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Case No: PTA/19/2008, PTA/22/2008, PTA/32/2008, PTA/33/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION PURSUANT
TO THE PREVENTION OF TERRORISM ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2009

Before :
MR JUSTICE MITTING
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Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Applicant**
- and -	
(1) AT	**Respondents**
(2) AW	

- -
- -

MR ROBIN TAM QC & MR ALAN PAYNE
(instructed by **THE TREASURY SOLICITOR**) for the Applicant

AT
(1) MR TIMOTHY OWEN QC & MR EDWARD GRIEVES
(instructed by TRP SOLICITORS) for the Respondent

MISS JUDITH FARBEY & MISS SHAHEEN RAHMAN
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE)** as Special Advocates

AW
(2) MR TIMOTHY OWEN QC & MR HUGH SOUTHEY
(instructed by **TRP SOLICITORS**) for the **Respondent**

MR MARTIN CHAMBERLAIN & MISS CATHRYN McGAHEY
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE)** as Special Advocates

Hearing dates: 10th, 11th, 12th, 13th,16th, 17th, 18th & 19th February 2009

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Judgment

MR JUSTICE MITTING :

Background

1. With the consent of all parties, I have heard the cases of AT and AW together. A non-derogating control order was served on each of them on 4th April 2008. This is the review hearing under section 3(10) Prevention of Terrorism Act 2005. Each also appeals against the Secretary of State's refusal to modify certain of the obligations imposed by the order if I determine that it should, in principle, be upheld. Because there is a complete overlap between the appeals and my obligation to scrutinise the individual obligations against which the appeals are brought, under section 3(10), it is unnecessary to give separate consideration to the appeals. The issue in each case is whether or not the decision of the Secretary of State to make, and maintain in force, the control order and its individual obligations is flawed: section 3(10)(b). In his opening questions to the Security Service witness, ZD, Mr Owen QC suggested that there were no relevant differences between the two cases. For reasons which I will explain in the open and closed judgments, I do not accept that proposition. I have given separate consideration to each and reach conclusions by reference to the particular considerations which arise in each case.

AT

2. AT is a Libyan national, born on 7th March 1963. He arrived in the United Kingdom, from Iran, in July 2002 with his wife and three children. He claimed asylum on arrival, which was refused in March 2003. He appealed successfully to an adjudicator. There is an immaterial difference between him and the Secretary of State about whether or not he was thereafter granted indefinite leave to remain. He has lived in the United Kingdom ever since. On 8th January 2004 he was arrested at his home at 20 Foxton Road, Birmingham on counterfeiting and forgery charges. He pleaded guilty on arraignment at Birmingham Crown Court and on 12th May 2004 was sentenced to 3 ½ years imprisonment. He was released on licence and on home detention curfew on 1st July 2005, to the address to which his family had moved, 156 St Benedict's Road, Birmingham. On 3rd October 2005, he was detained under immigration powers pending deportation to Libya on the ground that this presence in the United Kingdom was not conducive to the public good for reasons of national security. In December 2005, he was re-arrested and charged with conspiring with AU and AW to provide money and other property for the purposes of terrorism. He was arraigned on an indictment containing three counts and on 11th June 2007, following a Goodyear, hearing pleaded guilty to a count of entering into or being concerned with an arrangement to make property available to another contrary to section 17 of the Terrorism Act 2000. He was sentenced to 22 months imprisonment, a sentence which resulted in his immediate discharge from criminal custody. He was re-detained under immigration powers but released on SIAC bail in August 2007. (By then, SIAC had determined in the lead cases of AS and DD that although they posed a risk to national security, it was not safe to return them to Libya. Consequently, all Libyan appellants were admitted to SIAC bail.) On 3rd April 2008, Collins J gave the Secretary of State permission to make a non-derogating Control Order, in anticipation of the dismissal of the Secretary of State's appeal in AS and DD by the Court of Appeal.

AW

3. AW is a Libyan national born on 4th April 1971. He arrived in the United Kingdom on 16th October 2002 and claimed asylum on 25th October 2002 or 4th November 2002 (it matters not which). His claim to asylum has never been determined. He is married, with five children, the youngest of whom is now aged 8 months. On 8th January 2004, he was arrested at his then home, 16 Kyotts Lake Road, Birmingham, for offences of counterfeiting and forgery. He, too, pleaded guilty on arraignment and received the same sentence as AT: three and a half years imprisonment. He was released on licence on 21st July 2005, but, like AT, was arrested and charged with the same conspiracy offence in December 2005. He pleaded guilty to the same count as AT and was also sentenced on 11th June 2007 to 22 months imprisonment. He was released on SIAC bail on 2nd July 2007 to his current house in Birmingham, a house which he shares with his wife and five children. On 3rd April 2008, Collins J gave permission to the Secretary of State to make a non-derogating Control Order.

The Libyan Islamic Fighting Group (LIFG)

4. The LIFG was proscribed on 14th October 2005. My findings about its recent activities and current state are set out in my generic open and closed judgments. Nothing that I have heard or read in these cases has caused me to make any material change in my assessment of those matters. AT and AW admit that they were members of the LIFG and remained so after their arrival in the United Kingdom. Each claims to have ceased to be members. The Secretary of State does not allege in her open case that either has committed an offence under section 11 of the Terrorism Act 2000 (under which it is an offence to belong or profess to belong to a proscribed organisation, unless the member became or professed to be a member before proscription and has not taken part in the activities of the proscribed organisation while proscribed).

The principal issues

5. The principal issues arise under four heads:

   i) The decision to make the order:

      a) did the material provided to the Secretary of State adequately set out the matters or considerations which might affect her decision to make, or not to make, the order which she made?

      b) if not, was her decision flawed?

      c) if so, should it be quashed?

   ii) Procedure: have AT and AW been afforded at least the minimum requirements of procedural fairness to which they are entitled in these proceedings?

   iii) Necessity: is the Secretary of State's decision that the making and continuance in force of the control orders is necessary for purposes connected with protecting members of the public from a risk of terrorism, flawed?

iv) Modification: is the decision of the Secretary of State that the obligations challenged continue to be necessary for that purpose, flawed?

There are ancillary and subsidiary issues which I will deal with under the appropriate head. There is no challenge to the Secretary of State's determination that she had and has reasonable grounds for suspecting both AT and AW to have been involved in terrorism related activity: it is established by their conviction of an offence contrary to section 17 of the Terrorism Act 2000.

The Secretary of State's case on the substantive issue

6. At the start of open closing submissions and at my invitation, Mr Tam QC encapsulated the Secretary of State's case against AT and AW in three propositions:

i) within and associated with the LIFG are people who may wish to continue the armed struggle or jihad in Libya and elsewhere;

ii) as their activities in and before January 2004 demonstrate, AT and AW have the skills, knowledge and contacts which, if put at the service of such people, would be of assistance to them;

iii) neither AT nor AW have demonstrated that they are not willing to do so.

(I have re-phrased and simplified Mr Tam's exact words in the interests of clarity. I do not believe that I have altered or misunderstood their sense).

AT

7. The Secretary of State relies on five open grounds:

i) AT was and is a significant and influential member of the LIFG;

ii) AT has supported terrorist networks by providing a variety of false documentation including passports and identity documents;

iii) AT has supported LIFG activities by the transfer of funds;

iv) AT espouses violent Islamist views, as is demonstrated by the material seized at his home in October 2005;

v) the three propositions summarised above.

AW

8. The Secretary of State relies on four open grounds:

i) AW was and is a prominent member of the LIFG;

ii) AW was and is a facilitator for the LIFG, specializing in the production and provision of false documents to overseas LIFG members;

iii) AW was and is a facilitator for the LIFG specializing in the provision of funds to overseas LIFG members;

iv) the three propositions summarised above.

The decision to make the order – AW

9. The information provided to the Secretary of State upon which she made her decision to make the control order was contained in the un-amended first closed statement and its annexes, as is made clear by its title: "First Security Service submission to the Home Secretary in support of the control order". It is replicated, with the closed statements and materials deleted, in the un-amended first open statement, which bears the same title. Both documents are in familiar form. They are divided into seven sections; an introduction which states that the Security Service considers that a control order is necessary and identifies AW; a factual background, which sets out the immigration and procedural history; a summary of the national security case; the detail of the national security case – the material which justifies the summary; the Security Service's assessment; a general statement of the need to impose a control order; and a detailed justification of the obligations contained in it. Mr Owen QC submitted that the first open statement presented a false or, at least, significantly erroneous, impression of the activities of AW on which the Security Service relied for its submission. I will analyse the claimed errors in detail below, but Mr Owen's submission can be shortly summarised: on the information available to the Security Service, AW's activities as the forger of documents and provider of funds ceased on his arrest on 8th January 2004; but the impression given by the statement is that they resumed after his release from prison on 21st July 2005 and continue, despite successful prosecution. Mr Owen's submission was powerfully supported by Mr Chamberlain in both the open and closed sessions. Analysis of the first closed statement is for the closed judgment, but I deal with all of the submissions of principle made by Mr Chamberlain in both open and closed sessions in this judgment.

10. Paragraph 5 of the first open statement correctly summarises the fact of AW's arrest and prosecution for forgery and counterfeiting offences. The facts underlying that prosecution are accurately summarised in paragraphs 17 – 19 and lead to the reasonable assessment that AW was a highly proficient forger in paragraph 20. The author of the statement sets out the Security Service's assessment in paragraph 22: the sophisticated forgery material and documentation discovered at his address provides evidence that he "is a key manufacturer and supplier of false documentation". Given the absence of information that he had manufactured or supplied false documentation after 8th January 2004, the use of the present tense was unfortunate but not, by itself, misleading. A better choice of words might have been "was a key manufacturer and supplier of false documentation and retains the skills and capacity to do so again"; but the use of the shorthand "is" does not mislead. It is simply a matter of drafting style.

11. In the "factual background" section of the statement paragraph 8 reads:

> "In December 2005 (AW) was charged with the offence that between 1st January 2004 and 4th October 2005 he conspired together with (AU) (AT) and others to provide money or other property knowing or having reasonable cause to suspect that it may be used for the purposes of terrorism contrary to section 1(1) of the Criminal Law Act 1977 (CLA). The additional charge of "entering into or being concerned with an arrangement to make property available to another, contrary to

> section 17 of the Terrorism Act 2000" was added to (AW's) indictment prior to his criminal trial. In an indicative hearing on 11th June 2007 (AW) pleaded guilty to the latter offence and was sentenced to 22 month's imprisonment. The CLA offence was left on file…".

Paragraph 12 deals with AW's association with AU stating, correctly, that his e-mail address was found on a piece of paper during searches of AU's property in 2002, that AU's fingerprints were found on every page of a ledger discovered during searches of AW's house in January 2004 and that AU had visited AW whilst he was in prison. Paragraph 23 recorded, again correctly, that five of AW's fingerprints were found on the ledger and asserted the Security Service's reasonable assessment that it was likely that the money transfers recorded in it were destined for LIFG members and/or their families. Paragraph 24 repeats, in summary form, the statements about the criminal proceedings which began with the conspiracy charge in December 2005.

12. Paragraph 25 contains the following overall assessment:

> "(AW) is a facilitator for the LIFG and is involved in the illegal production and provision of false documents to LIFG members, and has been successfully prosecuted in the UK for offences relating to these activities. Additionally, (AW) is involved in sending funds to overseas LIFG members and has pleaded guilty to a TACT offence."

13. Paragraphs 8 and 25, read together and in the light of the other material in the first statement are not free of ambiguity. An experienced reader of Security Service submissions might appreciate that the statement in paragraph 25 that AW "is a facilitator for the LIFG and is involved in the illegal production and provision of false documents to LIFG members" was no more than a more strongly worded version of the statement in paragraph 22 that the forgery material and documentation discovered at AW's house in 2004 was evidence that he "is" a manufacturer and supplier of false documents. But even in this instance, it would have assisted the reader to have been told that there was no information that he had resumed that activity subsequently. The reader would, however, have been likely to suppose that the additional activity of sending funds overseas occurred in 2004 and 2005. That is what paragraph 8 states about the charge on which AW was arrested, which was ordered to lie on the file. The summary of the charge on which he was convicted contained no dates but, as its subject matter was apparently the same (the provision of money or other property for the purposes of terrorism/entering into or being concerned with an arrangement to make property available to another) would reasonably have been taken to refer to activity during the same period. The assessment in paragraph 25 that AW "is involved in sending funds to overseas LIFG members" would have done nothing to dispel that impression. Nor did the supporting text. It is true that the principal piece of evidence relied on was the ledger recovered from AW's home on 8th January 2004. The reader would naturally have inferred that the ledger provided first hand evidence of the link to AU; but would not have known that it recorded transactions which stopped on AU's arrest in November 2002 or that AW had stated, in interview, on 8th January 2004, that it had been given to him (by implication for safe keeping), because neither the dates in the ledger nor the interview record were referred to in the submission or included in its annexes. I have not been told whether the Secretary of

State considered the Security Service's submission in the case of AU at the same time as its submission in the case of AW, but it is reasonable to infer that she did, because the cases were linked and because she applied to Collins J for permission to make both orders on the same occasion. She would have been aware that it was the Security Service's assessment, amply supported by reliable information, that AU had resumed terrorism-related activity between his release from SIAC detention on 18th March 2004 and his detention under immigration powers on 3rd October 2005. She was told that AW was released on 1st July 2005 and, like AU, re-detained on 3rd October 2005. A reasonable interpretation of the submission to her would have been that AW undertook or resumed the provision of funds with AU between those dates. That understanding, if incorrect, could easily have been dispelled, by making it clear that the Security Service had no information that AW undertook or resumed the provision of funds in 2005. The true position was that AW's prosecution in 2005 - 2007 was exclusively based on evidence of activities before 8th January 2004, as the undated prosecution case summary and the (probably subsequent) case summary dated 31st January 2007 make clear (see Volume 3 in the open case in AU pages 782 (xxi) – (liv) and 736 – 782. The only mention of an activity post-dating 8th January 2004 is of four prison visits by AU to AT between 18th September 2004 and 30th March 2005. (782 (xliv)).

14. As is to be expected, the first closed statement contains a great deal more detail than the first open statement, but it does not, in my view, dispel the misleading impression created by the contents of the latter.

15. Mr Tam accepts that both documents are capable of misleading, but submits that they are also capable of being correctly read. He submits that unless it is proved on balance of probabilities that the Secretary of State was in fact misled, I should not conclude that her decision to make the order was flawed; and that, even if I were to conclude that it was, I should not exercise my power under section 3(12)(a) to quash the order. The issue is one of importance, both in AW's case and generally. There is no authority which binds me upon it.

16. The statutory framework for my decision is set out in sections 2(1) and 3(10)(11) and (12) of the 2005 Act:

> "2(1) The Secretary of State may make a control order against an individual if he –
>
> a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
>
> b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.
>
> 3(10) On a hearing in pursuance of directions under sub-section (2)(c)…the function of the Court is to determine whether any of the following decisions of the Secretary of State was flawed –
>
> a) his decision that the requirements of section 2(1)(a) and (b) were satisfied for the making of the order; and

b) his decisions on the imposition of each of the obligations imposed by the order.

(11) In determining –

…

c) the matters mentioned in sub-section (10),

the Court must apply the principles applicable on an application for judicial review.

(12) If the Court determines on a hearing in pursuance of directions under sub-section (2)(c)…that a decision of the Secretary of State was flawed, its only powers are -

a) power to quash the order;

b) power to quash one or more of the obligations imposed by the order; and

c) power to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations it imposes."

17. Ministerial decision-making was analysed by the Court of Appeal in *R(ota National Association of Health Stores and another) v Department of Health* [2005] EWCA 154:

> "A minister who reserves a decision to himself… must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account"

per Sedley LJ at para. 62.

Implicit in this statement is the further proposition that the minister must not be given information which is misleading in one or more respects which are critical to his decision. It is always possible for the minister to put in evidence that he was not misled and took the decision on a proper factual basis; but in the absence of such evidence, the reasonable and sufficient inference will be drawn that the decision was made on a basis that was materially erroneous. I gave to the Secretary of State the opportunity to put in evidence in written form, to displace that inference. Since the hearing, I have received a letter from the Treasury Solicitor of 27th February 2009 which makes it clear that there is no such evidence. I therefore draw the inference that the Secretary of State did make her decision on a materially erroneous basis.

18. The error went to a factor of critical importance in the decision. Section 8 provides that before making a control order the Secretary of State must consult the relevant chief officer of police about whether there is evidence available that could realistically be used for the purposes of a prosecution. The importance of this provision was acknowledged and explained by the House of Lords in *Secretary of State for the Home Department v E* [2008] 1 AC 499. Self-evidently, a successful prosecution may deter someone who was involved in terrorism-related activity from re-engaging in it. When, as here, that person has been successfully prosecuted – as it happens

twice – one of the factors which the Secretary of State will always wish to take into account when making her decision is whether or not he has been deterred. For the Security Service submission to give the impression that, not only has he not been deterred, but he has re-engaged in identified terrorism-related activity, misleads as to a critical factor in her decision. On any view, the error is sufficiently important to lead to the conclusion, which I reach, that the decision was flawed.

19. Mr Tam submits that, notwithstanding the error, I should not quash the order. I acknowledge, as he submits, that I am required to give intense scrutiny to the necessity for the order and for each of the obligations imposed under it: *Secretary of State for the Home Department v MB* [2007] QB 415 paras. 64 & 65. I also acknowledge that, as a matter of language, sub-section 3(11) only requires me to apply the principles applicable on an application for judicial review when determining whether the Secretary of State's decision that the requirements of section 2(1)(a) and (b) have been satisfied is flawed; and that the existence of the power to quash in sub-section 3(12)(a) by necessary implication includes the power not to quash. I am, however, satisfied that these considerations do not provide a reliable guide to the approach which I should adopt. I accept Mr Chamberlain's submission which I supplement with an observation of my own, that I should exercise my power to quash the order for the following reasons: first, Parliament has entrusted the decision whether or not to make a non-derogating control order to a minister responsible to Parliament. It is not for me, as a judge, to make the decision. Secondly, as *MB* makes clear, the Secretary of State is better placed than the Court to decide the measures which are necessary to protect the public from terrorism-related activities by the individual concerned. It is, accordingly, all the more necessary that she should do so on a basis which is correct about critical factors. Thirdly, ordinary judicial review principles permit the Court to uphold a decision which it would otherwise have quashed for procedural error, if, but only if, it is satisfied that the decision maker would have reached the same decision: see Lewis on Judicial Remedies in Public Law para. 11 – 026 – 029. I am not satisfied that she would, at least on the terms contained in the order made. Fourthly, Parliament has recently legislated on this topic in section 141 Tribunals Courts and Enforcement Act 2007, which substitutes sub-section 31(5) of The Supreme Court Act 1981 by providing that, on judicial review, the Court may "substitute its own decision for the decision in question", but only if the decision in question was made by a Court or Tribunal: section 31(5A)(a).

20. For the reasons given, I quash AW's control order.

21. By way of postscript, because the evidence is not material to my decision, it is noteworthy that two experienced and knowledgeable individuals within the Security Service and Home Office respectively reached the erroneous conclusion that AW's second conviction demonstrated that he had re-engaged in terrorist-related activity after his first release from prison. The Security Service author of the amended statement served in response to the section 10(3) appeal wrote in paragraph 19:

> "The Security Service assesses that should (AW) be given further time outside of his residence it would increase the chance of him re-engaging in LIFG activity. This assessment is backed up by his previous re-engagement in terrorism-related activity following a custodial sentence. On 8th January 2004, (AW) was arrested for forgery, conspiracy and possession of

> CS gas. After serving 1 ½ years of his 3 ½ year sentence (AW) was released in July 2005. Despite spending time in prison for his terrorism-related activities, (AW) re-engaged in his previous activities and was arrested again in December 2005. This resulted in him pleading guilty to the charge of "entering into or being concerned with an arrangement to make property available to another, contrary to section 17 of the Terrorism Act 2000" for which he was sentenced to 22 months in prison. The Security Service assesses that this re-engagement shows (AW's) commitment to terrorist-related activity. It is further assessed that should (AW's) non-curfew hours be extended, he may once again attempt to re-engage."

Miss Hadland, who chairs the Control Order Review Group, believes that the natural reading of paragraph 8 of the Security Service submission was that AW had committed a separate and second offence and did not realise the mistake in the section 10(3) statement until a week or two before the hearing.

The decision to make the Order – AT

22. The first open statement in AT's case is set out under the same headings as in AW's case, except that the introductory paragraphs are headed "Overview", not "Factual background". Paragraphs 7 and 17 are identically worded, save as to name, as paragraphs 8 and 24 in the first open statement in AW's case. The wording of the remainder of the statement is, however, significantly different. The summary of the national security case, in paragraph 10 is in the past tense:

> "(AT) has provided support to terrorist networks overseas. His activities on behalf of these groups have involved the provision of false documentation. It is assessed that (AT) continues to pose a risk to national security".

The detailed case refers only to past events and does not assert that it provides evidence that AT "is" a manufacturer and supplier of false documentation. The language of the assessment in paragraph 18 is accurate: "(AT) is a member of the LIFG, who has been involved in the provision of forged passports and false passports…", as is that of paragraph 24 justifying the curfew and related obligations, "he has created and supplied false documents". Nothing in the first open statement could lead the reader to conclude that AT had resumed the supply of false documentation or funds with AU or otherwise after 8th January 2004. The information provided about AT's activities in the submission to the Secretary of State was accurate and, for the reasons explained, not misleading. I am satisfied that the Secretary of State's decision to make the order in the terms which she did was not, in the case of AT and for that reason, flawed.

23. It is noteworthy that the Security Service author of the response to the section 10(3) appeal in AT's case did not make the same mistake as the author of the equivalent document in AW's case.

Procedure - AT

24. The legal landscape in this area changes by the month. By reason of the domestic doctrine of precedent, it is common ground that I am bound by the decision and conclusions of the majority of the Court of Appeal in *Secretary of State for the Home Department v AF, AM & AN* [2008] EWCA (Civ) 1148, in particular, as summarised in paragraph 64(iv) – (vii). I need not set out these, by now, well known passages. When the House of Lords considers the appeal against that judgment later this month, it will have to take account of the judgment of the European Court of Human Rights in *A v The United Kingdom* 3455/05, given on 19th February 2009 and, in particular, its observations on the requirements of procedural fairness contained in Article 5(4). The observations are not directly in point, because liberty is not in issue here, but they are in point by close analogy, because Article 6 is engaged and because the procedural protections afforded by Article 6 are no less stringent than those afforded by Article 5(4): this is implicit in the observation in paragraph 203 that though it is not always necessary that Article 5(4) procedure "be attended by the same guarantees as those required under Article 6 for criminal or civil litigation" it must provide appropriate guarantees, and Lord Hoffmann's observation in *RB(Algeria) v Secretary of State for the Home Department* [2009] UKHL 10 para. 176 that the requirements of the two articles are "little different". I have, therefore, considered the issue of procedural fairness not only on the basis laid down by the Court of Appeal but also having regard to the principle identified by the Strasbourg Court. The Court acknowledged that the Special Advocate procedure provided two important safeguards for (in that case) the appellants: questioning the need for secrecy and testing the evidence and putting forward arguments on behalf of the detainee during the closed hearings: paras. 219 and 220. "However the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate". This question must be decided on a case by case basis, but the Court gave helpful observations about categories of case in which the requirements of procedural fairness were likely to be satisfied, or not. The former included cases in which the open material played the predominant role in the determination and those in which the allegations in the open material were sufficiently specific to permit instructions to be given by the appellant even though the underlying evidence remained undisclosed. The latter included cases in which "the open material consisted purely of general assertions and (my emphasis) SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material".

25. In this case, the challenge to the Secretary of State's decision to make the control order and maintain it in force is not directed to her conclusion that there were reasonable grounds for suspecting that AT has been involved in terrorism-related activity, because that is admitted; and even if it were not, no attempt has been made by AT to prove on balance of probabilities that he did not commit the terrorism-related offence of which he was convicted. What is required by Article 6 in this case is the application of a minimum standard of procedural fairness to the issue of necessity.

26. The Secretary of State's open case on this issue is summarised in paragraphs 6 and 7 above. The closed material provides detail and context for those contentions and I have taken it into account in reaching the decisions set out later in this judgment; but

AT has had the opportunity to challenge them and has done so. By reference to the numbered sub-paragraphs in paragraph 7 above,

i) he admits that he was a member of the LIFG, but denies that he has played any part in its activities since 8th January 2004, because, from that time onwards, he has been in detention or under constraints imposed by the home detention curfew regime, SIAC bail and this control order and because the LIFG was "finished" as an organisation when its top leadership (Sadeq and Mundhir) were arrested and deported to Libya in March 2004.

ii) he admits participating in the distribution of false documentation, but denies that he thereby supported terrorist networks.

iii) his case on funding is inconsistent. It was submitted on his behalf at the hearing at which he was sentenced for forgery and counterfeiting offences that he was "particularly concerned with raising funds", in particular for the families of those who are imprisoned in Libya or who have died there and was sentenced on that basis by MacKay J for the terrorism-related offence on 11th June 2007. In evidence, he said that he was only the book-keeper and had never transferred anything, even after AU's arrest on 21st November 2002.

iv) he denies that he has ever held or espoused violent Islamist views. He said in evidence that the footage of the killing of Russian soldiers and of hostages seized at this house was not his and asserts that they were left there by a named person (whose identity is stated in the closed judgment) in November or December 2003.

v) for reasons which are apparent from his case on the specific issues referred to above, he refutes the three propositions upon which the Secretary of State's case is based.

27. I am satisfied that AT has had the opportunity to permit him to give effective instructions to the special advocate about his case on these issues. I am also satisfied that what appears in the closed material is not determinative of the issue of necessity. The determinative issue is whether or not the propositions set out in paragraph 6 above are made out and justify the making and continuance of the order. Even if the requirements of Article 5(4) identified by the Strasbourg Court in *A* apply to this hearing, I am satisfied that they have been fulfilled. It necessarily follows that I am satisfied that the less stringent requirements laid down by the Court of Appeal have also been fulfilled.

Substantive

28. I set out my conclusions on the grounds relied on by the Secretary of State by reference to the numbered sub-paragraphs of paragraph 7 above.

i) I remain of the opinion that the LIFG remains in being, although its cohesion and effectiveness have been much reduced, for the reasons set out in the open and closed generic judgments. I am satisfied, on balance of probabilities, that AT was and remains a significant member of the LIFG, with the potential to exercise influence over its members and associates if not subject to obligations

imposed by a control order. I reject his claim to have had nothing to do with the organisation since 8th January 2004.

ii) I am satisfied on balance of probabilities that AT's admitted participation in the provision of false documentation was for a terrorism-related purpose: the support of the activities of the LIFG in the United Kingdom and overseas.

iii) I am satisfied on balance of probabilities that AT has supported LIFG activities by the transfer of funds. I reject as untrue his claim that he was only the book-keeper – a claim which is inconsistent with the mitigation advanced on his behalf in the first criminal proceedings.

iv) I am satisfied to the criminal standard that AT has lied to me about the footage of atrocities seized at house. Some, at least, of the footage was not in existence at the time when he says it was left with him. Some of it depicts the murder of the hostage Paul Johnson. His beheaded corpse was found near Riyadh on, or shortly before, 18th June 2004, following the release of a video showing him alive on or shortly before 16th June 2004. The police searched AT's home (at different addresses) on only two occasions: 8th January 2004 and 3rd October 2005. This footage must have been seized on the latter date. I am also satisfied, to the criminal standard, that the individual named by AT did not leave the footage with him. That individual had long since ceased to belong to the LIFG and, as published interviews with him since have made clear, did not espouse pan-Islamist views or barbarous conduct of the kind depicted in the footage. I do not claim to know why AT lied about these issues; but the lies are deeply troubling and are capable of supporting the cautious conclusion of the Security Service expressed in paragraph 7 of the third open statement that "(AT) does not necessarily object to the global Islamist agenda espoused by AQ and the wider Islamist extremist community." The finding of the material and the lies told about it go a long way to supporting the third of the propositions advanced by Mr Tam, summarised in paragraph 6 above.

v) I am satisfied that Mr Tam's three propositions are factually sound.

I have reached these conclusions on both the open and closed material. In relation to some of the issues, my conclusions are more fully set out the closed judgment.

29. In the light of those factual conclusions, I must now determine whether or not the Secretary of State's decision to make the control order and maintain it in force is flawed. I apply the twin tests of necessity and proportionality. I do, however, do so having regard to a provision which was not mentioned in argument, section 2(9), which provides:

> "It shall be immaterial for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, whether the involvement in terrorism-related activity to be prevented or restricted by the obligations is connected with matters to which the Secretary of State's grounds for suspicion relate".

This provision reinforces the cautionary words of the Court of Appeal in ***MB*** in paragraphs 63 and 64 that the Secretary of State is better placed than the Court to decide the measures necessary to protect the public against the activities of a terrorist suspect. These words apply both to the need for the order and to its individual obligations. I have found, accepting the views of the Security Service, that the LIFG is currently in a state of flux. They are better placed than I could be to determine, as circumstances evolve, what can be done to minimise the risk to the public – by encouraging those elements within the LIFG which are amenable to a peaceful settlement with the Libyan government and inhibiting the activities of those who are not, in particular those who support the "merger" with AQ. When dealing as they are in the case of AT, with a significant and influential member of the LIFG whose activities in the past have furthered its ends, who has the capacity to re-engage and whose views are suspect and clouded by lies told by him, the Security Service and so the Secretary of State are entitled to be cautious. On the basis of the first sentence of paragraph 6 of my Judgment in *AU* [2009] EWHC 49 (Admin) Mr Owen submits that it must be proved that AT has a present intention to re-engage or, at least, that there is reasonable ground to suspect that he intends to do so; and that such an intention can only be inferred from post-release acts. Otherwise, he asks rhetorically: how can AT ever establish that he does not pose a risk to the public? His submission mis-states what I accepted in AU which was: "where the only information known about an individual is a set of facts which justifies, and results in, a successful prosecution for a terrorism-related offence and there is no reason to believe that the individual has undertaken any other terrorism-related activity or will do so after he has served the sentenced imposed for the crime, it would not thereafter be necessary to impose a control order upon him." The second circumstance does obtain here: for the reasons explained, there was and is, currently, reason to believe that AT will undertake terrorism-related activity unless inhibited by a control order. It is pointless now, to speculate on when and by what means AT may demonstrate that he will not do so. If, as he contends, he has the settled intention not to re-engage, there will come a time when he can safely be taken at his word. That time has not yet arrived. Mr Owen also submits that there is a close parallel between the assessment of the risk posed by an individual subject to a control order and the statutory test considered by POAC in *Lord Alton & Others* PC/02/2006 30th November 2007 by which the Secretary of State could refuse to de-proscribe an organisation under section 3(3)(b) of the Terrorism Act 2000: was his belief that the organisation "is concerned in terrorism", flawed? I do not accept the validity of the analogy. There is a significant difference between making a decision about the future risk posed by an individual who has been involved in terrorism-related activity and about an organisation which "is" concerned in terrorism. The former concerns future risk and the latter the assessment of a current state of affairs. I do, however, acknowledge Lord Carlile's view that control orders should generally have a life of no more than two years and accept the submissions made by both open and closed advocates on behalf of AT that the periods during which he has been imprisoned and subject to restrictions imposed by home detention curfew, SIAC bail order and the control order should be taken into account; but I do not accept that the Secretary of State should, as a result, have decided not to impose a control order or to maintain it in force. The management of the risk posed by AT is a delicate and difficult task. The imposition of a control order was and remains a necessary and proportionate response to that risk, because it diminishes the risk that AT will re-engage in the affairs of the LIFG in a way which would assist those who

wish to continue the armed struggle. That is a sufficient justification of the making and continuance of the order.

Modification

30. The grounds of appeal identify the five obligations challenged by AT.

i) Curfew hours: he seeks a reduction in the curfew to six hours. The Secretary of State's objection to the reduction is based on the factors set out in paragraphs 15 – 18 of her section 10(3) response: that, by confining AT to his home for twelve hours each day, his ability to make and resume worthwhile contact with LIFG members and associates who pose a risk to public security is inhibited. As witness ZD and Miss Hadland explained, it is part of a package of measures which, taken together, diminish that risk. Giving to their view the deference which I should, I cannot say that her decision to maintain a curfew of this length is flawed. I do, however, note with approval Ms Hadland's acceptance of the proposition that an "exit strategy" is likely to involve, in appropriate circumstances, the loosening of obligations imposed on a controlled person by the order, in particular, the curfew. I do not understand that the acknowledgment that so-called "light touch" control orders have limitations (see paragraph 33 of Lord Carlile's fourth report) precludes such loosening. Circumstances may well arise in the not too distant future which will permit the reduction in the curfew imposed on AT to the number of hours sufficient to ensure that he resides and sleeps at his home.

ii) Prohibited contact: I do not regard the Secretary of State's view that the maintenance of the prohibition of contact with the individuals named in paragraph 21 of the section 10(3) response is flawed. It is necessary and proportionate to reduce the chance that any of them will re-engage in terrorism-related activity as a result of contact with AT.

iii) Visitors. The current obligation restricts the number of visitors to AT's home, while he is there, who are aged thirteen or over, to one. The purpose is to inhibit meetings with LIFG members and associates. That is a legitimate aim, which is served by the restriction. However, it is more stringent than is reasonably required. It prevents spouses, in particular parents of children who are friends of AT's children, from making social visits to AT and his wife. As far as I know, the Libyan nationals who are the objects of Security Service concern are all male. I can see no reason why the conditions should not be redrawn to permit visits by spouses visiting together. Because the precise wording of a relaxed condition needs careful consideration, I will adjourn final determination of this issue to permit paragraph 5 of the schedule to the order to be reconsidered. If agreement cannot be reached within 28 days of the handing down of this judgment, I invite written submissions within 7 days thereafter and will determine the precise wording myself.

iv) Boundary. The justification for the boundary is, in principle, the same as that for the curfew; and I do not hold it to be flawed for the same reasons. Again, this is one of the obligations which may, in due course, be capable of being relaxed.

v) Study. The obligation to seek notification and prior approval of any training or academic study course is necessary and proportionate for the reasons set out in paragraph 36 of the section 10(3) response: the Secretary of State is entitled to consider what can be done to reduce AT's opportunity to gain access to the internet while undertaking such a course.

Save to the extent indicated above, I am satisfied that the Secretary of State's decision to impose and maintain in force the challenged individual obligations of the order is not flawed.

Postscript – AW

31. Because I have quashed the order in AW's case, it will be for the Secretary of State to determine whether or not to seek permission to make a fresh order in current circumstances. Because the decision is for her to make, I do not think it right for me to express any opinion about whether or not she can or should do so. If she were to decide to do so, I would, however, invite her to consider the following observations about the length of any curfew and the width of any geographical boundary which may be imposed. On the basis of all of the open and closed material which I have considered and having heard AW's oral evidence, I am convinced that he was a second-rank figure in the LIFG in the United Kingdom – an important second-rank figure, because of his skill and capacity as a forger, but a technician rather than a leader. The principal purpose of the control order has been to prevent him from lending his skills to those who might wish to make use of them. In those circumstances, a curfew as long twelve hours and a geographic boundary which restricts him to Handsworth and West Bromwich may be more than is needed to achieve that end.

Addendum

32. By an oversight, the responsibility for which is purely mine, I omitted to deal with the submission made by AT that the words "and/or you" in paragraph 6(1)(a) of AT's control order should be quashed, for the reasons set out in paragraphs 56 – 59 of the open judgment of Collins J in *GG & NN v Secretary of State for the Home Department* [2009] EWHC 142 (Admin). I agree with Collins J's reasoning and conclusion and, so, quash the obligation to submit to a personal search by deleting those words from AT's control order.