Michaelmas Term
[2014] UKSC 60
On appeal from: [2013] EWCA Civ 199

JUDGMENT

R (on the application of Lord Carlile of Berriew QC and others) (Appellants)

v

Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Sumption

JUDGMENT GIVEN ON

12 November 2014

Heard on 13 May 2014

Appellants
Lord Pannick QC
Harry Adamson
(Instructed by Masoud Zabeti, Mishcon de Reya)

Respondent
James Eadie QC
Robert Palmer
(Instructed by Nicola Morton-Wright, Treasury Solicitors)

LORD SUMPTION:

1. The United Kingdom has had a uniquely difficult relationship with Iran for at least a century and a half. British control of the country's natural resources in the late nineteenth century and the first half of the twentieth, a succession of British-orchestrated coups, and two extended British military occupations have combined to leave an enduring imprint on political sentiment. The passage of time heals many things, but in an ancient and distinctive national culture like Iran's, injured pride can subsist for generations. In recent years, the participation of the United Kingdom in international sanctions against Iran and a number of violent incidents have revived old suspicions at a time when negotiations with Iran about middle eastern issues, nuclear non-proliferation and human rights have assumed considerable importance for British interests and global security.

2. This is the background against which the Home Secretary, on the advice of the Foreign Office, decided that it was not conducive to the public good to allow Mrs Maryam Rajavi to enter the United Kingdom. Mrs Rajavi is described in the agreed Statement of Facts as a "dissident Iranian politician, resident in Paris". Between 1985 and 1993, she was the co-chair and then the Secretary-General of Majahedin e-Khalq ("MeK"), otherwise known as the People's Mojahedin Organisation of Iran. MeK is a political organisation founded in 1963 by opponents of Shah Mohammed Reza Pahlavi, which participated in the Iranian revolution of 1979 but subsequently fell out with the regime led by Ayatollah Khomeini. From the 1970s until 2001, MeK supported terrorist violence inside Iran, including bomb attacks and assassinations. It supported Iraq in its eight-year war with Iran between 1981 and 1989, when its fighters fought alongside Iraqi forces against those of Iran. For at least part of this period, Mrs Rajavi was also deputy commander of the armed forces of the opposition National Liberation Army. The evidence is that while no longer holding any formal office in MeK, she remains its de facto leader. Since 1993, she has also been the President-elect of the National Council of Resistance of Iran, a political organisation opposed to the current government of the country. Mrs Rajavi has visited the United Kingdom on four occasions, in 1985, 1990, 1991 and 1996. But in 1997, the then Secretary of State excluded her from the United Kingdom on the ground that her presence there "would not be conducive to the public good for reasons of foreign policy and in the light of the need to take a firm stance against terrorism." That exclusion has been reviewed at regular intervals, but has remained in force ever since.

3. Section 3 of the Terrorism Act 2000 provides for the proscription of organisations concerned in terrorism. Between 2001 and 2008, MeK was a proscribed organisation in the United Kingdom for the purposes of the Act, and in a number of other jurisdictions under corresponding legislation. Its proscription was revoked in the United Kingdom on 30 November 2007 by the Proscribed Organisations Appeals Commission ("POAC"). The Commission found that while MeK had been actively engaged in terrorism until June 2001, this had no longer been true since that date. The organisation was subsequently de-proscribed in the European Union (January 2009), the United States (September 2012) and Canada (December 2012). It is common ground that it is now a wholly non-violent organisation and Mrs Rajavi's own democratic credentials are not in dispute. She lives in France and is not excluded from any European country other than the United Kingdom. She engages regularly with parliamentarians in the European Parliament and a number of European national legislatures.

4. On 5 December 2010, Lord Carlile of Berriew QC, on behalf of himself and two other members of the House of Lords, asked for a meeting with the current Home Secretary to discuss the possibility of Mrs Rajavi's exclusion being lifted to enable her to address meetings in the Palace of Westminster on democracy, human rights and other policy issues relating to Iran. The request was accompanied by written representations. The Home Secretary sought the advice of the Foreign Office, where Lord Carlile's request was personally considered by the Foreign Secretary and the Parliamentary Under Secretary of State with the support of officials. On 1 February 2011, the Home Secretary responded to Lord Carlile's request for a meeting. She wrote that she had reconsidered Mrs Rajavi's case, taking into account the views of the Foreign Office and other government departments, as well as his representations, but had concluded that her admission to the United Kingdom was not conducive to the public good. She wrote:

> "The exclusion of Mrs Rajavi in 1997 pre-dates, and was not linked to, the proscription of the People's Mojahedin Organisation of Iran (PMOI). The de-proscription of this organisation therefore has no direct bearing on whether or not Mrs Rajavi's exclusion should be maintained, which involves wider considerations.
>
> The power to exclude is a serious one and I do not take such decisions lightly. In taking such decisions I must ensure that I am acting reasonably, proportionately and consistently and that there is a rational connection between the exclusion and the legitimate aim being pursued."

No other reasons were given at this stage.

5. On 12 April 2011, Mishcon de Reya, acting for a cross-party group of MPs and peers, wrote a letter before action, making further representations, and criticising the decision on the ground that it contravened their clients' rights under articles 9 and 10 of the European Convention on Human Rights. They asked for the decision to be reconsidered. In the absence of a satisfactory response, they said that their clients would apply for judicial review. The Treasury Solicitor responded on the Secretary of State's behalf on 13 May 2011. The main points made were that articles 9 and 10 of the Convention were not engaged, because there were other means by which parliamentarians could communicate with Mrs Rajavi. In particular they could set up a video link or meet her personally in France. If, however, articles 9 and 10 were engaged, there was still no contravention because while the Secretary of State was not prepared to go into her reasons in detail, she had concluded that any right arising under those articles was outweighed by "other factors rendering it appropriate to maintain her exclusion decision."

6. By the time that the Treasury Solicitor's letter was written, sixteen cross-party members of the House of Commons and the House of Lords had applied on 3 May 2011 for judicial review to challenge the Secretary of State's decision. Mrs Rajavi herself was added as a claimant in September 2011. In October 2011, after considering their application and the evidence in support of it, the Secretary of State made a second, fully reasoned decision, which was communicated to the claimants' solicitors by a letter from the UK Border Agency dated 10 October. Her reason, in summary, was "the significant damaging impact on UK interests in relation to Iran it is assessed that lifting the extant exclusion would bring about, and the consequences that may have for the lives and interests of others." Although the Secretary of State maintained her view that there was no interference with the claimants' article 9 rights, she did not on this occasion dispute that article 10 was engaged. What was said was that the availability of alternative methods of communication with Mrs Rajavi meant that any interference with the claimants' article 10 rights was limited, and that the decision was proportionate to it.

7. The Secretary of State's reasons have been subjected by the claimants to detailed criticism. I therefore propose to set them out substantially in full:

> "Whilst it is accepted that the MeK was de-proscribed by the UK in 2008 on the basis that it could not reasonably be believed to have continued to be concerned in terrorism since June 2001,

the organisation's historical activities and Mrs Rajavi's past role in them as de facto leader cannot be ignored. It is widely recognised that the MeK was actively concerned in terrorist activities between the 1970s and 2001. Acts committed by the MeK during this period include attacks on western interests. It is against this background that Mrs Rajavi was excluded from the UK in 1997, following her move to Iraq from where she had urged the MeK to 'liberate' Iran, at a time when the MeK had continued to mount terrorist attacks there. The MeK's history of terrorist violence until June 2001 and involvement in the Iran/Iraq war, where it was fighting with Iraqi forces against Iran, continues to resonate today. It has resulted in there being little support for the group among the general population in Iran, including anti-regime organisations, demonstrators and oppositionists, The FCO does not agree with Lord Carlile's own assessment that Mrs Rajavi 'leads the movement for democratic change in Iran' (para 22 of his witness statement). It assesses that the MeK is not a credible opposition group in Iran. The well-known Iranian opposition, the Green Movement, for example, has publically distanced itself from any involvement in it.

The UK has diplomatic relations with Iran. There is a British Embassy in Tehran and an Iranian Embassy in London. The UK has a strong interest in working with Iran on major policy issues including nuclear counter-proliferation, wider issues in the Middle East and human rights. Cooperation between both countries on issues of mutual importance also include reciprocal visa services (both diplomatic and public), consular services and cultural/educational exchanges.

However, UK interests are affected by difficulties in UK-Iran bilateral relations. The Iranian regime perceives that negative intent lies behind the UK Government's actions and statements. Any attempt at positive engagement by the UK is also viewed with scepticism. Anti-UK rhetoric by the Iranian authorities is frequent and both the President and the Iranian Parliament are particularly vocal in expressing their condemnation of the UK on a range of matters. This includes the perception that the UK is supportive of anti-Iranian extremist activities, including the sort historically carried out by the MeK. The 2008 de-proscription of the MeK led to serious political protests from the Iranian authorities and demonstrations outside the British Embassy in Tehran, particularly as the MeK remains

proscribed in Iran. The Iranian authorities believe that the de-proscription of the MeK in the UK was politically motivated, notwithstanding attempts to explain otherwise.

Similarly, the lifting of Mrs Rajavi's exclusion would also be seen by the Iranians as a deliberate political move against Iran, and, it is assessed, would have a wide-ranging negative impact on UK interests and day-to-day relations, as well as on the major policy areas such as nuclear counter-proliferation, human rights and wider issues in the Middle East. It may also result in accusations, however unjustified, of double standards in respect of the condemnation of terrorism. Any deterioration in relations would also be likely to impact on FCO efforts to replace their Ambassador to Tehran and an Iranian Ambassador in London. In short, it is assessed that lifting the exclusion would cause significant damage to the UK's interests in relation to Iran and the UK's ability to engage with Iran on wider and crucial objectives.

Whilst Mrs Rajavi is able to travel to other European Countries (in particular by virtue of the fact that she is resident in France), the particular nature of the UK-Iran bilateral relationship is such that a particularly strong reaction is expected if her exclusion is lifted. The presence of a British Embassy in Tehran means that staff there are particularly vulnerable to anti-Western sentiment in general and anti-UK sentiment in particular. There is substantial concern that if bilateral relations were to deteriorate as a consequence of the lifting of the exclusion order, there could be reprisals that put British nationals at risk and make further consular cooperation even more problematic. Historically, the Iranian Regime has actively targeted the British Embassy and staff members in Tehran. Even when tensions periodically ease, UK based staff members' access to Iranian officials and information from the authorities has been difficult. Demonstrations outside the Embassy have included damage to property, invasion of compounds and restriction of staff movement due to the fears for personal safety. There have also been cases where British nationals have been held in detention for long periods, often on spurious charges and sometimes without consular access being granted. As Iran moves into a period of electoral activity once again, the Iranian regime is likely to direct accusations at the UK should there be any instability and a ramping up of rhetoric may also provoke an uncontrolled public reaction.

> When weighed against the serious potential effects of lifting the exclusion on the UK's interests in relation to Iran, the Secretary of State has concluded that the damage to the public interest significantly outweighs any interference with Mrs Rajavi's ability to express her views as President-elect of the NCRI and with the Parliamentarians' ability to meet her in person in London, particularly in view of the fact that Mrs Rajavi has many alternative means at her disposal for achieving these aims (e.g. meeting in France or a third country, or contact by video-link or other media).
>
> While it is argued by the claimants that there is an urgent need to discuss the future of Camp Ashraf with her, the Secretary of State does not consider that the desire of the original claimants to meet with Mrs Rajavi in London (as opposed to elsewhere, or by other media) is of itself of such importance that the future of Camp Ashraf will be materially affected if the exclusion is not lifted. That issue is considered ultimately to be for the sovereign government of Iraq and the leadership of Camp Ashraf to resolve; while debate about its future is acknowledged to be of value, there are acceptable means by which that debate can be continued even absent Mrs Rajavi's physical presence in the United Kingdom.
>
> …
>
> In light of all the available evidence, the Secretary of State has decided that Mrs Rajavi's exclusion from the UK must be maintained, is justified on foreign policy grounds and is proportionate to any limited interference with either her right of freedom of expression, or that of the Parliamentarians."

8. On 21 November 2011, Britain, together with the United States and Canada, strengthened financial sanctions against Iran on account of the nuclear proliferation issue. On 29 November, a previously planned demonstration was held outside the Embassy to mark the first anniversary of the assassination of a nuclear scientist (for which Britain, the United States and Israel were blamed). In the course of the demonstration para-militaries invaded the Embassy compound and a residential compound of the Embassy. For six hours the compounds were sacked with the acquiescence of the police. All British diplomatic staff were thereafter withdrawn for their own safety and the Iranian Embassy in London was closed on the orders of the Foreign Secretary. Diplomatic relations were maintained, but at the

lowest possible level. In the light of these events, the Secretary of State made a third decision in January 2012, in which she maintained the exclusion of Mrs Rajavi, adding further reasons to those that she had previously given. The essential paragraphs of the letter conveying this decision are as follows:

> "The lifting of Mrs Rajavi's exclusion would be interpreted in Iran by both the regime and the people as a demonstration of UK support for what continues to be perceived as a terrorist organisation hostile to Iran (the MeK remains an illegal organisation in Iran).
>
> Iran continues to regard Mrs Rajavi as the leader of a terrorist organisation and often cites the POAC judgment, which removed the MeK from the UK's list of proscribed organisations, as evidence of UK support for terrorism.
>
> The complicity of the Iranian regime in the invasion of both UK diplomatic compounds in Tehran on 29 November 2011 clearly demonstrated that the UK is the prime target in Iran for anti-western sentiment in the absence of US and Israeli embassies (a view which would be supported by almost any impartial academic or commentator).
>
> Following the events of 29 November 2011, the lifting of Mrs Rajavi's exclusion from the UK could also be perceived by Iran as a purposeful political response to the 29 November attack on our Embassy, increasing the likelihood of an adverse Iranian response.
>
> The case for exclusion is not based purely on foreign policy grounds but also on grounds of UK security, especially the safety of HMG staff in Iran (there remain over one hundred local employees in Iran), the protection of UK assets that remain in Iran, and the security of UK personnel in the region. The assessment of risk has increased since the 29 November attack as Iran has demonstrated that it is prepared to sanction actions that breach international law.
>
> The Iranian regime would seek to respond to the lifting of the exclusion either by targeting our interests in Tehran, putting

> our local staff at risk, and/or the potential shift of risk to British interests and properties outside Iran which could now bear the brunt of any retaliatory action against the UK, both within and outside the region.
>
> Having carefully considered all the available evidence, the Secretary of State has decided that the decision of 25 August 2011 to maintain Mrs Rajavi's exclusion from the UK must be maintained and defended as it is justified on grounds including concerns about the welfare of British personnel and interests overseas and is proportionate to any limited interference with either her own or the relevant Parliamentarians' human rights or right to freedom of expression."

9. The letters conveying the Secretary of State's second and third decisions were supported by witness statements of Mr Ken O'Flaherty, an official in the Middle East and North African Directorate of the Foreign Office responsible for diplomatic relations with Iran. Mr O'Flaherty's evidence sets out the facts recited in the Secretary of State's decision letters in somewhat greater detail, and evidently reflects the advice of the Foreign Office on which her decisions were based. The following are among the points which he makes:

(1) The United Kingdom's relations with Iran are described by Mr O'Flaherty as "fragile yet imperative". Historically, the United Kingdom has had a more difficult relationship with Iran than other countries have, which still affect the way that it is perceived there. Statements hostile to the United Kingdom are frequently made by prominent public figures in Iran in the Iranian Parliament and elsewhere. The United States and Israel are also the subject of "particularly hostile rhetoric", but of these three states the United Kingdom is the only one which maintains an Embassy in Tehran. Consequently, the British Embassy has for some years been the principal target for anti-western feeling in Tehran. Conditions there are difficult. Access by British diplomats to Iranian officials has been limited even at the best of times. The ramping up of rhetoric is liable to aggravate the situation at any time, provoking "uncontrolled local reactions". Locally engaged staff have been harassed and detained. Some have been bullied into leaving their employment. Acid bombs have been thrown into the Embassy compound.

(2) Although the United Kingdom recognises that MeK is no longer a terrorist organisation, this is not accepted in Iran, where it remains an

illegal organisation. Moreover, quite apart from its current activities (or perceived activities), MeK's past support for terrorism in Iran and its armed assistance to Iran's principal regional enemy in a major war remain a significant factor in political sentiment there. The de-proscription order of 2008 was regarded in Iran as unjustified and politically motivated and provoked serious political protests from the Iranian authorities and demonstrations outside the Tehran Embassy. More recently, in November 2011, the Iranian Parliament voted to expel the newly arrived British ambassador to Iran (Dominick Chilcott) citing Britain's historic hostility to Iran and its support for terrorism, a reference to the de-proscription of MeK. There are outstanding requests by the government of Iran for assistance against alleged MeK terrorist plots. MeK is an authoritarian and hierarchical organisation and the personality of Mrs Rajavi and her husband have a symbolic significance in Iran greater than that of any other member of its leadership. The lifting of the exclusion order would be perceived in Iran as a hostile political act.

(3) The United Kingdom has a strong interest in working with Iran on major policy issues, in spite of the difficulties. These issues include nuclear counter-proliferation, wider issues in the Middle East and human rights. In particular, the United Kingdom is a prominent member of the group of western countries negotiating with Iran about nuclear proliferation. In addition to these issues, there are significant consular issues in a country where British nationals are viewed with suspicion and have been arrested and detained, often for long periods on spurious charges. There is a concern that if bilateral relations were to deteriorate, British nationals would be at risk of reprisals.

(4) Even after the downgrading of diplomatic relations since the riots of November 2011, there are about 100 locally engaged members of staff still employed there. They, together with British property in Iran, are at risk of violence in the event of retaliatory action against the United Kingdom following a further deterioration of relations. There is also concern about the safety of British nationals outside Iran following threats to promote terrorism in the west in response to perceived western hostility. These developments have led to an increase in the assessed levels of risk at a delicate stage of the bilateral relationship between the United Kingdom and Iran.

(5) The Foreign Office assesses that allowing Mrs Rajavi entry to the United Kingdom would have a "significant damaging impact on the relations between the United Kingdom and Iran which would therefore harm our wider and crucial objectives concerning Iran (such as on the

nuclear issue)". In particular, it would "damage existing United Kingdom interests in relation to Iran and endanger the security, wellbeing and properties of British officials overseas." The United Kingdom might be prepared to accept a greater measure of risk as the price of supporting a viable opposition group in Iran, but its assessment is that MeK has little support within Iran and that its significance has been overstated by the claimants.

The issue

10. The claimants' challenge to the Secretary of State's decision in these proceedings is based entirely on article 10 of the Convention, which protects freedom of expression. It is now common ground that article 10 is engaged. The Secretary of State submits that the interference with the claimants' article 10 rights is justified as a proportionate response to the threat to national security, public safety and the rights of others which would be posed by a hostile reaction from the Iranian government and other forces in Iran.

11. In the courts below, the claimants' case was that the Secretary of State's decision was disproportionate. It failed to give due weight to the significance of the right of free speech protected by article 10 and the stringency of the test for justifying any interference with it, and it overstated the likelihood and gravity of any hostile reaction on the part of the government of Iran. These contentions have been rejected both by the Divisional Court (Burnton LJ and Underhill J) and by the Court of Appeal (Arden, Patten and McCombe LJJ.). They have been substantially repeated in this court, but Lord Pannick QC, who appears for the claimants, has also advanced for the first time a threshold objection of a more radical kind. He submits that the Secretary of State's reasons were legally irrelevant. This, he suggests, is because she was not entitled to have regard at all to the potential reaction of a foreign state which did not share the values embodied in the Convention, and had no respect for the right of free speech or other democratic values.

Article 10 of the Convention

12. Article 10 provides:

"Article 10 – 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. It is well established in the jurisprudence of the European Court of Human Rights that the more important the right, the more difficult it will be to justify any interference with it. For this purpose, freedom of expression has always been treated as one of the core rights protected by the Convention. It "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment": *Sűrek v Turkey* (1999) 7 BHRC 339, at para 57. The exceptions in article 10(2) must therefore be "construed strictly and the need of any restrictions must be established convincingly": *ibid*. In this respect, the jurisprudence of the Strasbourg court is substantially at one with the common law as it had developed for many years before the Convention received the force of law in the United Kingdom: see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at pp 283-284 (Lord Goff); *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 550-551 (Lord Keith); *R v Secretary of State, Ex p Simms* [2000] 2 AC 115, 125 (Lord Steyn); *R v Shayler* [2003] 1 AC 247, at para 21 (Lord Bingham)

The claimants' threshold argument: legal irrelevance

14. A person has no right to enter the United Kingdom unless he or she is an EU citizen. Under paragraph 320(6) of the Immigration Rules, if the Secretary of State has personally directed that a particular person's exclusion from the United Kingdom is "conducive to the public good", that person will be refused entry clearance or leave to enter. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at para 8, Lord Slynn

of Hadley observed that the expression "conducive to the public good" was not expressly defined or limited, and that the matter was "plainly in the first instance and primarily one for the discretion of the Secretary of State." The question is one of judgment, informed by fact.

15. When the question arises whether a person's presence or activities in the United Kingdom is conducive to the public good, it is self-evident that its potential consequences are a relevant consideration. Indeed, they will usually be the only relevant consideration. A threat to British persons or interests is one potential consequence which in an age of widespread international lawlessness, some of it state-sponsored, is unfortunately more common than it used to be. The existence and gravity of the threat is a question of fact. It cannot rationally be regarded as any less relevant to the public good because it emanates from a foreign state as opposed to some other actor, or because that state does not share our values, or because the threat is to do things which would be unlawful by our laws or improper by our standards, or indeed by theirs. The difficulty about the claimants' first submission is that it involves treating as legally irrelevant something which is plainly factually relevant to a question which is ultimately one of fact. Moreover, if the proposition be accepted, it must logically apply however serious the consequences and however likely they are to occur, unless perhaps it was so serious as to permit a derogation under article 15 ("war or other public emergency threatening the life of the nation").

16. In *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756 the House of Lords rejected a very similar argument, which had been adopted by the Divisional Court, to the effect that it was contrary to the rule of law for a prosecutor to discontinue a criminal investigation in response to threats from a foreign state to suspend intelligence co-operation, even in circumstances where that was judged to be liable to expose persons in the United Kingdom to terrorist attack. A prosecutor's decision whether to investigate or prosecute an alleged crime is a species of executive decision with which the courts have always been particularly reluctant to interfere, as Lord Bingham of Cornhill pointed out at paras 30-31. But the question at issue was broader than that. The reason for the decision was that the House did not accept that even so fundamental a value as the rule of law could give rise to an absolute rule, as opposed to a weighing of the relevant considerations either way. The point is encapsulated in the statement of Lord Bingham at para 38:

> "The objection to the principle formulated by the Divisional Court is that it distracts attention from what, applying well-settled principles of public law, was the right question: whether, in deciding that the public interest in pursuing an

> important investigation into alleged bribery was outweighed by the public interest in protecting the lives of British citizens, the Director made a decision outside the lawful bounds of the discretion entrusted to him by Parliament."

17. Lord Pannick QC acknowledged most of this. He accepted, for example, that in principle the Secretary of State could lawfully exclude a person in a case like *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391, where the leader of a religious, social and political group was excluded because his presence would present a significant threat to community relations; or *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546, where a Muslim public speaker was excluded on the ground that he was associated with an organisation which supported terrorism. There has been a number of other cases in which persons holding controversial views have been excluded because it was undesirable in the interests of public order to allow them a platform in the United Kingdom. Lord Pannick suggested that these cases were different, because the Secretary of State herself regarded the visitor's views as unacceptable and inconsistent with our collective values of tolerance and inclusiveness. By comparison, in the present case the Secretary of State has no objection to Mrs Rajavi's values or opinions. I regard this distinction as contrary to principle. It suggests that the Secretary of State's views about the visitor's opinions or their consistency with our collective values might make all the difference to the question whether a restriction on freedom of expression is justifiable. But article 10 does not only protect the transmission of information and ideas which accord with the views of the Secretary of State or with her perception of the existing values of our society. It is a truism that freedom of speech is not worth much unless it extends to opinions with which others disagree. The question whether the visitor's presence or activities in the United Kingdom is conducive to the public good must depend on its effects, and not on whether his or her opinions command general or ministerial assent. Dr Naik was excluded because the Secretary of State considered that he was liable unlawfully to promote terrorism, and to express views which were "divisive and potentially damaging to community relations" (see para 11). As Carnwath LJ put it at para 66, "the rationale of the ban lies solely in the effect of his words."

18. I therefore reject the claimants' threshold argument.

Proportionality: the test

19. In *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] AC 700, this court considered the test of proportionality in a context with some analogies to the present one. The court was divided on the application of the test to the

facts, the principal judgments being my own for the majority and the dissenting judgment of Lord Reed. However, Lord Reed and I were agreed about what the test was. At para 20, I summarised the effect of the authorities as follows:

> "…the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

20. As Lord Reed observed at paras 69 and 70, "the intensity [of review] – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker – depends on the context." This means both the legal context (the nature of the right asserted), and the factual context (the subject-matter of the decision impugned). Not all rights protected by the Convention are of equal weight. Not all subjects call for the same degree of respect for the judgment of the executive. But, as both the majority and the minority recognised, no review, however intense, can entitle the court to substitute its own decision for that of the constitutional decision-maker: see my own judgment at para 21 and Lord Reed's at para 71.

21. *Bank Mellat*, like the present case, arose out of a government decision in the conduct of foreign policy. The majority and the minority were agreed that the judgment of the executive was in principle entitled to considerable weight. In the majority judgment, the point is put in this way at para 21:

> "None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. As Maurice Kay LJ observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Convention on Human Rights. Even so, any assessment of the rationality

> and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive. For my part, I wholly endorse the view of Lord Reed JSC that 'the making of government and legislative policy cannot be turned into a judicial process.'"

22. As a tool for assessing the practice by which the courts accord greater weight to the executive's judgment in some cases than in others, the whole concept of "deference" has been subjected to powerful academic criticism: see, notably, TSR Allan, "Human Rights and Judicial Review: a Critique of 'Due Deference'" [2006] CLJ 671; J. Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] PL 592. At least part of the difficulty arises from the word, with its overtones of cringing abstention in the face of superior status. In some circumstances, "deference" is no more than a recognition that a court of review does not usurp the function of the decision-maker, even when Convention rights are engaged. Beyond that elementary principle, the assignment of weight to the decision-maker's judgment has nothing to do with deference in the ordinary sense of the term. It has two distinct sources. The first is the constitutional principle of the separation of powers. The second is no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject-matter. Both sources were considered in detail in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. *Rehman* was a statutory appeal from a decision of the Secretary of State ordering Mr Rehman to be deported from the United Kingdom on the ground that his presence there was not conducive to the public good because of his association with an organisation which supported terrorism in the Indian subcontinent. The decision is authority for the proposition (which had been rejected by the Special Immigration Appeals Commission) that the activities of a person may adversely affect the national security of the United Kingdom if they are "directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals": see para 2 (Lord Slynn). The importance of the decision for present purposes lies in its analysis of the relationship between the courts and the executive on such an issue. This is

to be found mainly in the speech of Lord Hoffmann (with which Lord Clyde and Lord Hutton agreed).

23. Lord Hoffmann dealt with the separation of powers at paras 50-54 of his speech. He started by pointing out (para 50) that while the question what is meant by "national security" is a question of law, the question whether something would be damaging to national security was a question not of law but of "judgment and policy".

> "50. … Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.
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> …
>
> 53. Accordingly it seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security. Mr Kadri rightly said that one man's terrorist was another man's freedom fighter. The decision as to whether support for a particular movement in a foreign country would be prejudicial to our national security may involve delicate questions of foreign policy. And, as I shall later explain, I agree with the Court of Appeal that it is artificial to try to segregate national security from foreign policy. They are all within the competence of responsible ministers and not the courts. The Commission was intended to act judicially and not, as the European Court recognised in *Chahal v United Kingdom* 23 EHRR 413, 468, para 127, to substitute its own opinion for that of the decision-maker on 'questions of pure expediency'.
>
> 54. This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary, so as to 'defeat the purpose for which the Commission was set up': see the Commission's decision. It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive… The Commission serves at least three important functions which were shown to be necessary by the decision in *Chahal.* First,

> the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the Commission may reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held.' Thirdly, an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in *Chahal* itself, as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative."

24. Lord Hoffmann dealt with the evidential issue at paras 57-58 under the heading *Limitations of the appellate process*:

> "First, the Commission is not the primary decision-maker. Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body

> traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained. Such restraint may not be necessary in relation to every issue which the Commission has to decide. As I have mentioned, the approach to whether the rights of an appellant under article 3 are likely to be infringed may be very different. But I think it is required in relation to the question of whether a deportation is in the interests of national security… I emphasise that the need for restraint is not based upon any limit to the Commission's appellate jurisdiction. The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion. The need for restraint flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission."

25. Returning to both themes in a postscript written a month after the attack on the Twin Towers in New York, Lord Hoffmann observed at para 62 that these events

> "… are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."

26. I have cited Lord Hoffmann's speech at length because it is the fullest and most authoritative analysis of the question, and because it distinguishes the two distinct sources of the court's traditional reticence in this area which are often elided. The principles themselves were certainly not new in 2001 when Lord Hoffmann articulated them: see *Chandler v Director of Public Prosecutions* [1964] AC 763, 798 (Lord Radcliffe); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 (Lord Fraser),

411 (Lord Diplock); *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Pirbhai* (1985) 107 ILR 462; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Ferhut Butt* (1999) 116 ILR 607. Nor are they outdated now: *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2003] UKHRR 76 at para 106(iii) (Lord Phillips); *R* (*Campaign for Nuclear Disarmament) v Prime Minister* [2003] 3 LRC 335; *A v Secretary of State for the Home Department* [2005] 2 AC 68 at para 29 (Lord Bingham); *R v Jones* [2007] 1 AC 136 at para 30 (Lord Bingham); *R* (*Gentle) v Prime Minister* [2008] AC 1356 at para 8(2) (Lord Bingham).

27. The more difficult question, which is critical to the outcome of this appeal, is how far these principles fall to be modified in cases which (unlike *Rehman*) are founded on the complainant's Convention rights or other fundamental rights recognised at common law. The answer to this question must depend on the reason why the court is being invited to respect the autonomy of an executive decision.

28. The first possibility is that it is being invited to respect the separation of powers and the special constitutional function of the executive. The Human Rights Act 1998 did not abrogate the constitutional distribution of powers between the organs of the state which the courts had recognised for many years before it was passed. The case law of the Strasbourg court is not insensitive to questions of democratic accountability, even though their significance will vary from case to case. Even in the context of Convention rights, there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable. Examples are decisions involving policy choices (*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at paras 75-76); broad questions of economic and social policy (*Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at para 70); or issues involving the allocation of finite resources (*Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 at para 41 (Brooke LJ)).

29. However, traditional notions of the constitutional distribution of powers have unquestionably been modified by the Human Rights Act 1998. In the first place, any arguable allegation that a person's Convention rights have been infringed is necessarily justiciable. Section 6 of the Act requires public authorities, including the courts, to give effect to those rights. Secondly, the jurisprudence of the European Court of Human Rights calls for a standard of review of the proportionality of the decisions of public authorities which is not only formal and procedural but to some extent substantive. As Lord

Bingham put it in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, at para 29:

> "…the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated… The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act."

It follows, as he went on to point out, that

> "…the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 , para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 , paras 25–28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the *Court of Appeal in R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 62–67. Proportionality must be judged objectively, by the court: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 , para 51."

30. So far, therefore, as the traditional treatment of foreign policy or national security decisions depends on the non-justiciability of the Crown's prerogative to conduct the United Kingdom's foreign relations or of measures taken in the interests of national security, it cannot apply in cases where a scrutiny of such decisions is necessary in order to adjudicate on a complaint that Convention rights have been infringed. In these fields of law, nothing which is relevant can be a "forbidden area" (Lord Phillips' phrase in *Abbasi*), although complaints about the substance as opposed to the

application of British foreign policy may well be met by the response that it is not relevant: *R* (*Gentle) v Prime Minister* [2008] AC 1356 at paras 24-25 (Lord Hope). In describing what the courts do not or should not do, judges of great distinction have sometimes referred to "merits review". I should prefer to avoid the expression, because it has never been sufficiently clear what kind of inquiries a "merits review" embraces. But whatever it embraces, I would accept that when it comes to reviewing the compatibility of executive decisions with the Convention, there can be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate.

31. None of this means that in human rights cases a court of review is entitled to substitute its own decision for that of the constitutional decision-maker. However intense or exacting the standard of review in cases where Convention rights are engaged, it stops short of transferring the effective decision-making power to the courts. As Lord Bingham observed in *Corner House*, at para 41:

> "The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make."

Nor, as a general rule, does the jurisprudence of the Strasbourg court require that administrative decisions should be subject to an appeal on the merits, as opposed to judicial review of the lawfulness of the decision-making process, especially when the decision under review is substantially based on what have been loosely called "grounds of expediency" or is made by a body with specialised experience or expertise: see *Zumtobel v Austria* (1993) 17 EHRR 116, para 32 (article 6); *Bryan v United Kingdom* (1995) 21 EHRR 342, para 44, 47; *Chahal v United Kingdom* (1996) 23 EHRR 413, para 127. However, the obligation of the courts to adjudicate on alleged infringements of Convention rights does mean that the traditional reticence of the courts about examining the basis for executive decisions in certain areas of policy can no longer be justified on constitutional grounds.

32. Rather different considerations apply where the question is not what is the constitutional role of the court but what evidential weight is to be placed on the executive's judgment, a question on which the human rights dimension is relevant but less significant. It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise

its own institutional limitations. In the first place, although the Human Rights Act requires the courts to treat as relevant many questions which would previously have been immune from scrutiny, including on occasions the international implications of an executive decision, they remain questions of fact. The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. Nonetheless, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends upon a judgment about the future impact of alternative courses of action, there is not necessarily a single "right" answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range. A case like the present one is perhaps the archetypal example. Fourthly, although a recognition of the relative institutional competence of the executive and the courts in this field is a pragmatic judgment and not a constitutional limitation, it is consistent with the democratic values which are at the heart of the Convention, because it reflects an expectation that in a democracy a person charged with making assessments of this kind should be politically responsible for them. Ministers are politically responsible for the consequences of their decision. Judges are not. These considerations are particularly important in the context of decisions about national security on which, as Lord Hoffmann pointed out in *Rehman*, "the cost of failure can be high". It is pre-eminently an area in which the responsibility for a judgment that proves to be wrong should go hand in hand with political removability.

33. All of these points were made by Lord Bingham of Cornhill, two years after *Rehman*, in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 29, in the context of the right of derogation conferred by article 15(1) of the Convention in cases of "public emergency threatening the life of the nation":

> "Thirdly, I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the

> world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called 'relative institutional competence'. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum: see *Secretary of State for the Home Department v Rehman* [2003] I AC 153, para 62, per Lord Hoffmann."

I think that there was much wisdom in the observations of Laws LJ, delivering the judgment of the Court of Appeal in *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2008] QB 289, paras 146-148:

> "Reasonableness and proportionality are not formal legal standards. They are substantive virtues, upon which, it may be thought, lawyers do not have the only voice: nor necessarily the wisest. Accordingly, the ascertainment of the weight to be given to the primary decision-maker's view (very often that of central government) can be elusive and problematic… The courts have a special responsibility in the field of human rights. It arises in part from the impetus of the Human Rights Act 1998, in part from the common law's jealousy in seeing that intrusive state power is always strictly justified. The elected government has a special responsibility in what may be called

> strategic fields of policy, such as the conduct of foreign relations and matters of national security. It arises in part from considerations of competence, in part from the constitutional imperative of electoral accountability… The court's role is to see that the Government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject matter, the law accords to the executive an especially broad margin of discretion."

Or, as he has more recently observed in upholding the proportionality of an interference with article 10 rights on the ground on national security in *R* (*Miranda) v Secretary of State for the Home Department (Liberty intervening)* [2014] 1 WLR 3140, para 40, where a court of review considers whether the relevant decision strikes a fair balance between the competing interests engaged,

> "there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government. If it is properly within the judicial sphere, it must be on the footing that there is a plain case."

A very similar principle has been applied for many years to the review of Commission decisions by the Court of Justice of the European Union. It is essentially the same point as Lord Reed made in *Bank Mellat*, at para 93, when he observed that even in the context of the enforcement of Convention rights, the relevant decision

> "… may be based on an evaluation of complex facts, or considerations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations, the court has to allow room for the exercise of judgment by the executive and legislative branches of government, which bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process."

34. Various expressions have been used in the case law to describe the quality of the judicial scrutiny called for when considering the proportionality of an interference with a Convention right: "heightened", "anxious", "exacting", and so on. These expressions are necessarily imprecise because their practical effect will depend on the context. In particular, it will depend on the significance of the right, the degree to which it is interfered with, and

the range of factors capable of justifying that interference, which may vary from none at all (article 3) to very wide-ranging considerations indeed (article 8). But the legal principle is clear enough. The court must test the adequacy of the factual basis claimed for the decision: is it sufficiently robust having regard to the interference with Convention rights which is involved? It must consider whether the professed objective can be said to be necessary, in the sense that it reflects a pressing social need. It must review the rationality of the supposed connection between the objective and the means employed: is it capable of contributing systematically to the desired objective, or its impact on the objective arbitrary? The court must consider whether some less onerous alternative would have been available without unreasonably impairing the objective. The court is the ultimate arbiter of the appropriate balance between two incommensurate values: the Convention rights engaged and the interests of the community relied upon to justify interfering with it. But the court is not usually concerned with remaking the decision-maker's assessment of the evidence if it was an assessment reasonably open to her. Nor, on a matter dependent on a judgment capable of yielding more than one answer, is the court concerned with remaking the judgment of the decision-maker about the relative advantages and disadvantages of the course selected, or of pure policy choices (eg do we wish to engage with Iran at all?). The court does not make the substantive decision in place of the executive. On all of these matters, in determining what weight to give to the evidence, the court is entitled to attach special weight to the judgments and assessments of a primary decision-maker with special institutional competence.

Application to the present case

35. It is right to start by recording those points which are agreed or unchallenged. First, it is common ground that article 10 is engaged. This is because a refusal of permission to enter a country which is substantially based on a desire to prevent a person expressing or others from receiving her views is an interference with their article 10 rights and hers: *Cox v Turkey* (2010) 55 EHRR 347, paras 27-28, 43. Secondly, the good faith of the Secretary of State and the Foreign Office are accepted. We may proceed, therefore, on the footing that the decision was genuinely made for the reasons given, and not for some undisclosed or collateral reason. Third, there is no dispute about the primary facts, as Lord Pannick QC confirmed at the outset of the hearing. In relation to the second and third points, it should be noted that no application was made to cross-examine Mr O'Flaherty and that the Secretary of State's evidence has now been accepted by both the Divisional Court and the Court of Appeal.

36. Next comes a point which, although not formally conceded, was hardly challenged and on which in my view the position is clear. The Secretary of State's case is that Mrs Rajavi's admission to the United Kingdom for the purpose of discussions with Parliamentarians would pose an appreciable risk of (i) reprisals, either instigated by the Iranian government or resulting from an 'uncontrolled public reaction', against persons for whose safety Britain is responsible such as locally engaged staff of the British Embassy in Tehran and British nationals inside and outside Iran; (ii) damage to British property still in Iran, and (iii) a significant impairment of the United Kingdom's ability to engage diplomatically with Iran on important issues, including nuclear non-proliferation, the Middle East and human rights. If Mrs Rajavi's admission to the United Kingdom would really pose an appreciable risk of provoking these consequences, then I think it clear that the interference with the claimants' article 10 rights is capable of being justified in the interests of national security, public safety and the protection of the rights of others. Nor was this really disputed by Lord Pannick QC.

37. It has been said that there is "little scope under article 10.2 of the Convention for restrictions on political speech or on debate on questions of public interest": *Wingrove v United Kingdom* (1996) 24 EHRR 1, para 58; *Sűrek v Turkey* (1999) 7 BHRC 339, para 60. At the same time, the Strasbourg Court has recognised, in recent years with growing emphasis, that article 10 rights are qualified rights. An important milestone was the decision of the Grand Chamber in *Stoll v Switzerland* (2007) 47 EHRR 1270, acknowledging a legitimate interest on the part of the state in punishing an unauthorised disclosure by the press of tendentiously selected parts of a confidential diplomatic memorandum which admittedly dealt with matters of substantial public interest. The Grand Chamber observed that "article 10.2 does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern": para 102. In particular, the Court has always recognised the potential for considerations of national security or public order to justify proportionate restrictions on political speech or public debate, as it did in its observations in *Sűrek* itself at paras 60-61. If a person's presence or conduct in the United Kingdom threatened to provoke violence within the United Kingdom, or to export it from the United Kingdom to other countries, there could hardly be any argument about this. This is an unusual case in that the damage to national security or public order which is apprehended would originate from the response of persons outside the United Kingdom, but it is difficult to see why that consideration should itself make any difference to the principle.

38. To say that something is capable of justifying a restriction of freedom of expression does not of course mean that it necessarily justifies this particular restriction, but it unquestionably narrows the field of inquiry. Given that no

one has challenged the facts or the bona fides of the Secretary of State's decision, and that no one has argued that the consequences feared by the Secretary of State are not grave enough to justify her decision if her fears are realistic, there are only three bases on which the court might in theory quash the decision made in this case. It might conclude (i) that the Secretary of State's had attached insufficient importance to the value of freedom of expression generally, or understated its importance in this case; or (ii) that the Foreign Office's assessment on which the decision was based overstated the risks of damage to national security, public order or the rights of others; or (iii) that the Secretary of State' objective could reasonably have been achieved by some lesser measure. The claimants take all three points.

Point (i): Underrating the value of freedom of expression

39. The Home Secretary has said in her decision letters that she recognised and took into account the value of informed political debate in the United Kingdom. There is no basis for concluding that she underrated the importance of freedom of expression in general. The real point made against her by the claimants is that she underrated the significance of the restrictions on freedom of expression associated with her own decision in this case.

40. The argument gains some traction from the fact that in her decision-letter of May 2011 she denied that article 10 was engaged at all, because of the existence of other methods by which the Parliamentary claimants could communicate with Mrs Rajavi which did not involve her entering the United Kingdom. This was a bad point, but it was effectively abandoned in her subsequent decision-letters. They acknowledged that the claimants' article 10 rights were or might be engaged notwithstanding the availability of other modes of communication. But they relied upon the same matters as limiting the extent of her interference with those rights and asserted that any right arising from that article was outweighed by other considerations. Lord Pannick QC criticised this approach as tending to understate the extent of the interference with freedom of expression. But I think that his criticisms are unsound. There are degrees of interference with even so important a right as freedom of expression. The degree of interference involved necessarily has a significant impact on one's assessment of its proportionality. Relevant factors include the degree of control asserted by the state over the dissemination of the relevant information or opinion, the methods by which it exercises that control and whether the freedom of the press is curtailed. At one extreme there is a case like *Sűrek* which involved the total suppression of a particular point of view, enforced with criminal sanctions including imprisonment. At the other are cases where the measure impugned restricted only the method by which the opinion or information was conveyed. Absent unusually compelling considerations of public order,

it is difficult to think of any circumstances in which the first extreme would be consistent with article 10. But short of that, the position is more nuanced and less susceptible to absolute positions.

41. In *Appleby v United Kingdom* (2003) 37 EHRR 783, a local campaigning group was prevented from distributing leaflets against a planning proposal at the entrance to a shopping mall in Washington New Town known as "the Galleries". The Strasbourg court rejected the argument that this prohibition contravened the Convention, because the partial character of the interference meant that there had been no failure by the state to observe its positive obligation to protect the dissemination of information and ideas. The court observed, at para 48:

> "48. In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door-to-door or seeking exposure in the local press, radio and television. The applicants did not deny that these other methods were available to them. Their argument, essentially, was that the easiest and most effective method of reaching people was to use the Galleries, as shown by the local authority's own information campaign (see para 21 above). The Court does not consider however that the applicants can claim that they were as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens…
>
> 49. Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression."

42. In *Mouvement Raëlien Suisse v Switzerland* (2012) 56 EHRR 482, the complainant, an organisation dedicated to promoting communication with extra-terrestrial beings, was prevented by a local authority from advertising on billboards. The local authority disapproved of their message on the ground that it was liable to encourage child abuse and other evils. The

organisation, however, had other ways of getting its message across which were not under the local authority's control. The restriction was held to be proportionate. At para 75, the Grand Chamber said:

> "Like the Government, it finds that a distinction must be drawn between the aim of the association and the means that it uses to achieve that aim. Accordingly, in the present case it might perhaps have been disproportionate to ban the association itself or its website on the basis of the above-mentioned factors… To limit the scope of the impugned restriction to the display of posters in public places was thus a way of ensuring the minimum impairment of the applicant association's rights. The Court reiterates in this connection that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question… In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate."

43. In case these examples may seem too Lilliputian in one case or too eccentric in the other to give rise to large conclusions of principle, *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607, another Grand Chamber decision, raised issues filling a larger canvass. The complaint was that Animal Defenders International was prevented by law from taking paid advertising time on television to disseminate its views on animal rights, an issue which the court acknowledged to be of general public interest. The court held that the restriction was compatible with article 10, and treated as relevant the fact that, although television advertisement was the most effective mode of communication, it was not the only one. At para 124, the court said:

> "The Court notes, in this respect, the other media which remain open to the present applicant and it recalls that access to alternative media is key to the proportionality of a restriction on access to other potentially useful media… In particular, it remains open to the applicant NGO to participate in radio or TV discussion programmes of a political nature (ie broadcasts other than paid advertisements). It can also advertise on radio and television on a non-political matter if it sets up a charitable arm to do so and it has not been demonstrated that the costs of this are prohibitive. Importantly, the applicant has full access for its advertisement to non-broadcasting media including the

> print media, the internet (including social media), as well as to demonstrations, posters and flyers. Even if it has not been shown that the internet, with its social media, is more influential than the broadcast media in the respondent State (para 119 above), those new media remain powerful communication tools which can be of significant assistance to the applicant NGO in achieving its own objectives."

44. In the Court of Appeal in the present case, Arden LJ remarked (para 57) that the interference with article 10 rights in this case was "in effect a denial of the right". This seems to me to be too extreme a view. I do not doubt that a face-to-face meeting between the Parliamentarians and Mrs Rajavi is the most effective way of conducting their discussions. I would accept that the proposed venue (the Palace of Westminster) and the proposed attenders (members of the two Houses of Parliament) both add symbolic value to an occasion intended to promote democratic values, although it may equally be said to enhance any perception on the part of the Iranians that she is being officially endorsed by the organs of the British state. But Mrs Rajavi has not been denied the right to express her views. Nor have English Parliamentarians or anyone else been denied the right to receive them. Putting the matter at its highest, the Secretary of State's decision deprives them of the use of one method and one location for their exchanges. It may be that the decision rules out the best method and the best venue for the purpose. For that reason it would be wrong to suggest that such a restriction is trivial. It is not. Nor did the Secretary of State say that it was. The restriction is fairly described in her reasons as "limited". But the force of the point does not lie in the choice of adjectives. It lies in the Secretary of State's view that the particular restrictions of freedom of expression involved in her decision, in whatever language described, were outweighed by the risk to the safety of British persons and property and Embassy staff. That was a question to which she plainly did address herself.

Point (ii): Overstating the risks

45. The claimants take issue at a number of points with the assessment of the risks by the Foreign Office on which the Secretary of State has relied. None of their criticisms seem to me to meet the gravamen of the Secretary of State's case. Moreover, many of them were undermined six months after these proceedings were launched when the sack of the British Embassy in Tehran tended to bear out some of the worst fears of the Foreign Office. The points can be dealt with quite shortly, since it is neither necessary nor in my view possible for a court to reach a definitive conclusion of its own:

(1) The claimants say that the Iranian government has not reacted adversely to other European countries which have allowed Mrs Rajavi to engage without restriction with Parliamentarians and communicate her message on their soil. All of these countries have embassies in Tehran, including Switzerland which represents the interests there of the United States, regarded as Iran's principal international antagonist. The difficulty about this argument is that it fails to address the main point made in the Secretary of State's reasons and the evidence of Mr O'Flaherty, namely the long-standing and highly unusual character of Britain's relationship with Iran over a very long period. The Secretary of State's view derives considerable support from the fact that although the EU also had extensive sanctions in place against Iran in 2011 only the British Embassy was attacked. No other European country was targeted.

(2) It is said that there was no adverse reaction in Iran to Mrs Rajavi's earlier visits to the United Kingdom, before her exclusion in 1997; nor (apart from "minor demonstrations") to the de-proscription of MeK by the United Kingdom in 2008 and by other countries thereafter. Mr O'Flaherty's answer is that the factors involved have varied over the years in the course of what has generally been an unstable and deteriorating bilateral relationship, with the result that the position before 1997 is not a guide to the gravity of the threat now. Mrs Rajavi's last visit to the United Kingdom occurred seventeen years ago. The de-proscription of MeK is more recent, but the claimants' argument on this appears to be contrary to the evidence. There were demonstrations outside the Embassy after the decision to de-proscribe MeK. The fact that they were not violent is of limited relevance given the propensity of mob action to get out of control. De-proscription was certainly regarded as a political act and provoked a high level of official and public rhetoric directed against the United Kingdom, much of which was specifically based on the accusation that the United Kingdom was supporting terrorism.

(3) It is said that the Iranians are unlikely to try to acquire nuclear weapons because of the admission of Mrs Rajavi to the United Kingdom. This is not disputed, but it is hardly the right question. It is notorious that negotiations with Iran about nuclear non-proliferation have been prolonged and difficult. It is self-evident that their success is a matter of great importance to global security. It seems equally obvious that a perception of foreign hostility and an antagonistic relationship between Iran and one of the principal countries involved in the negotiations can only hinder their progress.

(4) The claimants have argued that since the United Kingdom was prepared to impose economic sanctions on Iran regardless of the consequences for the safety of its nationals and Embassy personnel, no plausible case can be founded on the comparatively minor offence that would be given to the Iranian regime by admitting Mrs Rajavi. I do not find this convincing. In the first place, the United Kingdom's sanctions were imposed under the auspices of the United Nations and the European Union in the context of a general international move against Iran provoked by its perceived desire to acquire nuclear weapons. Secondly, the value of sanctions as a diplomatic tool was considered to be great enough to warrant the risks. The Foreign Office's assessment is that by comparison concessions to Mrs Rajavi would have very little value having regard to her limited influence in Iran.

(5) There have been no overt threats to British persons or interests or to Embassy staff if Mrs Rajavi is admitted. This is correct, but there is a difference of view between the parties about whether an overt advance threat would be expected.

46. The claimants' contention that the Secretary of State has overstated the risks associated with the admission of Mrs Rajavi to the United Kingdom is outwardly unimpressive, especially in the aftermath of the events of November 2011. But in my opinion it fails for a more fundamental reason. The future is a foreign country, as L P Hartley almost said. They do things differently there. Predicting the likely consequences of a step which the evidence suggests will be viewed in Iran as a hostile act, cannot be a purely analytical exercise. Nor can it turn simply on extrapolation from what did or did not happen in the past. There is a large element of educated impression involved. The decision calls for an experienced judgment of the climate of opinion in Iran, both inside and outside that country's public institutions. The exercise is made more difficult by the intense political emotions engaged in Iran, combined with a large element of irrationality and the involvement of potentially violent mobs. The consequences of a failure to engage with this complex and unstable society are sufficiently serious to warrant a precautionary approach. It is the proper function of a professional diplomatic service to assess these matters as best they can. It follows that the only reasonable course which the Home Secretary could have taken once Mrs Rajavi's position was raised with her by Lord Carlile, was to draw on the expertise of the Foreign Office, as she did. Having received what was on the face of it a reasoned professional assessment of the consequences of admitting Mrs Rajavi, it is difficult to see how she could rationally have rejected it. This court is no better and arguably worse off in that respect than she was. We have no experience and no material

which could justify us in rejecting the Foreign Office assessment in favour of a more optimistic assessment of our own. To do so would not only usurp the proper function of the Secretary of State. It would be contrary to long established principle which this court has repeatedly and recently reaffirmed. It would step beyond the proper function of a court of review. And it would involve rejecting by far the strongest and best qualified evidence before us. In my opinion it would be a wholly inappropriate course for us to take.

Point (iii): less intrusive alternatives

47. Since the problem arises from the prospective presence of Mrs Rajavi in the United Kingdom it is difficult to see what lesser measure than her exclusion would meet the case. The only alternative suggested by the claimants is for the Secretary of State to explain to the Iranian government that she is bound by the Human Rights Act and by the decisions of an independent judiciary. A similar argument was advanced without success about Saudi Arabia in *R (Corner House Research and another) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756, see para 40. In my opinion, it is equally unrealistic in this case. In the first place, the evidence is that there have been attempts in the past to persuade the Iranian government of these things, which have got nowhere. Secondly, states commonly deal with each other as unitary entities. The impact on them of the United Kingdom's decisions is unlikely to be influenced by the question which organ of the United Kingdom state was its originator. Thirdly, there is no reason to suppose that Iran in particular would be susceptible to such explanations. They treated the judicial decision to de-proscribe MeK as a political decision in defiance of the facts.

Lord Kerr's Judgment

48. I have naturally reflected further on these issues in the light of the judgment of Lord Kerr, which strongly expresses the opposite view. Lord Kerr considers that while respect is required for the executive's assessment of the consequences of admitting Mrs Rajavi for national security, public safety and the rights of others, it is for the court to assess the weight to be attached to the Convention right to freedom of expression. In principle that is right, but it does not take matters any further in a case like this one, where the decision-maker has to weigh the one against the other. It cannot therefore be enough to assess the weight to be attached to freedom of expression on its own, unless perhaps the court is to say that the weight to be attached to freedom of expression is so great that as a matter of law nothing can prevail against it. I do not understand that to be Lord Kerr's position. Nor would it

be consistent with either the language of article 10 or the jurisprudence of the Strasbourg court, both of which emphasise that freedom of expression is not an absolute right but may be outweighed by other legitimate public interests.

49. This gives rise to what is surely the central issue on this appeal. How is the court to determine where the balance lies if (i) it has no means of independently assessing the seriousness of the risks or the gravity of the consequences were they to materialise, and (ii) the Secretary of State is not shown to have committed any error of principle in her own assessment of them. For that is indeed the position in which the court finds itself. We are not in point of law bound to accept the factual assessment of the Foreign Office about the impact on our relations with Iran of admitting Mrs Rajavi to the United Kingdom. But if we reject it we must have a proper basis for doing so. In this case, there is none. There is no challenge to the primary facts. We have absolutely no evidential basis and no expertise with which to substitute our assessment of the risks to national security, public safety and the rights of others for that of the Foreign Office. We have only the material and the expertise to assess whether the Home Secretary has set about her task rationally, by reference to relevant matters and on the correct legal principle. Beyond that, in a case like this one, we would be substituting our own decision for that of the constitutional decision-maker without any proper ground for rejecting what she had done. All the recent jurisprudence of this court has rejected that as an inappropriate exercise for a court of review, even where Convention rights are engaged. Yet that appears to be where Lord Kerr's analysis leads. "We do not ask whether the Secretary of State's view is tenable", he says (para 158), "but whether it is right." Notwithstanding the respect which in earlier parts of his judgment Lord Kerr has acknowledged is due to the executive's assessment of questions of national security, this is in fact nothing less than a transfer to the courts of the constitutional function of the Home Secretary, in circumstances where the court is wholly incapable of performing it.

50. In the end, however, Lord Kerr puts forward no reason for rejecting the Home Secretary's assessment of the risks to national security, public safety or the rights of others on the evidence. He makes two rather different points.

51. The first is that the predictive character of the judgment of the Home Secretary and the Foreign Office, combined with the volatility of the Iranian government and people, makes the executive's assessment inherently unreliable and therefore substantially diminishes its weight. I would accept that these factors inject into the situation a larger than usual element of uncertainty. This necessarily calls for a high degree of care, and if the evidence had been challenged in the High Court that would no doubt have

been one element of the challenge. But I would not accept that any of this diminishes the weight to be attached to the executive's assessment. It is inherent in the precautionary approach which is generally required in dealing with potential threats to national security and public safety that decisions must be based on inherently uncertain assessments of the future. In view of the importance of the objective, I am not prepared to say the very nature of the judgments required to achieve it should diminish their significance in the eyes of a court.

52. Lord Kerr's second point is a more fundamental one, namely that the risk of an adverse reaction by the Iranians to the admission of Mrs Rajavi should be entitled to limited weight, not because such a reaction is insufficiently probable or harmful, but because it would be "unreasoning and unreasonable", "anti-democratic" and contrary to the "standards and values of this country" for the Iranians to behave in that way. That may be so. However, the question is not whether an adverse reaction by the Iranians would be legitimate in our terms, but whether it would be sufficiently likely and dangerous to the interests referred to in article 10.2. This is an essentially factual judgment, on which the only pertinent material before us is the expert assessment of the Foreign Office. In the nature of things, many of the public interests listed in article 10.2 of the Convention as being capable of justifying restrictions on freedom of expression will arise from threats which can fairly be described as unreasoning, unreasonable, anti-democratic and contrary to the values underlying the Convention. Terrorism and other acts of political violence are unreasoning, unreasonable, anti-democratic and contrary to the values of this country. It is an unfortunate truth, but one that we must face, that in the modern world the great majority of threats to our national security, public safety and the rights of others do come from people who are unreasoning, unreasonable and anti-democratic and reject the values of this country. But it has never previously been suggested that the threat of violence by third parties should only be entitled to substantial weight in executive decisions so far as they emanate from people who share our values. On the contrary, the courts have consistently treated them as relevant and weighty, as they plainly are. The Secretary of State is concerned with the actual consequences of Mrs Rajavi's admission, not with the democratic credentials of those responsible for bringing them about. This was the precise issue decided in *Corner House*, where the error of the Divisional Court which led to its being overruled in the House of Lords was that it required the decision-maker to ignore or downplay real risks to national security where they originated from people acting for motives which were contrary to the values of this country. Lord Kerr suggests (para 161) that "no fundamental right was at stake" in *Corner House*. With respect, that is not right. The rights that were at stake were identified by Lord Bingham (at para 23) by reference to the judgment of the Divisional Court. They were on the one hand the rule of law and on the

other hand the duty of the state under article 2 of the Convention to protect human life against (among other things) terrorist threats. These are among the most fundamental values of our society.

Conclusion

53. In my opinion, on the undisputed facts before the Secretary of State, it has not been shown that she was guilty of any error of principle. On the points which were critical to their decision, it has not been shown that the Divisional Court or the Court of Appeal were guilty of any error of principle. I can see no factual or legal justification for this court to take a different view. I would therefore dismiss this appeal.

LORD NEUBERGER:

54. In my view, this appeal should be dismissed. Although I agree with a great deal of what he says, my reasons are perhaps more limited than those given by Lord Sumption, and I will therefore express them in my own words.

The nature of the issue

55. The issue on this appeal arises out of a decision of the Home Secretary to refuse to admit Mrs Rajavi into this country because the Foreign Secretary believes that it would risk harming the diplomatic and economic interests of the United Kingdom, and the safety of some people for whom it has a degree of responsibility. The issue is the extent to which the court can override the decision on the ground that it curtails Mrs Rajavi's ability to engage in political discussions with members of the United Kingdom legislature.

56. The issue requires one to focus on the boundary and overlap between the respective roles of the executive and of the judiciary. That aspect of our constitutional settlement has gained increasing significance with the growth of judicial review over the past fifty years, and that significance has accelerated since 2000 with the coming into force of the Human Rights Act 1998. Judicial review protects citizens against inappropriate use of the executive's powers, and, as those powers have increased in most areas since the 1960s, so has the number of judicial review applications. The 1998 Act for the first time formally introduced fundamental rights into the domestic law of the United Kingdom, and the exercise of executive powers often

affects those rights, which include the right engaged in this case, freedom of expression.

57. The courts accordingly are now frequently called on to review, and, where appropriate, to overturn, decisions of the executive, whether government ministers, local authorities, or other administrative bodies - as can be seen from perusing the law reports. Judges should always be vigilant and fearless in carrying out their duty to ensure that individuals' legal rights are not infringed by the executive. But judges must also bear in mind that any decision of the executive has to be accorded respect - in general because the executive is the primary decision-maker, and in particular where the decision is based on an assessment which the executive is peculiarly well equipped to make and the judiciary is not. However, I agree with what Lord Kerr says in paras 137 and 147, namely that, whatever the issue, once a Convention right is affected by a decision of the executive, the court has a duty to decide for itself whether the decision strikes a fair balance between the rights of an individual or individuals and the interests of the community as a whole.

58. The specific issue raised on this appeal arises from concerns about how the Iranian government is likely to react to a particular decision of the United Kingdom government, and whether the reaction could endanger the safety of individuals for whom our government has some responsibility, or could harm this country's economic or international political interests. These are plainly matters which are entrusted under our constitutional settlement to the executive, and in particular to the Foreign Secretary, who, with the experience and sources of information available to his department internally and externally, is, almost literally, infinitely more qualified to form an authoritative opinion on such issues than a domestic judge, however distinguished and experienced he or she may be.

59. The Home Secretary, whose decision is being challenged, has consulted the Foreign Secretary, and she states that, as a result, she has decided not to admit Mrs Rajavi into this country, because it would have "a significant damaging impact on United Kingdom interests in relation to Iran" and on "the lives and interests of others". The possible "adverse Iranian response" is said to include "targeting our interests in Iran … and … risk to British interests and properties outside Iran", and the decision is described as resting "not purely on foreign policy grounds but also on grounds of United Kingdom security, especially the safety of … over one hundred local employees in Iran, and the security of United Kingdom personnel in the region".

60. These concerns are more fully described by Lord Sumption in paras 7-9 and by Lord Kerr in paras 122-128 of their respective judgments. They are recorded in letters sent on behalf of the Home Secretary, conveying the decision not to admit Mrs Rajavi, and they are further explained in two statements prepared for the purpose of these proceedings by Mr O'Flaherty, a senior official in the Foreign Office responsible for diplomatic relations with Iran.

61. The ground upon which it is said that the decision is unlawful is that the concern on which it is based represents an insufficient justification for interfering with the article 10 rights of Mrs Rajavi and of those many Members of Parliament and Peers who wish to meet her in London in order to discuss the important issue of Iranian democracy. There is no doubt that, if it stands, the decision will impede such discussions; nor is there any doubt that such discussions are at the top of the hierarchy of free speech, as they constitute political communications.

62. There are, I think, three separate submissions contained in the argument of Lord Pannick QC, who seeks to impugn the Home Secretary's decision. The first is that the grounds of objection to Mrs Rajavi's admission to the United Kingdom raised by the Home Secretary could not, as a matter of law, defeat an article 10 right. The second submission is that, even if they could, the basis of the decision is flawed because the Home Secretary wrongly considered that article 10 was not engaged. The third submission is that, even if the basis of the decision is not so flawed, the grounds for it are insufficiently strong to justify refusing to give effect to the article 10 rights involved – ie that the reasons for refusing Mrs Rajavi admission into the United Kingdom are disproportionate bearing in mind that article 10 is engaged.

Discussion of the appellants' case

63. I would reject the first submission, which was raised for the first time in this Court. Where a person needs her permission to enter the United Kingdom, the Home Secretary is entitled, indeed in some circumstances she might be said to be obliged, to refuse entry if such a refusal would be "conducive to the public good" under rule 320 of the Immigration Rules. It is accepted that, if the Home Secretary was rationally concerned that a person's presence in the United Kingdom would damage the national interest within the jurisdiction, entry could be refused because of such concerns. I find it impossible to accept that the same decision could not be made if the Home Secretary was concerned that a person's presence in the United Kingdom would damage the national interest abroad. Neither logic nor the language

of the rule justify such a distinction. It is regrettable that the concerns in this case are based on the risk of what may appear to the great majority of people in this country to be an inappropriate and unjustifiable reaction on the part of a foreign government (and possibly others). However, government ministers and judges cannot disregard facts, particularly when it comes to making or reviewing decisions based on "the public good".

64. I would also reject the second submission. Although the Home Secretary appears initially to have considered that article 10 was not engaged (understandably, if wrongly, because the discussions with Mrs Rajavi could take place, albeit not with all the parties face-to-face in this country), it is pretty clear that she accepted that it was engaged by the time she made her final decision. If the second submission had been a good one, then, rather than deciding the question ourselves, I would have concluded that the question of Mrs Rajavi's admission into the United Kingdom should be remitted to the Home Secretary. For the reasons I have given for rejecting the third submission, it would, in my view, be inappropriate for us to determine for ourselves whether Mrs Rajavi should be admitted into the United Kingdom.

65. I turn then to Lord Pannick's third submission. He rightly did not contend that the Home Secretary's decision was disproportionate on the grounds that the concerns she invoked were not genuinely held by her or the Foreign Secretary. There are no proper grounds upon which we could conclude that the concerns expressed by the Foreign Secretary and his officials are not genuine: they are concerns which a domestic court is not in a position to challenge or doubt. If Mr O'Flaherty had been cross-examined, and the High Court had been satisfied that the factual basis for those concerns did not exist or was flawed in some other way, it might be different. So, too, if it had been argued that the concerns were irrational. But, rightly, that argument was not advanced either.

66. However, the appellants' evidence carries an undertone of a suggestion that the concerns were unjustified. For instance, it is said that Mrs Rajavi has visited the United Kingdom on four occasions between 1985 and 1996, that she moves round the rest of Europe freely, and that she lives in France. However, as Lord Sumption explains, Mr O'Flaherty's evidence is that the relationship between Iran and the United Kingdom has long been particularly sensitive, international relations with Iran generally are particularly fraught at the moment, and there have been unfortunate incidents in the past. Accordingly, there are reasons for rejecting the scepticism which some people might feel as to whether the concerns expressed by the Secretaries of State were justified.

67. Having said that, it remains the case that, where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision. That was made clear by all members of the appellate committee in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, paras 13, 24, 31, 44 and 97, applying *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100. More recently, the point was illuminatingly discussed by Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2*) [2014] AC 700, paras 68-76. As Lord Reed made clear at para 71, while proportionality is ultimately a matter for the court, it "does not …entitle [domestic] courts simply to substitute their own assessment for that of the decision-maker", and he went on to say that "the degree of restraint practised by [domestic] courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture". The same point was made by Lord Sumption in a passage he quotes on this appeal in para 21. It is also right to bear in mind Lord Bingham's remarks in para 29 of *A v Secretary of State for the Home Department* [2005] 2 AC 68, and Lord Reed's remarks in para 93 of *Bank Mellat (No 2),* quoted by Lord Sumption in para 33.

68. Accordingly, even where, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality.

69. Applying those principles to this case, it appears to me clear that the Home Secretary's decision to refuse to admit Mrs Rajavi into the UK is one with which the courts should not interfere, despite the engagement of article 10. Although that conclusion means that I would uphold the decisions of the courts below, it is right to add that I agree with Lord Kerr when he says at paras 136-137 that the Court of Appeal were wrong to confine themselves to the question "whether the decision-maker had approached the matter

rationally, lawfully and in a procedurally correct manner" (per Arden LJ at [2013] EWCA Civ 199, para 93). Such an approach has been traditionally adopted in domestic judicial review cases, whereas in cases involving Convention rights, the appropriate approach is that summarised in paras 67-68 above. However, it is fair to say that, in practice in a case such as this, for the reasons given in paras 70-73 below, the difference in the two approaches may rarely produce different results.

70. It is, I would have thought, self-evident that a decision based on the possibility of an adverse reaction of a foreign government, and consequential risk of damage to the United Kingdom's diplomatic and economic interests, and to the well-being of United Kingdom citizens and employees abroad, is very much at that end of the spectrum where a court should be extremely diffident about differing from a ministerial decision, at least where the only challenge is based on proportionality. Just as it is normally impossible for a judge to challenge the existence of such risks, once they are believed by the Foreign Secretary to exist, so it would normally be impossible for a judge to form a view as to how likely such risks are to eventuate and how serious the consequences would be. That view is also consistent with what Lord Reed called our "national traditions and institutional culture", as is evidenced by the cases cited by Lord Sumption in paras 22-26 above, especially those decided after the Human Rights Act came into force.

71. I appreciate that, as Lord Clarke suggests, some people might wonder whether, or even suspect that, the Foreign Secretary's concerns about the repercussions of permitting Mrs Rajavi to enter the United Kingdom are exaggerated, or that the risk of his concerns being realised was slight. That is an opinion which any citizen is entitled to hold and express, but, like Lord Clarke, I do not consider that it is an opinion on which a court would be entitled to act in this case. As I have mentioned, 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 of Mr O'Flaherty. 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.

72. Accordingly, treating this as a balancing exercise, there is, on the one side, a real risk of possible, conceivably substantial, harm to (i) the United Kingdom's diplomatic interests, (ii) the UK's economic interests, and (iii) individuals for whom the United Kingdom has a degree of responsibility. In terms of institutional competence, it is very much the function of the

executive, and not the judiciary, to assess the existence and the extent of such risks, and there is insufficient evidence to justify a court forming a different view of the risks. For that reason alone, I consider that it would require an exceptionally heavy weight on the other side of the balance before a court could satisfactorily carry out its own balancing exercise in this case and come to a different conclusion from that of the Home Secretary.

73. When one turns to the other side of the balance, it is perfectly true that the importance of freedom of expression is fundamental in a modern democratic society, and that political free speech is particularly precious. This is clear from the judicial observations cited by Lord Kerr in his judgment at paras 162-165. However, as article 10 provides, it is not an unqualified freedom, in that it "may be subject to" various "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society" for various purposes, including "the interests of national security, territorial integrity or public safety". While the Home Secretary's decision in this case results in curbing freedom of speech, the decision itself is a perfectly orthodox exercise of her power to refuse a person entry into the United Kingdom on the grounds of the national interest, and to that extent this is an unusual case.

74. Furthermore, although the effect of the decision would be to impede political discussions with Mrs Rajavi, those discussions would not by any means be prevented: they could be conducted by videolink or (less convincingly bearing in mind the numbers involved) by the Parliamentarians visiting Mrs Rajavi in France. In addition, the decision not to admit Mrs Rajavi into this country was taken at the highest possible level, both at the Home Office and at the Foreign Office, namely by the relevant Secretary of State. It is also worth mentioning (although it is not a decisive point) that, as those objecting to the decision are members of the House of Commons and the House of Lords, it would, at least on the face of it, be relatively easy for the decision to be challenged in Parliament.

The contrary view

75. As I understand it, Lord Kerr's contrary conclusion is based on the proposition that, because it is ultimately for the court to decide what weight to attach to the Convention right and where the proportionality balance comes down, we can and should allow this appeal, essentially for two reasons. The first is that there is a large element of uncertainty as to whether or not any of the consequences of admitting Mrs Rajavi, as feared by the Foreign Secretary and summarised in paras 59-60 above, would actually

occur. I agree that the feared outcome is uncertain, but I do not consider that that factor takes matters any further, essentially for the reasons given in paras 70-74 above. The very fact that the feared outcome is uncertain appears to me, if anything, to emphasise why a court is not in a position to challenge the conclusion reached by the Home Secretary. The Foreign Office is the best equipped organ of the State to assess the likely reactions of a volatile foreign government and people, and while it would be an overstatement to say that a domestic court is the worst, it is something of an understatement to say that it is less well equipped to make such an assessment than the Foreign Office.

76. Lord Kerr's second point is rather different, and does not appear to involve rejecting or discounting the opinion of the Home Secretary or the Foreign Secretary as to the risk of the harm summarised in paras 6-7 occurring. Rather it rests on the notion that the weight to be given to "the anticipated reaction of the Iranian authorities" should be significantly discounted, because, as he puts it, that reaction would be "rooted in profoundly anti-democratic beliefs, … antithetical to the standards and values of this country and its parliamentary system" in order to "significantly restrict one of the fundamental freedoms that has been a cornerstone of our democracy", namely freedom of speech – see his para 170.

77. I have no doubt that many people in this country would enthusiastically agree with the sentiment implicit in those observations, but, essentially for the reasons mentioned in para 63 above, I do not accept that they represent an appropriate basis for allowing this appeal. While it may be unwise to be categoric, I find it very hard to envisage any circumstances where a judge's decision to quash an executive decision to restrict a Convention right because its exercise might endanger the national interest, could turn on an assessment of the motives of the person responsible for the danger to the national interest. For instance, I cannot accept that, when considering whether anti-terrorist legislation was incompatible with the Convention in so far as it restrained citizens' human rights, a judge could take into account the fact that the legislation was motivated by the need to avoid risks to national security from actions by people motivated by unreasonable, violent and anti-democratic motives. The issue in this case concerns the nature, likelihood and impact of the reaction of the Iranian authorities and people to the admission of Mrs Rajavi into this country, not the legitimacy or defensibility of the reasons for that reaction.

78. This case involves a decision of the executive arm of Government, and, while the executive arm has to obey the law, it has to act in accordance with the harsh practical realities to protect the public interest. It cannot be seriously disputed that members of the executive are therefore entitled,

indeed often obliged, to take into account factors which a court, other than when considering the lawfulness of an executive or other third party decision, could normally not properly take into account. A good example can be found in *A v Secretary for the Home Department* [2005] UKHL 71, [2006] 2 AC 221, in which it was held that a court could never receive evidence obtained by torture; at paras 132-133, Lord Rodger of Earlsferry said that, unlike a judge, a Government minister could properly receive and act on information irrespective of how it had been obtained.

79. It is right to add that, although I disagree with Lord Kerr's conclusion and his reasons for it, I largely agree with what he says in his paras 147-152, as I do with what Lord Sumption and Lady Hale say in their respective judgments. I express myself as "largely" agreeing with those passages, not so much because there is any specific statement with which I take issue, but because, as Lady Hale says, there are differences between us in terms of nuance. I should, however, perhaps deal with two points on which they are not agreed in those passages.

80. First, there is the question discussed in Lord Kerr's para 158 and Lord Sumption's para 49. Lord Kerr suggests that the court has to decide whether the Secretary of State's decision in this case was "right" rather than "tenable", a proposition with which Lord Sumption disagrees. I find neither adjective entirely apt. I agree with Lord Kerr to the extent that the decision is for the court, but Lord Sumption is surely right to the extent that, unless it can be shown to be based on wrong facts or law, not genuinely held, or irrational, the nature of the decision in this case is such that the court would require strong reasons before it could properly substitute its own decision for that of the Secretary of State.

81. The second issue concerns the applicability of the reasoning of the House of Lords in *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756 to this case (cf Lord Kerr's para 161 and Lord Sumption's para 52). While I accept that the decision has features which could enable it to be distinguished in this case as explained by Lady Hale at para 85, I consider that allowing this appeal would be difficult to reconcile with the reasoning in *Corner House.* In particular, one of the two grounds advanced by Lord Kerr for allowing this appeal would seem to me to imply that *Corner House* must have been wrongly decided. Lord Kerr's approach appears to involve the notion that the courts should not allow the executive to take into account risks or threats when they are activated by undemocratic or unreasonable motives; if that were right, then the Director of the SFO should surely not have been permitted to take into account the threats which, the House of Lords decided, he was entitled to take into account in that case.

Conclusion

82. For the reasons which I have given, I consider that it is not open to a court on the facts of this case to conclude that the decision of the Home Secretary to refuse entry to Mrs Rajavi was unlawful. Accordingly, I would dismiss this appeal.

LADY HALE:

83. This has been a very troublesome case. It has become clear that its principal importance lies, not in the result at which we arrive (although that is not unimportant), but in the way in which we describe the role of the court in arriving at it. Fortunately, we have reached a large measure of agreement, although careful readers will undoubtedly detect nuanced differences between us. It is for that reason that I wish to make my own position as plain as I can.

84. The first and most important point is that this is not a judicial review of the lawfulness of the decision of the Secretary of State that the admission of Mrs Rajavi to this country would not be conducive to the public good. Yet the Court of Appeal confined their consideration to the usual grounds for judicial review of administrative action – that is, illegality, unfair process and unreasonableness or irrationality. Nor is this a statutory appeal against a decision to deport her from this country for the same reason, as was the case in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. Such cases also raise difficult questions about the respective roles of the executive and the courts where questions of national security are engaged. But they are not the same issues as those raised by this case.

85. Nor, with the greatest respect, is the decision in *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756 directly in point. That was not a human rights case. It was a traditional judicial review of the decision of the Director not to proceed with an investigation into allegations that BAE Systems had been guilty of the offence of bribing a foreign official. The courts have always been very reluctant to hold that a decision of the prosecuting authorities, whether to prosecute or to decline to prosecute, can be set aside on traditional judicial review grounds. The case was concerned with the rule of law, which is one of the two fundamental principles of our constitution; and the justification advanced for discontinuing the investigation included the risk to life if co-operation between our security services and those of another country were

to be withdrawn. But there was no allegation on either side that a United Kingdom public authority had acted, or proposed to act, in a way which was inconsistent with the Convention rights of any person within the jurisdiction of the United Kingdom.

86. This case is just such a claim. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority, such as the Secretary of State, to act in a way which is incompatible with a convention right. This means that even if the act is lawful in other terms it may be rendered unlawful if the effect is incompatible with a convention right. Section 7(1) provides that a victim of such an unlawful act may bring proceedings in the appropriate court or tribunal. Section 8(1) provides that in respect of an act which the court finds unlawful, the court may grant such relief or remedy, or make such other orders, within its powers as it considers just and appropriate. By section 6(3)(a), the court itself is a public authority and may therefore not act in a way which is incompatible with a convention right.

87. This all means that, although the decision in question is, by definition, one which the Secretary of State (or other statutory decision-maker) was legally entitled to make, so that in that sense she is the primary decision-maker, the court has to decide whether that decision is incompatible with a convention right. She is in the same position as a police officer, using his statutory or common law powers of arrest. He is the primary decision maker. But the court has to form a judgment as to whether or not a convention right has been violated. I agree with Lord Sumption that it is not helpful to ask whether or not this process involves "merits review". We have moved on from that question now.

88. This is not to say that the wise observations of distinguished judges in cases such as *Rehman* and *Corner House,* as to the respective competence of courts and the executive to make some of the judgments involved, are irrelevant. Far from it. They help us in our approach to some at least of the questions which we have to answer. We have to accept that there are some judgments which the primary decision-makers are better qualified to make than are the courts. We do not simply "frank" those judgments, but we accord them great respect. As Lord Bingham explained in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 29, when considering whether, shortly after the atrocities of 11 September 2001, there was a "public emergency threating the life of the nation":

> "I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-

> eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen."

89. To form its judgment, the court has to go through an orderly process of decision-making, answering a series of questions with which we are now all thoroughly familiar. Some questions are much easier for a court to answer than others, but the answer to each is relevant to the overall judgment that has to be made.

(1) Is there a Convention right involved here?

90. No-one doubts that article 10.1 of the Convention is involved:

> "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."

This covers the right of Mrs Rajavi and of the Parliamentarians both to receive and to impart information and ideas without state interference. And they have this right regardless of frontiers.

91. These are hugely important rights. Freedom of speech, and particularly political speech, is the foundation of any democracy. Without it, how can the electorate know whom to elect and how can the Parliamentarians know how to make up their minds on the difficult issues they have to confront? How can they decide whether or not to support the Government in the actions it wishes to take? This is all the more important, the larger the issues at stake. There are few, if any, issues larger and more rapidly changing than the political and military situation in the Middle East at present. Parliament is considering whether to support air strikes in Iraq as I write. Parliamentarians who have to make these momentous decisions should be

as well-informed as they can be. They should be sensitive to all sides of a delicate and complex argument. The position of Iran is a vital, and rapidly changing, component in the Middle East situation.

92. Furthermore, this is an unusual case, in that the Government takes no objection to what Mrs Rajavi is likely to say or the views which she is likely to express. The right is there to protect unpopular or offensive views just as much as it is to protect popular or inoffensive views, but this is not such as case, and the justification for interference may be different as a result.

93. This case is also unusual in that the claimants are senior and distinguished Parliamentarians, many of whom have experience which is directly relevant to the questions at issue here. Indeed, they are much better qualified to assess the weight of the Government's objections to Mrs Rajavi coming to address them than are we. But the very distinction of the people who wish to meet her, and of the place where they wish to meet, gives to the meeting a public and a symbolic importance which it would not otherwise have.

(2) Has the right been limited or interfered with?

94. The Secretary of State originally argued that there was no interference with the article 10 right by refusing Mrs Rajavi permission to come here to meet the Parliamentarians. They could always go to Paris to meet her. Or they could exchange views by audio- or video-conferencing methods (which these days are so effective that they are regularly used in court proceedings). But it was soon accepted that to prevent them from meeting face to face in the Houses of Parliament is indeed an interference with their rights. It would be much harder for the numbers of Parliamentarians who wish to meet Mrs Rajavi to do so in any other way. There is also the important symbolic value of a meeting in the Houses of Parliament. On the other hand, it must also be accepted that, as there are other ways in which the Parliamentarians could communicate with Mrs Rajavi, the interference is not as serious as it would be if they were banned from all forms of communication with her.

(3) Was the limitation or interference prescribed by law?

95. Mrs Rajavi has no right to enter this country. The Secretary of State undoubtedly has the power to prevent her coming here, if her presence would not be conducive to the public good. This does make a difference, because the power of the state to prevent people meeting, exchanging views and saying what they like in this country is much, much more limited. If

Mrs Rajavi were already here, it is unlikely that there would be any power to prevent her meeting the Parliamentarians and exchanging views with them, no matter how damaging the very fact of the meeting, let alone what was said there, might be to our fragile relations with Iran. Immigration control must be exercised consistently with the convention rights, but at least it means that the means used to limit those rights are "prescribed by law".

(4) Was it in pursuit of one of the legitimate aims permitted by the Convention in relation to the right in question?

96. Article 10.2 describes the permitted limitations:

> "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."

The claimants do not suggest that the aims of the interference do not fall within those permitted by article 10.2. They could fall within national security, public safety or the protection of the rights of others. But this is not "national security" as many would understand it. It is not suggested that Iran would attack the United Kingdom, or incite terrorist actions against the United Kingdom, or withhold co-operation with our security services, thus putting British lives at risk (as was the case in *Corner House*). This is not an existential threat to the life of the nation. Rather, it is a threat to the foreign policy our Government wishes to pursue. Two things are said (and, as the Administrative Court concluded, plausibly said): first, that it would be perceived by the Iranians as a hostile act, thus damaging our "fragile but imperative" relations with them; and secondly, that there would be a risk to the safety of locally engaged embassy staff and our remaining property and assets there, a risk which had become all the more plausible following the attack on our Embassy in November 2011, after we had cut off all financial ties with Iran. Knowing that the Strasbourg court generally takes a generous view of the concept, I am prepared to accept that the first risk comes within the ambit of "national security" and that (in the case of our local staff) the second comes within the protection of the rights of others.

97. That raises two further questions. The first is one of fact. How real are these risks? What is the evidence upon which they are based? What would the damage amount to? Lord Clarke is "extremely sceptical" about them and I can well understand why. It would, no doubt, have been open to the claimants to have challenged the factual basis for the Government's views before the Administrative Court. They could have asked that Mr O'Flaherty be cross-examined and subjected those views to searching examination. But they did not. Perhaps they were advised that little good would come of it. There are some factual questions upon which we may have to take the Government's word for it. They cannot always reveal the sources of their information. Qualitative assessments such as this are not readily challenged. So we must accept that those risks do indeed exist, although we have precious little information upon which to assess either their likelihood or their gravity. The second issue is one of evaluation. How important are those risks when weighed against the interference? That comes in at the next stage of the analysis.

(5) Was it "necessary in a democratic society"?

98. This is what we now call proportionality. In this country, we have broken this down into four sub-questions, recently articulated by Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, at para 45, and repeated in substantively identical terms by Lord Sumption and Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, at paras 20 and 74. In reality, however, there is a considerable overlap between the four questions. Provided that (i), (ii) and (iii) are answered in the affirmative, the real question is (iv), which can be encapsulated as "do the ends justify the means"? I have no doubt that it is for the court to make the proportionality assessment; but I have equally no doubt that on some parts of that assessment the court should be very slow indeed to disagree with the assessment made by the Government.

(i) Is the objective sufficiently important to justify limiting a fundamental right?

99. This entails a qualitative judgment which the Government is much better qualified to make than is the court. This is not to say that the court will always take the Government's word for it on this or any of the proportionality questions. We did not do so, for example, in *Aguilar Quila.* But foreign policy and national security are the Government's business – some would say the first business of any Government. They have access to sources of information which cannot be put before any court. They have

advisers whose job it is to assess what is likely to happen in the future and how serious that will be. They are accountable to Parliament if they get it wrong. These, in brief, are the reasons given in all the cases why courts should be slow to differ from the Government's assessment of the importance of the objectives pursued in a national security context.

100. This case has two unusual features bearing on this question in different directions. First, many of the claimants are themselves peculiarly well qualified to assess the importance of the Government's objectives. They have been in relevant positions in Government or, in the case of Lord Carlile, has served as the Government's independent reviewer of the operation of our anti-terrorism legislation. Second, they are all (apart from Mrs Rajavi herself), senior Parliamentarians. This means that they are among those who can hold the Government to account in Parliament for the judgments it makes.

101. At this threshold stage, however, whatever doubts I might have about the real strength of the Government's fears, I cannot say that preserving our relations with Iran is not even capable of justifying some limitation on freedom of speech.

(ii) Are the measures which have been designed to meet it rationally connected to it?

102. Clearly, they are. The risks are said to stem from letting Mrs Rajavi come here to address a group of Parliamentarians in the Houses of Parliament. Preventing her from doing so is the rational way of avoiding the risks.

(iii) Are they no more than are necessary to accomplish it?

103. Once again, clearly they are. In this case, this is a circular question. The risks stemming from allowing her to come here to address the Parliamentarians can only be prevented by refusing her permission to do so.

(iv) Do they strike a fair balance between the rights of the individual and the interests of the community?

104. This, as always, is the nub of the proportionality question. It involves weighing or balancing values which many may think cannot be weighed against one another. Some will think that our foreign policy interests in the

Middle East are so important, not only to the safety and security of this country but to the safety and security of the whole wide world, that nothing should be allowed to put them at risk. Some may think that freedom of political expression, especially where such serious and controversial issues are involved, is such a vital feature of any democracy that only the most weighty of reasons should suffice to justify any interference with it.

105. I agree that, difficult though this is, it is ultimately a task for the court, but a court which is properly humble about its own capacities. If the court is satisfied that the Government has struck the balance in the wrong place, then the court must say so. But I also agree that courts must be very slow to interfere with that balance in a case such as this. The court has a particular expertise in assessing the importance of fundamental rights and protecting individuals against the over-mighty power of the state or the majority. The Government has much greater expertise in assessing risks to national security or the safety of people for whom we are responsible. But the Government in a democracy such as ours should be at least as mindful of the need to strike the necessary balance between individual rights and the common good as are the courts; and if it does not protect those rights, it is accountable to Parliament in a way which we are not. I may be (like Nellie) a cockeyed optimist, but I believe that our Government does, on the whole, try to act within the law (there was a time when every senior civil servant carried a copy of guidance entitled *The Judge Over Your Shoulder*); that law now requires the Government to respect human rights, and so it must try to do so. There are occasions when they get it wrong, and we must say so if they do, but we should certainly not assume that they have.

106. This case is particularly difficult, and perhaps unusual. Not only is neither side of the balance particularly weighty, but many of the features cut both ways. I agree entirely with Lord Kerr that it is for us to assess the importance of the right, and we all agree about the particular importance of freedom of political speech, especially on issues such as this. But there are many other ways in which the Parliamentarians could learn from Mrs Rajavi and exchange views with her. She is not being prevented from making her views known, however unpopular those views are with the Iranian authorities. The Parliamentarians are not being prevented from discussing the issues with her. They do not need her to come to Parliament in the way that, for example, all sides of the political debate on the recent referendum had to be put before the voting public. They want her to come, not only for practical, but also for symbolic reasons.

107. On the other hand, the claimed risks to our national interests are also not of the most weighty. The Government has been prepared to take much greater risks in our relations with Iran than it would be taking if it were to allow

Mrs Rajavi to come here. They have judged the foreign policy objectives pursued to be more important than the risks. What is at stake here is, it must be admitted, comparatively small beer compared to what is at stake in sanctions aimed at combatting nuclear proliferation. But like everything else, that cuts both ways. The Government's view is that Mrs Rajavi is not an important figure in the Iranian opposition. There is little to be gained from exchanging views with her and something to be lost.

108. I was for a while troubled by the thought that the risks feared by the Government could not begin to justify interfering with the Parliamentarians' rights to exchange views with Mrs Rajavi were she already here. There are many important foreign opposition figures whom we have proudly welcomed to these shores and given a platform for their views. Only if they commit criminal offences here can they be prevented. This must often be extremely irritating, to put it mildly, to foreign governments with whom we wish to remain on friendly terms. Why should it make a difference that Mrs Rajavi is not here and has no right to be? In the end, I have concluded that it does make a difference, not only because the law allows the Government to prevent her coming here, but also because of the symbolic importance which both she and the Parliamentarians, on the one hand, and the Iranian authorities, on the other hand, would attach to the lifting of the ban.

Conclusion

109. In the end, I have reluctantly concluded that the risks anticipated by the Government, which we must accept are real, are, in the unusual circumstances of this case, sufficient to justify the interference with Mrs Rajavi's and, more importantly, the Parliamentarians' rights. No one can doubt the huge importance of what is going on in the Middle East to the national security of this country and of the whole world. Recent events have served to emphasise that our relations with Iran are not only "fragile" but also "imperative". I cannot conclude that the Parliamentarians' right to meet Mrs Rajavi face to face in the Houses of Parliament is sufficiently important to put that relationship at risk. They have the unique advantage that the Government can and must answer to Parliament for what the claimants see as an affront to their rights as Parliamentarians.

110. The three decisions under attack in these proceedings were made on 1 February 2011, 10 October 2011, and 24 January 2012. The witness statements of Mr O'Flaherty were made on the same days as the second two decisions. The Administrative Court made its decision on 16 March 2012. It is now November 2014. A great deal has happened in the Middle East since then. We do not know how, if at all, the Foreign Office and Security

Service assessments of the balance of risk and advantage would be different today. But I am conscious that we are looking in 2014 at the compatibility with the convention rights of a decision taken in 2011. We have, I hope, gone some way towards clarifying the principles. It can be taken again in the light of the up-to-date situation.

LORD CLARKE:

111. I would very much have liked to be able to agree with Lord Kerr and have allowed the appeal. This is because I am extremely sceptical about the reasons given on behalf of the Secretary of State for refusing to permit Mrs Maryam Rajavi to visit the United Kingdom in order to meet a number of members of Parliament and to discuss democracy and human rights in Iran. However, I have reached the conclusion that there is no basis upon which the court could properly allow the appeal and that the appeal should be dismissed, essentially for the reasons given by Lord Neuberger.

112. My reason for being unable to agree with Lord Kerr are essentially these. Like him (at para 133), I agree with the assessment of the Secretary of State that Mrs Rajavi's admission to this country would be (or would have been) regarded by the Iranian government as a hostile act and, again like him, I find it impossible to disagree with Stanley Burnton LJ's assessment that it was entirely feasible that, given the record of the Iranian government, retaliation in the form of action against Iranian employees or against United Kingdom citizens might ensue. In para 135 Lord Kerr poses this question. Put simply, if the executive's assessment of the risk must be accepted, what is the court's role in judging whether such a risk, and the consequences of its materialising, are sufficient to justify the interference with the particular Convention right?

113. It appears to me that, on the facts of this case, once those conclusions are accepted, it is very difficult for the court to reject the Secretary of State's view on proportionality. It was indeed at this first stage that I had some doubts. In particular I was unsure whether it was right to accept the evidence of Mr O'Flaherty upon which the findings were based. It seemed to me that there was scope for investigation of the question whether the Home Office were still influenced by their previous view that PMOI was a terrorist organisation, given that the Secretary of State had refused to reverse the proscription of PMOI, had resisted an appeal to POAC against that refusal and, when the appeal succeeded, had subsequently appealed to the Court of Appeal, which unanimously dismissed the appeal: see the description by Lord Kerr at para 119.

114. However, as Lord Neuberger and Lord Sumption observe, no attempt was made to cross-examine Mr O'Flaherty and, as Lord Neuberger says at para 65, not only were the concerns expressed by the Secretary of State and the Foreign Secretary (and their officials) genuine, but they were concerns which a domestic court is not, as a matter of fact, in a position to doubt, at any rate in the absence of evidence to the contrary.

115. The basis upon which Lord Kerr has reached the conclusion that the appeal should be allowed depends upon his analysis of proportionality. He accepts in para 150 that on the question of the assessment of the risks of admission to the United Kingdom and their consequences, very considerable respect for the executive decision is called for, albeit short of "genuflection". The position, he says at para 154, is different on the question whether the importance to be attached to the rights of the appellants (and indeed of Mrs Rajavi) to freedom of expression under article 10 of the European Convention on Human Rights was one on which the court should defer to the decision of the respondent. I agree with his conclusion in para 154 that it is for the court to reach its own conclusion on the importance to be attached to such a right on the facts of a particular case. As Lord Neuberger says at para 57, once a Convention right is affected by a decision of the executive, the court has a duty to decide for itself whether the decision strikes a fair balance between the rights of an individual or individuals and the interest of the community as a whole. In these circumstances I agree with Lord Kerr's conclusion at para 158 that the question is whether the decision of the Secretary of State was right.

116. I recognise the importance of Mrs Rajavi's rights under article 10. However, in his discussion on striking the balance Lord Kerr asks in para 169 whether unreasoning and unreasoned views should count significantly in support of a claimed justification for interference with that right and whether the Iranian reaction (even if correctly anticipated) should be allowed to exert significant influence over a decision to restrict the guaranteed rights of parliamentarians. He relies too in para 172 on the profoundly anti-democratic beliefs of Iran. However, I agree with Lord Neuberger (at his para 81) that the idea that the courts should not allow the executive to take account of risks which are activated by undemocratic or unreasonable motives is unsound. It is surely the duty of the executive to take account of the fact of such risks to personnel or property regardless of the motives of the perpetrators. I am unable to agree with Lord Kerr that it is relevant to take account of the perversity, irrationality or lack of justification of the likely conduct on the part of Iranians in Iran. The executive is rightly concerned with the actual risks.

117. As I see it, the question is how the balance should be struck between the importance of the exercise of the rights of Mrs Rajavi and the

parliamentarians to freedom of speech and the risks to British interests in Iran as identified by Lord Sumption in paras 7-9 and Lord Kerr in paras 122-124. Given that no attempt was made to cross-examine the witnesses or to challenge their veracity or reliability, while I recognise that questions of proportionality are ultimately questions for the court, the evidence here does not establish the case that the decision of the Secretary of State was disproportionate. In these circumstances, albeit with some reluctance, I would dismiss the appeal.

LORD KERR:

Introduction

118. Maryam Rajavi is a dissident Iranian politician. She lives in Paris. She has been invited by a number of members of the United Kingdom Parliament to come to meet them in the Palace of Westminster and to speak to them on the subject of democracy and human rights in Iran. In a letter from the appellants' solicitors of 12 April 2011 the following claims (which have not been disputed by the respondent) were made about Mrs Rajavi's abilities and status and about the organisations with which she is associated:

> "Mrs Rajavi is the leader of the National Council of Resistance of Iran (NCRI). The NCRI acts as a parliament in exile for Iran and aims to establish a democratic secular and coalition government in Iran committed to the rule of law and respect for human rights. Until her exclusion from the United Kingdom in 1997 Mrs Rajavi was a visitor to the United Kingdom where she participated in the political and religious discourse in connection with Iran. She continues to contribute to this discourse elsewhere in the European Union. It is clear that the current regime in Iran object to her views …
>
> Mrs Rajavi is an eminent and highly respected dissident Iranian politician. She is an expert on the status of women in Iran, the threats posed by the Iranian regime's brand of Islamic fundamentalism, the regime's export of fundamentalism and sponsorship of terrorism, its interference in the affairs of Middle Eastern nations (including the malign role played by the regime in Iraq, Afghanistan, Lebanon, Palestine, as well as North Africa) and pursuit of nuclear weapons. Since 1993, she has been the elected leader of the NCRI. As a woman and as a

> Muslim, she provides an important counterpoint to the religious and political beliefs expressed on behalf of the present regime in Iran. Despite the threat to her from that regime, she has continued to represent those who seek democracy, freedom of religion and respect for human rights in Iran. Although the People's Mojahedin Organization of Iran (PMOI), a constituent member of the NCRI, believes in Islam (albeit that it advocates a secular state with separation of church and state), the NCRI contains many other members of different faiths and none."

119. On 29 March 2001 PMOI became one of the proscribed organisations listed in Schedule 2 to the Terrorism Act 2000. On 30 November 2007, the Proscribed Organisations Appeals Commission (POAC) allowed an appeal brought by Lord Alton of Liverpool and a number of other peers and Members of Parliament against the Secretary of State's refusal to reverse the proscription of PMOI. POAC ordered the Home Secretary to lay before Parliament an Order removing PMOI from the list of proscribed organisations in Schedule 2. It found that, although PMOI had been actively involved in terrorism until June 2001, from that date onwards there had been a significant change in the organisation's activities and it could no longer be said to be involved in terrorism as defined in section 3 of the 2000 Act. POAC's decision was unanimously upheld by the Court of Appeal. PMOI has subsequently been de-proscribed in the European Union (January 2009), in the United States of America (September 2012) and Canada (December 2012).

120. Mrs Rajavi has visited the United Kingdom on four occasions, in 1985, 1990, 1991, and 1996. She was excluded from the United Kingdom in 1997. The reason given by the then Home Secretary was that her presence in this country "would not be conducive to the public good for reasons of foreign policy and in light of the need to take a firm stance against terrorism".

121. On 5 December 2010 Lord Carlile of Berriew QC wrote to the Secretary of State for the Home Department asking that she agree to meet him and others to discuss the possibility of Mrs Rajavi visiting the United Kingdom. On 1 February 2011 the Home Secretary replied. In her letter she said that she had decided to maintain the exclusion of Mrs Rajavi from the United Kingdom. Beyond saying that she did not consider that Mrs Rajavi's presence would be conducive to the public good, the Home Secretary did not give reasons for her decision. She pointed out, however, that the exclusion in 1997 had preceded and was unconnected to the proscription of PMOI. Mrs Rajavi's exclusion involved "wider considerations".

122. After proceedings for judicial review were issued, the United Kingdom Border Agency (UKBA), on behalf of the Secretary of State, wrote on 10 October 2011 to the appellants' solicitors. The letter stated that the Secretary of State had concluded that maintaining Mrs Rajavi's exclusion was justified "as her presence in the United Kingdom would not be conducive to the public good due to the significant damaging impact on United Kingdom interests in relation to Iran it is assessed that lifting the extant exclusion would bring about, and the consequences that may have for the lives and interests of others". That claim was elaborated on in a series of statements that can be broadly summarised as follows:

> (i) Notwithstanding MeK's having been deproscribed in 2008, the organisation's historical activities and Mrs Rajavi's role in them as its de facto leader could not be ignored; its terrorist violence until June 2001 continued to resonate. Moreover, there was little support for MeK in Iran; it was not a credible opposition group.
>
> (ii) The United Kingdom has a strong interest in working with Iran on major policy issues such as nuclear counter-proliferation and United Kingdom interests are affected by difficulties in United Kingdom -Iran bilateral relations. The United Kingdom is frequently condemned by public figures in Iran, for, among other things, its perceived support of extremist anti-Iranian activities, such as were historically carried on by MeK. When that organisation was deproscribed there were serious political protests from the Iranian authorities and demonstrations outside the British Embassy in Tehran.
>
> (iii) The lifting of Mrs Rajavi's exclusion would be seen as a deliberate political move against Iran, just as the deproscribing of MeK was, despite attempts by British officials to explain that it was not. Although Mrs Rajavi is able to travel to other European countries, the particular nature of the United Kingdom -Iran bilateral relationship is such that a particularly strong reaction is expected if her exclusion was lifted. Reprisals might occur which would put British nationals at risk and consular co-operation, already difficult, could become more problematic.
>
> (iv) Damage to the public interest significantly outweighs any interference with Mrs Rajavi's ability to express her views, not least because she has many alternative means of achieving this.

The parliamentarians could visit France or a meeting could be held by video-link.

123. The reasons for maintaining Mrs Rajavi's exclusion from the United Kingdom were also dealt with in two witness statements by Ken O'Flaherty, a senior civil servant in the Foreign and Commonwealth Office (FCO). In the first of these he repeated many of the reasons outlined in the UKBA's letter of 10 October 2011. He said that, despite the difficulties in United Kingdom -Iran relations, there were some areas in which the United Kingdom continued to work with Iran on a day to day basis. It was the FCO's opinion that a decision by the Home Secretary to lift Mrs Rajavi's exclusion would have a significantly damaging effect on relations between the two countries and that this would harm the United Kingdom's wider and crucial objectives.

124. On the basis of the Iranian reaction to the de-proscription of MeK in 2008 (which Iranian authorities continued to believe was politically motivated) Mr O'Flaherty considered that the lifting of the exclusion on Mrs Rajavi would be regarded as a deliberate political move against Iran. What he described as the "fragile yet imperative" nature of relations between Iran and the United Kingdom meant that any move by this country that could be perceived as appeasement of MeK was likely to have a "wide-ranging negative impact on day-to-day relations, as well as an impact on the major policy areas and United Kingdom interests that require negotiations with Iran". In short, Mr O'Flaherty considered that a decision to lift Mrs Rajavi's exclusion "would provoke a negative reaction from the Iranian regime, affecting United Kingdom interests in an already strained atmosphere" and that it might trigger threats to United Kingdom "personnel, property and activities in Iran".

125. A further decision letter was issued by the UKBA on 24 January 2012. In this letter it was stated that the Home Secretary had had regard to further evidence provided by the appellants, particularly the support for Mrs Rajavi expressed in some 180 statements, mainly from members of both Houses of Parliament. She had decided, however, that the exclusion of Mrs Rajavi had to be maintained for a number of reasons. These included that the lifting of the exclusion would be regarded as a demonstration of support for MeK which continued to be perceived by Iran as a terrorist organisation; that Iran continued to treat the removal of MeK from the list of proscribed organisations as evidence of United Kingdom support for terrorism; that the Iranian authorities had been complicit in the invasion of United Kingdom diplomatic compounds in Tehran in November 2011 and this demonstrated that the United Kingdom was the prime target for anti-Western sentiment, particularly because neither the USA nor Israel had embassies there; and

that lifting Mrs Rajavi's exclusion could be seen as a political response to the attack on the British Embassy and this would increase the risk of an adverse Iranian response which might involve a threat to United Kingdom government staff in Iran and United Kingdom assets in that country.

126. In his second witness statement Mr O'Flaherty said that the Foreign Secretary and the Parliamentary Under-Secretary of State, Alistair Burt, whose responsibilities included the Middle East, had both personally considered the question of the continued exclusion of Mrs Rajavi. Both had recommended to the Home Secretary that the exclusion should be maintained. The decision to maintain the exclusion order was also taken by the Home Secretary personally.

127. Mr O'Flaherty went on to describe the then current situation in Iran in the following passages of his statement:

> "4. As the Court no doubt will be aware, United Kingdom diplomatic relations with Iran have deteriorated significantly since my last witness statement. On 27 November, the Majles (Iranian Parliament) voted to expel our newly arrived Ambassador, Dominick Chilcott, citing both the United Kingdom's history of hostile policies towards Iran including its support for terrorism (ie the United Kingdom's deproscription of the MeK) and the announcement on 21 November 2011 that together with a strengthening of sanctions against Iran by Canada and the US, the United Kingdom would sever all financial ties with Iran.
>
> 5. The following week, on the afternoon of 29 November 2011, a planned demonstration outside the British Embassy Tehran to mark the first anniversary of the assassination of an Iranian nuclear scientist (for which the United Kingdom is blamed by Iran together with the US and Israel), resulted in approximately two hundred regime-backed Basijj paramilitaries invading both our diplomatic compounds, including our residential compound to the north of Tehran. They set light to the Embassy building and ransacked and looted all our properties in an attack that went on for nearly six hours, with Police acquiescence. All British diplomatic staff left Iran shortly after this incident for their own safety and given the Iranian authorities' failure to protect the safety of our staff and diplomatic property, the Foreign Secretary ordered that the Iranian Embassy in London be closed and all Iranian diplomats

> were told to leave the United Kingdom within 48 hours. Diplomatic relations were reduced at this point to the lowest possible level, short of severing them completely."

128. The risks attendant on Mrs Rajavi being permitted to come to this country were described by Mr O'Flaherty in para 6 of his second witness statement. He considered that, although the British Embassy in Tehran had closed down, the security of locally engaged staff would be imperilled. Remaining British Embassy property and assets would be in jeopardy. There was also a potential risk to British interests outside Iran. British property in the Middle East could become targets of retaliatory action against the United Kingdom.

The proceedings

129. The appellants are Mrs Rajavi and a cross party group of parliamentarians, led by Lord Carlile of Berriew QC, a Liberal Democrat member of the House of Lords. The parliamentarians wish to meet Mrs Rajavi in the Palace of Westminster in order to discuss the future of Iran, particularly in relation to the establishment of democracy and human rights in that country. They claim that there has been an unjustified interference with their rights under article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

130. The appellants contend that a face-to-face meeting between them is vital to the success of their proposed discussions. In support of that claim, they have provided a statement from Mr Alejo Vidal-Quadras, a vice president of the European Parliament. On the status and standing of Mrs Rajavi he said that she represents the rights of the oppressed in Iran, from women and students to ethnic and religious minorities. He considered that her modern and progressive interpretation of Islam was an important and necessary example to others. He found her to be a true believer in gender equality and freedom of thought and religion, and he considered that she was committed to the rule of law. She was, in Mr Vidal-Quadras' estimation, "a very responsible leader". He emphasised the importance of meeting Mrs Rajavi in the flesh, citing the experience of members of the European Parliament who had had direct meetings with her. This had allowed them and their advisers to question Mrs Rajavi and spend time with her, addressing a range of sensitive issues. This, he suggested, would not have been possible through long distance communication means.

131. Before the Divisional Court (*R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2012] EWHC 617 (Admin) – Stanley Burnton LJ and Underhill J) the Secretary of State accepted that there had been interference with the appellants' rights under article 10 of ECHR but she suggested that this was minor in nature since it was feasible for Members of Parliament to visit France or other countries to speak to Mrs Rajavi or a video-link conference could be held. Either of these, it was claimed, would be a suitable alternative to a face-to-face meeting. That argument was rejected by the Divisional Court, Stanley Burnton LJ observing at para 27 of his judgment that there was no suitable room in the Palace of Westminster to accommodate all who wished to be present at the proposed meeting. That consideration, taken together with the greater impact that a face-to-face meeting would have and the symbolic importance of such a meeting, persuaded the Divisional Court not to accept the respondent's claim on this issue.

132. The Divisional Court accepted that where the right of free expression interfered with was that of parliamentarians, particularly strong justification for the interference was required both under ECHR and at common law – para 28 of the Divisional Court's judgment. But the court considered that, because the executive had assessed that there was the possibility of unwelcome action by a foreign government, the decision of the Secretary of State could not be gainsaid by the court – paras 34 and 35.

133. Stanley Burnton LJ questioned some aspects of the Secretary of State's apprehensions. For instance, he found it difficult to accept that the Iranian government's decision whether or not to develop atomic weapons would be influenced by lifting the exclusion on Mrs Rajavi. He had no such difficulty, however, in agreeing with the assessment that her admission to this country would be regarded by the Iranian government as a hostile act. (Nor, may I say, do I doubt that such a reaction *might* occur). Stanley Burnton LJ went further. He said that it was entirely feasible that, given the record of the Iranian government, retaliation in the form of action against Iranian employees or against United Kingdom citizens might ensue. (Again, I find it impossible to disagree with this assessment). Two observations about this must be made, however. As I shall discuss below, the recent history of relations between the United Kingdom and Iran is characterised, above all, by the unpredictability of the reaction of Iranian authorities and those whom they encourage to engage in attacks on employees or property of the United Kingdom. The second observation is that such risks, even if they materialise, do not of themselves provide irrefutable justification for the interference with the appellants' article 10 rights.

134. The Divisional Court considered that this case closely resembled that of *R (Corner House Research) v Direction of Serious Fraud Office (JUSTICE intervening)* [2008] UKHL 60 [2009] 1 AC 756. It was acknowledged that in the *Corner House* case there was an express threat of action by a foreign government whereas here there is only fear of such action. But Stanley Burnton LJ felt that no material distinction could be drawn between the two situations. In both cases, he said, the assessment by the executive, which could not be "gainsaid" by the court, of "the possibility of unwelcome action" was the critical factor. He relied particularly on the passage from the speech of Lord Bingham in *Corner House* where he cited with approval the statement in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 to the effect that the polycentric character of official decision-making in matters involving policy and public interest considerations were not susceptible of judicial review because it was not within "the constitutional function [or] the practical competence of the courts to assess their merits".

135. The Divisional Court's reliance on *Corner House* and *Matalulu* prompts consideration of two important matters which will be dealt with later in this judgment. The first is whether, when coming to assess the proportionality of interference with an article 10 right, it is relevant that the apprehended inimical action by a foreign state is threatened or merely assumed. The second, and more important, issue is how the executive's assessment of the level and importance of the risk should affect the court's consideration of whether this justifies the particular form of interference. Put simply, if the executive's assessment of the risk must be accepted, what is the court's role in judging whether such a risk, and the consequences of its materialising, are sufficient to justify the interference with the particular Convention right?

136. The Divisional Court's decision was appealed to the Court of Appeal *(R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2013] EWCA Civ 199 Arden, Patten and McCombe LJJ). The principal judgment was delivered by Arden LJ. She held that, in the context of national security and foreign policy, the question whether the interference with the appellants' rights was no more than necessary to achieve the Secretary of State's objectives was to be answered by a review of her decisions on the basis of their "rationality, legality and procedural [propriety], not by the substitution by the court of its own judgment on the merits" – para 7 (iii). At para 72 of her judgment Arden LJ said:

> "… once the court is satisfied that the decision was within the range of decisions that could properly be made, proportionality does not require it to go on and be satisfied that the decision is correct."

And at para 93 Arden LJ said that the court "does not second guess the merits of the substantive decision-maker in the field of foreign policy and security but looks to see whether the decision-maker had approached the matter rationally, lawfully and in a procedurally correct manner".

137. For reasons that I will give in more detail later, I consider that this was a wrong approach. Shortly stated, the court's role in deciding whether there has been an unjustified interference with a Convention right is to answer the four questions which are said to usually arise – see *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621 at para 45 per Lord Wilson: (a) is the objective sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community? In dealing particularly with the latter two of these questions, the court must indeed exercise its own judgment. Of course, it may defer to the Secretary of State's assessment of the risks involved and of the consequences, should the risks materialise. But that does not relieve the court of the duty to confront frankly the stark questions whether, given those risks and consequences, it (as opposed to the decision-maker) has been persuaded that the measures are no more than is required to achieve the stated object and that a fair balance has been struck.

The arguments

138. Lord Pannick QC for the appellants presented two main grounds of challenge to the Secretary of State's decision. Firstly he claimed that her anticipation of adverse consequences to British interests if Mrs Rajavi was permitted to come to this country could not constitute a legal justification for interference with the appellants' article 10 rights. Such an interference must be founded on standards that are in conformity with democratic values. A restriction of the appellants' Convention rights which depended on surrender in the face of anticipated illegal activity wholly undermined the right to freedom of expression. To restrict the right to free speech because of the fear of repressive action was to negate the very values that article 10 was designed to uphold. Society must not abandon its values in the face of threats of a violent reaction, unless conditions warranted a derogation under article 15 of ECHR. To allow anticipated illegal activity by a country that had no respect for the right to free speech or other democratic values to interfere with the appellants' rights contravened the very purpose of the Human Rights Act 1998 by allowing a foreign country which did not share the values of ECHR to determine the 1998 Act's application in this country.

139. Interference with a Convention right because of threats or fear of reprisal by a foreign power could only be justified, Lord Pannick argued, in circumstances where a derogation under article 15 of ECHR was warranted. This provides in para 1:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

140. Lord Pannick's second argument was that, even if it was lawful for the Secretary of State to have regard to the feared reaction from another country, a decision to interfere with freedom of expression in relation to political speech could only be regarded as proportionate in the most extreme circumstances. Such circumstances were not present in this instance.

141. For the Secretary of State Mr Eadie QC emphasised that the decision not to lift the exclusion on Mrs Rajavi was taken by the Home Secretary personally and that the advice proffered by the Foreign and Commonwealth Office had been considered personally by the Foreign Secretary and the Under-secretary of State. All of the factors that went up to making the decision were dependent on judgment, as was the final decision itself. This was therefore pre-eminently a case where the courts should be slow to interfere with the government's decision. The evaluation of risks was something to be carried out by the experts, namely, the politicians and their advisers.

142. On the first of Lord Pannick's arguments, Mr Eadie submitted that, for it to be viable, it had to prevail in all circumstances. Thus, irrespective of how dire the threat represented by the anticipated reaction of the foreign power, the government of the United Kingdom was powerless to respond to it by restricting a Convention right if what was expected to occur was the product of repression or a failure to subscribe to Convention values. Carried to its logical conclusion, the appellants' argument meant that paramount importance had to be given to the nature of the action of the foreign state rather than the risk of the consequences of failing to respond to it. This, Mr Eadie submitted, could not be correct.

143. On the appellants' second argument, the respondent submitted that there was no single, indisputably correct answer to the question whether a

restriction on the appellants' rights was required in order to safeguard national interests. But the risks to local staff and British interests were undeniable. The British Embassy in Tehran had been targeted above all other nations represented in Tehran before the departure of British Embassy staff in November 2011. Lifting the exclusion would be viewed as highly provocative and possibly construed as a further response to the attack on the British Embassy. As the Divisional Court had held, the prospect of the lifting of the exclusion on Mrs Rajavi being regarded as a hostile act was incontestable. The judgment that to permit her to come to the United Kingdom "would damage existing United Kingdom interests in relation to Iran and endanger the security, wellbeing and properties of British officials overseas" could not be gainsaid. The decision of the Secretary of State could not be considered disproportionate, therefore.

Discussion

(i) The need to protect democratic values

144. Despite its initial appeal, the appellants' first ground of challenge, that interference with article 10 rights can never be justified on the basis of apprehension of action which is out of accord with Convention standards, cannot be accepted. In advancing that argument, Lord Pannick had relied particularly on the decision of ECtHR in *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121. At para 45 the court said:

> "… Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."

145. Lord Pannick suggested that this betokened the court's view that the only interference which could be countenanced was that which was actuated by and rooted in democratic values. This, he said, ties the basis for the interference to the democratic values which the Convention right enshrines. I am satisfied that this is not the correct construction of the court's judgment. What the court was saying was that only such interference as was necessary to defend democratic society was eligible as justification. Thus, intrusion

on a Convention right which did not seek to promote democratic values would not qualify. But that does not mean that the occasion for the decision to interfere (in order to protect those values) must also spring from the same values. Put simply, if it is necessary that, in order to protect the democratic values of our society from the repressive actions of a regime which has no regard for those values, there should be interference with a Convention right, that is justified. The emphasis must be on the values to be protected, not on the circumstances that prompt the need for protection. If the values which require protection are those which can be recognised as democratic and worthy of legitimate protection, it is of no consequence that the need to protect them stems from actions which are undemocratic or repressive.

146. My view on this argument is reinforced by consideration of the very limited and exceptional circumstances in which the state could defend the national interest by use of the power of derogation under article 15 of ECHR. This can only arise where there is a public emergency threatening the life of the nation. On the appellants' first argument, dire and immediate threat to the very democratic values that the Convention is designed to uphold, but which fell short of the high threshold of article 15, could not be guarded against by way of interference with individual Convention rights if the threat emanated from an undemocratic and repressive regime. That could not be correct.

(ii) Proportionality

147. In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, paras 68-76 Lord Reed provided an admirable review of the history, development and, in the case law of the Court of Justice of the European Union and ECtHR, the current contours of the principle of proportionality. As he pointed out in para 70, an inherent feature of the Convention is the "search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights". The striking of that vital balance is influenced by the importance of the objective pursued and the value of the right that has been interfered with – para 71. While in Convention case law proportionality is, as Lord Reed put it, "indissolubly linked" to the principle of the margin of appreciation, this does not apply at the national level where the degree of restraint practised by courts in applying the principle of proportionality and the extent to which they will respect the judgment of the primary decision maker depends on the context.

148. Not only is the proportionality principle dependent on context, in the national setting it is applied in a structured way. Building on the formulation

suggested by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 and drawing also on the decision of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, the House of Lords in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 described four stages through which the proportionality exercise should pass. These were endorsed in *Aguilar Quila*, as earlier mentioned. The four stage process was derived from Dickson CJ's judgment in *Oakes* and was outlined by Lord Reed in *Bank Mellat* in para 74 as follows:

> "The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

149. Obviously, some factors may be relevant in more than one of the four stages described but it is important to maintain separate consideration of each of them. In particular it is essential to recognise the clear difference between the existence of a sufficiently important objective to justify the decision to limit the right (the first stage) and the need for the objective to be sufficiently important to outweigh the interests of those whose rights have been interfered with. Lord Reed dealt with this in para 76 of his judgment in *Bank Mellat*:

> "In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the

objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four)."

150. In following the structured approach to the question of whether the Home Secretary's decision was proportionate, it is, I believe, essential to keep the two separate aspects of Mrs Rajavi's exclusion clearly in mind. On the question of an assessment of the risks of her being admitted to the United Kingdom and the consequences which might flow from them, very considerable respect for the executive decision is called for, although, as Lord Neuberger has said, this cannot be simply "franked" by the courts. Although we must accord the Secretary of State's view on this issue due deference, we are not required to genuflect in its presence. But on the question of the importance of the right which has been infringed, the courts do not defer to the executive in assessing the value of that right. On that issue, the word of the Secretary of State cannot hold sway. Of course, her views are worthy of careful consideration but they are not necessarily - indeed they cannot be if the system is functioning properly - the final word. The whole purpose of having the court assess the proportionality of the measure is to allow an independent judgment to be applied to the prominence to be given to the Convention right which is engaged.

151. On the matter of the judgment to be made on how foreign relations would be affected by allowing Mrs Rajavi to come to this country, the courts should therefore be prepared to give considerable, if not uncritical, respect to what the Home Secretary has said. As Lord Bingham said in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at para 29, "it is the function of political and not judicial bodies to resolve political questions". Interpretation of historical events and assessment of their impact on relations between countries are not the concern of the courts.

152. Whether executive action transgresses a Convention right, however, and, if it does, the importance to be attached to the right interfered with are emphatically matters on which courts are constitutionally suited to make judgments. The courts' competence to make those judgments is secondary, however, to the consideration that the current constitutional order, in the form of the Human Rights Act 1998, requires courts to make those very judgments. And, although it is trite to say it, one must always remember that they make those judgments on the command of Parliament. The importance given by government to the impact that a particular outcome may have on foreign relations should give courts pause and, undoubtedly, they should be appropriately reticent about questioning the validity of a decision taken on grounds which a government minister considers to be in the national interest. But this should not operate as an inhibition on the discharge of the

courts' proper constitutional function. If there has been an interference with Convention rights (and in this case there certainly has been), courts are there to examine whether that interference is justified. That examination must focus on the proffered reasons of the decision-maker but the inquiry necessarily extends beyond that. The courts, charged with the solemn duty by Parliament of deciding whether the political reasons that have actuated the decision to interfere with the particular Convention right justify the interference, have a clear obligation to have proper regard to the importance of the right which has been interfered with. That exercise requires the courts not only to examine the reasons given for the interference but also to decide *for themselves* whether that interference is justified.

153. It is superficially attractive to say that because the Home Secretary has, albeit not initially, recognised the symbolic importance of a meeting between parliamentarians and Mrs Rajavi taking place in the Palace of Westminster, she has paid sufficient attention to the appellants' article 10 rights and that her decision to maintain the exclusion is beyond interference by the courts. On this basis, it is suggested that there is no warrant for concluding that the Secretary of State has underrated the significance of the restrictions on freedom of expression in this case. On that account, (the argument goes) the court has no business in substituting its view for that of the Home Secretary that the restriction was proportionate. This approach proceeds on the premise that the court is not engaged in what Lord Sumption has described as a "merits review" and, moreover, that the court is entitled (or required) "to attach special weight to the judgments and assessments of those with special institutional competence".

154. All of this is unexceptionable so far as the Secretary of State's assessment of the possible political consequences of lifting Mrs Rajavi's exclusion is concerned. But the appropriate reticence in relation to that issue should not be assumed to give rise to a similar need for restraint in the matter of deciding the weight to be attached to the right of the appellants to hold the meeting that they wish to have with Mrs Rajavi at Westminster. In none of the cases referred to by Lord Sumption on this issue: *Appleby v United Kingdom* (2003) 37 EHRR 783; *Mouvement Raëlien Suisse v Switzerland* (2012) 56 EHRR 482; and *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607 did the Strasbourg court suggest that the question of the importance to be attached to the right was one on which it should defer to the decision of the respondent. On the contrary, it is clear that the court in each of those cases reached its own independent view as to the significance of the interference and, consequently, whether the interference was justified. True it may therefore be that the Secretary of State addressed herself to the question whether the restrictions on the appellants' freedom of expression were outweighed by the risk to the safety

of British persons, property and Embassy staff, but that is not the point. It is for the court to decide whether these considerations have that offsetting effect.

155. Even if one accepts without reservation the Home Secretary's assessment of the risks and the nature of the hostile reaction in Iran to Mrs Rajavi being permitted to visit the United Kingdom, the question remains whether the apprehension that those risks may materialise justifies the interference with the article 10 rights of the appellants. That is a question that the court must confront and it may not answer merely by saying that the Home Secretary has made her assessment. The court, having accorded appropriate respect to the Home Secretary's assessment of the risk, must then weigh that in the balance against the importance to be attached to the right which her decision interferes with. It would be, in my view, a fundamental error to attach "special weight to the judgments and assessments of those with special institutional competence" when it comes to evaluating the importance of the appellants' article 10 right. The Home Secretary has special institutional competence in the matter of an assessment of the risk to British interests if Mrs Rajavi is permitted to come to the United Kingdom. She has no such competence in the matter of assessing the importance of the article 10 right. To conflate the two elements of the exercise is plainly wrong.

156. It is also plainly wrong to suppose that, because the Home Secretary enjoys particular expertise in assessing the risk to British interests, this places an inhibition on the court's performance of the balancing exercise. The first factor is one on which the Home Secretary can claim expertise and knowledge which put her in a better position than the court to make a judgment; it follows that the court must either accept that judgment or accord it considerable weight. But that is not an end of the court's role and function. On the second part of the balancing exercise, the court is entirely competent – and duty bound - to reach its own independent judgment.

157. Put simply, it is perfectly feasible for courts to accord considerable respect to the political reasons underlying a particular ministerial decision but to conclude that that decision has a disproportionate effect on the Convention rights at stake. Such a conclusion should not be portrayed as government by the courts. It is simply an instance of the courts looking at the basis on which intrusion on a person's Convention right has been sought to be justified, examining and assessing the nature of the right and finding that, given the importance of that right in the particular circumstances of the case, justification for the interference has not been established.

158. Ultimately, therefore, it is not a question of whether the Secretary of State has been shown to be guilty of an error of principle. We do not ask whether the Secretary of State's view is tenable; we ask whether it is right. Right, that is, by the standards that have been set for us by the Human Rights Act. Taking account, albeit with a suitably critical appraisal, of the Secretary of State's view as to the consequences of lifting the exclusion on Mrs Rajavi, the question is whether the interference with the appellants' right, notwithstanding those consequences, is justified.

159. What it comes to is this. By enacting the Human Rights Act, the government has chosen to subject decisions which any public authority, including the executive or an individual minister, takes, involving interference with citizens' Convention rights, to the courts' independent review. In submitting to that review, the government is entitled to say to the courts, "respect our reasons for deciding why such interference is required". It is not entitled to say, however, "you must accept our view as to the importance of the right that has been interfered with".

160. The decisions in *Matalulu* and *Corner House* must be seen in this light. In the *Corner House* case, the decision of the Director of the Serious Fraud Office to discontinue a criminal investigation was challenged on the basis that it had been terminated because of, among other things, a threat by Saudi authorities to withdraw from existing bilateral counter-terrorism co-operation arrangements with the United Kingdom. In para 30 et seq of his speech, Lord Bingham of Cornhill explained why it was "only in highly exceptional cases" that the court will review the decisions of independent prosecutors and investigators:

> "31 The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*)
>
> 'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'

> Thirdly, the powers are conferred in very broad and unprescriptive terms."

161. The decision under challenge in *Corner House* was quite different in a number of significant respects from that of the Home Secretary in the present case. In the first place, although the power to exclude rests solely with the Secretary of State, where its exercise conflicts with a Convention right, review of her decision is clearly contemplated. Secondly, for the reasons already given, the courts are competent to assess the value of the right that has been interfered with and are expressly charged with the duty to make a decision as to the proportionality of the interference. Thirdly, unlike the present case, no fundamental right was at stake in the Director's decision in the *Corner House* case. Finally, while the polycentric dimension of the Home Secretary's decision may have been present in her evaluation of the risks that would be incurred by the admission of Mrs Rajavi to the United Kingdom, the same cannot be said about consideration of the value of the article 10 right. The value to be placed on that right does not require the inexpressible or undefinable experience and expertise of ministers or their advisers.

162. I cannot therefore agree with the view of Stanley Burnton LJ that the citation from *Matalulu* is "as applicable to the present case as it was in *Corner House*". He considered that the present case concerned "fears or apprehensions, based on assessments or judgments made with the wide experience and expertise and information available, in particular to the Foreign and Commonwealth Office, which the Court is not in a position to gainsay" – para 35. The present case does indeed involve those matters but it goes well beyond them. It also critically involves striking a balance between those concerns and the interference with the important right of freedom of expression.

The importance of the right

163. Article 10 of ECHR provides:

> "(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."

164. Freedom of expression is a fundamental Convention right. Its importance was recognised in *R v Secretary of State for the Home Department Ex p Simms and another* [2000] 2 AC 115, particularly in the speech of Lord Steyn, who at 126E/F said:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market:' *Abrams v United States* (1919) 250 US 616, 630, *per* Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *Stone, Seidman, Sunstein and Tushnet, Constitutional Law*, 3rd ed (1996), pp 1078-1086."

165. This sentiment has received frequent and enthusiastic endorsement in Strasbourg. In *Sűrek v Turkey* (1999) 7 BHRC 339, a decision of the Grand Chamber, the court said at para 57:

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to article 10.2, it is applicable not only to 'information' or 'ideas' that are favourably received or

> regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly. (ii) The adjective 'necessary', within the meaning of article 10.2, implies the existence of a 'pressing social need'."

166. Freedom of political speech is given a particular premium. At para 60 of its judgment in *Sűrek* the Grand Chamber said:

> "In assessing the necessity of the interference in the light of the principles set out above (see paras 57-58), the court recalls that there is little scope under article 10.2 of the convention for restrictions on political speech or on debate on questions of public interest (see *Wingrove v United Kingdom* (1996) 1 BHRC 509 at 526 (para 58))"

167. The Strasbourg court has recognised the special importance of the right of politicians to freedom of expression. In *Castells v Spain* (1992) 14 EHRR 445, 476, at para 42 the court said:

> "The Court recalls that the freedom of expression, enshrined in article 10.1, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to article 10.2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court."

168. Apart from Mrs Rajavi, the appellants in this case comprise a cross party group of eminent politicians, many of them former holders of senior

government posts. It is clear by their commitment to this case that they regard the lifting of the exclusion on Mrs Rajavi as a matter of supreme importance to free speech and freedom of expression in this country. That factor, in my view, makes this case one where only the most compelling and pressing circumstances would justify a restriction on the article 10 right. The position is enhanced by the consideration that Mrs Rajavi stands for values which this country has cherished and championed, some of them for centuries. To deny her the opportunity to express views and advance causes in this country that all right-thinking members of our society fervently support is a very significant step indeed.

Striking the balance

169. The strongly held views of a number of eminent politicians that it is vital that Mrs Rajavi be permitted to visit the United Kingdom is a significant factor which must weigh heavily against a finding that the interference with the article 10 right is justified. On the other hand, the circumstance that her visit here might be regarded by Iran as a hostile act is obviously a matter of significant concern as is the anticipated retaliation against Iranian employees and United Kingdom citizens and property. These are rightly to be regarded as solid countervailing factors. But in as much as the chances of those risks materialising cannot be discounted, so also the chances of their not coming to pass must not be overlooked. It seems to me, therefore, that the fact that this is a prediction of likely action rather than, as in the case of *Corner House*, an explicit threat, must be taken into account.

170. Lord Sumption has suggested that any attempt by the Secretary of State to explain to the Iranian government that she is bound by the Human Rights Act and by the decisions of an independent judiciary would not avail. He has said that the impact on the Iranian authorities of the United Kingdom's decisions is unlikely to be influenced by the question of which organ of the state was its originator. He has pointed out that they treated the judicial decision to de-proscribe MeK as a political decision in defiance of the facts and that it is not to be supposed that they would alter their stance on account of the Secretary of State's resolute resistance of the appellants' claim in this case.

171. All of this may be true. But, if it is true, one must not lose sight of the fact that these are unreasoning and unreasonable views. While they may, indeed must, be taken into account by the Secretary of State, the weight to be accorded to them cannot be completely divorced from recognition of their perversity. The history of the Iranian government's reaction in the past may carry a portent of how it would react in the future. But when one comes to

the question of how much this should influence the judgment of the Secretary of State, the circumstance that such views are irrational and unjustified should not be left out of account, particularly when this involves a restriction of the guaranteed rights of parliamentarians in this country.

172. Moreover, the fact that the anticipated reaction of the Iranian authorities, if indeed it materialises, would be rooted in profoundly anti-democratic beliefs; would be antithetical to the standards and values of this country and its parliamentary system; and would significantly restrict one of the fundamental freedoms that has been a cornerstone of our democracy must weigh heavily against sanctioning such a drastic interference with the appellants' article 10 rights. While, therefore, the Secretary of State should have regard to the possibility of an adverse reaction by Iran, she must give due recognition to the fact that, if that anticipated response leads to the continued exclusion of Mrs Rajavi, this would be at the expense of one of the most fundamental rights of our Parliamentary democracy.

173. In paras 75 and 76 of his judgment Lord Neuberger refers to what he describes as two points that I have made as to why the appeal should be allowed. In the first place, I should make it clear that these points are not to be taken as alternatives. It is their combined effect which has led me to the view that I have reached. True it is that the Executive is in a better position than the court to make a judgment on "the likely reactions of a volatile foreign government and people". But the fact that those reactions are, as recent history unquestionably shows, highly unpredictable should not be left out of account by a court tasked with the duty of deciding whether this particular instance of government's interference with this Convention right is proportionate. The government is entitled to say, "we are better placed than the court to make an assessment of what is likely to happen politically"; but the court is entitled, indeed required, to observe, "that is so, but what is likely to happen is inherently difficult to predict and, on that account, the weight which we attach to your judgment must be adjusted accordingly".

174. Lord Neuberger has suggested that my second point is that the weight to be given to the anticipated reaction of the Iranian authorities should be "significantly discounted" because this is the product of undemocratic beliefs etc. It is possible to characterise my discussion of this issue as discounting the Secretary of State's view about the anticipated Iranian reaction. I prefer to consider the matter more comprehensively. It is one thing to countenance a significant interference with a Convention right when the basis for that interference is the anticipated reaction of a democratic regime. It is quite another when what is apprehended is a wholly anti-democratic reaction. It is not simply a question of discounting the Secretary of State's view about the reaction of Iran, therefore. This is a

factor which should also be taken into account in relation to the significance of the article 10 rights of the appellants.

Conclusion

175. The courts of this country have been given momentous obligations by the Human Rights Act, none more so than the duty to decide whether interferences with Convention rights are justified. Parliament has decided that decisions of all public authorities, including government itself, should be subject to that form of independent review.

176. In conducting the review of government decisions, courts must, of course, be keenly alive to the expertise and experience that ministers and public servants have by reason of their involvement in affairs of state, an involvement that courts cannot possibly replicate. But if the power and the duty to conduct fearless, independent review of the justification for interference with Convention rights is to mean anything, close, dispassionate and independent examination of the reasons for interfering with those rights must take place. Convincing reasons for the interference must be provided – convincing, that is, to the court that is required to examine and assess them.

177. Taking Mr O'Flaherty's statements at face value, it is unclear what specific consequences would flow from a decision to allow Mrs Rajavi to come to the United Kingdom. It is revealing that most of what is feared is already happening or has occurred in the past. Generalities such as that contained in Mr O'Flaherty's first statement, that "ramping up of rhetoric may … provoke an uncontrolled public reaction" really do not provide any tangible evidence that the admission of Mrs Rajavi to the United Kingdom carries a particular risk.

178. Moreover, the inherent unpredictability of such events as have occurred in the past makes any forecast of what might or might not happen in the future extremely difficult. The circumstances of the sacking of the British Embassy in 2011, for instance, demonstrate the problem associated with making this type of prediction. Such events could well occur whether or not Mrs Rajavi is allowed to come to the United Kingdom. Mr O'Flaherty's first statement vividly illustrates this. In 2009 some of the United Kingdom's locally engaged staff were arrested and accused of involvement in the unrest which followed disputed Presidential elections in Iran. This was something which was, presumably, entirely unforeseen. The throwing of acid bombs into one of the British compounds, shortly before Mr

O'Flaherty's first statement was made on 10 October 2011, appears to have been an entirely random attack, unprovoked by any action on the part of British authorities. According to Mr O'Flaherty, even when tensions in the bilateral relationship ease, United Kingdom based staff members have problems with access to Iranian authorities.

179. All of this paints a picture of unpredictability and arbitrariness. Any assessment of the risk of adverse consequences must therefore be of a general, non-specific nature. While this court must have due regard to the assessment that Mr O'Flaherty has made of the risk (and to the judgment that the Home Secretary has made based on that assessment), it must not lose sight of the fact that the risks cannot be explicitly identified nor can they be precisely defined. They are a loosely expressed agglomeration of possible outcomes.

180. By contrast, the interference with the appellants' article 10 right is direct and immediate. Article 10 rights are, in any context, of especial significance but the critical importance of free speech in this case should not be underestimated. Our Parliament is the sovereign part of our constitution. Its laws prevail over everything else. The courts accord greater deference to the decisions of Parliament than to those of any other body. When a distinguished group of Parliamentarians wishes, in the interests of democracy, to conduct a face-to-face exchange with someone whose views they consider to be of critical importance, only evidence of the most compelling kind will be sufficient to deny them their right to do so. This court has a bounden duty to uphold that right unless convinced of the inescapable need to interfere with it. I have not been brought to that point of conviction. I would therefore allow the appeal and quash the decision to maintain the exclusion of Mrs Rajavi from the United Kingdom.