

ASYLUM AND IMMIGRATION TRIBUNAL

GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050

THE IMMIGRATION ACTS

Heard at: Prosession House

Date of Hearing: 12 October 2009

Before:

**Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Pinkerton
Senior Immigration Judge Grubb**

Between

GW

Appellant

and

AN IMMIGRATION OFFICER, HEATHROW

Respondent

Representation

For the Appellant:

Mr Arfan Khan, instructed by C T Emezic Solicitors

For the Respondent:

Miss Giovannetti, instructed by the Treasury Solicitor

What are the 'fundamental interests' of a society within the meaning of reg 21 (a threat to which may justify the exclusion of an EEA national) is a question to be determined by reference to the legal rules governing the society in question, for it is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests.

DETERMINATION AND REASONS

1. Geert Wilders (the Appellant) is a national of the Netherlands. He appeals to this tribunal against the decision of the Respondent on 12 February 2009 refusing to admit him to the United Kingdom. Although the decision was formally made by an Immigration Officer, there is no doubt that it was made with the consent of and on the instructions of the Secretary of State and for the purposes of this appeal, Miss Giovannetti, who represents the Respondent, has referred to those individuals equally.

2. Prior to the Hearing the Tribunal had the benefit of receiving skeleton arguments as follows: a skeleton argument on behalf of the Appellant running to ninety-one paragraphs on thirty-four pages; a response to that by Miss Giovannetti, on behalf of the Respondent, running to twenty-three paragraphs on seven pages; and in response to that a further skeleton argument from Mr Khan on behalf of the Appellant, running to ninety-seven paragraphs on fourteen pages. We have read all those: and in view of the copious information that they gave us, on the position of the Appellant in particular, we began the hearing by suggesting that we should hear from Miss Giovanetti first. After taking brief oral evidence we did so; and in the result we have not needed to call on Mr Khan.
3. The Appellant is a member of the Dutch Parliament. He is the leader of his party which is, we understand, the eleventh largest in that Parliament. His views, to which we refer in a moment, may be shared by all the members of his party, but this we do not know. We are concerned with the views he holds personally. He is strongly opposed to what he sees as the Islamicization of Europe. He expresses his views in a manner which any right thinking person would regard as offensive to the religion of Islam and its founder. His aim as he declares it is in particular to persuade others that the religion and culture of Islam is not one that should be tolerated or followed. He has made a film called 'Fitna' which interposes readings from the Koran, the holy book of Islam, with images of atrocities committed around the world, with the implication that the relevant suras of the Koran encourage or permit the acts portrayed. His activities, by showing the film and expressing his views, have caused concern and debate in many countries. We were referred in particular to a condemnation of his views and of the film made on behalf of the United Nations by the Secretary-General last year.
4. The appellant proposed to visit the United Kingdom. He was to be the guest of Baroness Cox and Lord Pearson of Rannoch, who gave oral evidence before us. The visit was to take place on 12 February this year. Lord Rannoch told us what the visit would entail. The Appellant was to attend a Committee Room at the House of Lords and to show his film, 'Fitna', and to be available for a question and answer session. The meeting was to be open to all members of either House of Parliament who wished to attend, and to anybody else holding a pass for the Palace of Westminster. That meeting was, we were told, to last for about an hour. The Appellant was then to go across the road to the premises which are, in essence, the House of Lords press conference room. There was to be a similar meeting on those premises. It was primarily to be intended for the press but was to be open to the public. Again the film was to be shown and the Appellant would be available to take part in a question and answer session which was to be chaired by Baroness Cox. That was the proposal.
5. On 10 February 2009, two days before those events were to take place, an official writing on behalf of the SSHD, wrote to the Appellant via the British Embassy in The Hague. The letter reads as follows:

“The purpose of this letter is to inform you that the SSHD is of the view that your presence in the UK would pose a genuine, present, and sufficiently serious threat to one of the fundamental interests of society. The SSHD is satisfied that your statements about Muslims and their beliefs, as expressed in your film ‘Fitna’ and elsewhere, would threaten community harmony, and therefore public security in the UK. You are advised that, should you travel to the UK and seek admission, an immigration officer will take into account the SSHD’s view. If in accordance with Regulation 21 of the Immigration European Economic Area Regulations 2006, the immigration officer is satisfied that your exclusion is justified on grounds on public policy and/or public security, you will be refused admission to the UK under Regulation 19. You would have a right of appeal against any refusal of admission exercisable from outside the UK. “

6. Despite the contents of that letter the Appellant travelled to the UK with the intention of carrying out the programme to which we have alluded. After an interview at the airport, he was refused admission. The Notice of Refusal is the decision against which he appeals in these proceedings. The substantive part of it reads as follows:

“You have sought admission to the UK under EC law in accordance with Regulation 11 of the Immigration European Economic Area Regulations 2006, on the grounds that you are a Dutch national. However, I am satisfied that your exclusion is justified on grounds of public policy and public security for the following reasons.

As a result of your previous activities in the Netherlands you are to be prosecuted for incitement to hatred and discrimination. These are grounds similar to inciting racial and religious hatred under English law. While you have not been convicted of any criminal offence, as an Immigration Officer I am obliged to balance your right to free movement against the threat your presence in the UK could pose to public safety and public order. I understand that during your stay in the UK you intend to attend the screening of your film ‘Fitna’ that promotes the views against Muslims and their belief which form a basis for the Amsterdam appeals court’s decision that you should be prosecuted in the Netherlands.

After considering the purpose of your proposed stay, and noting the high level of public attention your activities have previously attracted within the Netherlands, I have concluded that there is a considerable risk that your presence in the UK would threaten community harmony and therefore public security. In light of this I consider that your presence could foster hate and lead to inter-community violence within the UK. Therefore in accordance with Regulation 21 of the 2006 EEA Regulations, I am denying you admission under Regulation 19 of those Regulations. This decision attracts limited right of appeal from abroad and you are now liable for removal from the UK.”

7. The Appellant was duly removed, or at any rate went back to the Netherlands, and exercised his right of appeal. The challenge to the decision of 12 February is by way of appeal on the grounds that the Appellant has a right of free movement and a right of freedom of expression and of association. Our task is to decide

whether in the circumstances of the present case, the Appellant's exclusion is justified and appropriate.

The Law.

8. The regulations to which the Notice of Decision makes reference are the Immigration (European Economic Area) Regulations 2006 (SI 1003/2006). Regulation 11(1) is as follows:

“An EEA National must be admitted to the UK if he produces on arrival a valid national identity card or passport issued by an EEA state.”

9. Part 4 of the Regulations is headed: “Refusal of admission and removal, etc”. Regulation 19 has as its first paragraph:

“A person is not entitled to be admitted to the UK by virtue of Regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with Regulation 21.”

10. For completeness we will add para (3):

“Subject to paras 4 and 5, a person who has been admitted to, or acquired a right to reside in, the UK under these Regulations may be removed from the United Kingdom if

(a) he does not have, or ceases to have, a right to reside under these Regulations, or

(b) he would otherwise be entitled to reside in the UK under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 21.”

11. We need to read reg 21 almost in full. We omit paras 6 and 7.

“21(1) In this regulation a ‘relevant decision’ means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under Regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of eighteen,

unless the relevant decision is necessary in his best interests as provided for in the Convention on the Rights of the Child

(5) Where a relevant decision is taken on the grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles:

(a) the decision must comply with the principle of proportionality.

- (b) the decision must be based exclusively on the personal conduct of the person concerned.
- (c) the personal conduct of the person concerned must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society.
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision.
- (e) a person's previous criminal convictions do not in themselves justify the decision".

12. The Articles of the European Convention on Human Rights dealing with freedom of expression and freedom of association are amongst those in the Schedule to the Human Rights Act 1998 and so constitute 'Convention rights' in the law of the UK. We need read only Article 10 which is headed Freedom of Expression:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television, or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

13. We should say that Article 2 of protocol 4, which was relied on by Mr Khan in his skeleton argument, has not been ratified by the UK. It is not scheduled to the Human Rights Act 1998. It is not part of English law and plays no part in our decision.

The Interpretation of Regulation 21

14. It is clear that we are concerned primarily with interpreting reg 21 of the EEA Regulations. Miss Giovannetti points out, and it is indeed uncontroversial, that in determining whether a person should be allowed to enter, or be removed from, the UK in pursuance of reg 21, there is an ascending difficulty, if we may so put it, arising from paras (3) and (4) of that regulation. The more firmly anchored in the United Kingdom an individual is, the greater the considerations necessary to justify his removal, or refusal of admission. A person who merely intends a short visit is on the bottom rung of the ladder. The decision must nevertheless comply with, in particular, paras (2) and (5) of reg 21; but when we are looking to see what within reg 21(5)(c) is a "sufficiently serious threat, affecting one of the fundamental interests of society", we must look at what is sufficient for the purpose of the refusal of entry of the person who does not have a fixed right to reside in the UK but merely intends a short visit.

15. Having said that, in interpreting the provisions applicable to this appeal for the purposes of applying them, we come at once to a point of considerable difficulty. What is precisely meant by Regulation 21(5)(c)? In particular, does the phrase, “a threat affecting one of the fundamental interests of society” necessarily imply a threat to do something which is prohibited by law? Or, does it have a wider meaning, justifying exclusions by reference to this provision, even where there is no suggestion that the individual will contravene the law? We are told that there is no authority on this point.
16. Mr Khan takes it as a given that there must be a real prospect that a crime will be committed. Miss Giovannetti’s primary submission is that no such thing is necessary. In our view the true position lies somewhere between those two extremes but very much nearer to Mr Khan’s position than Miss Giovannetti’s. In our judgement it would be very rare indeed for a state to be able to establish that prospective activity falls within Regulation 21(5)(c) when it is not prohibited by the law of the state in question. We use the word “prohibited” rather than referring specifically to the criminal law, in order to encompass such matters as breach of the peace in England and Wales. As the House of Lords most recently expounded in R (Laporte) v Chief Constable of Gloucestershire [2006] UKHL 55, a breach of the peace is not a crime in English law; but it is also not permitted. A person committing or about to commit a breach of the peace may be, and indeed should be, prevented from doing so, by any other person: see Lord Bingham’s speech at [29]). For the purposes of reg 21(5)(c) we draw no distinction between an activity so prohibited and an action subject to the penalties of the criminal law. We do, however, think it is right to distinguish, between actions that are prohibited and actions that are not prohibited.
17. We reach that conclusion for two reasons. The first depends firmly on the wording of the regulation. The threat has to be one which affects one of the fundamental interests of society. In a society as closely regulated as the United Kingdom is, but probably in any society governed by the rule of law, it is one of the functions of legal regulation to protect the fundamental interests of society. If one wants to discover what interests are regarded as fundamental in a society it is appropriate to look at the legal provisions in that society. It is therefore highly unlikely that a matter which is not governed by law is a matter which is properly regarded as the fundamental interests of that society. That is the first reason.
18. The second reason is perhaps only another way of looking at the first. It depends largely on discrimination. The matter can be tested by imagining that in Laporte’s case, the travel to the proposed site of demonstration was by air, instead of being by coach, and that amongst the demonstrators was, as well as UK nationals, a Dutchman. The decision in Laporte is that at the time when the demonstrators were restrained there was, at any rate in the case of the claimant, no justification for applying any prohibition to her. Had the position had been that she was travelling by air with a Dutchman, the proposal is that he could have been stopped at the airport, because he, intending to do precisely the same thing, might pose a threat to one of the fundamental interests of society. That would be

a discrimination between the British citizen and the Dutchman. It would be a discrimination which could not be objectively justified because the threat, if it was a threat, would be being posed by the British citizen at the very time the Dutchman was refused entry. A distinction of that sort is prima facie illegal in European law; but it is also a matter of common sense. It is difficult, very difficult in our view, to see that something which could be done with impunity by a British citizen (in the example we give, travelling towards a proposed demonstration) is something which, when done by a non-UK national, poses a threat to the fundamental interests of society.

19. For those reasons therefore we have concluded that for present purposes, reg 21(5)(c) refers only to conduct which is prohibited. Having reached that conclusion, we immediately find another question of interpretation, albeit one which is not as difficult as the last. Alongside the principles relating to breach of the peace, the regulation of public order as a matter of the criminal law, is largely contained in the Public Order Act 1986 as amended a number of times. It is, as we understand it, common ground between the parties that no other provisions of the criminal law are of any relevance for the purposes of this appeal and, specifically, Miss Giovannetti did not ask us to consider the Appellant's respective criminality in any other context.

20. It follows, from what we have said at the beginning of this judgement about the Appellant's views and their expression, that his conduct is likely to be conduct amounting to criticism in the strongest terms of the Muslim religion. For that reason Mr Khan has engaged in a detailed consideration of the amendments to the 1986 Act introduced by the Racial and Religious Hatred Act 2006. That Act inserts a new Part 3A into the 1986 Act, headed: "Hatred against persons on religious grounds", and makes provisions prohibiting conduct under a number of head on that basis.

21. Section 29J is headed "Protection of freedom of expression" and is as follows:

"Nothing in this part shall be read or given effect in a way which prohibits or restricts discussion, criticism, or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions, or the beliefs or practices of their adherents or of any other belief system or the beliefs or practices of its adherents, or proselytising, or urging adherents of a different religion or belief system to cease practising their religion or belief system."

22. Mr Khan refers in his skeleton argument to the explanatory note, and he submits in writing as follows:

" 24. It follows therefore that a speech which falls within 29J is protected speech and in such a case no public disorder offence can be committed under the Public Order Act 1986."

23. We reject that submission. It is clearly too wide. Section 29J prevents the conduct which it describes from being an offence under Part 3A. It does not

permit conduct that would amount to an offence under the sections of the Public Order Act 1986 that are not within Part 3A.

24. We turn therefore to those other parts. If there is a prospect of the Appellant's conduct amounting to conduct prohibited by the criminal law the offence would be one under s 4, s 4A or s 5 of the Act. Sections 4 and 4A require a specific intent. Section 5 does not, but it presents other difficulties. It is as follows:

"5(1) A person is guilty of an offence if he
(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."

25. The other subsections include provisions relating to the commission of the offence in private premises such as a dwelling-house, and provide, in certain circumstances, for a specific defence. But it does appear to be clear that the offence under s 5 is committed only in relation to persons who are present, which appears to mean physically present at the time of the expression in question.
26. Miss Giovannetti does not retreat from her submission that the s 4A offence, and perhaps the s 4 offence, might be committed. But the offence under s 5 is clearly the one that is most likely to be of concern, and we repeat that a breach of the peace, or potential breach of the peace, is also capable of falling within reg 21(5)(c).

Assessing the Threat

27. In deciding whether there is a genuine, present and sufficiently serious threat, posed by the admission of the Appellant to the United Kingdom, we must look at the evidence. Miss Giovannetti asks us to give deference to the Secretary of State's and the Immigration Officer's views; but it is very difficult to see how that it is to be done in an appeal on the merits, such as this is, when the evidential basis for those views is largely undisclosed, or, if it has been fully disclosed in the letter of 10 February and the decision under appeal, is so sparse and so vague as it is, and in being directed to community harmony independent of the commission of any prohibited act, is perhaps misjudged or misguided. It is right for us to look at the evidence and reach our own view on it.
28. It seems to us that so far from pointing towards the application of reg 21(5)(c), the evidence points in the opposite direction. There is simply nothing to suggest that the Appellant's presence is likely to cause any difficulties at all. He lives and works and expresses his views in the Netherlands, a country with a by no means insignificant immigrant Muslim population; and we have been told of no public order difficulties there. He has visited other European countries and we have not been told of any public order difficulty. He has visited the United Kingdom on at

least one previous occasion and there were no public order difficulties. His views, and the film 'Fitna', are available throughout the world, by the Internet, by publications, and by news reports. For the purposes of this appeal it is important to note that the film has been shown and discussed in the United Kingdom particularly, but probably not only, at the meetings it was proposed he attend on 12 February 2009, and which went ahead in the event without him. There were no public order or other difficulties. The only difficulties of which we have been told have been in Muslim countries which the Appellant has not visited. The Respondent's written evidence refers generally to Muslim countries; specifically in the course of her submissions Miss Giovannetti referred to a demonstration of some sort in Iran. We are surprised if it is to be said that what happens in Iran is therefore likely to happen in the United Kingdom.

29. The invocation of reg 21(5)(c) in this appeal is therefore on a basis that is not only entirely speculative: it is contrary to the available evidence. Despite the nature of the Appellant's views, and the vigour with which they are expressed, it does not appear that his conduct in expressing them represents a threat affecting one of the fundamental interests of society. And that is, as we see it, the case even if, contrary to our view, reg 21(5)(c) encompasses conduct that is not prohibited.
30. We have not yet, however, dealt with two matters that Miss Giovannetti on behalf of the Respondent particularly urges upon us. The first is that the position in the Netherlands itself may not be as anodyne as the evidence to which we have already referred suggests. After considerable hesitation, and following a decision of the Amsterdam Court of Appeal, a prosecution of the Appellant has commenced under Dutch Penal Code Articles relating to public order. That decision has been taken since the Appellant's last recorded visit here in 2008.
31. We do not, however, find the fact that a prosecution has commenced is of any assistance in determining this appeal. A prosecution is not a conviction. Evidence supporting a prosecution cannot be regarded as having been accepted as true by the criminal court. Even a conviction of an offence under the law of the Netherlands would not, of itself, show that the Appellant posed in this country a threat within the ambit of Regulation 21(5)(c) even without taking into consideration the further requirement of Regulation 21(5)(e). It is of course possible that evidence may be given to, or accepted by, the Dutch court in the future; and in that case it may constitute a matter to be taken into consideration in relation to any future decision made in respect of the Appellant. The evidence before us, however, in relation to those proceedings, does not affect the matter one way or the other.
32. A second additional factor is rather more troublesome, not in terms of the decision we make, but because of what it appears to imply about the arguments being adduced on behalf of the Respondent. It is said that the presence of the Appellant in this country along with the expression of his views is an untried situation. As it is, he has been here before, and his views have been expressed here before, but the two have not previously happened together. Miss

Giovannetti asked us to take into consideration the new risk posed. She said that if the Government was seen as having made a decision allowing the Appellant to enter the United Kingdom - “welcomed” was the word she used in argument - there might be an additional risk to public order and community harmony, above those previously experienced.

33. The first thing to say about that is that it remains entirely speculative, and does not advance the respondent’s argument at all. That is not what is troubling. What is, is the following.
34. First, if there was disquiet about the Appellant having been welcomed into this country, that is, allowed by some executive act to enter, the disquiet would surely be with the government. Criticism of a government decision is entirely proper in a democratic society and to characterise it as “community disharmony” that ought not to be allowed to occur is entirely inappropriate. We hope that that was not what Miss Giovannetti was arguing on behalf of the Respondent. It would have been entirely unworthy.
35. But, secondly, there is, as the Respondent well knows, no question of welcoming the Appellant to the United Kingdom. The constitutional structure and the legal foundations of this country have entirely changed since 1997. As a result of the 2006 Regulations, introduced by the present government, a Dutchman has almost the same right to visit London as a Yorkshireman has; and as a result of the Human Rights Act 1998, a Dutchman has the same right of freedom of expression as a Yorkshireman has. It should be the government’s role to celebrate, publicise, and promote its reforms rather than to ignore them or misrepresent them, or allow them to be misrepresented. If the Appellant comes to the UK it is in the exercise of a right given to him by the 2006 Regulations, a right of free movement given by the UK government to all citizens of all countries of the European Union. No question of leave to enter, or of “welcoming” arises.

Freedom of Speech: the Interference

36. We turn now to issues directly relating to proportionality and freedom of expression. We set out Article 10 earlier. We remind ourselves that the test for the assessment of the proportionality of a decision which affects freedom of expression is that expressed (uncontroversially as far as we understand it) by Laws LJ in Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, at [39]. In that case the decision under challenge was comprised in by-laws relating to camping at Aldermaston. Laws LJ with whom the other members of the Court agreed, said this:

“In the light of all these considerations, I consider that if he is to show compliance with his obligations under the Human Rights Act, the Secretary of State must demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Bylaws, amounting to an undoubted pressing social need.”

37. We must now look at the decision of highest national authority relating to Article 10 in an immigration context. That is the decision of the Court of Appeal in R (Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606. In that case the claimant was a citizen of the United States and the leader of a religious, social and political group known as the Nation of Islam. He was excluded from the United Kingdom following directions given by the Secretary of State. He applied for judicial review to quash the exclusion order and cited Article 10 of the European Convention on Human Rights as supporting his claim to a right to enter the UK in order to have the freedom to express views to, and receive views from, his followers and to engage with them.
38. The decision of the Court of Appeal is based to a large extent on conclusions relating to the proper role of the Secretary of State, who in that case had set out at some length the basis upon which the decision was made' and sought to support it by substantial evidence. But in the course of the judgement of the Court, given by Lord Phillips MR, at [77], he said this:

"The other factor of great relevance to the test of proportionality is the very limited extent to which the right of freedom of expression of Mr Farrakhan was restricted. The reality is that it was a particular forum which was denied to him rather than the freedom to express his views. Furthermore, no restriction was placed on his disseminating information or opinions within the UK by communication other than his presence within the country. In making this observation, we do not ignore the fact that freedom of expression extends to receiving as well as imparting views and information and that those within this country were not able to receive these from Mr Farrakhan face to face."

That was evidently part of the consideration, an important part as it is described, which led to the Court of Appeal rejecting the claim made on behalf of the claimant in that case.

39. At first sight the distinction made in para 77 between a particular forum being denied to a person, rather than the freedom to express his views, seems to pose considerable difficulties for the Appellant. That is because it is part of the background of the present case that the Appellant's views, including the film 'Fitna', are widely available in this country; and there is and probably could be no proposal to prevent their dissemination by any means other than the Appellant's presence here. He too, therefore, might perhaps be regarded as restricted only in the forum of expression, rather than the content of what he says. But it appears to us that the difficulty posed by Farrakhan's case is for a number of reasons more apparent than real.
40. The first is that in Tabernacle, Laws LJ expresses caution about regarding the distinction between forum and content as a rigorous one. At [35] he says this:

"In my judgement, the supposed distinction between the essence of a protest and the manner and form of its exercise, has to be treated with considerable care. In some cases it will be real, in other insubstantial. It all depends on the particular facts."

That was a case in which, of course, the mode of protest was camping, and camping in a particular place. The judgement of the Court was that for the purposes of the expression for which freedom was claimed, being able to camp in the particular place was the content of the protest and not only its form.

41. With that caution in mind, we turn to the crucial distinction between Farrakhan's case and the present.
42. Farrakhan was a citizen of the United States of America. He had no right to enter the United Kingdom other than in accordance with leave given as the exercise of a positive decision in his favour by the Secretary of State. As he had no underlying right to enter the United Kingdom, Article 10, granting him freedom of expression, had to do all the work of constructing a right to enter that might override the Secretary of State's decision excluding him. Article 10 is not in substance a provision about immigration and it may not be surprising that in the context of the decision in Farrakhan, Article 10 failed to give a right powerful enough to override the exclusion of the claimant.
43. This case is entirely different. As a Dutch national, the Appellant has an underlying right to come to the UK pursuant to the provisions of reg 11 of the EEA Regulations. He has that right unless he is validly prohibited from exercising it by a decision taken under reg 19, with reference to reg 21. His Article 10 rights, accordingly only supplement a prima facie right to enter. They do not of themselves have to constitute or give rise to that right. It seems to us, therefore, that in the case of a claimant who is a citizen of an EU country, a considerably smaller infringement of the right of expression, may assist him, because it may be sufficient to show that his prima facie right of free movement should prevail.
44. There is another important difference between Farrakhan and the present case. Farrakhan was, as we have said, the leader of a group whose members he sought to address by visiting the UK. To that extent, although his visit was said to have political and religious dimensions if it took place, it was a private visit. It was to be the visit of a leader to meet his members. That is not the position in the present case. The purpose of the Appellant's proposed visit was to meet parliamentarians and other policy- and decision-makers and publicisers. There was to be a question and answer session in which individuals would have an opportunity to challenge the Appellant and to see what his answers were. And his purpose was clearly to see if others might be persuaded to take the same view as he does. That is a function of a public nature in a sense that the proposed visit by Farrakhan was not. The proposal was to exercise the rights of freedom of expression for what may be regarded as one of the fundamental reasons for which those rights exist.
45. What then, are those rights? As Sedley LJ said in Redmond-Bate v Director of Public Prosecutions 7 BHRC 375, a decision of 23 July 1999:

“Free speech includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, providing it does not intend to provoke violence. Freedom only to speak inoffensively is not worth having.”

46. But the matter goes further than that, because freedom of speech in a democratic society is one of the ways in which democracy works. It would be very rare for a government to be justified in restricting the freedom of expression of an opinion which might inform the votes of voters as well as the law of lawmakers and the policy of policymakers. That is why the right to freedom of speech is a strong right. It is why the test is the high test set out by Laws LJ in Tabernacle, to which we have referred. It is in accordance with that test and with the considerations to which we have just referred that we consider whether the decision in the present case could be justified.
47. In Farrakhan's case, because there was, as we would say, a private function to the meeting, because the claimant was a United States citizen, and because the restriction was only as to forum, the provisions of Article 10 were said not to be sufficient to give the claimant a right to enter, despite the encroachment on his Article 10 rights. In other words, the interference with those rights was not in that case substantial enough to constitute an interference that could not be justified under the provisions of the second paragraph of Article 10.
48. In contrast, and because of the aspects of it that we have identified, we consider that in the present case the restriction imposed on the Appellant by the refusal to admit him to the UK was a substantive interference with his right of freedom of expression. It was substantive because the proposed exercise of freedom of expression was one to which the highest value ought to be given and it was substantive because the right to freedom of movement supports the right of freedom of expression which he sought to exercise.

Freedom of Speech: Proportionality and Justification of Interference

49. We must therefore look to see whether there has been or could be a justification of the interference of that right. We refer again to the evidence. The evidence is not that any particular purpose would be served by his exclusion. There is, as we have found on the evidence, no demonstrable threat to any of the values protected by the law of the UK.
50. We have been referred to the decision of the European Court of Human Rights in IA v Turkey 45 EHRR 703. That is a decision in which a conviction under the blasphemy law of Turkey was challenged by the claimant. He had published a book criticising Islam, and the criticism was evidently in strong and offensive terms. He was convicted under the applicable Turkish law and claimed before the European Court that his conviction was a violation of his rights under Article 10. He failed in that claim. The Court took the view that Turkey was entitled to have the criminal law that it did, and to apply in the way that it had done. There

was no doubt in that case that the decision made by the Turkish Court was a decision which was in accordance with the Turkish legal order.

51. Miss Giovannetti points out that the Court reminded itself and decided that although the rights under Article 10 are strong and broad, there are limits. As it is put in the head-note, those who chose to exercise the freedom to manifest their religion could not reasonably expect to be exempt from all criticism. They had to tolerate and accept the denial by others or their religious beliefs and even the propagation of doctrines hostile to their faith. But the case concerned not only comments that offended and shocked, or were provocative opinion, but also an abusive attack on the Prophet of Islam. The measure, that is to say, the existence of the criminal statute and the conviction under it, had been intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it had met a pressing social need. The authorities could not be said to have overstepped their margin of appreciation and the reasons given by the Turkish court to justify the measure had been relevant and sufficient.
52. As Miss Giovannetti correctly points out, that case strongly draws the distinction at the Strasbourg level between criticism, even strong criticism and the expression of views in a way which is merely offensive. But it does not appear to us to assist very greatly in the present case.
53. That was a case where the effect of the national law was to prohibit the statement from being made. The criminal law of Turkey prevented the claimant, IA, from writing, publishing and selling the statements he had done. He claimed that Article 10 gave him a right nevertheless. There is no suggestion here that the United Kingdom proposes to (or could) prevent the statements made by the Appellant from being made. The question is only whether the Appellant should be admitted to the United Kingdom; and that admission would take place in the context of a state which, whether obliged to do so or willingly, accepts the fact that statements of the form made by the Appellant, and indeed statements made by him, are lawfully in circulation here. So the first reason why we consider that no proper justification has been shown, is that in the circumstance of this case, and on the evidence before us, the measure is not demonstrated to have any effect at all.
54. Secondly, the Appellant's exclusion is not necessary. There are two reasons why we say that. The first is that, as we indicated earlier in this determination, reg 19(3) has, *mutatis mutandis*, and with the addition of another factor, precisely the same considerations for removal of a European National from the UK as apply to refusal of his admission. It is therefore highly unlikely to be necessary to exclude somebody on a speculative basis about what may happen, given that, if there is, after his admission, any real ground for apprehending the threat, he can be removed under reg 19(3) by reference to the same considerations as are invoked here.

55. The other factor is the existence in this country of effective enforcement of law and order. The police forces in particular are well able to protect a right as fundamental in a democratic society as that of freedom of expression, and to prevent that right being exercised in a way which damages in fact, or threatens to damage any fundamental interest of our society.

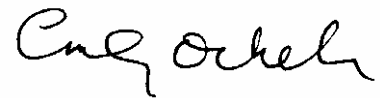
56. For the reasons we have given, our conclusions are as follows.

1. Regulation 21(5)(c) incorporates a reference to conduct prohibited in the state in question, and there is no reason on the evidence to suppose that that regulation as so interpreted applies to the present case.

2. Secondly, if we are wrong about that, there is in any event no demonstrable risk of community disharmony or disorder arising from the Appellant's arrival.

3. Thirdly, even if reg 21(5)(c) applied, the decision would fail the test of proportionality, imposed generally by the European Union law and specifically by Regulation 21(5)(a).

For those reasons the Appellant's appeal is allowed.



C M G OCKELTON
DEPUTY PRESIDENT
Date: 17 October 2009