circumstances pertaining in Libya at the time; what the Applicant has said about the need to work pragmatically with others, including those with more hardline views than his own; nor with what the Applicant has said about self-defence (the hospital incident). The decision also fails to take into account the extent to which the Applicant can properly be held accountable for the actions of others, again in the circumstances pertaining to Libya, as well as his own organisation, at the time. The decision does not deal with the character evidence, and his background as a businessman interested in securing Libya and then returning to his business (and education), not someone who is ideological or seeking power or leadership."

53. In our view this plea does squarely put into issue the question of whether the Secretary of State took the specified matters into account. We reject the submission of Mr Dunlop that L3 requires permission to pursue this ground. We also reject the submission that the Secretary of State should be entitled to put in further evidence as to what the impact on her decision making would have been if various matters relied on by L3 had been taken into account. The Secretary of State has had every opportunity to address the grounds of claim. Allowing further evidence now would unnecessarily delay the proceedings yet further, would be unjust to L3, and would not assist in addressing the question of whether the Secretary of State's decision was rational.

54. On the first day of the hearing the Applicant provided a note to clarify that "for the avoidance of doubt... as part of his rationality ground" he sought to argue that the submission that was put before the Secretary of State was "not a full or balanced summary of the evidence which the Applicant had submitted." We have sympathy with the Secretary of State's submission that this ground of challenge does not clearly come within the ambit of L3's pleaded case. Nothing in the grounds complained, explicitly or implicitly, about the submission that had been put before the Secretary of State. Moreover, the complaint that is now advanced is not that the Secretary of State failed properly to seek further information, but that the Secretary of State had been given incomplete or unbalanced information. That said, the submission was only disclosed to L3 in late September 2020, less than 3 months before this hearing, and it was only from then that the point could have been visible to L3. In all the circumstances we have considered it appropriate to address the merits of the point that has been raised, if only because the merits of the point might be relevant to the question of whether we should permit the point to be advanced.

55. Much more could have been included in the submission. It did not fully set out the evidence on which L3 relied. It did not set out the detailed context in which L3 had commanded the ZMB. If the assessment that L3 posed a risk to national security had been formed simply on the basis that he had commanded the ZMB, then that context would, in our judgment, have been critical to an informed assessment. That is because it potentially provided a basis for concluding that L3's actions were consistent with his desire to restore democratic government to Libya (and Benghazi in particular). For our part, we consider that it would have been helpful if some of this detail had been included in the submission. It was, however, for the Secretary of State, and those advising her, to decide (within rational parameters) what information was required by the Secretary of State to enable her to make

a decision as to whether L3 posed a risk to national security. The basis for concern was not simply that L3 had commanded the ZMB, but that he had ongoing contact with extremists, including contact which he had denied. It is this denied contact that seems to us to be the critical factor. That being so, the context in which L3 had lent himself to the armed revolution is less material and it was, we consider, open to the Secretary of State not to concern herself directly with that detail, and open to those advising the Secretary of State not to provide this level of detail in the submission (though we repeat our view that it would have been helpful if this had been included). The question remains, however, whether the submission was sufficiently detailed to enable the Secretary of State to make the decision that was required. That is a question that can only be answered in the light of the entire submission, part of which is only disclosed in the closed evidence. For the further reasons we give in our closed judgment we consider that the Secretary of State was given sufficient information.

56. Whether the Secretary of State had regard to all relevant factors: The Secretary of State did not (because it was not placed before her) take account of all of the detail of L3's supporting evidence, which included evidence as to the circumstances in which he shot dead the security guard, and evidence as to the context in Libya in which he became involved in an armed militia group, associating with those (such as AAS) who held extremist views. It is argued on L3's behalf that there was no good reason not to take account of this material.

57. If the Secretary of State had made a positive decision that L3 was not acting in self-defence, then the detailed evidence in relation to the hospital incident would clearly have been important. Similarly, if the Secretary of State had made a decision that L3's role in the ZMB in itself showed that he held an extremist mindset, then the context would again have been important. This was not, however, the nature of the decision that was made by the Secretary of State. That decision was that L3 posed a risk to national security because of a constellation of factors. That being the case it was for the Secretary of State, and those advising her, to weigh up the different factors and reach a view (within the bounds of rationality) as to what material was relevant to be taken into account. We have already explained that the Secretary of State was entitled to conclude that L3 had associated with Islamist extremists and that he had been misleading in the account he had given. That being the case, L3's biographical profile as someone who has led an armed militia unit and has used lethal force is of relevance and concern to the level of risk that is posed. That is so irrespective of the precise context or the question of whether or not L3 was acting in self-defence (as to which no finding was made by the Secretary of State). We do not therefore consider that it has been shown that the Secretary of State failed to have regard to any material factor.

58. Is the decision reasonable?: We have set out above our assessment of the evidence. The closed evidence suggests that the Applicant may have had frequent and regular contact with a known extremist. We do not consider that evidence can be discounted, notwithstanding L3's denials and notwithstanding the powerful evidence that, particularly in the period 2011-2014, he expressed moderate rather than extremist views. If he has had the contact that is suggested by the closed evidence then his denial of such contact is dishonest (the regularity and frequency is such that it cannot be put down to a forgotten email chain, or coincidental appearance at a single event). Such dishonesty suggests that the contact was, itself, for a sinister purpose. L3 has led an armed militia unit in combat, and has used lethal

force against a security guard (albeit in circumstances that may raise an issue as to self-defence). We consider that the Secretary of State was entitled to conclude, on the basis of these factors, that L3 posed a significant risk to national security.

59. On the basis that L3 posed a significant risk to national security it was entirely rational to exclude him from the United Kingdom. There was a rational connection between the threat that the Secretary of State wished to address (a threat posed by L3 to the national security of the United Kingdom) and the means that the Secretary of State adopted to address that threat (namely excluding L3 from the United Kingdom). It has not been shown that the threat could satisfactorily have been addressed by any other means that would have had less of an impact on L3. The decision reached by the Secretary of State struck a fair balance between L3's rights, and the public interest that the Secretary of State was seeking to uphold. The decision to exclude L3 from the United Kingdom was neither disproportionate nor unreasonable. It was not unlawful on *Wednesbury* grounds.

Ground 1A: Tameside duty

60. The Applicant argues that the Secretary of State was obliged to inform herself about all matters that were relevant to her decision, but she failed to do so. In particular, it is said that the Secretary of State should have sought further information from the Applicant about the hospital incident, and "other key aspects of his case", and that there was no reason not to seek such information before making the fresh decision.

61. We do not consider that there is merit in this complaint. Whatever might be said of the first decision to exclude made in 2017, by the time that the second decision was made L3 had adduced a great deal of evidence. That evidence included his own account of the hospital incident and about the other key aspects of his case. He knew that the Secretary of State was proposing to make a further decision. There was no reason for the Secretary of State to consider that the Applicant had not provided all of the information on which he relied, and which he wished the Secretary of State to take into account.

62. So far as the hospital incident is concerned, the Secretary of State had sufficient material before her. She did not purport to determine whether L3 was in fact acting in self-defence, and it is difficult to see how she could have made a final determination of that highly fact-sensitive issue. The relevance of the hospital incident is that it shows L3's capacity for the use of lethal armed force. That is not in dispute. It does not in itself show that L3 has extremist views (and the Secretary of State did not suggest otherwise). However, once the Secretary of State concluded that L3 was associating with a known extremist, his capacity to use lethal force was relevant to the level of risk that he posed. That seems to us to be axiomatic and did not require the Secretary of State to secure any further information before making a decision.

Ground 2: Breach of policy

63. The Applicant's case is that he has not done anything which falls within the definitions of "unacceptable behaviour" or "extremism" within the Secretary of State's policy. He contends that the Secretary of State's decision that he falls to be excluded, by application of that policy, is irrational.

64. The difficulty with this argument is that the policy does not prescribe an exhaustive list of actions that will render a person liable to exclusion. Rather, it provides a broad description of the types of conduct which might have that result. As the authorities recognise, the Secretary of State has to undertake a wide discretionary assessment in making this type of decision. Nothing within the policy prevents the Secretary of State from deciding to exclude a person where she rationally concludes that the presence of the individual in the UK would be a threat to UK national security. That is the assessment that the Secretary of State here made. For the reasons we have given, we conclude that it was a rational assessment. It was not inconsistent with the terms of the policy.

Ground 3: Reasons

65. The Secretary of State has given reasons for her decision. Some, but not all, of those reasons have been disclosed to the Applicant. The reasons that have been disclosed are that:

    (1) L3 has had regular and frequent contact with Ben Hamid as late as December 2015;

    (2) L3 may have given a misleading account of the full extent and nature of his associations;

    (3) L3 held a leadership position in the ZMB, a militia group active in Libya which contained hardline Islamic elements and engaged in arbitrary detentions; and

    (4) L3 killed a security guard in a hospital while holding that position.

66. L3's complaint is that these reasons do not engage with the circumstances in Libya at the time and the extent to which L3 can be held responsible for the actions of others, and that they do not deal with what L3 says about self-defence in relation to the hospital incident.

67. We agree with the factual premise that underlies the complaint: the reasons do not engage with these matters. However, we do not consider that it was necessary for them to do so. So far as the hospital incident is concerned, the Secretary of State did not purport to make a finding as to whether L3 was acting in self-defence. It was therefore not necessary for the Secretary of State to give reasons for a decision that was not made, one way or another.

68. So far as the other matters are concerned we agree that if the Secretary of State had concluded, solely on the basis of L3's role in the ZMB, that L3 posed a risk to UK national security then it would have been necessary to give reasons for that conclusion. Again, however, it was not simply L3's role in the ZMB that gave rise to the assessment that he posed a risk to national security. The Secretary of State's decision was explicitly made on the basis that L3 had associated with extremists, but had denied that association, and that he was a man who had used lethal force and had experience of armed combat. That provides legally sufficient reasons for the conclusion that was reached.

Ground 4: Article 8

69. There is an issue between the parties as to whether the Applicant may rely on Article 8 ECHR. Mr Dunlop QC points out that the jurisdictional ambit of the ECHR (and hence the Human Rights Act 1998) is essentially territorial. Here, at the time of the decision, L3 and his family were outside the United Kingdom. Accordingly, Mr Dunlop argues that they are not entitled to rely on Article 8 ECHR. This issue was recently considered by SIAC in *P3 v Secretary of State for the Home Department* (judgment 11 February 2021) where the

relevant authorities and principles were identified (see at [83]-[90]). Those authorities lead to the conclusion that L3 "is not within the reach of the Convention for the purposes of article 1 [ECHR]" (see at [87]). However, it would for all practical purposes be sufficient if L3's wife and children were within the jurisdictional ambit of the ECHR (because they are, with L3, part of a unitary family unit). They have British citizenship and would be able to return to the United Kingdom at any point. In those circumstances we are prepared to proceed on the assumption (without deciding the point) that Article 8 is engaged.

70. We also accept that the effect of the decision to exclude the Applicant is that his wife and children, who were otherwise living in the UK, and as British citizens were entitled to remain in the UK, have left the UK. The Applicant's wife explains the practical impact in her witness statement. We accept the evidence of the Applicant's wife as to the impact that the exclusion decision has had on all members of the family. We accept that this amounts to a significant interference with the right of each member of the family to respect for private and family life. As against that, however, the family only came to the UK in 2014, and were only within the UK for 3 years. Before that L3's wife and her two eldest children had lived in Turkey (where they now live) and the two eldest children had gone to school there. The primary difficulties that the family have encountered are economic and cultural. The impact on family life is more indirect. As against that, the Secretary of State is concerned to protect national security. There is a rational connection between the legitimate aim that the Secretary of State has sought to pursue, and the decision to exclude the Applicant. Given the Secretary of State's rational conclusion that his presence in the UK would be a threat to national security, there was no measure less intrusive to family life that she could have taken to address the assessed risk. She took account of the impact on family life. We consider that the decision that was taken did strike a fair balance between the family's Article 8 rights, and the need to protect national security. Any interference with Article 8 rights was therefore justified pursuant to Article 8(2) ECHR.

Ground 5: Zambrano

71. L3's case is that his children had a fundamental right, as a matter of EU law, to exercise the substance of the rights conferred on them by virtue of their status as EU citizens, which included a right to remain in the UK. They were dependent on L3. The effect of the Secretary of State's decision is that they were compelled to leave the United Kingdom. They say that this is demonstrated by the fact that they in fact left the United Kingdom to join L3 in Turkey, notwithstanding the evidence as to the obvious advantages for them of remaining in the United Kingdom. L3 considers that there has, as a result, been a breach of the principles of EU law recognised in *Ruiz Zambrano; Dereci* Cases C-356/11 and C-357/11.

72. In *VM (Jamaica) v Secretary of State for the Home Department* [2017] EWCA Civ 255 Sales LJ identified some of the limitations of these principles, including in particular, that they are limited to cases where the children are entirely dependent on the excluded person such that the inevitable consequence is that the children will be compelled to leave the United Kingdom – see at [60]-[63]:

> "60. ...VM has no claim to remain in the UK as a result of the citizenship rights in EU law of his wife and children. If he is deported to Jamaica, KB and the children (with KB deciding for them) will face a difficult choice whether to

relocate there with him or remain in the UK without him. But the fact that they will be confronted with that choice, and might in practice feel compelled to go with him, does not engage EU rights in a way which creates a right under EU law for VM to remain in the UK. As this court held in *FZ (China) v Secretary of State for the Home Department* [2015] EWCA Civ 550, following *Dereci* and the decision in *O, S and L*... "the critical question is whether there is an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported"... In the present case there is no "entire dependency" of AB, KSM and KDM on VM, in the requisite sense, because they could remain in the UK with their mother, KB, who as a British citizen herself has a right to be here.

61. The analysis in *FZ (China)* is consistent with the guidance given by the Supreme Court in respect of the application of *Dereci* in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11 at [61]-[67]. The Supreme Court distinguished the situation in *Ruiz Zambrano* – which concerned the refusal of a right of residence and a work permit in a member state to the third-country parents of dependent minor children who were citizens of that state, which had "the *inevitable* consequence" that the parents would have to leave the EU and the children would have to accompany their parents – from that in *Dereci*, in which "the same relationship of *complete dependence*" between the EU citizen (the wife and children in the *Dereci* case) and the third country national (Mr Dereci) was not present, where the argument based on Article 20 TFEU and the EU citizenship rights of the wife and children was rejected: see [64]-[67] (emphasis added).

62. In *FZ (China)*, as in the present case, a third country national was married to a British wife by whom he had a British daughter, who was a minor dependent on her parents. Although the wife would face a difficult choice if her husband were deported, whether to go with him to keep the family together or to remain in the UK with her daughter, that situation did not engage the principle in *Ruiz Zambrano* so as to generate a right for the husband to be allowed to remain. The wife might feel compelled by circumstances to leave with her husband and take their daughter with her, but she was not compelled by law to do so. The wife could choose to remain. There was therefore no "entire dependence" of the daughter on the person being deported, namely the father...

63. In my view, the reasoning in *FZ (China)* covers the present case...

73. In our view, the same reasoning covers the present case. The history shows that L3's children are not entirely dependent on him. They have, in the past (between July 2014 and October 2015) lived in a different country from him. There is nothing which legally prevents L3's wife and children from returning to the United Kingdom. The fact that they have chosen to travel to Turkey to live with L3 does not engage the *Zambrano* principle.

Ground 6: Fairness

74. L3 contends that the decision is vitiated by unfairness because the Secretary of State relied on the allegation that he had authorised or had been involved in arbitrary detention, and had

shot the hospital guard, and had contact with Wissam Bin Hamid, without putting L3 on notice of her intention to rely on these matters.

75. L3 knew that the Secretary of State was going to reconsider the question of whether he posed a risk to national security such that he should be excluded. He had provided evidence in support of his challenge to the original decision to that effect. The Secretary of State relied on that evidence, including the evidence that L3 had provided to the effect that he had been involved in arbitrary detention and had shot the security guard. We do not consider that this involves any unfairness. So far as the reliance on contact with Wissam Bin Hamid is concerned, the totality of the evidence in relation to that issue has not been disclosed to L3. SIAC has granted permission for the evidence to be withheld on the grounds that disclosure would be contrary to the interests of national security. The Secretary of State considered that disclosure of the allegation would likewise be damaging to the interests of national security. That was a genuine and rational view, which justified not providing L3 with an opportunity to make representations on that particular issue. That is so even though, in the event and with the involvement of the Special Advocates, the Secretary of State has ultimately agreed to disclose the basic allegation that is made. The statutory framework which regulates these judicial review proceedings contemplates that information that is relevant to the decision will be disclosed only in the course of the proceedings. That does not mean that the decision itself was unfair. There is no unfairness if the information is initially withheld in the genuine belief that disclosure would be damaging to the interests of national security but is then subsequently disclosed – see *Farooq v Secretary of State for the Home Department* (SN/7/2014 and SN/8/2014). That is what has happened here.

Outcome

76. The Secretary of State was entitled to conclude that L3 posed a risk to national security on the grounds that he had associated with Islamic extremists, he had misled the Secretary of State about this association, and he had been the leader of an armed militia group and he had shot dead a hospital security guard. The Secretary of State's conclusion that he should be excluded from the United Kingdom was rational and took account of all relevant factors. It was in accordance with the Secretary of State's policy. Adequate reasons were given. If and to the extent it interfered with the family's right to respect for private and family life that interference was proportionate to the interests of national security. The *Zambrano* principle was not engaged. The decision making process was fair.

77. The claim is dismissed.